CRIMMIGRATION LAW

AN OPEN CASEBOOK

KIT JOHNSON

VERSION 1.0

Crimmigration Law: An Open Casebook

Author Edition

Version 1.0

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First printing.

For Zane and Joe whom, for reasons that will become clear, I'm grateful to have birthed on U.S. soil.

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Note that some portions of these notices and other materials, including editing notes, have been adapted from other sources, including Eric E. Johnson's *Torts: Cases and Context* and Kit Johnson's *Immigration Law* version 2.0.

About the Author

Kit Johnson is the Hugh Roff Professor of Law and Thomas P. Hester Presidential Professor at the University of Oklahoma College of Law. She has taught immigration law since 2008. In addition, she has taught related courses on crimmigration, border enforcement, and applied immigration law.

Professor Johnson's research concerns immigration law. Her works have, broadly speaking, focused on the intersection of immigration law and U.S. business interests as well as issues related to the intersection of criminal law and immigration enforcement. Since 2014, she has served as a co-editor and regular blogger for the ImmigrationProf Blog, http://lawprofessors.typepad.com/immigration/.

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Note to Teachers

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This book is designed for use in a course on crimmigration (i.e. law concerning the intersection of immigration with criminal law and procedure).

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I would welcome the chance to connect with any immigration law teachers, particularly those of you who are thinking about using this book or who are teaching crimmigration law for the first time. I have a library of teaching materials—from daily class slides to video clips—that I would be happy to share with you.

Editing Notes

This book uses the following editing marks to indicate when material has been added or deleted from the original text:

˜ The superscript tilde denotes matter omitted, which might be of any type.

[] Brackets indicate an insertion. The insertion may be mine or the court's. They are usually mine if they are not in a quote.

This book is formatted without footnotes to make it maximally accessible in an online format. Where footnote material from the original text is included, it is identified with the following editing marks:

⤷ The superscript right-pointing descending arrow indicates the beginning of footnote material.

⤶ The superscript left-pointing descending arrow indicates the end of footnote material.

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Chapter One: Introducing Crimmigration

The word "crimmigration" refers to the intersection of immigration law with criminal law and procedure. The word itself is fairly new. It is widely attributed to Professor Juliet Stumpf and her 2006 article *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367. In that article, Stumpf explores what she describes as a "merger" of immigration and criminal law "in both substance and procedure," which, she argues, has created a situation "in which immigration law and the criminal justice system are merely nominally separate."

The convergence of immigration and criminal law is evident when examining the immigration consequences that face noncitizens based on their criminalized conduct. The next chapter of this book, Chapter 2, offers a primer on U.S. immigration law. Then Chapter 3 explores the specific immigration consequences for criminalized conduct. After reading these chapters, you will see how noncitizens face vastly more serious consequences for criminal conduct than U.S. citizens. Noncitizens face banishment from the United States, as discussed in Chapter 3. Noncitizens also face the prospect of spending months, even years, of additional time in detention beyond what was required under any criminal sentence, as explored in Chapter 4. The U.S. Supreme Court has recognized these additional consequences for noncitizen criminal defendants, and, as explored in Chapter 5, the Court has accordingly imposed particular requirements on criminal defense counsel. Such counsel must advise noncitizen clients regarding the immigration consequences not only of convictions at trial but also of potential plea agreements. Thus, ordinary, non-immigration-related criminal law has particular and substantial immigration consequences.

Beyond the interaction of regular criminal law with immigration, the field of crimmigration also includes criminal offenses introduced to target immigrants and

immigration-related conduct. Chapter 6 explores federal immigration crimes, most notably the crime of entering the United States without authorization and the crime of re-entering the United States after removal. Chapter 7 explores state efforts to regulate migration through criminal law—both by criminalizing migration directly (such as criminalizing entry "without having first obtained legal authorization to enter the United States") and by criminalizing conduct that is perceived to correlate with a migrant's undocumented status, such as driving without a license or using a false identification. Adding to the complexity of law in this area are turbulent issues of constitutionality and federal preemption, which require that lawyers not take state and local statutes on their face. Notably, federal and state criminalization of migration can have feedback effects. That is to say, convictions for migration crimes can lead to the kinds of collateral immigration consequences addressed in Chapters 3 and 4.

The final aspect of crimmigration addressed in this casebook concerns the enforcement of immigration laws. Chapter 8 discusses the enforcement of criminal and immigration law by federal actors at the border itself, examining the constitutional limitations (or lack thereof) on federal actors' conduct. Chapter 9 discusses the enforcement of immigration law by federal actors in the interior of the United States, including constitutional limitations. In addition, Chapter 9 explores how state and local actors have been tapped to become "force multipliers" for federal immigration enforcement. These state and local actors are frequently law enforcement officers, charged with enforcing state criminal law, who then embark on enforcing *federal civil* immigration laws pursuant to partnerships with federal agencies. Together, Chapters 8 and 9 help explain how noncitizens become identified by and embroiled in the crimmigration systems explored in Chapters 3, 4, 6, and 7.

Lying at the intersection of immigration and crime—two perennial hot-button issues for voters—crimmigration is, inevitably, a highly politicized area. For practitioners, being able to successfully navigate in this area means appreciating the social and political context, and understanding the factual background behind the controversies. With that in mind, the remainder of this Chapter 1 addresses three issues that pervade the law and practice of crimmigration: (1) the construct of the "illegal alien" (section 1.1), (2) the narrative of noncitizen criminality (section 1.2), and (3) the existence of racial disparities in the crimmigration realm (section 1.3).

1.1 The "Illegal Alien" Misconception

The phrases "illegal alien" and "illegal immigrant" are used frequently by politicians and media outlets. Mega-retailer Amazon sells t-shirts emblazoned with the motto

"What Part of ILLEGAL Don't You Understand?" Other online retailers offer buttons and bumper stickers, mugs and hats, all with the same slogan.

Coupling the word "illegal" with "alien" or "immigrant" invokes the idea that noncitizens who are present in the United States without authorization are criminals. Former Attorney General Jeff Sessions pursued this point explicitly in a 2018 speech, stating "the Mayor of Oakland called illegal aliens 'law-abiding Oaklanders.' By definition of course, that is not true."

Yet the primary consequence facing noncitizens present in the United States without authorization is civil deportation. Contrary to popular assumptions, is not a crime to be present in the United States without authorization. Lawmakers have, from time to time, proposed making unauthorized presence a federal crime. Such proposals, however, have faced a dead end in Congress.

As will be discussed in Chapter 5, it is a federal crime—typically charged as a misdemeanor—to enter the United States without authorization. Yet even where a person has entered illegally, immigration practitioners broadly reject the use of the adjective "illegal" as applied to the person. In any other context, one would not refer to an individual as "illegal" if they have committed a crime.

Additionally, many individuals currently residing in the United States without authorization did not enter unlawfully. This is because they previously had authorization to be here. Many persons enter the United States using valid nonimmigrant visas and then overstay their authorized periods of admission. A 2023 report from the Congressional Research Service estimated that 42% of the approximately 11 million people living without authorization in the United States were overstayers. As these individuals entered the United States with permission, they could not be charged with the crime of entry without authorization. Without more, such individuals are only civilly deportable.

As you make your way through the remainder of this book, keep in mind that unlawful presence is not a crime.

1.2 The Mythic Notion of Noncitizen Criminality

Politicians and media outlets frequently invoke the specter of noncitizen criminality. In 2024, former president Donald J. Trump began using the phrase "migrant crime" during his reelection campaign. He told conservative television host Laura Ingraham "[I] came up with this one: migrant crime. This crime—there's violent crime, there's migrant crime. We have a new category of crime. It's called migrant crime. And it's going to be worse than any other form of crime."

The issue resonates with voters, and the Democratic Party's official 2024 platform calls for "immigration reform that fixes our nation's broken immigration system, improves border security, [and] prioritizes enforcement so we are targeting criminals[.]" This platform is consistent with President Barack Obama's November 20, 2014 promise to prioritize the deportation of "felons, not families."

Notwithstanding widespread concern with migrant-perpetrated crime, empirical studies paint a contrasting picture. Those studies contradict the idea that noncitizens are responsible for widespread crime in the United States, much less an increase in highly violent crime.

Alex Nowrasteh, the vice president for economic and social policy studies of the libertarian thinktank the CATO Institute, published a study in 2018 based on data from the Texas Department of Public Safety. Nowrasteh found that "For all criminal convictions in Texas in 2015, illegal immigrants had a criminal conviction rate 50 percent below that of native-born Americans. Legal immigrants had a criminal conviction rate 66 percent below that of native-born Americans." See *Criminal Immigrants in Texas: Illegal Immigrant Conviction and Arrest Rates for Homicide, Sex Crimes, Larceny, and Other Crimes* (2018). https://www.cato.org/sites/cato.org/files/pubs/pdf/irpb-4-updated.pdf.

Sociologists Michael T. Light and Ty Miller published a broader, longitudinal study of immigration and crime in 2018. Light and Miller combined "newly developed estimates of the unauthorized population with multiple data sources to capture the criminal, socioeconomic, and demographic context of all 50 states and Washington, DC, from 1990 to 2014." They found that "Increases in the undocumented immigrant population within states are associated with significant decreases in the prevalence of violence." See Michael T. Light & Ty Miller, *Does Undocumented Immigration Increase Violent Crime*, 56 CRIMINOLOGY 370 (2018).

Criminologists Charis Kubrin and Graham Ousey published a book on noncitizen criminality in 2023 titled IMMIGRATION AND CRIME: TAKING STOCK. Looking at numerous studies, they found either no connection between immigration and crime or a "negative association" between immigrants and crime. In other words, they found that more immigration corresponds with less crime. As the authors told CNN, crimes committed by noncitizens that become "high profile incidents" and the focus of media and politicians are "not the norm. They're the outlier."

Finally, Stanford economist Ran Abramitzky took a different approach to examining noncitizen criminality in his 2023 study with co-authors Leah Platt Boustan, Elisa Jácome, Santiago Pérez, and Juan David Torres. They looked at incarceration data

from 1870 to 2020 and found that "immigrants have had lower incarceration rates than the US-born for 150 years." They also found that immigrants today are 60% less likely to be incarcerated than US-born individuals. See *Law-Abiding Immigrants: The Incarceration Gap Between Immigrants and the US-born, 1870-2020* (2023), https://www.cato.org/research-briefs-economic-policy/law-abiding-immigrants-incarceration-gap-between-immigrants-us-born.

Thus, while the remainder of this book focuses on noncitizens who have been accused of or have committed crimes, keep in mind that the empirically informed consensus is that noncitizens commit crimes at a lower rate than U.S. citizens.

1.3 Racial Disparities in Crimmigration

The U.S. criminal justice system suffers from well-documented racial bias. Consider Black Americans, who make up 14.4% of the U.S. population but account for 37% of the adult incarcerated population. A 2018 study found that one in three Black men born today will be incarcerated at some point in their lives. For Latino men, the figure is one in six; for White men, it is one in 17. Incarceration is disproportionate across race for women as well. One in 18 Black women are likely to be incarcerated during their lifetime, as opposed to one in 111 White women. See Elizabeth Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System* (2018), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf.

Those numbers, which looking at incarceration, reflect occurrences and decisions made earlier in the procedural timeline of criminal justice cases. When political scientist Kelsey Shoub looked at 14 years of traffic stops in North Carolina, she found that, accounting for time on the road, Black drivers were 95% more likely than White drivers to be stopped by law enforcement. She also found that Black drivers were 115% more likely than White drivers to be searched during a traffic stop. See SUSPECT CITIZENS: WHAT 20 MILLION TRAFFIC STOPS TELL US ABOUT POLICING AND RACE (2018). A later study similarly concluded that Black and Latino drivers were searched more frequently than White drivers. See Emma Pierson et al., *A large-scale analysis of racial disparities in police stops across the United States*, 4 NATURE 736 (2000).

Not every law enforcement stop necessarily leads to an arrest. Nevertheless, sociologists Beth Redbird and Kat Albrecht found that "the average 2015 police agency arrests 15.6 Black adults for every White adult, and 5.5 Black juveniles for every White juvenile." See *Racial Disparity in Arrests Increased as Crim Rates Declined* (2020), https://www.ipr.northwestern.edu/documents/working-papers/2020/wp-20-28.pdf.

Another study, based on FBI data, found Black and Latino individuals overrepresented among persons arrested for nonfatal violent crimes compared to their representation in the U.S. population. See Allen J. Beck, *Race and Ethnicity of Violent Crime Offenders and Arrestees, 2018* (2021), https://bjs.ojp.gov/content/pub/pdf/revcoa18.pdf.

Once in custody, bail is set higher for Black and Latino defendants than White defendants facing similar charges and with similar criminal histories. See Connor Concannon and Chongmin Na, *Examining Racial and Ethnic Disparities in Prosecutor's Bail Requests and Downstream Decision-making* 4 RACE SOC. PROBS. 1 (2023), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9810515/#CR68.

Black defendants also receive less favorable plea offers than White defendants. Specifically, "White defendants are twenty-five percent more likely than black defendants to have their most serious initial charge dropped or reduced to a less severe charge (i.e., black defendants are more likely than white defendants to be convicted of their highest initial charge).˜ As a result, white defendants who face initial felony charges are approximately fifteen percent more likely than black defendants to end up being convicted of a misdemeanor instead.˜ In addition, white defendants initially charged with misdemeanors are approximately seventy-five percent more likely than black defendants to be convicted for crimes carrying no possible incarceration, or not to be convicted at all.˜" Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187 (2018).

Finally, upon conviction, Black individuals tend to receive harsher sentences than White individuals. See David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285 (2001).

Given these data points, it should come as no surprise that there are significant racial disparities among noncitizens caught up in the crimmigration system. Black and Latino noncitizens are more likely to be stopped by police than White noncitizens, more likely to be arrested and prosecuted, more likely to be assigned high bail, and, upon conviction, more likely to be incarcerated and for a longer term than White noncitizens. See *Bias in the Criminal Legal System: A Report on Racial Bias in the Criminal Process and its Impact on Noncitizens of Color in Removal Proceedings* (2024), https://nipnlg.org/sites/default/files/2024-06/2024-Bias-Criminal-Legal-System.pdf. Given that, as sociologists Michael T. Light and Avery Warner note, "Incarceration is the most direct way to expose noncitizens" to immigration enforcement authorities, Black and Latino noncitizens are more likely to face immigration consequences than White noncitizens. See *Does Immigration Enforcement Exacerbate Racial/Ethnic Inequality Under the Law?* (2024).

Ninety-one percent of the noncitizens removed from the United States during fiscal years 2003-2013 were from Mexico or the Northern Triangle countries of El Salvador, Guatemala, and Honduras. See Marc R. Rosenblum and Kristen McCadbe, *Deportation and Discretion: Reviewing the Record and Options for Change* (2014), https://www.migrationpolicy.org/sites/default/files/publications/Deportation-Discretion-Report.pdf. Data from October 2020 through December 2023 reveals that Spanish-speaking countries accounted for 90% of removals during that period. See https://www.ice.gov/spotlight/statistics. These figures are wildly disproportionate to the percentage of noncitizens in the United States who are Latino (45%), causing legal scholar Kevin Johnson to conclude that the United States has developed "nothing less than a Latino/a removal system." See Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals,* 66 CASE W. RES. L. REV. 993 (2016).

Chapter Two: Immigration Basics

This chapter provides an introduction to immigration law that will help situate the rest of your studies regarding crimmigration. We begin with the sources of immigration law (section 2.1). Next, we distinguish between citizens (section 2.2) and noncitizens (section 2.3) and learn the three principal categories of noncitizens: immigrants (section 2.4), nonimmigrants (section 2.5), and undocumented migrants (section 2.6). Refugees and asylees are also introduced (section 2.7). As you read future cases, keep this material in mind—which noncitizen category does the noncitizen fall under? How does that category broaden or limit opportunities for the noncitizen?

Thereafter, you'll find a nuts-and-bolts introduction to the immigration process (section 2.8), including entry to the United States via admission (section 2.9) or parole (section 2.10), acquiring a visa while inside the United States (section 2.11), ejection or "removal" of noncitizens from the country (sections 2.12-2.14), as well as forms of relief from removal (section 2.15).

After that is an introduction to the federal agencies relevant to immigration law (section 2.16) as well as key immigration terms (section 2.17). The field of immigration law is filled with specialized legal terms and acronyms. As you read, you can reference Appendix A.1, a comprehensive glossary, and Appendix A.2, a list of common acronyms.

2.1 Sources of Immigration Law

The principal source of authority for U.S. immigration law is the Immigration and Nationality Act of 1952 (INA). The INA is codified within the United States Code at 8 U.S.C. §§ 1101-1537. Since 1952, the INA has been amended numerous times.

Significant legislative changes include the 1986 Immigration Reform and Control Act (IRCA, pronounced "irk-uh"), the Immigration Act of 1990, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA, pronounced "eye-ruh-eye-ruh"), the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA, pronounced "uh-dep-uh"), and the Homeland Security Act of 2002 (HSA).

Immigration lawyers and immigration courts typically cite to the INA and its original section numbering. Criminal lawyers and federal courts, including the U.S. Supreme Court, frequently cite to the corresponding U.S. Code provisions. You can find a handy table for converting INA and USC numbers at Appendix A.5.

2.2 Citizens vs. Noncitizens

Immigration law centers on the distinction between citizens and noncitizens. United States citizenship is determined by: (1) birth in the United States, also known as *jus soli*; (2) birth to U.S. citizen parents abroad, also known as *jus sanguinis*; and (3) naturalization, the process that allows individuals, after following a series of prescribed steps, to take on a new citizenship different from the one they were born into.

The only noncitizens eligible to apply for naturalization are lawful permanent residents (LPRs), a category discussed in section 2.4 below.

CRS, U.S. Naturalization Policy (2021)

To qualify for U.S. citizenship, LPRs must meet certain requirements.˜ They must

- be at least 18 years of age;
- reside continuously in the United States for five years (three years for spouses of U.S. citizens);
- be of good moral character;
- demonstrate the ability to read, write, speak, and understand English;
- pass an examination on U.S. government and history; and
- be willing and able to take the naturalization Oath of Allegiance.

—-—

2.3 Noncitizen Categories: An Overview

There are three categories of noncitizens present in the United States. First, there are "immigrants," those who are admitted permanently into the United States (see

section 2.4). Second, there are "nonimmigrants," those who come to the United States for a limited time and for a limited purpose (see section 2.5). Finally, there are undocumented migrants, noncitizens who have no legal status (see section 2.6). U.S. law refers to all noncitizens as "aliens."

It can be argued that refugees and asylees fall into one or more of the above categories. Section 2.7 gives a basic primer on these unique noncitizen populations.

2.4 Noncitizen Categories: Immigrants

"Immigrant" is a legal term of art that is synonymous with "lawful permanent resident" (LPR) and "green card holder." It refers to noncitizens who are admitted to the United States on a permanent basis and with a pathway to achieving U.S. citizenship through naturalization (see section 2.2). In fiscal year 2022, 1,018,000 noncitizens obtained lawful permanent resident status in the United States.

Only three categories of people qualify for immigrant visas: (1) those with specific family relationships to U.S. citizens and lawful permanent residents, (2) those with employment-based ties to the United States, and (3) "diversity" immigrants who participate in an annual lottery of immigrant visas.

Before delving into the specifics of those three categories, it is important to note two issues that affect all immigrants.

First, U.S. law imposes an annual limit of 675,000 immigrant visas to be allocated among the three immigrant categories. In addition, U.S. law provides that no single country can receive more than 7% of the total number of family- and employment-based immigrant visas annually. The combination of the numerical cap and single-country cap, coupled with high demand for immigrant visas, has led to a significant backlog of immigrant visa applications. Some individuals who have applied for an immigrant visa, and who would statutorily be eligible for such a visa, must wait for years, even decades, until an immigrant visa becomes available to them.

Second, U.S. immigration law broadly favors family unity. One consequence of this preference is that every immigrant (whether family-based, employment-based, or diversity) is entitled to bring their spouse (same- or opposite-sex) and children (if those children are unmarried and under 21) with them to the United States. INA § 203(d), 8 U.S.C. § 1153(d). The person who qualifies for the immigrant visa is called the "principal beneficiary." The spouse and children of that immigrant are called "derivative beneficiaries." Derivative beneficiaries also receive immigrant visas, and their visas are deduced from the overall annual cap.

FAMILY-BASED IMMIGRANTS

There are two large groups of family-based immigrants: "immediate relatives," who are not subject to numerical limitations, and other family members, who are subject to numerical limitations.

"Immediate relatives" of U.S. citizens are not subject to numerical limitations. This group includes U.S. citizens' spouses (same- or opposite-sex), children (if unmarried and under the age of 21), and parents (if the qualifying U.S. citizen is over the age of 21).

Other family members can qualify for family-based immigrant visas, but they are subject to numerical limitations. Qualifying family members include: (1) children of U.S. citizens who are unmarried and 21-years-or-older; (2) spouses and unmarried sons and daughters of legal permanent residents, whether under or over the age of 21; (3) married sons and daughters of U.S. citizens; and, finally, (4) brothers and sisters of U.S. citizens where the citizen is at least 21-years old.

EMPLOYMENT-BASED IMMIGRANTS

All employment-based immigrants are subject to numerical limitations. These are people who come to the United States on the basis of skills or offered employment. There are five different employment-based immigrant visas. The EB-1 visa is for individuals of "extraordinary" ability in the sciences, arts, education, business or athletics, outstanding professors and researchers, and certain multinational executives and managers. The EB-2 visa is for professionals holding advanced degrees, and persons of "exceptional" ability in the sciences, arts, and business. The EB-3 visa covers professionals holding baccalaureate degrees, "skilled workers" with at least two years of work experience, and other workers whose skills are in short supply in the United States. The EB-4 visa is for "special immigrants," a defined term that includes everything from religious workers and military translators to neglected and abused children. Finally, the EB-5 visa is available to investors who create employment for at least ten unrelated persons by investing $1.8 million into the country.

DIVERSITY IMMIGRANTS

Congress has allocated a maximum of 55,000 diversity immigrant visas for noncitizens from countries with historically low rates of migration to the United States. Millions of individuals around the globe apply for these visas, which are allocated pursuant to a lottery.

2.5 Noncitizen Categories: Nonimmigrants

"Nonimmigrant" is a legal term of art referring to noncitizens who come to the United States for a limited time (such as a few months or a few years) and for a limited purpose (such as to work, attend school, or travel around the country). The United States admits significantly more nonimmigrants each year than immigrants. As discussed in section 2.4, just over one million noncitizens became LPRs in fiscal year 2022. In contrast, the United States granted an estimated 97 million nonimmigrant admissions in fiscal year 2022. Because nonimmigrants come on a temporary basis to perform limited tasks, the United States is willing to accept far greater numbers of nonimmigrants than immigrants.

A word on naming conventions. Nonimmigrant categories are laid out at INA § 101(a)(15), 8 U.S.C. § 1001(a)(15). Nonimmigrant visa categories are known by the subsection under which they are found within that statutory provision. So, for example, the "Q" visa is found at INA § 101(a)(15)(Q), 8 U.S.C. § 1101(a)(15)(Q). The B visa is found at INA § 101(a)(15)(B); 8 U.S.C. § 1101(a)(15)(B).

2.6 Noncitizen Categories: Undocumented Migrants

Undocumented migrants make up the third significant group of noncitizens living in the United States. These noncitizens do not have permission to be present in the United States. They may have entered the country surreptitiously or they may have initially entered the United States with authorization, such as on a tourist visa, but overstayed the duration of their visa. Those in the latter category are frequently referred to as being "out of status." It is not known exactly how many individuals are residing in the United States without authorization. In 2019, the Migration Policy Institute estimated the undocumented population to be around 11 million.

Some undocumented migrants have been granted "quasi-legal" status in the United States, allowing them to remain in the United States without gaining the official status of immigrants or nonimmigrants. Parole (see section 2.10), temporary protected status (TPS), and Deferred Action for Childhood Arrivals (DACA) are examples of programs that offer undocumented migrants quasi-legal status in the United States.

There is a commonly held misconception that it is a crime to be present in the United States without authorization. This is untrue. Despite the ubiquitous use of the phrase "illegal alien" to describe a noncitizen present in the United States without authorization, presence is not a criminally punishable offense.

2.7 Noncitizen Categories: Refugees and Asylees

The United States provides protection to individuals seeking refuge from specific types of persecution through two different, but related, programs. The *refugee* program applies to noncitizens living overseas. The *asylum* program applies to noncitizens who live in the United States or who seek protection when they arrive at our nation's border. Both programs rely on the same INA definition of refugee, found at INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), which provides that: "any person who is outside any country of such person's nationality˜ 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˜."

The quintessential refugee has fled their country for a nearby refugee camp. They are identified by a nongovernment organization (NGO) for relocation directly from the refugee camp to the United States. The United States numerically limits refugee admissions, and the quotas set vary widely. In fiscal year 1980 the cap was set at 231,700; in fiscal year 2021, the cap was set at 18,000. Refugees are admitted to the United States under "refugee status." After one year in the United States, refugees can apply for permanent residence status (see section 2.4).

Asylees, in contrast to refugees, seek protection once they are already inside the United States—whether having entered as nonimmigrants (see section 2.5) or having entered surreptitiously (see section 2.6)—or by requesting relief at the U.S. border. Noncitizens who win their asylum case gain "asylee status." Like refugees, they can apply for permanent resident status (see section 2.4) after one year of asylee status.

2.8 The Immigration Process: An Overview

Legal migration to the United States is a multi-step process that culminates in the formal "admission" of the noncitizen into the United States (see section 2.9). Some noncitizens are allowed to physically enter the United States without being formally admitted—that process, called parole, is discussed in section 2.10. Some noncitizens who are already present in the United States and who become eligible for an immigrant visa (see section 2.4), might follow a different path called "adjustment of status" (see section 2.11).

When the United States wants to kick a noncitizen out of the country, it undertakes "removal" of that noncitizen (see section 2.12). The process of judicial removal—when a noncitizen appears before an immigration judge—is the same for immigrants, nonimmigrants, and undocumented migrants. However, the legal standard relevant to

the noncitizen's removability changes depending on whether or not that noncitizen has ever been "admitted" into the United States. The formal admission process is discussed in section 2.9. Immigrants (see section 2.4) and nonimmigrants (see section 2.5), even if currently out of status, are removable under the categories outlined at INA § 237, 8 U.S.C. § 1227. Undocumented migrants (see section 2.6) who entered the country surreptitiously and have therefore never been through the formal admission process, because they entered the country surreptitiously, are removable under the categories outlined at INA § 212, 8 U.S.C. § 1182.

Not all removals take place before an immigration judge. Non-judicial forms of removal are discussed in section 2.14.

Finally, just because a noncitizen is subject to removal does not mean that the individual must be removed. Noncitizens can petition for "relief from removal." This topic is briefly introduced in section 2.15 and discussed more fully in Chapter 3 (sections 3.16-3.19).

2.9 The Immigration Process: Admission

Noncitizens following the authorized path for coming to the United States hope to gain formal "admission" to the country. Admission is the culmination of a multi-step process that involves at least two and as many as four federal agencies.

DEPARTMENT OF LABOR

For some noncitizens looking to come to the United States on a work-based visa (immigrant or nonimmigrant), the admission process starts when an employer files necessary paperwork with the Department of Labor (DOL). In broad strokes, the DOL examines whether employment of the foreign worker will affect U.S. workers.

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES

The next step for all immigrants and many nonimmigrants is to file a visa petition with United States Citizenship and Immigration Services (USCIS). USCIS is a division of the Department of Homeland Security (DHS). Filing a petition with USCIS is the first step for all family-based immigrants and those nonimmigrant categories that require a visa petition but do not require DOL input.

A note on vocabulary: The person who files the paperwork with USCIS is the petitioner; the ultimate recipient of the visa is the beneficiary. The petitioner might be the noncitizen beneficiary's family member or a prospective employer.

DEPARTMENT OF STATE

Immigrant visa petitions, if approved by the USCIS, are sent to the Department of State for processing. When ready, immigrant petitions will most often be sent to the U.S. embassy or consulate servicing the beneficiary's country of origin. In contrast, many nonimmigrants start their immigration journey at a U.S. embassy or consular office.

At this point, the noncitizen completes a visa application. In addition to the application, the noncitizen may be asked to submit to a medical exam, to bring photographs and other supporting documentation, or to be interviewed (along with their spouse and children) by a consular officer.

Immigrants and nonimmigrants alike are screened to see if they are "inadmissible" or "excludable"—terms used interchangeably—under at INA § 212, 8 U.S.C. § 1182. As discussed in Chapter 3, this course focuses on the crime-based grounds of inadmissibility.

If successful, the noncitizen and their derivative beneficiaries will each receive a physical visa authorizing their entry into the United States.

DEPARTMENT OF HOMELAND SECURITY

Receipt of a visa does not guarantee a noncitizen entry into the United States. INA § 221(h), 8 U.S.C. § 1201(h). There is one final hurdle for both immigrants and nonimmigrants: admission into the United States at an official port of entry after inspection by an officer from the Department of Homeland Security. More specifically, inspection will be done by an agency within DHS: the Office of Field Operations (OFO) division of the U.S. Customs and Border Patrol. OFO officers verify identity, examine the validity of travel documents, evaluate the noncitizen's compliance with rules regarding their individual visa, and consider the applicability of INA § 212 inadmissibility grounds to the noncitizen. A noncitizen who passes all these checks and is allowed to physically enter the country, has been formally admitted into the United States.

2.10 The Immigration Process: Parole

Not every noncitizen who is allowed physical entry into the United States is formally "admitted" into the United States pursuant to the rules and regulations described in section 2.9. Some noncitizens are allowed to enter the United States under "parole." Parole offers temporary "quasi-legal" status to noncitizens who must leave when the conditions supporting their parole end. There are many different forms of parole, which will be addressed as the issue arises in future chapters. As just one example

among many, the government might parole an asylum-seeker into the United States so the asylum seeker can pursue their claim for relief.

2.11 The Immigration Process: Adjustment of Status

As discussed in section 2.9, most noncitizens travel to a consulate overseas in order to receive their visa. This includes noncitizens who are already present in the United States; they, too, typically leave the country and travel abroad to get their visa. However, certain noncitizens present in the United States can obtain an immigrant visa without leaving the country through a process called adjustment of status. INA § 235, 8 U.S.C. § 1255, permits the Secretary of Homeland Security, "in his discretion and under such regulations as he may prescribe," to adjust the status of any alien "who was inspected and admitted or paroled into the United States" to that of an LPR (see section 2.4) provided the alien is "admissible ... for permanent residence" and "an immigrant visa is immediately available" to them.

Some noncitizens opt to take advantage of adjustment of status in order to save the time and money associated with visiting an overseas consulate. Others pursue adjustment of status to avoid the immigration consequences of leaving the United States after having spent time out of status—either because they never had permission to be in the United States and entered without authorization or because they once had permission to be in the United States but then overstayed their visa period. A noncitizen in either category who has been unlawfully present in the United States for more than 180 days, but less than a year, and who leaves the country, cannot return to the United States for at least three years. INA § 212(a)(9)(B)(i)(I), 8 U.S.C. § 1182(a)(9)(B)(i)(I). Noncitizens who remain in the United States without authorization for more than a year and who leave the country cannot return for at least ten years. INA § 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II). A noncitizen who pursues adjustment of status will not leave the United States and so will not trigger either the three- or ten-year bar.

2.12 The Immigration Process: Judicial Removal

Removal is the name of the process by which the United States formally expels noncitizens from the country. As will be explored further in Chapter 3, the grounds for removal depend on whether the noncitizen being removed has been formally admitted to the United States. Noncitizens who have not been formally admitted are subject to removal on the grounds laid out at INA § 212, 8 U.S.C. § 1182. Noncitizens who have been formally admitted to the country, regardless of whether they are currently in status, are subject to removal on the grounds laid out at INA § 237, 8 U.S.C. § 1227.

CRS, Formal Removal Proceedings: An Introduction (2021)

[T]he Immigration and Nationality Act (INA) and implementing regulations provide a framework for the Department of Homeland Security (DHS) to seek the removal of aliens from the United States. Aliens targeted for removal in the interior of the United States are typically placed in proceedings under INA § 240 [8 U.S.C. § 1229a].˜

Formal removal proceedings are conducted before an immigration judge (IJ) within the Executive Office for Immigration Review (EOIR)[which is a division of the Department of Justice (DOJ)].˜

COMMENCEMENT OF FORMAL REMOVAL PROCEEDINGS

Formal removal proceedings begin with DHS filing a Notice to Appear (NTA) in immigration court. The NTA sets forth the allegations and charges against an alien believed to be subject to removal.˜

MASTER CALENDAR HEARINGS

An alien will first appear before an IJ at a Master Calendar hearing. There the IJ is required to explain the alien's rights, the charges against the alien, and the nature of the proceedings. [The ICE Office of Principal Legal Advisor (OPLA), a part of DHS, represents the United States Government in immigration court. Noncitizens are not given counsel.] If the alien is unrepresented, the IJ must provide a list of free or low-cost legal service providers and give the alien an opportunity to find counsel (unless the alien waives counsel and elects to proceed pro se). [A noncitizen has no right to appointed counsel. Under INA § 292, 8 U.S.C. § 1362, "[he] shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."] An interpreter might also be used to facilitate communication in the hearing and other proceedings.˜

CONSEQUENCES OF FAILURE TO APPEAR

If an alien receives proper notice but fails to attend a hearing, an IJ is required to order the alien removed *in absentia* if DHS establishes that the alien is removable as charged in the NTA. But the order of removal may be rescinded if the alien (1) files a motion to reopen within 180 days of the order and shows that the failure to appear was because of "exceptional circumstances" (e.g., serious illness); or (2) files a motion to reopen at any time and shows that the alien did not receive notice of the hearing, or that the alien was in custody and could not appear.˜

MERITS HEARING AND IJ'S DECISION

In the merits hearing an alien may present testimony and evidence in support of an application for relief. The IJ may direct the parties to present opening or closing statements. The alien's counsel (or the IJ if the alien is unrepresented) may conduct direct examination of the alien, and DHS counsel conducts cross-examination. The IJ may question the alien and any witnesses.

The IJ then issues an oral or written decision granting or denying the alien's application for relief. The decision must also include a finding as to the alien's removability. If the IJ denies the application, the IJ must issue an order of removal (but the alien may request an opportunity to voluntarily depart at his or her own expense in lieu of removal, unless ineligible). If the IJ grants the alien's application for relief, or otherwise concludes the alien is not removable as charged, the alien will not be subject to removal.

APPEAL TO THE [BOARD OF IMMIGRATION APPEALS (BIA)]

Both the alien and DHS may appeal an IJ's decision to the [Board of Immigration Appeals (BIA), another division of the Department of Justice].˜ Absent an appeal, the IJ's decision becomes administratively final.˜

The BIA may summarily dismiss an appeal, such as when the appealing party fails to specify the reasons for the appeal or submits an untimely appeal. Absent summary dismissal, a single BIA member normally will issue a decision on the merits. The BIA member may affirm the IJ's decision without opinion if the appeal raises no substantial legal or factual issues, or raises issues controlled by legal precedent. Otherwise, the BIA member issues an opinion. But the BIA member may designate the case for a three-member panel decision in some circumstances (e.g., to resolve inconsistent IJ rulings or to create precedent).

JUDICIAL REVIEW OF ORDERS OF REMOVAL

If the BIA affirms an IJ's order of removal, that order becomes administratively final. An alien may seek judicial review of a final order of removal by petitioning for review in the [federal] judicial circuit in which the immigration court proceedings were completed. ˜ But there are limitations to judicial review. For instance, no court may review a final order against an alien found removable based on certain enumerated crimes. Additionally, no court has jurisdiction to review certain discretionary denials of relief. But courts retain jurisdiction to review constitutional claims or questions of law raised in a petition for review.˜

ATTORNEY GENERAL (AG) CERTIFICATION

The [U.S. Attorney General (AG)] has ultimate authority over administrating agencies' interpretation and application of federal immigration laws, including in formal removal cases. DOJ regulations require the BIA to certify cases for AG review when (1) the AG directs the BIA to refer a specific case to him for review; (2) either the Chair or a majority of the BIA believes the case should be referred; or (3) the Secretary of DHS or certain authorized DHS officials refer the case to the AG. The AG thus has considerable authority to review BIA decisions and issue superseding rulings.

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2.13 The Immigration Process: Adjusted Removal Proceedings for Certain Crime-Based Removals

INA § 238(a)(1) allows for removal proceedings for aliens convicted of certain crimes to be conducted at federal, state, and local correctional facilities. The removal process is the same: it must be conducted in conformance with INA § 240. The removal proceeding will take place before an immigration judge who will consider both removability and any claim to relief from removal. The difference is that the hearing will be conducted at the correctional facility—either by having the IJ appear and conduct hearings at the facility or by having the prisoner appear in immigration court by video conference. Such hearings are part of the EOIR's "Institutional Hearing Program" or IHP.

The crime-based removals eligible for the IHP are INA § 237(a)(2)(A)(iii) (aggravated felony), (B) (controlled substances), (C) (certain firearm offenses), (D) (miscellaneous crimes) as well as offenses covered by INA § 238(a)(2)(A)(ii) (multiple criminal convictions) where the predicate offenses, "without regard to the date of their commission," are otherwise covered by section 237(a)(2)(A)(i) (crimes of moral turpitude).

The stated goals of this provision are to assure "expeditious removal following the end of the alien's incarceration" and to eliminate "the need for additional detention at any [DHS] processing center" following incarceration. INA § 238(a)(1).

2.14 The Immigration Process: Non-Judicial Forms of Removal

There are other forms of removal accomplished without a noncitizen appearing before an immigration judge.

EXPEDITED REMOVAL

When a federal agent encounters a noncitizen at the border—whether at an official port of entry, at the border between ports of entry, or within 100 miles of the border—that agent will determine whether the person is authorized to enter or be present within the United States. If the agent determines that the noncitizen either lacks authorization entirely or is seeking admission on the basis of fraud or misrepresentation, the noncitizen may be subject to expedited removal under INA § 235(c), 8 U.S.C. § 1225(c).

Expedited removal is a streamlined form of removal that Congress established through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996. It allows an immigration officer to summarily remove noncitizens without a hearing or an appearance before an immigration judge. The only basis for appeal is to claim that the noncitizen is not subject to expedited removal at all because they are a U.S. citizen, lawful permanent resident (LPR), refugee, or asylee.

Expedited removal is one of the most regularly employed means by which immigration authorities remove persons from the United States.

ADMINISTRATIVE REMOVAL

INA § 238(b), 8 U.S.C. § 1228(b), provides that a nonimmigrant (see section 2.5) convicted of an aggravated felony—a concept discussed in Chapter 3—may be subject to an administrative removal order. This is another streamlined removal process that authorizes the DHS to remove noncitizens without a hearing before an immigration judge.

REINSTATEMENT OF REMOVAL

INA § 241(a)(5), 8 U.S.C. § 1231(a)(5), authorizes DHS to reinstate the previously executed removal order of a noncitizen who unlawfully reenters the United States. This means that a previously removed noncitizen will be removed for the second time without a new hearing before an immigration judge.

2.15 The Immigration Process: Relief from Removal

A noncitizen who is removable under INA § 212 or INA § 237 can nevertheless petition the immigration judge for relief from removal. There are many different forms of relief from removal. Some depend on whether the noncitizen is an immigrant (section 2.4), a nonimmigrant (section 2.5), or an undocumented migrant (section 2.6). Others depend on how long the noncitizen has been present in the United States. Chapter 3

(sections 3.16-3.19) discusses how criminal convictions, or even just criminal acts, can affect a noncitizen's eligibility for various forms of relief from removal.

2.16 Federal Agencies Responsible for Immigration Law

The prior sections of this chapter have referenced various federal agencies involved in immigration law. This section reiterates some of that information with the goal of providing a comprehensive picture of each agency's unique role.

THE DEPARTMENT OF JUSTICE

Immigration courts fall under the purview of the Department of Justice (DOJ). Specifically, they fall under the Executive Office for Immigration Review (EOIR), a division of the DOJ that is sometimes pronounced by spelling out its letters (E-O-I-R) and sometimes pronounced like the Winne the Pooh character Eeyore.

The EOIR encompasses trial level courts run by immigration judges (IJs). At present, there are 682 IJs located in 69 immigration courts around the country.

The EOIR also encompasses the Board of Immigration Appeals (BIA), which considers appeals from IJ decisions. At present, the BIA is comprised of 28 Appellate Immigration Judges. The BIA makes binding decisions about immigration law, though those decisions can be modified or overruled by the U.S. Attorney General, a federal court of appeals, or Congress.

Outside of the EOIR, Assistant United States Attorneys (AUSAs) within the DOJ's Criminal Division, prosecute violations of immigration-related crimes in federal district courts across the country.

Finally, the DOJ is headed by the U.S. Attorney General (AG). The AG has the power to play an outsized role when it comes to immigration. First, the AG can refer immigration cases from IJs or the BIA to him or herself and, in rendering a decision, can thereby set immigration law that can only be overturned by a federal court of appeals or Congress. Second, the AG can set enforcement priorities for all AUSAs around the country, including whether to prioritize the enforcement of the federal immigration crimes discussed in Chapter 6.

THE DEPARTMENT OF HOMELAND SECURITY

The Homeland Security Act of 2002 (HSA), passed in the wake of 9/11, changed the organizational structure of immigration enforcement. Before the HSA, the Immigration and Naturalization Service (INS), a division of the DOJ, was in charge of immigration benefits and enforcement. The HSA abolished the INS and created the

Department of Homeland Security (DHS). In addition, three new agencies were created under DHS to divide the benefits and enforcement tasks previously handled by the INS: U.S. Citizenship and Immigration Services (USCIS), Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE).

USCIS, often referred to as "C-I-S" by immigration counsel, is the DHS agency that oversees lawful migration to the United States. It processes applications for immigration benefits.

There are two agencies under DHS that focus on immigration enforcement: CBP and ICE. There are two key branches of CBP: the Office of Field Operations (OFO) and U.S. Border Patrol (USBP). Their work is divided geographically. The OFO enforces immigration law at ports of entry. Border Patrol enforces immigration law between official ports of entry. ICE is responsible for enforcing immigration law everywhere else in the United States.

THE DEPARTMENT OF STATE

The State Department's consular officers process visa applications and issue visas to noncitizens.

THE DEPARTMENT OF LABOR

The U.S. Department of Labor (DOL) determines whether noncitizen workers will adversely affect American workers.

2.17 Select Immigration Terms

At the end of this book, in Appendix A.1, you will find a comprehensive glossary of immigration law terms. Here are selected terms that are helpful to look at before diving into the following chapters. See Appendix A.1. for the sources of language used in this section.

admission. The "lawful entry of the alien into the United States after inspection and authorization by an immigration officer." INA § 101(a)(13), 8 U.S.C. § 1101(a)(13).

alien. "The term 'alien' means any person not a citizen or national of the United States." INA § 101(a)(3), 8 U.S.C. § 1101(a)(3). The term has been criticized as dehumanizing. See, e.g., Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1996-97). Nevertheless, it persists in statute.

asylum. The process by which a nation grants protection to a migrant fleeing from persecution; also the protection itself.

citizen. The legally recognized subject or national of a nation.

deportation. The formal removal of a previously admitted noncitizen from the United States. INA § 237, 8 U.S.C. § 1227. It also refers to the type of immigration proceedings commenced prior to April 1, 1997, to remove noncitizens who entered the United States without inspection. Note: Regarding relation to the term "removal," see *removal*.

entry without inspection (EWI). Prior to 1996, noncitizens who entered without inspection by an immigration officer were considered deportable. Under the amended INA, they are now considered inadmissible. INA § 212(a)(6)(A), 8 U.S.C. § 1182(a)(6)(A). Noncitizens who enter without inspection may be criminally prosecuted. INA § 275, 8 U.S.C. § 1325.

exclusion. Prior to the 1996, exclusion was the formal term for denial of a noncitizen's entry into the United States. This was distinguished from deportation, which applied to all noncitizens present in the United States. Today, exclusion refers to both the process of adjudicating the inadmissibility of noncitizens seeking entry into the United States and the removal of noncitizens who entered the United States without formal admission. INA § 212, 8 U.S.C. § 1182. See *inadmissible*.

green card (alien registration card). A card issued to lawful permanent residents in lieu of a visa. The first such cards were issued in 1946 and were green in color. After 1964 the cards ceased to be green, but they are still referred to as "green cards." See *lawful permanent resident*.

illegal alien. A common but linguistically inapt phrase that is used in an imprecise way to refer to a noncitizen who has entered the United States without authorization, remains in the United States without authorization, or is perceived as having done something contrary to U.S. law. The phrase is rightly condemned on the grounds that persons themselves cannot be "illegal" and on the grounds that a noncitizen's presence in the United States without authorization, while grounds for removal, does not constitute a crime or civil offense. The phrase is not commonly used by immigration lawyers.

immigrant. A noncitizen entering the country to settle there permanently. Under U.S. law, every noncitizen seeking to enter the U.S. is presumed to be an immigrant—a person intending to settle in the U.S. permanently—unless they can prove that they are a nonimmigrant. INA § 214(b), 8 U.S.C. § 1184(b). See *nonimmigrant*.

inadmissible. The status of a noncitizen seeking admission at a port of entry who does not meet the criteria in the INA for admission. Since 1996, the statutory grounds for inadmissibility are also applied to the removal of migrants who have entered without inspection. INA § 212, 8 U.S.C. § 1182.

lawful permanent resident (LPR). An immigrant who has been conferred permanent resident status, that is, who has authorization to live and work in the United States indefinitely. Upon meeting the statutory prerequisites for naturalization, an LPR may apply to become a naturalized citizen.

migrant. A person who leaves his/her country of origin to seek residence in another country.

naturalization. The process of conferring nationality of a state on a person after birth. INA § 101(a)(23), 8 U.S.C. § 1101(a)(23).

noncitizen. A person who is not a citizen of the United States. This term is synonymous with the statutory definition of "alien."

nonimmigrant. A noncitizen admitted to the United States for a temporary duration, such as a student, a visitor, or a temporary worker. INA § 101(a)(15), 8 U.S.C. § 1101(a)(15).

removal. The expulsion of a noncitizen from the United States. This expulsion may be based on grounds of inadmissibility (INA § 212) or deportability (INA § 237). Note: The usage of the terms "deportation" and "removal" shifted under U.S. law in 1996; subsequently, deportation can be thought of as a subset of removal.

undocumented. A noncitizen described as "undocumented" lacks legal authorization to be present in the United States.

U.S. citizen (USC). An individual is or becomes a U.S. citizen in various ways—generally by birth in the United States, birth to U.S. citizen parents, or naturalization.

visa. A permit issued by a consular representative of a country, allowing the bearer entry into or transit through that country. The United States issues immigrant visas (IV) to lawful permanent residents and nonimmigrant visas (NIV) to temporary visitors.

Chapter Three: Immigration Consequences of Criminal Conduct

The U.S. immigration system is intensely focused on noncitizen criminality. This chapter begins with a historical look at the country's approach to noncitizens with criminal convictions (section 3.1). We then begin our exploration of current law, starting with the critical distinction between noncitizens who have been formally admitted into the United States and those who have not (section 3.2-3.3). Next, this chapter explores the types of criminality that trigger immigration consequences, including convictions (section 3.4) and admissions (section 3.5). Noncitizens can face immigration consequences for all sorts of criminal conduct; this chapter focuses on crimes involving moral turpitude, controlled substance offenses, and aggravated felonies (section 3.6). Whether an immigrant will face immigration consequences for such convictions depends on a court's analysis of the "categorial approach" to crime-based removal (sections 3.7-3.13). The remainder of this chapter discusses ways in which noncitizens might potentially remain in the United States notwithstanding any criminal conviction (sections 3.15-3.19).

3.1 The Long American History of Immigration and Criminality

Early American colonists included convicted felons shipped to our shores by Great Britain. While exact numbers are debated, historians generally agree that at least 50,000 British convicts arrived on American shores before the Revolutionary War. Some of these British imports were convicted of purely political or military crimes—prisoners taken by England in battles with Scotland and Ireland who were then sold into servitude in the American colonies for a set number of years in lieu of British imprisonment or

capital punishment. More were non-political offenders—cattle-killers, burners of corn-stacks, prostitutes, con artists, burglars, robbers, and thieves. They, too, exchanged capital punishment for transportation to and limited-term servitude in the American colonies.

Criminals were not always welcome in the New World. Several colonies passed laws prohibiting the admission of convicts, including Virginia (1670), Maryland (1676), and Pennsylvania (1722). England, however, declared these laws invalid. And so, British convicts continued to flow into the American colonies up until the American Revolution.

The criminality of noncitizens remained important after the foundation of the United States. States were encouraged by the Continental Congress of 1788 to ban "the transportation of convicted malefactors from foreign countries into the United States." Many did.

The first federal immigration law was passed in 1875, nearly 100 years after American independence. The Page Act of 1875 excluded women brought to the United States for "immoral purposes," which is to say, prostitution. In subsequent years, Congress extended the ranks of excludable noncitizens to include all "convicts" (1882), "persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude" (1891), and persons who "admit to having committed a felony or other crime or misdemeanor involving moral turpitude" (1917). And in 1922, Congress determined that deportation of noncitizens was appropriate for narcotics offenses.

The first quantitative immigration restrictions were put in place in 1921, limiting the number of noncitizen admissions annually by country-of-origin to just 3 percent of the total number of foreign-born persons from that country as recorded in the 1910 U.S. census. The United States doubled down on these numerical restrictions in 1924, setting country-of-origin quotas at 2 percent of the total number of foreign-born persons from that country as recorded in the 1890 U.S. census, with a total cap of 150,000. Notably, the 1924 law did not apply to migration from the Western Hemisphere. These national origin quotas remained in place until passage of the Immigration and Nationality Act of 1965, which instituted the immigration structure outlined in Chapter 2.

Congress, however, was not done with immigration restrictions based on criminal conduct. In 1952, Congress reaffirmed the exclusion of those convicted of or who had admitted to crimes of moral turpitude and added exclusion of noncitizens convicted of "two or more offenses" when sentenced to 5-years imprisonment or more. In addition, Congress stated that noncitizens present in the country would be deportable if they

entered surreptitiously in violation of law, were convicted of a crime involving moral turpitude within five years of entry and sentenced to a year or more imprisonment, were convicted of a violation of "any law or regulation relating to the illicit traffic in narcotic drugs," or had a firearms conviction. The Anti-Drug Abuse Act of 1986 expanded the deportation on the basis of controlled substance offenses beyond trafficking to "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance."

With the Anti-Drug Abuse Act of 1988, Congress created a new category of deportable noncitizens: those convicted of an "aggravated felony" at any time after entry. The 1988 law defined this term to include those convicted of murder, drug trafficking, and firearms trafficking. In subsequent years, Congress steadily expanded the definition of "aggravated felony." The Immigration Act of 1990 classified money laundering and crimes of violence as aggravated felonies. In 1994, Congress added theft and burglary offenses resulting in imprisonment of five or more years as well as certain offenses relating to ransom, child pornography, prostitution, RICO, and tax evasion, among other crimes. The 1996 Anti-terrorism and Effective Death Penalty Act (AEDPA) added gambling, alien smuggling, bribery, perjury, and more. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) added rape and sexual abuse of a minor to the list of aggravated felonies, and IIRIRA reduced the time of imprisonment required for many of the predicate crimes from five years to one year. IIRIRA also expanded deportation on the basis of crimes involving moral turpitude to reach any noncitizen whose crime was punishable by a year in prison, even if they never served time in prison.

3.2 INA 212 vs. INA 237

There are two statutes relevant to the exclusion and deportation of noncitizens on the basis of criminal conduct: INA § 212, 8 U.S.C. § 1182 and INA § 237, 8 U.S.C. § 1227. Which statute applies depends on the immigration status of the noncitizen.

Section 212 applies to two different populations of noncitizens: (i) those looking to enter the United States for the first time and (ii) those who entered the country without authorization. With regard to the first group, the U.S. agencies that vet noncitizen admissions (see section 2.9) will evaluate whether a noncitizen should be deemed inadmissible under INA § 212 because of criminal conduct. With regard to the second group, INA § 212 identifies the grounds for removing noncitizens from the United States (see section 2.12) on the basis of criminal conduct.

Note that immigration practitioners interchangeably use the terms "inadmissibility," "inadmissible," "exclusion," and "excludability" when discussing INA § 212. Some will use the term "inadmissible" solely in relation to noncitizens outside the United States seeking lawful entry and the term "excludable" in relation to noncitizens present in the United States without authorization. Others do not adhere to those distinctions. The statute heading for INA § 212 is "Excludable aliens." This term is then defined as applying to "aliens who are inadmissible under the following paragraphs." Just know that the terms refer to the same criteria, which are laid out in INA § 212.

Section 237, in contrast, applies when analyzing whether a noncitizen who has been formally admitted into the country (see section 2.9) should be removed (see section 2.12) on the basis of criminal conduct. Thus, INA § 237 determines whether an immigrant (see section 2.4) or nonimmigrant (see section 2.5) should be removed on the basis of criminal conduct. Section 237 also applies to those undocumented migrants who were admitted on the basis of a nonimmigrant visa but overstayed the duration of their visa (see section 2.6).

Notably, the distinction between INA § 212 and INA § 237 did not always exist. Prior to 1996, U.S. law focused on physical entry into the United States, not the admission process. Since April 1, 1997, the effective date of IIRIRA, however, admission has been the dividing line between removal under INA § 212 and INA § 237.

3.3 INA 212 vs. INA 237: A Wrinkle for LPRs Traveling Overseas

In general, when a lawful permanent resident travels overseas and thereafter returns to the United States, they are not regarded as seeking formal admission (see section 2.9). INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C). Officers with the U.S. Customs and Border Patrol will not, therefore, examine whether the returning LPR is "admissible" under INA § 212, 8 U.S.C. § 1182.

There is an important exception to this rule. When an LPR who commits a criminal offense identified in section 212(a)(2) (see section 3.6), leaves the country, and thereafter returns to the United States, that LPR will be regarded as seeking formal admission (see section 2.9). Officers with the U.S. Customs and Border Patrol will examine whether the returning LPR is excludable under INA § 212, 8 U.S.C. § 1182. The only exception to this exception is for LPRs who, after full disclosure of their INA § 212(a)(2) offense, have been granted relief under the processes outlined below at sections 3.16-3.19.

3.4 Criminal Convictions

In general, noncitizens who have been "convicted of" certain crimes are removable under INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) and INA § 237(a)(2), 8 U.S.C. § 1227(a)(2).

The term "convicted" is defined by statute at INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A). A "formal judgment of guilt" qualifies as a conviction. So does the noncitizen's admission of "sufficient facts to warrant a finding of guilt" coupled with "some form of punishment, penalty, or restraint on the alien's liberty" by a judge.

Criminal convictions that are the result of a jury trial clearly qualify as a "formal judgment of guilt." So are guilty pleas; the guilty plea is merely a predicate to an agreed-upon conviction. But what about other, alternative sentencing forms?

PRETRIAL DIVERSION/INTERVENTION

Pretrial diversion programs typically involve the postponement of prosecution while a defendant completes a program, which might include education, job services and vocational training, counseling and psychiatric care, drug treatment, community service, or providing restitution. Successful completion of the program will result in dismissal of the original charges. Unsuccessful participants will be prosecuted.

So long as participation in pretrial diversion does not require admission of guilt, participation in such a program is generally a safe option for noncitizens. See Matter of Grullon, 20 I & N Dec. 12 (BIA 1989).

DEFERRED ADJUDICATION/JUDGMENT

Deferred adjudication or judgment typically works as follows: the defendant enters a guilty plea, the judge "defers" entering a judgment based on that plea, and the defendant is given probationary terms. Successful completion of the probationary terms will result in withdrawal of the guilty plea and dismissal of the original charges. Unsuccessful completion will result in a judgment based on the original plea.

This form of deferred adjudication is not helpful for noncitizens because it has both elements a conviction under INA § 101(a)(48)(A): admission of "sufficient facts to warrant a finding of guilt" (the guilty plea) coupled with "some form of punishment" (the probationary terms).

However, not all deferred adjudication systems work in this manner. Some jurisdictions do not require a guilty plea. In such jurisdictions, deferred adjudication is a good option for noncitizens. See Crespo v. Holder, 631 F.3d 130 (4th Cir. 2011)

(holding that deferred adjudication under Virginia law did not qualify as a conviction under INA § 101(a)(48)(A) because it did not require a guilty plea).

NO CONTEST PLEA/NOLO CONTENDERE

A plea of nolo contendere means that the defendant does not admit or deny the charges but does subject themselves to punishment from the court. The definition of conviction at INA § 101(a)(48)(A) specifies that convictions include situations where "the alien has entered a plea of ... nolo contendere" so long as the noncitizen is also subject to "some form of punishment, penalty, or restraint on ... liberty."

ALFORD PLEA

In an "Alford plea," the defendant asserts their innocence but admits that the prosecution has sufficient evidence to likely convince a jury to find the defendant guilty. See North Carolina v. Alford, 400 U.S. 25 (1970). An Alford plea is considered a conviction for immigration purposes. See Abimbola v. Ashcroft, 378 F.3d 173, 181 (2d Cir. 2004).

JUVENILE CONVICTIONS

In general, a guilty verdict, ruling, or judgment in a juvenile court does not constitute a conviction for immigration purposes. See Matter of Devison-Charles, 22 I & N Dec. 1362 (BIA 2000). A conviction for a person who is under 18 years of age and who was charged as an adult, on the other hand, will constitute a conviction for immigration purposes. See Vargas-Hernandez v. Gonzales, 497 F.3d 919, 922-23 (9th Cir. 2007).

COURT MARTIAL

A judgment of guilt entered by a general court-martial of the U.S. Armed Forces qualifies as a "conviction" within the meaning of INA § 101(a)(48)(a). See Matter of Rivera-Valencia, 24 I & N Dec. 484 (BIA 2008).

SUSPENDED SENTENCE

A criminal defendant, after receiving a conviction, may be sentenced by the court but have that sentence suspended. This means the convicted individual is not imprisoned but instead serves a period of probation. Successful completion of probation will satisfy the sentence. Probation violations will result in serving the remainder of the sentence in prison.

A suspended sentence is not helpful for noncitizens looking to avoid a conviction under INA § 101(a)(48)(A) because it involves a "formal judgment of guilt."

MODIFIED AND VACATED SENTENCES

Sentences can be modified post-conviction to relieve the imposed penalty in whole or in part. Post-conviction modifications to a person's criminal record, by way of reducing, mitigating, or commuting a sentence or by the granting of probation or parole have no effect for purposes of INA § 101(a)(48)(A).

Even vacating a sentence altogether will not affect analysis under INA § 101(a)(48)(A). There is, however, one exception that will change the immigration consequences to a noncitizen: if the sentence is vacated on the basis of an underlying defect in the original legal proceedings. See Matter of Pickering, 23 I&N Dec. 621, 625 (BIA 2003) ("If a court vacates an alien's conviction for reasons solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes.")

EXPUNGEMENTS

The Board of Immigration Appeals has held that expungements, if granted for rehabilitative purposes or to attempt to avoid the immigration consequences of a conviction, will not affect analysis under INA § 101(a)(48)(A). See Matter of Pickering, 23 I&N Dec. 621, 625 (BIA 2003). The underlying conviction will still have immigration consequences. Courts diverge on how to determine just why a criminal conviction was expunged. See Jason A. Cade, Deporting the Pardoned, 46 U.C. Davis L. Rev. 355, 385 (2012).

Note that the State Department instructs that expungements of convictions do not remove the existence of a conviction only with respect to a finding of ineligibility under INA 212(a)(2)(A)(i)(II) (controlled substances). 9 FAM 302.4-2(B)(3)(5)(a).

PARDONS

There are no provisions in INA § 212 regarding the effect of pardons on the immigration consequences of criminal convictions for noncitizens facing exclusion. From 1956 to 1990, former INA § 241(b) explicitly made pardons of controlled substance convictions ineffectual for immigration purposes. While that provision was eliminated in the restructured INA of 1990, the absence of any language in INA § 212 regarding pardons has led courts to conclude that controlled substance offenses continue to be non-pardonable for purposes of INA § 212. See, e.g., Aguilera-Montero

v. Mukasey, 548 F.3d 1248 (9th Cir. 2008). The State Department also considers pardons of controlled substance offenses to be ineffectual in eliminating INA § 212 consequences. 9 FAM 302.4-2(B)(3)(5)(b). However, State Department regulations provide that pardons of crimes involving moral turpitude, discussed in section 3.6 do eliminate attendant INA § 212 consequences. 22 C.F.R. § 40.21(a)(5).

In contrast, INA § 237 includes language regarding the immigration consequences of pardons for noncitizens facing deportation. Noncitizens who have been "granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several states" will not be deemed to have a conviction for purposes of INA §§ 237(a)(2)(A)(i) (crimes of moral turpitude), (ii) (multiple criminal convictions), (iii) (aggravated felony), and (iv) (high speed flight). See INA § 237(a)(2)(A)(vi), 8 U.S.C. § 1227(a)(2)(A)(vi).

APPEALS

The majority of circuits have concluded that a conviction is final for immigration purposes even if a direct appeal is pending. However, a conviction no longer exists if the judgment of conviction has been overturned on appeal to a higher court.

3.5 Admissions of Criminal Conduct

Convictions are not the only basis for excluding noncitizens on the basis of criminal conduct. A noncitizen "who admits committing acts" that constitute the essential elements of a crime involving moral turpitude (see section 3.6 below) or a controlled substance offence (also 3.6 below) can be excluded under INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i). There is no comparable provision under INA § 237.

Consular officers are unlikely to find a noncitizen excludable because of an admission of criminal conduct. This reluctance is codified in the Foreign Affairs Manual, which states that it is "often difficult to obtain" an admission for purposes of INA § 212. 9 FAM 302.3(B)(4). The FAM dictates the following requirements for an admission: "(1) The crime, which the alien has admitted, must appear to constitute moral turpitude based on the statute. It is not necessary for the alien to admit that the crime involves moral turpitude. (2) Before the actual questioning, you must give the applicant an adequate definition of the crime, including all of the essential elements. You must explain the definition to the applicant in terms he or she understands, making certain the explanation conforms carefully to the law of the jurisdiction where the offense is alleged to have been committed. (3) You must give the applicant a full explanation of the purpose of the questioning. The applicant must then be placed under oath and the proceedings must be recorded verbatim. (4) The applicant must then admit

all of the factual elements which constituted the crime.˜ (5) The applicant's admission of the crime must be explicit, unequivocal and unqualified.˜" These elements exceed the BIA's definition: "a valid admission of a crime for immigration purposes requires that the alien be given an adequate definition of the crime, including all essential elements, and that it be explained in understandable terms." Matter of K-, 7 I & N. Dec. 594, 597 (1957).

In practice, it is far more likely that a CBP officer at a port of entry will determine that a noncitizen is inadmissible on the basis of admitted criminal activity. More specifically, it is likely that a CBP officer would screen for and exclude noncitizens on the basis of responses to questions regarding marijuana drug use that, while legal in many states and countries, is nonetheless federally prohibited and so a basis for exclusion (see section 3.6). The following training materials are designed to guide immigration inspectors regarding admissions:

Keith Hunsucker, Senior Instructor, Federal Law Enforcement Training Center, Criminal Without Conviction – Prosecuting the Unconvicted Arriving Alien Under section 212(a)(2)(A) of the Immigration and Nationality Act, 2 Q. Rev. (2d ed. 2001)

THE LAW˜

In Matter of K-, [7 I&N 594, 597 (BIA 1957)], the Board held that before an alien can be charged with inadmissibility due to admitting the elements of a crime involving moral turpitude, the alien must be given the following: 1) an adequate definition of the crime, including all essential elements, and 2) an explanation of the crime in understandable terms.˜ The Board noted that these rules "were not based on any specific statutory requirement but appear to have been adopted for the purpose of insuring that the alien would receive fair play and to preclude any possible later claim by him that he had been unwittingly entrapped into admitting the commission of a crime˜."˜

THE ADMISSIONS˜

[T]he alien need only admit the elements of the crime, not the legal conclusion that he actually committed the crime.˜ However, the admissions must be voluntary˜ and unequivocal.˜ The admissions must, by themselves, constitute full and complete admission of (or attempt or conspiracy to commit) a crime involving moral turpitude or a controlled substance offense.˜

BUILDING A CASE

It is the burden of an arriving alien to prove that he is admissible to the United States.˜ If an alien refuses to answer questions in support of his request to enter the United States, he can (and likely will) be deemed inadmissible. Therefore, it is unlikely that an alien will simply refuse to answer questions about criminal activity when questioned by a federal law enforcement officer.˜ An alien may lie about his prior criminal activity, but this (if discovered) will render the alien inadmissible on other grounds.˜

Many aliens do admit to criminal activity for which they have not been convicted. The alien may believe his actions were not criminal, or he may believe that without a conviction he cannot be further prosecuted. He likely suspects that the officer is aware of his criminal activity and that an admission, coupled with a fast-talking explanation, might allow him to convince the officer to permit him entry into the United States. In many instances the officer is alert to the possibility of criminal activity, based on arrest records or other leads.

As discussed previously, the mere admission of criminal activity is not enough to establish inadmissibility. The law enforcement officer must use lawful means to obtain admissions that will be legally sufficient to support the criminal charge of inadmissibility.

To meet that goal, the following process is recommended:

First, the alien should be thoroughly questioned to determine if he has committed a crime.˜ Where available, arrest records will provide the officer a starting point to initiate questioning.˜ Questioning should always be in a confident presumptive manner. For example, an officer encounters an alien with an arrest for cocaine possession but no conviction. He should not ask: "Have you ever knowingly possessed a controlled substance?" Rather, he should assert: "I see you've been involved with cocaine. Are you still dealing drugs?" When confronted with the very serious offense of trafficking in cocaine, many criminal drug users will immediately deny this offense while equivocating on the lesser offense of cocaine possession. Experience indicates that if this individual actually was involved with cocaine, they will likely admit to it if questioned properly. However, the officer must be very cognizant that the criminal alien might later assert he was improperly coerced into making damning admissions. Therefore, the officer should carefully document every circumstance surrounding the interrogation.˜

Once the "cat is out of the bag," it is unlikely the alien will deny the criminal activity when the officer seeks to document the admissions in writing. However, before preparing the written statement, the officer must locate the precise state or federal

criminal statute the alien admits violating. Within the context of a recorded˜ statement, the officer should present the elements of this statute to the alien, and have the alien admit to each element of the offense. For example, an officer learns that an arriving alien has an arrest record in the United States for sale of cocaine. This arrest did not lead to conviction. However, during questioning the alien admits that he had a personal problem with using cocaine but that he never sold it. Title 21 U.S.C. § 844 makes it unlawful to knowingly possess a controlled substance. Thereafter, the officer obtains admissions of criminal wrongdoing from the alien (in the alien's language). Such an interrogation might go as follows:

Q. A few minutes ago you told me that you tried cocaine here in the United States. Did you in fact tell me that?

A. Yes

Q. In order to possess that cocaine you had to actually have it in your possession, correct?

A. Yes

Q. This wasn't an accident, you knew you had cocaine in your possession, correct?

A. Yes

Q. Do you understand that Title 21 of the United States Code at section 844 makes it unlawful to knowingly possess a controlled substance?

A. Yes˜

Q. Do you admit that on [date] you knowingly possessed cocaine?

A. Yes

Q. And this possession took place in the United States˜?

A. Yes

The alien may likely have a further explanation, such as the use was long ago, he's learned his lesson, etc. It is best to include every bit of this explanation in the written statement. This will help rebut any future claim from the alien that he was confused or that he did not mean he actually possessed cocaine.

CONCLUSION˜

Some advocates complain that the tactics described in this article unfairly cause the criminal alien to admit to crimes. They suggest that unless the alien has been convicted by the criminal court system, it is unfair to punish him for criminal activity for which

he has managed to avoid conviction. This attitude is simply not consistent with the law of the United States.

Admission to the United States is a privilege. The United States does not need to import criminals from overseas. Used properly, INA section 212(a)(2)(A)(i) provides one more weapon the law enforcement officer can use to protect the citizens of the United States.

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3.6 Crime-Based Deportation: Key Crimes

There are multiple crime-based deportation grounds. See INA § 212(a)(2), 8 U.S.C. § 1182(a)(2), and INA § 237(a)(2), 8 U.S.C. § 1227(a)(2). Three of the most important are crimes involving moral turpitude (CIMT), controlled substance offenses, and aggravated felonies.

CRIMES INVOLVING MORAL TURPITUDE

The phrase "crime involving moral turpitude" was first introduced to immigration law in 1917 (see section 3.1). It has never been statutorily defined. However, as one court has put it, a CIMT typically involves "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." Marciano v. INS, 450 F.2d 1022 (8th Cir. 1971). The most common CIMTs include fraud, larceny, or intent to harm persons or things. 9 FAM 302.3-2(B)(2)(b).

Under INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I), noncitizens convicted of or admitting to having committed a crime involving moral turpitude, are excludable. There is a juvenile exception to the INA § 212 CIMT exclusion ground. A noncitizen is not excludable if their CIMT was committed when they were under the age of 18 and the crime was committed (and the noncitizen finished any time served) more than 5 years before seeking a visa. INA § 212(a)(2)(A)(ii)(I), 8 U.S.C. § 11822(a)(2)(A)(ii)(I). In addition, there is a *de minimis* exception to the INA § 212 CIMT exclusion ground. A noncitizen is not excludable if: (i) the maximum possible penalty for their CIMT does not exceed imprisonment for one year; *and* (ii) the noncitizen was not sentenced to serve more than six months. INA § 212(a)(2)(A)(ii)(II), 8 U.S.C. § 11822(a)(2)(A)(ii)(II).

Under INA § 237(a)(2)(A)(i), a noncitizen who commits a crime involving moral turpitude (CIMT) within five years of admission and is convicted of a crime for which a sentence of "one year or longer may be imposed" is deportable. Note the timing: it's

important *when* the criminal act is committed: within five years of admission. Note too that it does not matter what the actual sentence received is; what matters is what the potential sentence for the crime is. In addition, a noncitizen who, at any time after admission, is convicted of two or more CIMTs "not arising out of a single scheme of criminal misconduct," regardless of the sentence, is deportable. INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii).

INA § 212	INA § 237
1 CIMT, unless petty offense or youthful offense exception applies	2 CIMTs, or 1 CIMT within 5 years of admission with 1-year sentence possible

CONTROLLED SUBSTANCE OFFENSES

The United States first passed an immigration law regarding controlled substance offenses in 1922 (see section 3.1). This category of crimes has expanded substantially over the years.

Under INA § 212, any violation of law regarding controlled substances is grounds for exclusion. INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II). This includes violations of state, federal, or foreign laws regarding controlled substances. In addition, there is a special exclusion ground for "controlled substance traffickers." INA § 212(a)(2)(C), 8 U.S.C. § 1182(a)(2)(C). The Supreme Court has held that "ordinarily 'trafficking' means some sort of commercial dealing." Lopez v. Gonzales, 549 U.S. 47, 53 (2006).

Under INA § 237, just as under section 212, conviction for any violation of a controlled substance law after admission is a basis for removal. INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i). However, section 237 has an exception—not found in section 212—for "a single offense involving possession for one's own use of 30 grams or less of marijuana." INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i). And, for noncitizens subject to INA § 237, "illicit trafficking in a controlled substance" is not just a controlled substance offense, it is an "aggravated felony." INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B).

INA § 212	INA § 237
Controlled substance offense	Controlled substance offense (except possession of ≤ 30 grams of marijuana for personal use)

AGGRAVATED FELONIES

The term "aggravated felony" was introduced to immigration law in 1988. There are two key things to note about this term. First, it applies only to removal under INA § 237 but not to removal under INA § 212. Second, while INA § 237 references the phrase "aggravated felony," the phrase itself is defined elsewhere, under INA § 101(a)(43), 8 U.S.C. § 1101(a)(43).

A noncitizen convicted of an "aggravated felony at any time after admission is deportable" under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii). Note how the timing differs from removal on the basis of crimes involving moral turpitude, discussed above, which triggers only when a CIMT is committed within five years of admission. There is no similar cut-off for the commission of aggravated felonies. Any conviction at any time after admission triggers removal.

The term "aggravated felony" is defined at INA § 101(a)(43) and includes 21 separate subparts. Some of the aggravated felony provisions look to the potential length of a noncitizen's sentence under their statute of conviction. See INA § 101(a)(43)(J), (Q), (T). Other aggravated felony provisions look to the noncitizen's actual sentence. See INA § 101(a)(43)(F), (G), (P), (R), (S). Sentencing—potential or actual—is irrelevant to the majority of aggravated felony provisions. See INA § 101(a)(43)(A)-(E), (H)-(I), (K)-(O), (U). Substantively, aggravated felonies run the gamut from murder, INA § 101(a)(43)(A), to perjury, INA § 101(a)(43)(S). Attempt and conspiracy to commit a delineated offense are also included. INA § 101(a)(43)(U). As long as a conviction falls within INA § 101(a)(43), it is an aggravated felony, even if the crime would not be generally considered "aggravated" and even if the underlying state law conviction is for a misdemeanor.

INA § 212	INA § 237
	Aggravated felonies

3.7 The Categorical Approach to Crime-Based Deportation

Courts follow what is called the "categorial approach" to determine whether a noncitizen is removable based on a crime involving moral turpitude, a controlled substance offense, or an aggravated felony. The categorical approach is a methodology for determining whether a noncitizen's prior criminal conviction falls within the INA's provisions regarding removal.

The "categorial approach" requires looking at the nature of the underlying criminal conviction and comparing the elements of the criminal statute to the INA's removal provision. Notably, the facts underlying the conviction are irrelevant to this analysis—only the statutory elements of the crime matter.

THE STRICT CATEGORICAL APPROACH

Determining whether there is a categorical match between the statute of conviction and the removability ground requires:

1. identifying and defining the elements of the federal removal offense;
2. identifying and defining the elements of the statute of conviction; and
3. comparing the elements of the generic offense with the elements of the statute of conviction.

There are two approaches to the first step—identifying and defining the elements of the federal removal offense. When the removal offense uses a general term—such as "murder," which is considered an aggravated felony under INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A)—the categorical approach requires identifying the "generic" definition of that term. That is, what is the generic definition of the federal offense of murder? The answer to that question may be found in case law from federal courts or the Board of Immigration Appeals. It might require analysis of other legal sources such as dictionaries and treatises. As it happens, the BIA has identified the elements of the generic offense of murder as: (1) killing, (2) with malice aforethought, (3) of a human being. Matter of M-W-, 25 I.&N. Dec. 748 (BIA 2012).

There is no need to come up with a "generic" definition when the federal removal offense at issue refers to specified federal law. For example, Congress has determined that a crime of violence as defined by 18 U.S.C. § 16 is also an aggravated felony. INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F). Thus, when a noncitizen is facing removal under INA § 101(a)(43)(F), there is no need to uncover the "generic" definition of a "crime of violence," rather, categorical analysis begins by seeing how courts have understood 18 U.S.C. § 16.

The second step of the categorical approach—identifying and defining the elements of the statute of conviction—starts with the statute of conviction. In most cases, the statute of conviction will be a state law. The categorical approach requires identifying the minimum conduct that could result in a conviction under that statute. This requires looking at case law and jury instructions regarding the statute as it existed at the time of conviction. Consider a noncitizen convicted under California Penal Code § 187(a). The statutory elements of that crime are: (1) killing, (2) with malice

aforethought, (3) of a human being or fetus. The minimum conduct that could result in a conviction under Cal. Penal Code § 187(a) is the premeditated killing of a fetus.

The third step is to compare the elements of the generic offense with the elements of the statute of conviction. The goal is to identify whether every violation of the state statute of conviction necessarily falls within the generic definition of the removability offense. If we take the examples above—the generic federal definition of murder and Cal. Penal Code § 187(a)—we can see that there is a way to violate the state law without meeting the federal generic definition of murder: by killing a fetus. This indicates that there is not a categorical match between the generic offense and the state statute of conviction. This is good news for the noncitizen. When there is not a categorical match, the state statute is considered "overbroad," and the noncitizen is not removable. In contrast, when every conviction under the state statute would fall within the generic definition of the removability offense, then there is a categorical match, and the noncitizen would be removeable.

Generic federal offense of "murder"	Cal. Penal Code § 187(a)
(1) killing	(1) killing
(2) with malice aforethought	(2) with malice aforethought
(3) of a human being	(3) of a human being or fetus [overbroad]

REALISTIC PROBABILITY

In Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007), the Supreme Court wrote that "to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." 549 U.S. at 193.

The Court repeated this language in Moncrieffe v. Holder, 569 U.S. 184 (2013), writing: "our focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense; there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.'" 569 U.S. at 191 (citing Duenas-Alvarez).

These are the only two Supreme Court decisions about the "realistic probability" analysis. Courts are split as to how to interpret it.

Eight circuits hold that the realistic probability test is obviated where the express language of the statute evidences overbreadth. That is, where the statute, as written, clearly applies to conduct that is beyond the removable offense, these circuits will hold the statute to be overbroad without undergoing the "reasonable probability" analysis. The reasoning behind these cases is that no "legal imagination" is required to assess overbreadth, only the actual wording of the statute.

The Board of Immigration Appeals, in contrast, has held that: "Even if the language of a statute is plain, its application may still be altogether hypothetical and may not satisfy the requirements of Moncrieffe if the respondent cannot point to his own case or other cases where the statute has been applied in the manner that he advocates." Matter of Navarro Guadarrama, 27 I& N Dec. 560, 567 (BIA 2019).

DIVISIBILITY

In some cases, the underlying criminal statute is "divisible." This means that the statute sets out different offenses within one statute. That is, the statute defines multiple crimes and lists them as alternative elements. Whether or not the statute of conviction is divisible matters because a different categorical approach—the modified categorical approach discussed below—applies to divisible statutes.

In Mathis v. United States, 579 U.S. 500 (2016), the Supreme Court noted a distinction between statutes that lay out different elements and statutes that lay out different means. Only the former are divisible statutes.

In Mathis, the Court explained that elements require jury unanimity; they are what the prosecution must prove beyond a reasonable doubt in order to get a conviction. Means, on the other hand, are just different ways to satisfy an element. That is, they are just ways of committing a crime not the essential ingredients of the crime itself. Means do not require jury unanimity nor must a prosecution prove them beyond a reasonable doubt to get a conviction.

Trying to decide if a statute is divisible or not is a difficult proposition. The starting point is the statute itself, informed by case law and jury instructions.

Recently, in Pereida v. Wilkinson, 592 U.S. 224 (2021), the Supreme Court held that where a removable noncitizen is applying for relief and has a conviction under a divisible statute, the noncitizen has the burden of establishing the actual basis for their conviction under a divisible statute because they have the burden of establishing their eligibility for relief. See section 3.17.

MODIFIED CATEGORIAL APPROACH

If the statute of conviction is divisible, then the court can look at the noncitizens' "record of conviction" for the sole purpose of determining which of the alternative offenses within the statute is the basis for their conviction. At that point, the court will compare the generic definition of the removal offense to the elements of the statute of conviction. If the statute of conviction is broader than the removal offense, the statute is overbroad and cannot be the basis for removal. If the statute matches the offense, the noncitizen loses and is removable.

The modified categorical approach differs from the categorical approach because limited facts matter. The court can consider the "record of conviction" for purposes of determining what statute of conviction is at issue. The "record of conviction" includes what are known as "Shepard documents," in reference to Shepard v. United States, 544 U.S. 13 (2005). These include: the plea colloquy transcript, admissions during plea, charge if evidence shows plea to charge, judgment, factual basis for plea, and sometimes notations on minute orders. It does not include dropped charges, statements to the immigration judge (unless admitting a fact in the NTA during plea), a co-defendant's record, police report, probation/pre-sentencing report, nor the preliminary hearing transcript (unless stipulated to as the factual basis for their plea).

CIRCUMSTANCE SPECIFIC APPROACH

Courts do not apply either the categorical or modified categorical approach when a comparison between the criminal statute and a generic offense requires an examination of the "particular circumstances in which an offender committed the crime on a particular occasion." This is known as the "circumstance-specific" exception. It enables the court to consider evidence outside the record of conviction to determine whether a criminal conviction involved factors specified in a generic offense that are not tied to the elements of a criminal statute.

In Nijhawan v. Holder, 557 U.S. 29, 38 (2009), the Supreme Court held that courts can consider evidence as to whether a fraud offense met a $10,000 loss threshold to trigger an aggravated felony conviction under INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i). Circuit courts have similarly held that they can consider evidence as to whether a drug conviction involved the personal use of 30 grams or less of marijuana, which is an exception to removal on the basis of a controlled substance offense under INA § 237(a)(2)(B)(i), 8 U.S.C. § 1101(a)(2)(B)(i), and whether a conviction was for a "crime of domestic violence" under INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i)

3.8 Case: Zarate v. U.S. Attorney General

Zarate v. U.S. Attorney General
26 F.4th 1196 (11th Cir. 2022)

JORDAN, CIRCUIT JUDGE:˜

The question presented in this appeal˜ is whether a conviction for falsely representing a social security number, see 42 U.S.C. § 408(a)(7)(B), is a CIMT.

I

In 2019, Ruperto Hernandez Zarate—a citizen and national of Mexico—was convicted of violating 42 U.S.C. § 408(a)(7)(B) for using a social security card that was not his. As relevant here, that provision makes it a felony for someone "(7) ... for the purpose of obtaining anything of value from any person, or for any other purpose ... (B) with intent to deceive, [to] falsely represent[ ] a number to be the [S]ocial [S]ecurity account number assigned by the Commissioner of Social Security to him or to another person, when in fact such number is not the [S]ocial [S]ecurity account number assigned by the Commissioner of Social Security to him or to such other person[.]" 42 U.S.C. § 408(a)(7)(B).

An immigration judge ruled that˜ his conviction under § 408(a)(7)(B) was for a CIMT˜. Mr. Zarate appealed to the Board of Immigration Appeals, which agreed with the immigration judge and dismissed the appeal.˜ The BIA explained that § 408(a)(7)(B) requires intent to deceive, and as a result Mr. Zarate's conviction was for a CIMT.˜ The BIA did not, however, address whether a violation of § 407(a)(7)(B) is inherently base, vile, or depraved. And that, as we will later explain, is a significant omission.

II

We "review de novo the legal question of whether a[ ] conviction qualifies as a [CIMT]."˜ In determining whether a conviction is a CIMT, we employ the categorical approach ˜. This means that "[w]hether a crime involves the depravity or fraud necessary to be one of moral turpitude depends on the inherent nature of the offense, as defined in the relevant statute, rather than the circumstances surrounding a defendant's particular conduct."˜ We ask whether the "least culpable conduct necessary to sustain a conviction under the statute meets the standard of a crime involving moral turpitude."˜

III

CIMTs have been part of the immigration lexicon since the late 19th century, initially appearing in laws providing for the exclusion of certain categories of persons

from the United States.˜ Remarkably, however, the term "moral turpitude" has never been defined by federal statute or rule, and its contours have been left to case-by-case adjudication by administrative and judicial tribunals for over a century.˜

The BIA has, understandably, described "moral turpitude" as a "nebulous concept."˜ That may be a kind characterization. As one commentator has put it, "[t]he term 'moral turpitude' is probably incapable of precise definition in a legal sense, since it basically involves moral or ethical judgments."˜ Some have remarked that, to the extent that definitions of the term exist, "[i]t's difficult to make sense of ... [them]."˜

Nevertheless, the Supreme Court has held that the term "moral turpitude" is not unconstitutionally vague. "Whatever else" it "may mean in peripheral cases," the Court said, case law "make[s] it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude."˜

So what exactly does "moral turpitude" mean? We turn to that question next.

A

According to the BIA, "moral turpitude" refers to "conduct that is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. To involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental state." Matter of Silva-Trevino, 26 I. & N. Dec. 826, 833–34 (BIA 2016) (internal quotation marks and citation omitted).˜

Consistent with the two elements identified by the BIA—reprehensible conduct and a culpable mental state—we agree with the Fourth Circuit that "by using the phrase 'involving moral turpitude' to define a qualifying crime, Congress meant to refer to more than simply the wrong inherent in violating [a] statute. Otherwise, the requirement that moral turpitude be involved would be superfluous. It follows, therefore, that a crime involving moral turpitude must involve conduct that not only violates a statute but also independently violates a moral norm."˜

Our survey of the legal landscape indicates that fraud offenses are—rightly or wrongly—categorically deemed to involve moral turpitude. As noted, the Supreme Court˜ rejected a vagueness challenge to the phrase "involving moral turpitude" by explaining that "crimes in which fraud was an ingredient have always been regarded as involving moral turpitude."˜˜ Given that pronouncement, it would be inappropriate for us (regardless of our own views) to now declare that fraud offenses are not always CIMTs.˜

[I]t seems to us that fraud may be a sui generis category necessarily involving moral turpitude, and that only non-fraud offenses must also satisfy the "inherently base, vile, or depraved" requirement to constitute CIMTs. Such a conclusion, we believe, is supported by a number of decisions from the BIA and our sister circuits.˜

Nevertheless, as explained below, this treatment of fraud offenses does not help the government here. That is because under the categorical approach the crime Mr. Zarate committed does not include fraud as an element or ingredient.

B

Applying the categorical approach, we look to the elements of 42 U.S.C. § 408(a)(7)(B), Mr. Zarate's statute of conviction.˜ We have explained that the "elements of [an] offense [under § 408(a)(7)(B)] are (1) false representation of a Social Security number, (2) with intent to deceive, (3) for any purpose."˜

Fraud requires that a misrepresentation be made to obtain a benefit from someone or cause a detriment to someone. See generally Restatement (Second) of Torts § 531 (A.L.I. 1977) ("One who makes a fraudulent misrepresentation is subject to liability to the persons ... whom he intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation, for pecuniary loss suffered by them through their justifiable reliance in the type of transaction in which he intends or has reason to expect their conduct to be influenced."); Black's Law Dictionary 775 (10th ed. 2014) (defining fraud as a "knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment"); Merriam-Webster's Dictionary of Law 202 (2016) (defining fraud as "any act, expression, omission or concealment calculated to deceive another to his or her disadvantage"). A violation of § 408(a)(7)(B) can sometimes be for the "purpose of obtaining anything of value from any person"—which would involve fraud—but under the categorical approach the "least culpable conduct necessary to sustain a conviction"˜ is the false representation of the Social Security number for "any other purpose," i.e., for a non-fraudulent purpose.˜

In Mr. Zarate's case, the BIA concluded that a violation of § 408(a)(7)(B) involves moral turpitude because the statute requires intent to deceive. But that analysis is both inconsistent with BIA precedent (which we discuss below) and incomplete because it fails to address the second moral turpitude element: inherent baseness, vileness, or depravity. As we explain, the BIA has long held that non-fraud offenses involving deception are not automatically CIMTs.

C˜

BIA decisions teach that making a false statement or engaging in general deception is not necessarily the same thing as fraud.˜ As a result, a violation of § 408(a)(7)(B) is not categorically a CIMT: "The intent to deceive is not equivalent to the intent to defraud, which generally requires an intent to obtain some benefit or cause a detriment. There are many situations in which a person may have the intent to deceive without having the intent to defraud."˜

[U]nder the categorical approach § 408(a)(7)(B) does not have fraud as a necessary element or ingredient. The "minimum conduct criminalized,"˜ is the false representation of a Social Security number, with intent to deceive, for "any purpose."˜ [T]hat means a violation of this provision does not have fraud as an element or ingredient and therefore is not necessarily a CIMT. Again, if the intent to deceive is not for the purpose of obtaining a benefit or causing a detriment, moral turpitude is not automatically involved.˜

[T] he BIA's two-pronged moral turpitude standard requires not just a culpable mental state, but also conduct that is reprehensible, i.e., inherently base, vile, or depraved.˜ [I]t is inappropriate to conflate the BIA's two requirements in non-fraud scenarios so that one (a culpable mental state) automatically satisfies the other (moral reprehensibility).˜ Here, the BIA erred by collapsing the two requirements of moral turpitude into one.˜

Our holding today does not foreclose the possibility that a conviction for a violation of § 408(a)(7)(B) may be a CIMT. But if the BIA is going to hold that it is, it will need to do what it has so far failed to do in Mr. Zarate's case—it will have to apply its two-pronged moral turpitude standard in toto and decide whether the statute, under the categorical approach, involves conduct that is "reprehensible," i.e., conduct that is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." Silva-Trevino, 26 I. & N. Dec. at 833–34 (internal quotation marks omitted).˜

We remand to the BIA for that purpose.

IV

We grant Mr. Zarate's petition, vacate the BIA's decision, and remand for further proceedings.

Petition Granted.˜

3.9 Case: Mellouli v. Lynch

Mellouli v. Lynch
575 U.S. 798 (2015)

JUSTICE GINSBURG DELIVERED THE OPINION OF THE COURT.

This case requires us to decide how immigration judges should apply a deportation (removal) provision, defined with reference to federal drug laws, to an alien convicted of a state drug-paraphernalia misdemeanor.

Lawful permanent resident Moones Mellouli, in 2010, pleaded guilty to a misdemeanor offense under Kansas law, the possession of drug paraphernalia to "store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body." Kan. Stat. Ann. § 21–5709(b)(2) (2013 Cum. Supp.). The sole "paraphernalia" Mellouli was charged with possessing was a sock in which he had placed four orange tablets. The criminal charge and plea agreement did not identify the controlled substance involved, but Mellouli had acknowledged, prior to the charge and plea, that the tablets were Adderall. Mellouli was sentenced to a suspended term of 359 days and 12 months' probation.

In February 2012, several months after Mellouli successfully completed probation, Immigration and Customs Enforcement officers arrested him as deportable under 8 U.S.C. § 1227(a)(2)(B)(i) based on his Kansas misdemeanor conviction. section 1227(a)(2)(B)(i) authorizes the removal of an alien "convicted of a violation of ... any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21)." We hold that Mellouli's Kansas conviction for concealing unnamed pills in his sock did not trigger removal under § 1227(a)(2)(B)(i). The drug-paraphernalia possession law under which he was convicted, Kan. Stat. Ann. § 21–5709(b), by definition, related to a controlled substance: The Kansas statute made it unlawful "to use or possess with intent to use any drug paraphernalia to ... store [or] conceal ... a controlled substance." But it was immaterial under that law whether the substance was defined in 21 U.S.C. § 802. Nor did the State charge, or seek to prove, that Mellouli possessed a substance on the § 802 schedules. Federal law (§ 1227(a)(2)(B)(i)), therefore, did not authorize Mellouli's removal.

I

A

This case involves the interplay between several federal and state statutes. section 1227(a)(2)(B)(i)˜ authorizes the removal of an alien "convicted of a violation of ... any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana." section 1227(a)(2)(B)(i) incorporates 21 U.S.C. § 802, which limits the term "controlled substance" to a "drug or other substance" included in one of five federal schedules. § 802(6).

The statute defining the offense to which Mellouli pleaded guilty, Kan. Stat. Ann. § 21–5709(b), proscribes "possess[ion] with intent to use any drug paraphernalia to," among other things, "store" or "conceal" a "controlled substance." Kansas defines "controlled substance" as any drug included on its own schedules, and makes no reference to § 802 or any other federal law. § 21–5701(a).˜ At the time of Mellouli's conviction, Kansas' schedules included at least nine substances not included in the federal lists. See § 65–4105(d)(30), (31), (33), (34), (36) (2010 Cum. Supp.); § 65–4111(g) (2002); § 65–4113(d)(1), (e), (f) (2010 Cum. Supp.)˜.

The question presented is whether a Kansas conviction for using drug paraphernalia to store or conceal a controlled substance, § 21–5709(b), subjects an alien to deportation under § 1227(a)(2)(B)(i), which applies to an alien "convicted of a violation of [a state law] relating to a controlled substance (as defined in [§ 802])."

B

Mellouli, a citizen of Tunisia, entered the United States on a student visa in 2004. He attended U.S. universities, earning a bachelor of arts degree, magna cum laude, as well as master's degrees in applied mathematics and economics. After completing his education, Mellouli worked as an actuary and taught mathematics at the University of Missouri–Columbia. In 2009, he became a conditional permanent resident and, in 2011, a lawful permanent resident. Since December 2011, Mellouli has been engaged to be married to a U.S. citizen.

In 2010, Mellouli was arrested for driving under the influence and driving with a suspended license. During a postarrest search in a Kansas detention facility, deputies discovered four orange tablets hidden in Mellouli's sock. According to a probable-cause affidavit submitted in the state prosecution, Mellouli acknowledged that the tablets were Adderall and that he did not have a prescription for the drugs. Adderall, the brand

name of an amphetamine-based drug typically prescribed to treat attention-deficit hyperactivity disorder,˜ is a controlled substance under both federal and Kansas law. See 21 CFR § 1308.12(d)(1) (2014) (listing "amphetamine" and its "salts" and "isomers"); Kan. Stat. Ann. § 65–4107(d)(1) (2013 Cum. Supp.) (same). Based on the probable-cause affidavit, a criminal complaint was filed charging Mellouli with trafficking contraband in jail.

Ultimately, Mellouli was charged with only the lesser offense of possessing drug paraphernalia, a misdemeanor. The amended complaint alleged that Mellouli had "use[d] or possess[ed] with intent to use drug paraphernalia, to-wit: a sock, to store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance."˜ The complaint did not identify the substance contained in the sock. Mellouli pleaded guilty to the paraphernalia possession charge; he also pleaded guilty to driving under the influence. For both offenses, Mellouli was sentenced to a suspended term of 359 days and 12 months' probation.

In February 2012, several months after Mellouli successfully completed probation, Immigration and Customs Enforcement officers arrested him as deportable under § 1227(a)(2)(B)(i) based on his paraphernalia possession conviction. An Immigration Judge ordered Mellouli deported, and the Board of Immigration Appeals (BIA) affirmed the order. Mellouli was deported in 2012.

Under federal law, Mellouli's concealment of controlled-substance tablets in his sock would not have qualified as a drug-paraphernalia offense. Federal law criminalizes the sale of or commerce in drug paraphernalia, but possession alone is not criminalized at all. See 21 U.S.C. § 863(a)-(b). Nor does federal law define drug paraphernalia to include common household or ready-to-wear items like socks; rather, it defines paraphernalia as any "equipment, product, or material" which is "primarily *intended or designed for use*" in connection with various drug-related activities. § 863(d) (emphasis added). In 19 States as well, the conduct for which Mellouli was convicted—use of a sock to conceal a controlled substance—is not a criminal offense.˜ At most, it is a low-level infraction, often not attended by a right to counsel.˜

The Eighth Circuit denied Mellouli's petition for review.˜ We granted certiorari,˜ and now reverse the judgment of the Eighth Circuit.

II

We address first the rationale offered by the BIA and affirmed by the Eighth Circuit, which differentiates paraphernalia offenses from possession and distribution offenses. Essential background, in evaluating the rationale shared by the BIA and the Eighth Circuit, is the categorical approach historically taken in determining whether a

state conviction renders an alien removable under the immigration statute.˜ Because Congress predicated deportation "on convictions, not conduct," the approach looks to the statutory definition of the offense of conviction, not to the particulars of an alien's behavior.˜ The state conviction triggers removal only if, by definition, the underlying crime falls within a category of removable offenses defined by federal law.˜ An alien's actual conduct is irrelevant to the inquiry, as the adjudicator must "presume that the conviction rested upon nothing more than the least of the acts criminalized" under the state statute. Moncrieffe˜ (internal quotation marks and alterations omitted).˜

The categorical approach "has a long pedigree in our Nation's immigration law."˜ As early as 1913, courts examining the federal immigration statute concluded that Congress, by tying immigration penalties to convictions, intended to "limi[t] the immigration adjudicator's assessment of a past criminal conviction to a legal analysis of the statutory offense," and to disallow "[examination] of the facts underlying the crime."˜

Rooted in Congress' specification of conviction, not conduct, as the trigger for immigration consequences, the categorical approach is suited to the realities of the system. Asking immigration judges in each case to determine the circumstances underlying a state conviction would burden a system in which "large numbers of cases [are resolved by] immigration judges and front-line immigration officers, often years after the convictions."˜ By focusing on the legal question of what a conviction necessarily established, the categorical approach ordinarily works to promote efficiency, fairness, and predictability in the administration of immigration law.˜ In particular, the approach enables aliens "to anticipate the immigration consequences of guilty pleas in criminal court," and to enter "'safe harbor' guilty pleas [that] do not expose the [alien defendant] to the risk of immigration sanctions."˜

The categorical approach has been applied routinely to assess whether a state drug conviction triggers removal under the immigration statute. As originally enacted, the removal statute specifically listed covered offenses and covered substances. It made deportable, for example, any alien convicted of "import[ing]," "buy[ing]," or "sell[ing]" any "narcotic drug," defined as "opium, coca leaves, cocaine, or any salt, derivative, or preparation of opium or coca leaves, or cocaine."˜ Over time, Congress amended the statute to include additional offenses and additional narcotic drugs.˜ Ultimately, the Anti–Drug Abuse Act of 1986 replaced the increasingly long list of controlled substances with the now familiar reference to "a controlled substance (as defined in [§ 802])." See § 1751, 100 Stat. 3207–47. In interpreting successive versions of the removal statute, the BIA inquired whether the state statute under which the alien was convicted covered federally controlled substances and not others.˜

Matter of Paulus, 11 I. & N. Dec. 274 (1965), is illustrative. At the time the BIA decided Paulus, the immigration statute made deportable any alien who had been "convicted of a violation of ... any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana."~ California controlled certain "narcotics," such as peyote, not listed as "narcotic drugs" under federal law.~ The BIA concluded that an alien's California conviction for offering to sell an unidentified "narcotic" was not a deportable offense, for it was possible that the conviction involved a substance, such as peyote, controlled only under California law.~ Because the alien's conviction was not necessarily predicated upon a federally controlled "narcotic drug," the BIA concluded that the conviction did not establish the alien's deportability.~

Under the Paulus analysis,~ Mellouli would not be deportable. Mellouli pleaded guilty to concealing unnamed pills in his sock. At the time of Mellouli's conviction, Kansas' schedules of controlled substances included at least nine substances—e.g., salvia and jimson weed—not defined in § 802. See Kan. Stat. Ann. § 65–4105(d)(30), (31). The state law involved in Mellouli's conviction, therefore, like the California statute in Paulus, was not confined to federally controlled substances; it required no proof by the prosecutor that Mellouli used his sock to conceal a substance listed under § 802, as opposed to a substance controlled only under Kansas law. Under the categorical approach applied in Paulus, Mellouli's drug-paraphernalia conviction does not render him deportable. In short, the state law under which he was charged categorically "relat[ed] to a controlled substance," but was not limited to substances "defined in [§ 802]."~

The BIA, however, announced and applied a different approach to drug-paraphernalia offenses (as distinguished from drug possession and distribution offenses) in Matter of Martinez Espinoza, 25 I. & N. Dec. 118 (2009). There, the BIA ranked paraphernalia statutes as relating to "the drug trade in general."~ The BIA rejected the argument that a paraphernalia conviction should not count at all because it targeted implements, not controlled substances.~ It then reasoned that a paraphernalia conviction "relates to" any and all controlled substances, whether or not federally listed, with which the paraphernalia can be used.~ Under this reasoning, there is no need to show that the type of controlled substance involved in a paraphernalia conviction is one defined in § 802.

The Immigration Judge in this case relied upon Martinez Espinoza in ordering Mellouli's removal, quoting that decision for the proposition that "the requirement of a correspondence between the Federal and State controlled substance schedules, embraced by Matter of Paulus ... has never been extended" to paraphernalia offenses.~ The BIA affirmed, reasoning that Mellouli's conviction for possession of drug

paraphernalia "involves drug trade in general and, thus, is covered under [§ 1227(a)(2)(B)(i)]."~ Denying Mellouli's petition for review, the Eighth Circuit deferred to the BIA's decision in Martinez Espinoza, and held that a Kansas paraphernalia conviction "'relates to' a federal controlled substance because it is a crime ... 'associated with the drug trade in general.'"~

The disparate approach to state drug convictions, devised by the BIA and applied by the Eighth Circuit, finds no home in the text of § 1227(a)(2)(B)(i). The approach, moreover, "leads to consequences Congress could not have intended."~ Statutes should be interpreted "as a symmetrical and coherent regulatory scheme."~ The BIA, however, has adopted conflicting positions on the meaning of § 1227(a)(2)(B)(i), distinguishing drug possession and distribution offenses from offenses involving the drug trade in general, with the anomalous result that minor paraphernalia possession offenses are treated more harshly than drug possession and distribution offenses. Drug possession and distribution convictions trigger removal only if they necessarily involve a federally controlled substance, see Paulus, 11 I. & N. Dec. 274, while convictions for paraphernalia possession, an offense less grave than drug possession and distribution, trigger removal whether or not they necessarily implicate a federally controlled substance, see Martinez Espinoza, 25 I. & N. Dec. 118. The incongruous upshot 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. Because it makes scant sense, the BIA's interpretation, we hold, is owed no deference under the doctrine described in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837~ (1984).

III

Offering an addition to the BIA's rationale, the Eighth Circuit reasoned that a state paraphernalia possession conviction categorically relates to a federally controlled substance so long as there is "nearly a complete overlap" between the drugs controlled under state and federal law.~ The Eighth Circuit's analysis, however, scarcely explains or ameliorates the BIA's anomalous separation of paraphernalia possession offenses from drug possession and distribution offenses.

Apparently recognizing this problem, the Government urges, as does the dissent, that the overlap between state and federal drug schedules supports the removal of aliens convicted of any drug crime, not just paraphernalia offenses. As noted, § 1227(a)(2)(B)(i) authorizes the removal of any alien "convicted of a violation of ... any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in [§ 802])." According to the Government, the words "relating to" modify "law or regulation," rather than "violation."~ Therefore, the

Government argues, aliens who commit "drug crimes" in States whose drug schedules substantially overlap the federal schedules are removable, for "state statutes that criminalize hundreds of federally controlled drugs and a handful of similar substances, are laws 'relating to' federally controlled substances."˜

We do not gainsay that, as the Government urges, the last reasonable referent of "relating to," as those words appear in § 1227(a)(2)(B)(i), is "law or regulation." The removal provision is thus satisfied when the elements that make up the state crime of conviction relate to a federally controlled substance. As this case illustrates, however, the Government's construction of the federal removal statute stretches to the breaking point, reaching state-court convictions, like Mellouli's, in which "[no] controlled substance (as defined in [§ 802])" figures as an element of the offense. We recognize, too, that the § 1227(a)(2)(B)(i) words to which the dissent attaches great weight, i.e., "relating to," post, at 1991 – 1992, are "broad" and "indeterminate."˜ As we cautioned in New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645˜ (1995), those words, "extend[ed] to the furthest stretch of [their] indeterminacy, ... stop nowhere." "[C]ontext," therefore, may "tu[g] ... in favor of a narrower reading."˜ Context does so here.

The historical background of § 1227(a)(2)(B)(i) demonstrates that Congress and the BIA have long required a direct link between an alien's crime of conviction and a particular federally controlled drug.˜ The Government's position here severs that link by authorizing deportation any time the state statute of conviction bears some general relation to federally controlled drugs. The Government offers no cogent reason why its position is limited to state drug schedules that have a "substantial overlap" with the federal schedules.˜ A statute with any overlap would seem to be related to federally controlled drugs. Indeed, the Government's position might well encompass convictions for offenses related to drug activity more generally, such as gun possession, even if those convictions do not actually involve drugs (let alone federally controlled drugs). The Solicitor General, while resisting this particular example, acknowledged that convictions under statutes "that have some connection to drugs indirectly" might fall within § 1227(a)(2)(B)(i).˜ This sweeping interpretation departs so sharply from the statute's text and history that it cannot be considered a permissible reading.

In sum, construction of § 1227(a)(2)(B)(i) must be faithful to the text, which limits the meaning of "controlled substance," for removal purposes, to the substances controlled under § 802. We therefore reject the argument that any drug offense renders an alien removable, without regard to the appearance of the drug on a § 802 schedule. Instead, to trigger removal under § 1227(a)(2)(B)(i), the Government must connect an element of the alien's conviction to a drug "defined in [§ 802]."

* * *

For the reasons stated, the judgment of the U.S. Court of Appeals for the Eighth Circuit is reversed.

It is so ordered.

JUSTICE THOMAS, WITH WHOM JUSTICE ALITO JOINS, DISSENTING.

The Court reverses the decision of the United States Court of Appeals for the Eighth Circuit on the ground that it misapplied the federal removal statute. It rejects the Government's interpretation of that statute, which would supply an alternative ground for affirmance. Yet it offers no interpretation of its own. Lower courts are thus left to guess which convictions qualify an alien for removal under 8 U.S.C. § 1227(a)(2)(B)(i), and the majority has deprived them of their only guide: the statutory text itself. Because the statute renders an alien removable whenever he is convicted of violating a law "relating to" a federally controlled substance, I would affirm.

I

With one exception not applicable here, § 1227(a)(2)(B)(i) makes removable "[a]ny alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21)." I would hold, consistent with the text, that the provision requires that the conviction arise under a "law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21)." Thus, Mellouli was properly subject to removal if the Kansas statute of conviction "relat[es] to a controlled substance (as defined in section 802 of title 21)," regardless of whether his particular conduct would also have subjected him to prosecution under federal controlled-substances laws. See ante, at 1986 ("An alien's actual conduct is irrelevant to the inquiry"). The majority's 12 references to the sock that Mellouli used to conceal the pills are thus entirely beside the point.~

The critical question, which the majority does not directly answer, is what it means for a law or regulation to "relat[e] to a controlled substance (as defined in section 802 of title 21)." At a minimum, we know that this phrase does not require a complete overlap between the substances controlled under the state law and those controlled under 21 U.S.C. § 802. To "relate to" means "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383~ (1992) (quoting Black's Law Dictionary 1158 (5th ed. 1979)). In ordinary parlance, one thing can "relate to" another

even if it also relates to other things. As ordinarily understood, therefore, a state law regulating various controlled substances may "relat[e] to a controlled substance (as defined in section 802 of title 21)" even if the statute also controls a few substances that do not fall within the federal definition.

The structure of the removal statute confirms this interpretation. Phrases like "relating to" and "in connection with" have broad but indeterminate meanings that must be understood in the context of "the structure of the statute and its other provisions."˜ In interpreting such phrases, we must be careful to honor Congress' choice to use expansive language.˜

Here, the "structure of the statute and its other provisions" indicate that Congress understood this phrase to sweep quite broadly. Several surrounding subsections of the removal statute reveal that when Congress wanted to define with greater specificity the conduct that subjects an alien to removal, it did so by omitting the expansive phrase "relating to." For example, a neighboring provision makes removable "[a]ny alien who ... is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying ... any weapon, part, or accessory *which is* a firearm or destructive device (as defined in section 921(a) of title 18)." 8 U.S.C. § 1227(a)(2)(C) (emphasis added). This language explicitly requires that the object of the offense fit within a federal definition. Other provisions adopt similar requirements. See, e.g., § 1227(a)(2)(E)(i) (making removable "[a]ny alien who ... is convicted of a crime of domestic violence," where "the term 'crime of domestic violence' means any crime of violence (as defined in section 16 of title 18) ... committed by" a person with a specified family relationship with the victim); see generally § 1101(a)(43) (defining certain aggravated felonies using federal definitions as elements). That Congress, in this provision, required only that a law relate to a federally controlled substance, as opposed to involve such a substance, suggests that it understood "relating to" as having its ordinary and expansive meaning.˜

Applying this interpretation of "relating to," a conviction under Kansas' drug paraphernalia statute qualifies as a predicate offense under § 1227(a)(2)(B)(i). That state statute prohibits the possession or use of drug paraphernalia to "store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body." Kan. Stat. Ann. § 21–5709(b)(2) (2013 Cum. Supp.). And, as used in this statute, a "controlled substance" is a substance that appears on Kansas' schedules, § 21–5701(a), which in turn consist principally of federally controlled substances.˜ The law certainly "relat[es] to a controlled substance (as defined in section 802 of title 21)" because it prohibits conduct involving controlled substances falling within the federal definition in § 802.

True, approximately three percent of the substances appearing on Kansas' lists of "controlled substances" at the time of Mellouli's conviction did not fall within the federal definition,˜ meaning that an individual convicted of possessing paraphernalia may never have used his paraphernalia with a federally controlled substance. But that fact does not destroy the relationship between the law and federally controlled substances. Mellouli was convicted for violating a state law "relating to a controlled substance (as defined in section 802 of title 21)," so he was properly removed under 8 U.S.C. § 1227(a)(2)(B)(i).˜

The statutory text resolves this case. True, faithfully applying that text means that an alien may be deported for committing an offense that does not involve a federally controlled substance. Nothing about that consequence, however, is so outlandish as to call this application into doubt. An alien may be removed only if he is convicted of violating a law, and I see nothing absurd about removing individuals who are unwilling to respect the drug laws of the jurisdiction in which they find themselves.˜

3.10 Case: Luna Torres v. Lynch

Luna Torres v. Lynch
578 U.S. 452 (2016)

JUSTICE KAGAN DELIVERED THE OPINION OF THE COURT.˜

In this case, we must decide if a state crime counts as an aggravated felony when it corresponds to a specified federal offense in all ways but one—namely, the state crime lacks the interstate commerce element used in the federal statute to establish legislative jurisdiction (i.e., Congress's power to enact the law). We hold that the absence of such a jurisdictional element is immaterial: A state crime of that kind is an aggravated felony.

I

The INA makes any alien convicted of an "aggravated felony" after entering the United States deportable. See § 1227(a)(2)(A)(iii). Such an alien is also ineligible for several forms of discretionary relief, including cancellation of removal—an order allowing a deportable alien to remain in the country. See § 1229b(a)(3). And because of his felony, the alien faces expedited removal proceedings. See § 1228(a)(3)(A).

The Act defines the term "aggravated felony" by way of a long list of offenses, now codified at § 1101(a)(43). In all, that provision's 21 subparagraphs enumerate some 80 different crimes. In more than half of those subparagraphs, Congress specified the crimes by citing particular federal statutes. According to that common formulation, an

offense is an aggravated felony if it is "described in," say, 18 U.S.C. § 2251 (relating to child pornography), § 922(g) (relating to unlawful gun possession), or, of particular relevance here, § 844(i) (relating to arson and explosives). 8 U.S.C. §§ 1101(a)(43)(E), (I). Most of the remaining subparagraphs refer to crimes by their generic labels, stating that an offense is an aggravated felony if, for example, it is "murder, rape, or sexual abuse of a minor." § 1101(a)(43)(A). Following the entire list of crimes, § 1101(a)(43)'s penultimate sentence reads: "The term [aggravated felony] applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years." So, putting aside the 15–year curlicue, the penultimate sentence provides that an offense listed in § 1101(a)(43) is an aggravated felony whether in violation of federal, state, or foreign law.

Petitioner Jorge Luna Torres, who goes by the name George Luna, immigrated to the United States as a child and has lived here ever since as a lawful permanent resident. In 1999, he pleaded guilty to attempted arson in the third degree, in violation of New York law; he was sentenced to one day in prison and five years of probation. Seven years later, immigration officials discovered his conviction and initiated proceedings to remove him from the country. During those proceedings, Luna applied for cancellation of removal. But the Immigration Judge found him ineligible for that discretionary relief because his arson conviction qualified as an aggravated felony.˜

The Board of Immigration Appeals (Board) affirmed˜.

The Court of Appeals for the Second Circuit denied Luna's petition for review of the Board's ruling.˜ The court's decision added to a Circuit split over whether a state offense is an aggravated felony when it has all the elements of a listed federal crime except one requiring a connection to interstate commerce.˜ We granted certiorari.˜

II

The issue in this case arises because of the distinctive role interstate commerce elements play in federal criminal law. In our federal system, "Congress cannot punish felonies generally,"˜ it may enact only those criminal laws that are connected to one of its constitutionally enumerated powers, such as the authority to regulate interstate commerce. As a result, most federal offenses include, in addition to substantive elements, a jurisdictional one, like the interstate commerce requirement of § 844(i). The substantive elements "primarily define[ ] the behavior that the statute calls a 'violation' of federal law,"˜—or, as the Model Penal Code puts the point, they relate to "the harm or evil" the law seeks to prevent, § 1.13(10). The jurisdictional element, by contrast, ties the substantive offense (here, arson) to one of Congress's constitutional powers (here,

its authority over interstate commerce), thus spelling out the warrant for Congress to legislate.˜

For obvious reasons, state criminal laws do not include the jurisdictional elements common in federal statutes. ˜That flat statement is infinitesimally shy of being wholly true. We have found a handful of state criminal laws with an interstate commerce element,˜ [b]ut because the incidence of such laws is so vanishingly small, and the few that exist play no role in Luna's arguments, we proceed without qualifying each statement of the kind above.˜ State legislatures, exercising their plenary police powers, are not limited to Congress's enumerated powers; and so States have no reason to tie their substantive offenses to those grants of authority.˜ In particular, state crimes do not contain interstate commerce elements because a State does not need such a jurisdictional hook. Accordingly, even state offenses whose substantive elements match up exactly with a federal law's will part ways with respect to interstate commerce. That slight discrepancy creates the issue here: If a state offense lacks an interstate commerce element but otherwise mirrors one of the federal statutes listed in § 1101(a)(43), does the state crime count as an aggravated felony? Or, alternatively, does the jurisdictional difference reflected in the state and federal laws preclude that result, no matter the laws' substantive correspondence?

Both parties begin with the statutory text most directly at issue, disputing when a state offense (here, arson) is "described in" an enumerated federal statute (here, 18 U.S.C. § 844(i)).˜

Here, two contextual considerations decide the matter. The first is § 1101(a)(43)'s penultimate sentence, which shows that Congress meant the term "aggravated felony" to capture serious crimes regardless of whether they are prohibited by federal, state, or foreign law. The second is a well-established background principle distinguishing between substantive and jurisdictional elements in federal criminal statutes. We address each factor in turn.

A

Section 1101(a)(43)'s penultimate sentence, as noted above, provides: "The term [aggravated felony] applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years."˜ That sentence (except for the time limit on foreign convictions) declares the source of criminal law irrelevant: The listed offenses count as aggravated felonies regardless of whether they are made illegal by the Federal Government, a State, or a foreign country. That is true of the crimes identified by reference to federal statutes

(as here, an offense described in 18 U.S.C. § 844(i)), as well as those employing generic labels (for example, murder). As even Luna recognizes, state and foreign analogues of the enumerated federal crimes qualify as aggravated felonies.˜ The whole point of § 1101(a)(43)'s penultimate sentence is to make clear that a listed offense should lead to swift removal, no matter whether it violates federal, state, or foreign law.

Luna's jot-for-jot view of "described in" would substantially undercut that function by excluding from the Act's coverage all state and foreign versions of any enumerated federal offense that (like § 844(i)) contains an interstate commerce element. Such an element appears in about half of § 1101(a)(43)'s listed statutes—defining, altogether, 27 serious crimes.˜ Yet under Luna's reading, only those federal crimes, and not their state and foreign counterparts, would provide a basis for an alien's removal—because, as explained earlier, only Congress must ever show a link to interstate commerce.˜ No state or foreign legislature needs to incorporate a commerce element to establish its jurisdiction, and so none ever does. Accordingly, state and foreign crimes will never precisely replicate a federal statute containing a commerce element. And that means, contrary to § 1101(a)(43)'s penultimate sentence, that the term "aggravated felony" would not apply to many of the Act's listed offenses irrespective of whether they are "in violation of Federal[,] State[, or foreign] law"; instead, that term would apply exclusively to the federal variants.˜

Indeed, Luna's view would limit the penultimate sentence's effect in a peculiarly perverse fashion—excluding state and foreign convictions for many of the gravest crimes listed in § 1101(a)(43), while reaching those convictions for less harmful offenses. Consider some of the state and foreign crimes that would not count as aggravated felonies on Luna's reading because the corresponding federal law has a commerce element: most child pornography offenses, including selling a child for the purpose of manufacturing such material, see § 1101(a)(43)(I); demanding or receiving a ransom for kidnapping, see § 1101(a)(43)(H); and possessing a firearm after a felony conviction, see § 1101(a)(43)(E)(ii). Conversely, the term "aggravated felony" in Luna's world would include state and foreign convictions for such comparatively minor offenses as operating an unlawful gambling business, see § 1101(a)(43)(J), and possessing a firearm not identified by a serial number, see § 1101(a)(43)(E)(iii), because Congress chose, for whatever reason, not to use a commerce element when barring that conduct. And similarly, the term would cover any state or foreign conviction for such nonviolent activity as receiving stolen property, see § 1101(a)(43)(G), or forging documents, see § 1101(a)(43)(R), because the INA happens to use generic labels to describe those crimes. This Court has previously refused to construe § 1101(a)(43) so as to produce such "haphazard"—indeed, upside-down—coverage.˜ We see no reason to follow a

different path here: Congress would not have placed an alien convicted by a State of running an illegal casino at greater risk of removal than one found guilty under the same State's law of selling a child.˜

In an attempt to make some sense of his reading, Luna posits that Congress might have believed that crimes having an interstate connection are generally more serious than those lacking one—for example, that interstate child pornography is "worse" than the intrastate variety.˜ But to begin with, that theory cannot explain the set of crazy-quilt results just described: Not even Luna maintains that Congress thought local acts of selling a child, receiving explosives, or demanding a ransom are categorically less serious than, say, operating an unlawful casino or receiving stolen property (whether or not in interstate commerce). And it is scarcely more plausible to view an interstate commerce element in any given offense as separating serious from non-serious conduct: Why, for example, would Congress see an alien who carried out a kidnapping for ransom wholly within a State as materially less dangerous than one who crossed state lines in committing that crime? The essential harm of the crime is the same irrespective of state borders. Luna's argument thus misconceives the function of interstate commerce elements: Rather than distinguishing greater from lesser evils, they serve (as earlier explained) to connect a given substantive offense to one of Congress's enumerated powers.˜ And still more fundamentally, Luna's account runs counter to the penultimate sentence's central message: that the national, local, or foreign character of a crime has no bearing on whether it is grave enough to warrant an alien's automatic removal.˜

B

Just as important, a settled practice of distinguishing between substantive and jurisdictional elements of federal criminal laws supports reading § 1101(a)(43) to include state analogues lacking an interstate commerce requirement. As already explained, the substantive elements of a federal statute describe the evil Congress seeks to prevent; the jurisdictional element connects the law to one of Congress's enumerated powers, thus establishing legislative authority.˜ Both kinds of elements must be proved to a jury beyond a reasonable doubt; and because that is so, both may play a real role in a criminal case. But still, they are not created equal for every purpose. To the contrary, courts have often recognized—including when comparing federal and state offenses—that Congress uses substantive and jurisdictional elements for different reasons and does not expect them to receive identical treatment.

Consider the law respecting mens rea. In general, courts interpret criminal statutes to require that a defendant possess a mens rea, or guilty mind, as to every element of an offense.˜

Except when it comes to jurisdictional elements. There, this Court has stated, "the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute."˜ In line with that practice, courts have routinely held that a criminal defendant need not know of a federal crime's interstate commerce connection to be found guilty.˜

Still more strikingly, courts have distinguished between the two kinds of elements in contexts, similar to this one, in which the judicial task is to compare federal and state offenses. The Assimilative Crimes Act (ACA), 18 U.S.C. § 13(a), subjects federal enclaves, like military bases, to state criminal laws except when they punish the same conduct as a federal statute. The ACA thus requires courts to decide when a federal and a state law are sufficiently alike that only the federal one will apply. And we have held that, in making that assessment, courts should ignore jurisdictional elements˜.

And lower courts have uniformly adopted the same approach when comparing federal and state crimes in order to apply the federal three-strikes statute. That law imposes mandatory life imprisonment on a person convicted on three separate occasions of a "serious violent felony." 18 U.S.C. § 3559(c)(1). Sounding very much like the INA, the three-strikes statute defines such a felony to include "a Federal or State offense, by whatever designation and wherever committed, consisting of" specified crimes (e.g., murder, manslaughter, robbery) "as described in" listed federal criminal statutes. § 3559(c)(2)(F). In deciding whether a state crime of conviction thus corresponds to an enumerated federal statute, every court to have faced the issue has ignored the statute's jurisdictional element.˜

III˜

Luna has acknowledged that the New York arson law differs from the listed federal statute, 18 U.S.C. § 844(i), in only one respect: It lacks an interstate commerce element.˜ And Luna nowhere contests that § 844(i)'s commerce element—featuring the terms "in interstate or foreign commerce" and "affecting interstate or foreign commerce"—is of the standard, jurisdictional kind.˜ For all the reasons we have given, such an element is properly ignored when determining if a state offense counts as an aggravated felony under § 1101(a)(43). We accordingly affirm the judgment of the Second Circuit.

It is so ordered.

JUSTICE SOTOMAYOR, WITH WHOM JUSTICE THOMAS AND JUSTICE BREYER JOIN, DISSENTING.˜

In this case, petitioner, who goes by George Luna, was convicted of third-degree arson under N.Y. Penal Law Ann. § 150.10 (West 2010), which punishes anyone who

(1) "intentionally" (2) "damages," by (3) "starting a fire or causing an explosion," (4) "a building or motor vehicle." By contrast, the federal arson statute, 18 U.S.C. § 844(i), applies when someone (1) "maliciously" (2) "damages or destroys," (3) "by means of fire or an explosive," (4) "any building, vehicle, or other real or personal property" (5) "used in interstate or foreign commerce." There is one more element in the federal offense than in the state offense—(5), the interstate or foreign commerce element. Luna thus was not convicted of an offense "described in" the federal statute. Case closed.

Not for the majority. It dubs the fifth element "jurisdictional," then relies on contextual clues to read it out of the statute altogether.˜

On the majority's reading, long-time legal permanent residents with convictions for minor state offenses are foreclosed from even appealing to the mercy of the Attorney General. Against our standard method for comparing statutes and the text and structure of the INA, the majority stacks a supposed superfluity, a not-so-well-settled practice, and its conviction that jurisdictional elements are mere technicalities. But an element is an element, and I would not so lightly strip a federal statute of one. I respectfully dissent.

3.11 Case: Esquivel-Quintana v. Sessions

Esquivel-Quintana v. Sessions
581 U.S. 385 (2017)

JUSTICE THOMAS DELIVERED THE OPINION OF THE COURT.

The Immigration and Nationality Act (INA)˜ provides that "[a]ny alien who is convicted of an aggravated felony after admission" to the United States may be removed from the country by the Attorney General. 8 U.S.C. § 1227(a)(2)(A)(iii). One of the many crimes that constitutes an aggravated felony under the INA is "sexual abuse of a minor." § 1101(a)(43)(A). A conviction for sexual abuse of a minor is an aggravated felony regardless of whether it is for a "violation of Federal or State law." § 1101(a)(43). The INA does not expressly define sexual abuse of a minor.

We must decide whether a conviction under a state statute criminalizing consensual sexual intercourse between a 21–year–old and a 17–year–old qualifies as sexual abuse of a minor under the INA. We hold that it does not.

I

Petitioner Juan Esquivel–Quintana is a native and citizen of Mexico. He was admitted to the United States as a lawful permanent resident in 2000. In 2009, he pleaded no contest in the Superior Court of California to a statutory rape offense:

"unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator," Cal. Penal Code Ann. § 261.5(c) (West 2014); see also § 261.5(a) ("Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor"). For purposes of that offense, California defines "minor" as "a person under the age of 18 years." Ibid.

The Department of Homeland Security initiated removal proceedings against petitioner based on that conviction. An Immigration Judge concluded that the conviction qualified as "sexual abuse of a minor," 8 U.S.C. § 1101(a)(43)(A), and ordered petitioner removed to Mexico. The Board of Immigration Appeals (Board) dismissed his appeal.˜ "[F]or a statutory rape offense involving a 16– or 17–year–old victim" to qualify as "sexual abuse of a minor," it reasoned, "the statute must require a meaningful age difference between the victim and the perpetrator."˜ In its view, the 3–year age difference required by Cal. Penal Code § 261.5(c) was meaningful.˜ Accordingly, the Board concluded that petitioner's crime of conviction was an aggravated felony, making him removable under the INA.˜ A divided Court of Appeals denied Esquivel–Quintana's petition for review˜. We granted certiorari˜ and now reverse.

II

Section 1227(a)(2)(A)(iii) makes aliens removable based on the nature of their convictions, not based on their actual conduct.˜ Accordingly, to determine whether an alien's conviction qualifies as an aggravated felony under that section, we "employ a categorical approach by looking to the statute ... of conviction, rather than to the specific facts underlying the crime."˜ Under that approach, we ask whether "'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a corresponding aggravated felony."˜ In other words, we presume that the state conviction "rested upon ... the least of th[e] acts" criminalized by the statute, and then we determine whether that conduct would fall within the federal definition of the crime.˜ Petitioner's state conviction is thus an "aggravated felony" under the INA only if the least of the acts criminalized by the state statute falls within the generic federal definition of sexual abuse of a minor.

A

Because Cal. Penal Code § 261.5(c) criminalizes "unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator" and defines a minor as someone under age 18, the conduct criminalized under this provision would be, at a minimum, consensual sexual intercourse between a victim who is almost 18 and a perpetrator who just turned 21. Regardless of the actual facts of petitioner's crime, we

must presume that his conviction was based on acts that were no more criminal than that. If those acts do not constitute sexual abuse of a minor under the INA, then petitioner was not convicted of an aggravated felony and is not, on that basis, removable.

Petitioner concedes that sexual abuse of a minor under the INA includes some statutory rape offenses. But he argues that a statutory rape offense based solely on the partners' ages (like the one here) is "abuse" "only when the younger partner is under 16."~ Because the California statute criminalizes sexual intercourse when the victim is up to 17 years old, petitioner contends that it does not categorically qualify as sexual abuse of a minor.

B

We agree with petitioner that, in the context of statutory rape offenses that criminalize sexual intercourse based solely on the age of the participants, the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16. Because the California statute at issue in this case does not categorically fall within that definition, a conviction pursuant to it is not an aggravated felony under § 1101(a)(43)(A). We begin, as always, with the text.

1

Section 1101(a)(43)(A) does not expressly define sexual abuse of a minor, so we interpret that phrase using the normal tools of statutory interpretation. "Our analysis begins with the language of the statute."~

Congress added sexual abuse of a minor to the INA in 1996, as part of a comprehensive immigration reform act. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 321(a)(i), 110 Stat. 3009–627. At that time, the ordinary meaning of "sexual abuse" included "the engaging in sexual contact with a person who is below a specified age or who is incapable of giving consent because of age or mental or physical incapacity." Merriam–Webster's Dictionary of Law 454 (1996). By providing that the abuse must be "of a minor," the INA focuses on age, rather than mental or physical incapacity. Accordingly, to qualify as sexual abuse of a minor, the statute of conviction must prohibit certain sexual acts based at least in part on the age of the victim.

Statutory rape laws are one example of this category of crimes. Those laws generally provide that an older person may not engage in sexual intercourse with a younger person under a specified age, known as the "age of consent."~ Many laws also require an age differential between the two partners.

Although the age of consent for statutory rape purposes varies by jurisdiction,˜ reliable dictionaries provide evidence that the "generic" age—in 1996 and today—is 16. See B. Garner, A Dictionary of Modern Legal Usage 38 (2d ed. 1995) ("Age of consent, usu[ally] 16, denotes the age when one is legally capable of agreeing ... to sexual intercourse" and cross-referencing "statutory rape"); Black's Law Dictionary 73 (10th ed. 2014) (noting that the age of consent is "usu[ally] defined by statute as 16 years").

2

Relying on a different dictionary (and "sparse" legislative history), the Government suggests an alternative "everyday understanding" of "sexual abuse of a minor."˜ Around the time sexual abuse of a minor was added to the INA's list of aggravated felonies, that dictionary defined "[s]exual abuse" as "[i]llegal sex acts performed against a minor by a parent, guardian, relative, or acquaintance," and defined "[m]inor" as "[a]n infant or person who is under the age of legal competence," which in "most states" was "18."˜ "Sexual abuse of a minor," the Government accordingly contends, "most naturally connotes conduct that (1) is illegal, (2) involves sexual activity, and (3) is directed at a person younger than 18 years old."˜

We are not persuaded that the generic federal offense corresponds to the Government's definition. First, the Government's proposed definition is flatly inconsistent with the definition of sexual abuse contained in the very dictionary on which it relies; the Government's proposed definition does not require that the act be performed "*by a parent, guardian, relative, or acquaintance*." Black's Law Dictionary 1375 (6th ed. 1990) (emphasis added). In any event, as we explain below, offenses predicated on a special relationship of trust between the victim and offender are not at issue here and frequently have a different age requirement than the general age of consent. Second, in the context of statutory rape, the prepositional phrase "of a minor" naturally refers not to the age of legal competence (when a person is legally capable of agreeing to a contract, for example), but to the age of consent (when a person is legally capable of agreeing to sexual intercourse). Third, the Government's definition turns the categorical approach on its head by defining the generic federal offense of sexual abuse of a minor as whatever is illegal under the particular law of the State where the defendant was convicted. Under the Government's preferred approach, there is no "generic" definition at all.˜

C

The structure of the INA, a related federal statute, and evidence from state criminal codes confirm that, for a statutory rape offense to qualify as sexual abuse of a minor

under the INA based solely on the age of the participants, the victim must be younger than 16.

1

Surrounding provisions of the INA guide our interpretation of sexual abuse of a minor.˜ This offense is listed in the INA as an "*aggravated* felony." 8 U.S.C. § 1227(a)(2)(A)(iii) (emphasis added). "An 'aggravated' offense is one 'made worse or more serious by circumstances such as violence, the presence of a deadly weapon, or the intent to commit another crime.'"˜ Moreover, the INA lists sexual abuse of a minor in the same subparagraph as "murder" and "rape," § 1101(a)(43)(A)—among the most heinous crimes it defines as aggravated felonies. § 1227(a)(2)(A)(iii). The structure of the INA therefore suggests that sexual abuse of a minor encompasses only especially egregious felonies.

A closely related federal statute, 18 U.S.C. § 2243, provides further evidence that the generic federal definition of sexual abuse of a minor incorporates an age of consent of 16, at least in the context of statutory rape offenses predicated solely on the age of the participants.˜ Section 2243, which criminalizes "[s]exual abuse of a minor or ward," contains the only definition of that phrase in the United States Code. As originally enacted in 1986, § 2243 proscribed engaging in a "sexual act" with a person between the ages of 12 and 16 if the perpetrator was at least four years older than the victim. In 1996, Congress expanded § 2243 to include victims who were younger than 12, thereby protecting anyone under the age of 16.˜ Congress did this in the same omnibus law that added sexual abuse of a minor to the INA, which suggests that Congress understood that phrase to cover victims under age 16.˜

Petitioner does not contend that the definition in § 2243(a) must be imported wholesale into the INA,˜ and we do not do so. One reason is that the INA does not cross-reference § 2243(a), whereas many other aggravated felonies in the INA are defined by cross-reference to other provisions of the United States Code, see, e.g., § 1101(a)(43)(H) ("an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom)"). Another is that § 2243(a) requires a 4–year age difference between the perpetrator and the victim. Combining that element with a 16–year age of consent would categorically exclude the statutory rape laws of most States.˜ Accordingly, we rely on § 2243(a) for evidence of the meaning of sexual abuse of a minor, but not as providing the complete or exclusive definition.

2

As in other cases where we have applied the categorical approach, we look to state criminal codes for additional evidence about the generic meaning of sexual abuse of a

minor.˜ When "sexual abuse of a minor" was added to the INA in 1996, thirty-one States and the District of Columbia set the age of consent at 16 for statutory rape offenses that hinged solely on the age of the participants. As for the other States, one set the age of consent at 14; two set the age of consent at 15; six set the age of consent at 17; and the remaining ten, including California, set the age of consent at 18.˜ A significant majority of jurisdictions thus set the age of consent at 16 for statutory rape offenses predicated exclusively on the age of the participants.

Many jurisdictions set a different age of consent for offenses that include an element apart from the age of the participants, such as offenses that focus on whether the perpetrator is in some special relationship of trust with the victim. That was true in the two States that had offenses labeled "sexual abuse of a minor" in 1996. See Alaska Stat. § 11.41.438 (1996) (age of consent for third-degree "sexual abuse of a minor" was 16 generally but 18 where "the offender occupie[d] a position of authority in relation to the victim"); Me. Rev. Stat. Ann., Tit. 17–A, § 254(1) (1983), as amended by 1995 Me. Laws p. 123 (age of consent for "[s]exual abuse of minors" was 16 generally but 18 where the victim was "a student" and the offender was "a teacher, employee or other official in the ... school ... in which the student [was] enrolled"). And that is true in four of the five jurisdictions that have offenses titled "sexual abuse of a minor" today. Compare, e.g., D.C. Code §§ 22–3001 (2012), 22–3008 (2016 Cum. Supp.) (age of consent is 16 in the absence of a significant relationship) with § 22–3009.01 (age of consent is 18 where the offender "is in a significant relationship" with the victim)˜. Accordingly, the generic crime of sexual abuse of a minor may include a different age of consent where the perpetrator and victim are in a significant relationship of trust. As relevant to this case, however, the general consensus from state criminal codes points to the same generic definition as dictionaries and federal law: Where sexual intercourse is abusive solely because of the ages of the participants, the victim must be younger than 16.

D

The laws of many States and of the Federal Government include a minimum age differential (in addition to an age of consent) in defining statutory rape. We need not and do not decide whether the generic crime of sexual abuse of a minor under 8 U.S.C. § 1101(a)(43)(A) includes an additional element of that kind. Petitioner has "show[n] something special about California's version of the doctrine"—that the age of consent is 18, rather than 16—and needs no more to prevail.˜ Absent some special relationship of trust, consensual sexual conduct involving a younger partner who is at least 16 years of age does not qualify as sexual abuse of a minor under the INA, regardless of the age differential between the two participants. We leave for another day whether the generic offense requires a particular age differential between the victim and the perpetrator, and

whether the generic offense encompasses sexual intercourse involving victims over the age of 16 that is abusive because of the nature of the relationship between the participants.˜

* * *

We hold that in the context of statutory rape offenses focused solely on the age of the participants, the generic federal definition of "sexual abuse of a minor" under § 1101(a)(43)(A) requires the age of the victim to be less than 16. The judgment of the Court of Appeals, accordingly, is reversed.

It is so ordered.

3.12 Case: Sessions v. Dimaya

Sessions v. Dimaya
584 U.S. 148 (2018)

JUSTICE KAGAN ANNOUNCED THE JUDGMENT OF THE COURT AND DELIVERED THE OPINION OF THE COURT WITH RESPECT TO PARTS I, III, IV–B, AND V, AND AN OPINION WITH RESPECT TO PARTS II AND IV–A, IN WHICH JUSTICE GINSBURG, JUSTICE BREYER, AND JUSTICE SOTOMAYOR JOIN.

Three Terms ago, in Johnson v. United States [576 U.S. 591 (2015)], this Court held that part of a federal law's definition of "violent felony" was impermissibly vague.˜ The question in this case is whether a similarly worded clause in a statute's definition of "crime of violence" suffers from the same constitutional defect. Adhering to our analysis in Johnson, we hold that it does.

I

The Immigration and Nationality Act (INA) renders deportable any alien convicted of an "aggravated felony" after entering the United States. 8 U.S.C. § 1227(a)(2)(A)(iii). Such an alien is also ineligible for cancellation of removal, a form of discretionary relief allowing some deportable aliens to remain in the country.˜ Accordingly, removal is a virtual certainty for an alien found to have an aggravated felony conviction, no matter how long he has previously resided here.

The INA defines "aggravated felony" by listing numerous offenses and types of offenses, often with cross-references to federal criminal statutes.˜ According to one item on that long list, an aggravated felony includes "a crime of violence (as defined in section 16 of title 18...) for which the term of imprisonment [is] at least one year." § 1101(a)(43)(F). The specified statute, 18 U.S.C. § 16, provides the federal criminal

code's definition of "crime of violence." Its two parts, often known as the elements clause and the residual clause, cover: "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." section 16(b), the residual clause, is the part of the statute at issue in this case.

To decide whether a person's conviction "falls within the ambit" of that clause, courts use a distinctive form of what we have called the categorical approach.˜ The question, we have explained, is not whether "the particular facts" underlying a conviction posed the substantial risk that § 16(b) demands.˜ Neither is the question whether the statutory elements of a crime require (or entail) the creation of such a risk in each case that the crime covers.˜ The § 16(b) inquiry instead turns on the "nature of the offense" generally speaking.˜ More precisely, § 16(b) requires a court to ask whether "the ordinary case" of an offense poses the requisite risk.˜

In the case before us, Immigration Judges employed that analysis to conclude that respondent James Dimaya is deportable as an aggravated felon. A native of the Philippines, Dimaya has resided lawfully in the United States since 1992. But he has not always acted lawfully during that time. Twice, Dimaya was convicted of first-degree burglary under California law.˜ Following his second offense, the Government initiated a removal proceeding against him. Both an Immigration Judge and the Board of Immigration Appeals held that California first-degree burglary is a "crime of violence" under § 16(b). "[B]y its nature," the Board reasoned, the offense "carries a substantial risk of the use of force."˜ Dimaya sought review in the Court of Appeals for the Ninth Circuit.

While his appeal was pending, this Court held unconstitutional part of the definition of "violent felony" in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). ACCA prescribes a 15–year mandatory minimum sentence if a person convicted of being a felon in possession of a firearm has three prior convictions for a "violent felony." § 924(e)(1). The definition of that statutory term goes as follows: "any crime punishable by imprisonment for a term exceeding one year ... that— (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*." § 924(e)(2)(B) (emphasis added). The italicized portion of that definition (like the similar language of § 16(b)) came to be known as the statute's residual clause. In Johnson

v. United States, the Court declared that clause "void for vagueness" under the Fifth Amendment's Due Process Clause.˜

Relying on Johnson, the Ninth Circuit held that § 16(b), as incorporated into the INA, was also unconstitutionally vague, and accordingly ruled in Dimaya's favor.˜ Two other Circuits reached the same conclusion, but a third distinguished ACCA's residual clause from § 16's.˜ We granted certiorari to resolve the conflict.˜

II

"The prohibition of vagueness in criminal statutes," our decision in Johnson explained, is an "essential" of due process, required by both "ordinary notions of fair play and the settled rules of law."˜ The void-for-vagueness doctrine, as we have called it, guarantees that ordinary people have "fair notice" of the conduct a statute proscribes.˜ And the doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges.˜ In that sense, the doctrine is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not.˜

The Government argues that a less searching form of the void-for-vagueness doctrine applies here than in Johnson because this is not a criminal case.˜ As the Government notes, this Court has stated that "[t]he degree of vagueness that the Constitution [allows] depends in part on the nature of the enactment": In particular, the Court has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe."˜ The removal of an alien is a civil matter.˜ Hence, the Government claims, the need for clarity is not so strong; even a law too vague to support a conviction or sentence may be good enough to sustain a deportation order.˜

But this Court's precedent forecloses that argument, because we long ago held that the most exacting vagueness standard should apply in removal cases. In Jordan v. De George, we considered whether a provision of immigration law making an alien deportable if convicted of a "crime involving moral turpitude" was "sufficiently definite." 341 U.S. 223˜ (1951). That provision, we noted, "is not a criminal statute" (as § 16(b) actually is).˜ Still, we chose to test (and ultimately uphold) it "under the established criteria of the 'void for vagueness' doctrine" applicable to criminal laws.˜ That approach was demanded, we explained, "in view of the grave nature of deportation,"˜—a "drastic measure," often amounting to lifelong "banishment or exile,"˜.

Nothing in the ensuing years calls that reasoning into question. To the contrary, this Court has reiterated that deportation is "a particularly severe penalty," which may be of greater concern to a convicted alien than "any potential jail sentence."˜ And we have observed that as federal immigration law increasingly hinged deportation orders on prior convictions, removal proceedings became ever more "intimately related to the criminal process."˜

For that reason, the Government cannot take refuge in a more permissive form of the void-for-vagueness doctrine than the one Johnson employed. To salvage § 16's residual clause, even for use in immigration hearings, the Government must instead persuade us that it is materially clearer than its now-invalidated ACCA counterpart. That is the issue we next address, as guided by Johnson 's analysis.

III

Johnson is a straightforward decision, with equally straightforward application here. Its principal section begins as follows: "Two features of [ACCA's] residual clause conspire to make it unconstitutionally vague."˜ The opinion then identifies each of those features and explains how their joinder produced "hopeless indeterminacy," inconsistent with due process.˜ And with that reasoning, Johnson effectively resolved the case now before us. For § 16's residual clause has the same two features as ACCA's, combined in the same constitutionally problematic way. Consider those two, just as Johnson described them:

"In the first place," Johnson explained, ACCA's residual clause created "grave uncertainty about how to estimate the risk posed by a crime" because it "tie[d] the judicial assessment of risk" to a hypothesis about the crime's "ordinary case."˜ Under the clause, a court focused on neither the "real-world facts" nor the bare "statutory elements" of an offense.˜ Instead, a court was supposed to "imagine" an "idealized ordinary case of the crime"—or otherwise put, the court had to identify the "kind of conduct the 'ordinary case' of a crime involves."˜ But how, Johnson asked, should a court figure that out? By using a "statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?"˜ ACCA provided no guidance, rendering judicial accounts of the "ordinary case" wholly "speculative."˜ Johnson gave as its prime example the crime of attempted burglary. One judge, contemplating the "ordinary case," would imagine the "violent encounter" apt to ensue when a "would-be burglar [was] spotted by a police officer [or] private security guard."˜ Another judge would conclude that "any confrontation" was more "likely to consist of [an observer's] yelling 'Who's there?' ... and the burglar's running away."˜ But how could either judge really know? "The residual clause," Johnson summarized, "offer[ed] no reliable way" to

discern what the ordinary version of any offense looked like.˜ And without that, no one could tell how much risk the offense generally posed.

Compounding that first uncertainty, Johnson continued, was a second: ACCA's residual clause left unclear what threshold level of risk made any given crime a "violent felony."˜ The Court emphasized that this feature alone would not have violated the void-for-vagueness doctrine: Many perfectly constitutional statutes use imprecise terms like "serious potential risk" (as in ACCA's residual clause) or "substantial risk" (as in § 16's). The problem came from layering such a standard on top of the requisite "ordinary case" inquiry. As the Court explained: "[W]e do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct; the law is full of instances where a man's fate depends on his estimating rightly ... some matter of degree[.] The residual clause, however, requires application of the 'serious potential risk' standard to an idealized ordinary case of the crime. Because the elements necessary to determine the imaginary ideal are uncertain[,] this abstract inquiry offers significantly less predictability than one that deals with the actual ... facts."˜

So much less predictability, in fact, that ACCA's residual clause could not pass constitutional muster. As the Court again put the point, in the punch line of its decision: "By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause" violates the guarantee of due process.˜

Section 16's residual clause violates that promise in just the same way. To begin where Johnson did, § 16(b) also calls for a court to identify a crime's "ordinary case" in order to measure the crime's risk.˜ Nothing in § 16(b) helps courts to perform that task, just as nothing in ACCA did. We can as well repeat here what we asked in Johnson: How does one go about divining the conduct entailed in a crime's ordinary case? Statistical analyses? Surveys? Experts? Google? Gut instinct?˜ And we can as well reiterate Johnson 's example: In the ordinary case of attempted burglary, is the would-be culprit spotted and confronted, or scared off by a yell?˜. Once again, the questions have no good answers; the "ordinary case" remains, as Johnson described it, an excessively "speculative," essentially inscrutable thing.˜

And § 16(b) also possesses the second fatal feature of ACCA's residual clause: uncertainty about the level of risk that makes a crime "violent." In ACCA, that threshold was "serious potential risk"; in § 16(b), it is "substantial risk."˜ But the Government does not argue that the latter formulation is any more determinate than the former, and for good reason.˜ The difficulty comes, in § 16's residual clause just as in ACCA's, from applying such a standard to "a judge-imagined abstraction"—i.e., "an

idealized ordinary case of the crime."˜ It is then that the standard ceases to work in a way consistent with due process.

In sum, § 16(b) has the same "[t]wo features" that "conspire[d] to make [ACCA's residual clause] unconstitutionally vague."˜ It too "requires a court to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents" some not-well-specified-yet-sufficiently-large degree of risk.˜ The result is that § 16(b) produces, just as ACCA's residual clause did, "more unpredictability and arbitrariness than the Due Process Clause tolerates."˜

IV

The Government and dissents offer two fundamentally different accounts of how § 16(b) can escape unscathed from our decision in Johnson. Justice THOMAS accepts that the ordinary-case inquiry makes § 16(b) "impossible to apply."˜ His solution is to overthrow our historic understanding of the statute: We should now read § 16(b), he says, to ask about the risk posed by a particular defendant's particular conduct. In contrast, the Government, joined by THE CHIEF JUSTICE, accepts that § 16(b), as long interpreted, demands a categorical approach, rather than a case-specific one. They argue only that "distinctive textual features" of § 16's residual clause make applying it "more predictable" than its ACCA counterpart.˜ We disagree with both arguments.

A

The essentials of Justice THOMAS's position go as follows˜[:] jettison the categorical approach in residual-clause cases.˜

[W]e find it significant that the Government cannot bring itself to say that the fact-based approach Justice THOMAS proposes is a tenable interpretation of § 16's residual clause.

Perhaps one reason for the Government's reluctance is that such an approach would generate its own constitutional questions. As Justice THOMAS relates˜, this Court adopted the categorical approach in part to "avoid[ ] the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries."˜ Justice THOMAS's suggestion would merely ping-pong us from one constitutional issue to another.˜

In any event, § 16(b)'s text creates no draw: Best read, it demands a categorical approach. Our decisions have consistently understood language in the residual clauses of both ACCA and § 16 to refer to "the statute of conviction, not to the facts of each defendant's conduct."˜

B

Agreeing that is so, the Government (joined by THE CHIEF JUSTICE) takes a narrower path to the same desired result. It points to three textual discrepancies between ACCA's residual clause and § 16(b), and argues that they make § 16(b) significantly easier to apply. But each turns out to be the proverbial distinction without a difference. None relates to the pair of features—the ordinary-case inquiry and a hazy risk threshold—that Johnson found to produce impermissible vagueness. And none otherwise affects the determinacy of the statutory inquiry into whether a prior conviction is for a violent crime.˜

1

The Government first—and foremost—relies on § 16(b)'s express requirement (absent from ACCA) that the risk arise from acts taken "in the course of committing the offense."˜ Because of that "temporal restriction," a court applying § 16(b) may not "consider risks arising after " the offense's commission is over.˜ In the Government's view, § 16(b)'s text thereby demands a "significantly more focused inquiry" than did ACCA's residual clause.˜

To assess that claim, start with the meaning of § 16(b)'s "in the course of" language. That phrase, understood in the normal way, includes the conduct occurring throughout a crime's commission—not just the conduct sufficient to satisfy the offense's formal elements. The Government agrees with that construction, explaining that the words "in the course of" sweep in everything that happens while a crime continues.˜ So, for example, conspiracy may be a crime of violence under § 16(b) because of the risk of force while the conspiracy is ongoing (i.e., "in the course of" the conspiracy); it is irrelevant that conspiracy's elements are met as soon as the participants have made an agreement.˜ Similarly, and closer to home, burglary may be a crime of violence under § 16(b) because of the prospects of an encounter while the burglar remains in a building (i.e., "in the course of" the burglary); it does not matter that the elements of the crime are met at the precise moment of his entry.˜ In other words, a court applying § 16(b) gets to consider everything that is likely to take place for as long as a crime is being committed.

Because that is so, § 16(b)'s "in the course of" language does little to narrow or focus the statutory inquiry. All that the phrase excludes is a court's ability to consider the risk that force will be used after the crime has entirely concluded—so, for example, after the conspiracy has dissolved or the burglar has left the building. We can construct law-school-type hypotheticals fitting that fact pattern—say, a burglar who constructs a booby trap that later knocks out the homeowner. But such imaginative forays cannot realistically affect a court's view of the ordinary case of a crime, which is all that matters

under the statute.˜ In the ordinary case, the riskiness of a crime arises from events occurring during its commission, not events occurring later. So with or without § 16(b)'s explicit temporal language, a court applying the section would do the same thing—ask what usually happens when a crime goes down.

And that is just what courts did when applying ACCA's residual clause—and for the same reason. True, that clause lacked an express temporal limit. But not a single one of this Court's ACCA decisions turned on conduct that might occur after a crime's commission; instead, each hinged on the risk arising from events that could happen while the crime was ongoing.˜ Nor could those decisions have done otherwise, given the statute's concern with the ordinary (rather than the outlandish) case. Once again, the riskiness of a crime in the ordinary case depends on the acts taken during—not after—its commission. Thus, the analyses under ACCA's residual clause and § 16(b) coincide.

The upshot is that the phrase "in the course of" makes no difference as to either outcome or clarity. Every offense that could have fallen within ACCA's residual clause might equally fall within § 16(b). And the difficulty of deciding whether it does so remains just as intractable. Indeed, we cannot think of a single federal crime whose treatment becomes more obvious under § 16(b) than under ACCA because of the words "in the course of."˜ The phrase, then, cannot cure the statutory indeterminacy Johnson described.

Second, the Government˜ observes that § 16(b) focuses on the risk of "physical force" whereas ACCA's residual clause asked about the risk of "physical injury." The § 16(b) inquiry, the Government says, "trains solely" on the conduct typically involved in a crime.˜ By contrast, the Government continues, ACCA's residual clause required a second inquiry: After describing the ordinary criminal's conduct, a court had to "speculate about a chain of causation that could possibly result in a victim's injury."˜ The Government's conclusion is that the § 16(b) inquiry is "more specific."˜

But once more, we struggle to see how that statutory distinction would matter. To begin with, the first of the Government's two steps—defining the conduct in the ordinary case—is almost always the difficult part. Once that is accomplished, the assessment of consequences tends to follow as a matter of course. So, for example, if a crime is likely enough to lead to a shooting, it will also be likely enough to lead to an injury. And still more important, § 16(b) involves two steps as well—and essentially the same ones. In interpreting statutes like § 16(b), this Court has made clear that "physical force" means "force capable of causing physical pain or injury."˜ So under § 16(b) too, a court must not only identify the conduct typically involved in a crime, but also gauge its potential consequences. Or said a bit differently, evaluating the risk of "physical force" itself entails considering the risk of "physical injury." For those reasons, the

force/injury distinction is unlikely to affect a court's analysis of whether a crime qualifies as violent. All the same crimes might—or, then again, might not—satisfy both requirements. Accordingly, this variance in wording cannot make ACCA's residual clause vague and § 16(b) not.

Third, the Government briefly notes that § 16(b), unlike ACCA's residual clause, is not preceded by a "confusing list of exemplar crimes."~ Here, the Government is referring to the offenses ACCA designated as violent felonies independently of the residual clause (i.e., burglary, arson, extortion, and use of explosives).~ According to the Government, those crimes provided "contradictory and opaque indications" of what non-specified offenses should also count as violent.~ Because § 16(b) lacks any such enumerated crimes, the Government concludes, it avoids the vagueness of ACCA's residual clause.

We readily accept a part of that argument. This Court for several years looked to ACCA's listed crimes for help in giving the residual clause meaning.~ But to no avail. As the Government relates (and Johnson explained), the enumerated crimes were themselves too varied to provide such assistance.~ Trying to reconcile them with each other, and then compare them to whatever unlisted crime was at issue, drove many a judge a little batty. And more to the point, the endeavor failed to bring any certainty to the residual clause's application.~

But the Government's conclusion does not follow. To say that ACCA's listed crimes failed to resolve the residual clause's vagueness is hardly to say they caused the problem. Had they done so, Johnson would not have needed to strike down the clause. It could simply have instructed courts to give up on trying to interpret the clause by reference to the enumerated offenses.~ That Johnson went so much further—invalidating a statutory provision rather than construing it independently of another—demonstrates that the list of crimes was not the culprit.~

2

Faced with the two clauses' linguistic similarity, the Government relies significantly on an argument rooted in judicial experience. Our opinion in Johnson, the Government notes, spoke of the longstanding "trouble" that this Court and others had in "making sense of [ACCA's] residual clause."~ According to the Government, § 16(b) has not produced "comparable difficulties."~ Lower courts, the Government claims, have divided less often about the provision's meaning, and as a result this Court granted certiorari on "only a single section 16(b) case" before this one.~ "The most likely explanation," the Government concludes, is that " section 16(b) is clearer" than its ACCA counterpart.~

But in fact, a host of issues respecting § 16(b)'s application to specific crimes divide the federal appellate courts. Does car burglary qualify as a violent felony under § 16(b)? Some courts say yes, another says no.˜ What of statutory rape? Once again, the Circuits part ways.˜ How about evading arrest? The decisions point in different directions.˜ Residential trespass? The same is true.˜ Those examples do not exhaust the current catalogue of Circuit conflicts concerning § 16(b)'s application.˜ And that roster would just expand with time, mainly because, as Johnson explained, precious few crimes (of the thousands that fill the statute books) have an obvious, non-speculative—and therefore undisputed—"ordinary case."˜

Nor does this Court's prior handling of § 16(b) cases support the Government's argument. To be sure, we have heard oral argument in only two cases arising from § 16(b) (including this one), as compared with five involving ACCA's residual clause (including Johnson).˜ But while some of those ACCA suits were pending before us, we received a number of petitions for certiorari presenting related issues in the § 16(b) context. And after issuing the relevant ACCA decisions, we vacated the judgments in those § 16(b) cases and remanded them for further consideration.˜ That we disposed of the ACCA and § 16(b) petitions in that order, rather than its opposite, provides no reason to disregard the indeterminacy that § 16(b) shares with ACCA's residual clause.

And of course, this Court's experience in deciding ACCA cases only supports the conclusion that § 16(b) is too vague. For that record reveals that a statute with all the same hallmarks as § 16(b) could not be applied with the predictability the Constitution demands.˜ The Government would condemn us to repeat the past—to rerun the old ACCA tape, as though we remembered nothing from its first showing. But why should we disregard a lesson so hard learned? "Insanity," Justice Scalia wrote in the last ACCA residual clause case before Johnson, "is doing the same thing over and over again, but expecting different results."˜ We abandoned that lunatic practice in Johnson and see no reason to start it again.

V

Johnson tells us how to resolve this case. That decision held that "[t]wo features of [ACCA's] residual clause conspire[d] to make it unconstitutionally vague."˜ Because the clause had both an ordinary-case requirement and an ill-defined risk threshold, it necessarily "devolv[ed] into guesswork and intuition," invited arbitrary enforcement, and failed to provide fair notice.˜ section 16(b) possesses the exact same two features. And none of the minor linguistic disparities in the statutes makes any real difference. So just like ACCA's residual clause, § 16(b) "produces more unpredictability and arbitrariness than the Due Process Clause tolerates."˜ We accordingly affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE GORSUCH, CONCURRING IN PART AND CONCURRING IN THE JUDGMENT.

Vague laws invite arbitrary power. Before the Revolution, the crime of treason in English law was so capaciously construed that the mere expression of disfavored opinions could invite transportation or death. The founders cited the crown's abuse of "pretended" crimes like this as one of their reasons for revolution. See Declaration of Independence ¶ 21. Today's vague laws may not be as invidious, but they can invite the exercise of arbitrary power all the same—by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up.˜

[W]hile the statute before us doesn't rise to the level of threatening death for "pretended offences" of treason, no one should be surprised that the Constitution looks unkindly on any law so vague that reasonable people cannot understand its terms and judges do not know where to begin in applying it. A government of laws and not of men can never tolerate that arbitrary power. And, in my judgment, that foundational principle dictates today's result.˜

CHIEF JUSTICE ROBERTS, WITH WHOM JUSTICE KENNEDY, JUSTICE THOMAS, AND JUSTICE ALITO JOIN, DISSENTING.

In Johnson v. United States, we concluded that the residual clause of the Armed Career Criminal Act was unconstitutionally vague, given the "indeterminacy of the wide-ranging inquiry" it required.˜ Today, the Court relies wholly on Johnson—but only some of Johnson—to strike down another provision, 18 U.S.C. § 16(b). Because § 16(b) does not give rise to the concerns that drove the Court's decision in Johnson, I respectfully dissent.˜

Section 16(b) does not present the same ambiguities [as Johnson]. The two provisions do correspond to some extent. Under our decisions, both ask the sentencing court to consider whether a particular offense, defined without regard to the facts of the conviction, poses a specified risk. And, relevant to both statutes, we have explained that in deciding whether statutory elements inherently produce a risk, a court must take into account how those elements will ordinarily be fulfilled.˜ In the Court's view, that effectively resolves this case. But the Court too readily dismisses the significant textual distinctions between § 16(b) and the ACCA residual clause.˜ Those differences undermine the conclusion that § 16(b) shares each of the "dual flaws" of that clause.˜

There are three material differences between § 16(b) and the ACCA residual clause˜. First, the ACCA clause directed the reader to consider whether the offender's conduct presented a "potential risk" of injury.˜ section 16(b), on the other hand, asks

about "risk" alone, a familiar concept of everyday life. It therefore calls for a commonsense inquiry that does not compel a court to venture beyond the offense elements to consider contingent and remote possibilities.

Second, § 16(b) focuses exclusively on the risk that the offender will "use[ ]" "physical force" "against" another person or another person's property. Thus, unlike the ACCA residual clause, "§ 16(b) plainly does not encompass all offenses which create a 'substantial risk' that injury will result from a person's conduct."˜

Third, § 16(b) has a temporal limit that the ACCA residual clause lacked: The "substantial risk" of force must arise "in the course of committing the offense." Properly interpreted, this means the statute requires a substantial risk that the perpetrator will use force while carrying out the crime.˜ The ACCA residual clause, by contrast, contained no similar language restricting its scope. And the absence of such a limit, coupled with the reference to "potential" risks, gave courts free rein to classify an offense as a violent felony based on injuries that might occur after the offense was over and done.˜

Why does any of this matter? Because it mattered in Johnson.˜

Those three distinctions—the unadorned reference to "risk," the focus on the offender's own active employment of force, and the "in the course of committing" limitation—also mean that many hard cases under ACCA are easier under § 16(b).˜

Because Johnson does not compel today's result, I respectfully dissent.

JUSTICE THOMAS, WITH WHOM JUSTICE KENNEDY AND JUSTICE ALITO JOIN AS TO PARTS I–C–2, II–A–1, AND II–B, DISSENTING.

I agree with THE CHIEF JUSTICE that 18 U.S.C. § 16(b), as incorporated by the Immigration and Nationality Act (INA), is not unconstitutionally vague. Section 16(b) lacks many of the features that caused this Court to invalidate the residual clause of the Armed Career Criminal Act (ACCA) in Johnson v. United States, 576 U.S. [591] ˜ (2015). ACCA's residual clause—a provision that this Court had applied four times before Johnson—was not unconstitutionally vague either.˜ But if the Court insists on adhering to Johnson, it should at least take Johnson at its word that the residual clause was vague due to the "sum" of its specific features.˜ By ignoring this limitation, the Court jettisons Johnson's assurance that its holding would not jeopardize "dozens of federal and state criminal laws."˜

While THE CHIEF JUSTICE persuasively explains why respondent cannot prevail under our precedents, I write separately to make two additional points. First, I continue to doubt that our practice of striking down statutes as unconstitutionally vague is consistent with the original meaning of the Due Process Clause.˜ Second, if the

Court thinks that § 16(b) is unconstitutionally vague because of the "categorical approach,"˜ then the Court should abandon that approach—not insist on reading it into statutes and then strike them down. Accordingly, I respectfully dissent.

I

I continue to harbor doubts about whether the vagueness doctrine can be squared with the original meaning of the Due Process Clause—and those doubts are only amplified in the removal context. I am also skeptical that the vagueness doctrine can be justified as a way to prevent delegations of core legislative power in this context.˜

A

The Fifth Amendment's Due Process Clause provides that no person shall be "deprived of life, liberty, or property, without due process of law." section 16(b), as incorporated by the INA, cannot violate this Clause unless the following propositions are true: The Due Process Clause requires federal statutes to provide certain minimal procedures, the vagueness doctrine is one of those procedures, and the vagueness doctrine applies to statutes governing the removal of aliens. Although I need not resolve any of these propositions today, each one is questionable.˜

C˜

I need not resolve these historical questions today, as this case can be decided on narrower grounds.˜

[A] challenger must prove that the statute is vague as applied to him.˜

In my view, § 16(b) is not vague as applied to respondent. When respondent committed his burglaries in 2007 and 2009, he was "sufficiently forewarned ... that the statutory consequence ... is deportation."˜ At the time, courts had "unanimous[ly]" concluded that residential burglary is a crime of violence, and not "a single opinion ... ha[d] held that [it] is not."˜ Residential burglary "ha[d] been considered a violent offense for hundreds of years ... because of the potential for mayhem if burglar encounters resident."˜

Finally˜ I adhere to my view that a law is not facially vague "[i]f any fool would know that a particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the law."˜

II˜

[I]f the categorical approach renders § 16(b) unconstitutionally vague, then constitutional avoidance requires us to make a reasonable effort to avoid that

interpretation. And a reasonable alternative interpretation is available: Instead of asking whether the ordinary case of an alien's offense presents a substantial risk of physical force, courts should ask whether the alien's actual underlying conduct presents a substantial risk of physical force.˜

I see no good reason for the Court to persist in reading the ordinary-case approach into § 16(b). The text of § 16(b) does not mandate the ordinary-case approach, the concerns that led this Court to adopt it do not apply here, and there are no prudential reasons for retaining it. In my view, we should abandon the categorical approach for § 16(b).˜

* * *

The Court's decision today is triply flawed. It unnecessarily extends our incorrect decision in Johnson. It uses a constitutional doctrine with dubious origins to invalidate yet another statute (while calling into question countless more). And it does all this in the name of a statutory interpretation that we should have discarded long ago. Because I cannot follow the Court down any of these rabbit holes, I respectfully dissent.

3.13 Case: Borden v. United States

Borden v. United States
593 U.S. 420 (2021)

JUSTICE KAGAN ANNOUNCED THE JUDGMENT OF THE COURT AND DELIVERED AN OPINION, IN WHICH JUSTICE BREYER, JUSTICE SOTOMAYOR, AND JUSTICE GORSUCH JOIN.

The Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), mandates a 15-year minimum sentence for persons found guilty of illegally possessing a gun who have three or more prior convictions for a "violent felony." The question here is whether a criminal offense can count as a "violent felony" if it requires only a mens rea of recklessness—a less culpable mental state than purpose or knowledge. We hold that a reckless offense cannot so qualify.

I˜

ACCA enhances the sentence of anyone convicted under 18 U.S.C. § 922(g) of being a felon in possession of a firearm if he has three or more prior convictions (whether state or federal) for a "violent felony."˜ An offense qualifies as a violent felony under that clause if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." § 924(e)(2)(B)(i).

To decide whether an offense satisfies the elements clause, courts use the categorical approach.˜ Under that by-now-familiar method, applicable in several statutory contexts, the facts of a given case are irrelevant. The focus is instead on whether the elements of the statute of conviction meet the federal standard. Here, that means asking whether a state offense necessarily involves the defendant's "use, attempted use, or threatened use of physical force against the person of another." § 924(e)(2)(B)(i)˜. If any—even the least culpable—of the acts criminalized do not entail that kind of force, the statute of conviction does not categorically match the federal standard, and so cannot serve as an ACCA predicate.˜

In this case, petitioner Charles Borden, Jr., pleaded guilty to a felon-in-possession charge, and the Government sought an enhanced sentence under ACCA. One of the three convictions alleged as predicates was for reckless aggravated assault in violation of Tennessee law. The relevant statute defines that crime as "[r]ecklessly commit[ting] an assault" and either "caus[ing] serious bodily injury to another" or "us[ing] or display[ing] a deadly weapon." Tenn. Code Ann. § 39–13–102(a)(2) (2003); see § 39–13–101(a)(1). Borden argued that this offense is not a violent felony under ACCA's elements clause because a mental state of recklessness suffices for conviction.˜ The District Court disagreed˜. The Court of Appeals for the Sixth Circuit affirmed that decision˜.

The circuit courts have˜ differed in addressing the question Borden raises. Some have held, as in this case, that a statute covering reckless conduct qualifies as a violent felony under ACCA.˜ Others have concluded that only a statute confined to purposeful or knowing conduct can count as such a felony.˜ The dispute turns on the definition of "violent felony" in ACCA's elements clause—more specifically, on how different mental states map onto the clause's demand that an offense entail the "use ... of physical force against the person of another." § 924(e)(2)(B)(i). We granted certiorari to resolve the issue.˜

II

Two pieces of background should ease the way. We begin by setting out four states of mind, as described in modern statutes and cases, that may give rise to criminal liability. Those mental states are, in descending order of culpability: purpose, knowledge, recklessness, and negligence. We then discuss˜ prior decisions of this Court addressing questions similar to the one here.˜

Purpose and knowledge are the most culpable levels in the criminal law's mental-state "hierarchy."˜ A person acts purposefully when he "consciously desires" a particular result.˜ He acts knowingly when "he is aware that [a] result is practically certain to follow

from his conduct," whatever his affirmative desire.˜ We have characterized the distinction between the two as "limited," explaining that it "has not been considered important" for many crimes.˜

Recklessness and negligence are less culpable mental states because they instead involve insufficient concern with a risk of injury. A person acts recklessly, in the most common formulation, when he "consciously disregards a substantial and unjustifiable risk" attached to his conduct, in "gross deviation" from accepted standards.˜ That risk need not come anywhere close to a likelihood. Speeding through a crowded area may count as reckless even though the motorist's "chances of hitting anyone are far less [than] 50%."˜ Similarly (though one more step down the mental-state hierarchy), a person acts negligently if he is not but "should be aware" of such a "substantial and unjustifiable risk," again in "gross deviation" from the norm.˜ There, the fault lies in the person's simple "failure to perceive" the possible consequence of his behavior.˜

In Leocal v. Ashcroft, 543 U.S. 1˜ (2004), this Court held that offenses requiring only a negligent mens rea fall outside a statutory definition relevantly identical to ACCA's elements clause. That definition, codified at 18 U.S.C. § 16(a), is for the term "crime of violence," which appears in many federal criminal and immigration laws. section 16(a) states, in language that should by now sound familiar, that a "crime of violence" means "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." (In case you missed it, the sole difference between § 16(a) and the elements clause is the phrase "or property," which brings property crimes within the former statute's ambit.) The question presented was whether that definition covers DUI offenses—for driving under the influence of alcohol and causing serious bodily injury—that require only a negligent mental state. In addressing that issue, the parties had debated whether "the word 'use' alone supplies a mens rea element."˜ But the Court thought the focus on that one word "too narrow."˜ Rather, we said, the "critical aspect" of § 16(a) is its demand that the perpetrator use physical force "against the person or property of another."˜ As a matter of "ordinary or natural meaning," we explained, that "key phrase ... most naturally suggests a higher degree of intent than negligent" conduct.˜ And confirmation of that view came from the defined term itself. The phrase "crime of violence," we reasoned, "suggests a category of violent, active crimes that cannot be said naturally to include" negligent offenses.˜ All that sufficed to resolve the status of the DUI offense at issue. The Court thus reserved the question whether an offense with a mens rea of recklessness likewise fails to qualify as a crime of violence.˜

III

Today, we reach the question we reserved in˜ Leocal˜. We must decide whether the elements clause's definition of "violent felony"—an offense requiring the "use of physical force against the person of another"—includes offenses criminalizing reckless conduct.˜ We hold that it does not. The phrase "against another," when modifying the "use of force," demands that the perpetrator direct his action at, or target, another individual. Reckless conduct is not aimed in that prescribed manner. Our reading of the relevant text finds support in its context and purpose. The treatment of reckless offenses as "violent felonies" would impose large sentencing enhancements on individuals (for example, reckless drivers) far afield from the "armed career criminals" ACCA addresses—the kind of offenders who, when armed, could well "use [the] gun deliberately to harm a victim."˜

A˜

The parties here dispute the meaning of the phrase "use of physical force against the person of another." They start in the same place, as they must: The "use of physical force,"˜ means the "volitional" or "active" employment of force.˜ The fight begins with the word "against." According to Borden, that word means "in opposition to," and so "introduces the target of the preceding action."˜ Examples are easy to muster: The general deployed his forces against a rival regiment, or the chess master played the Queen's Gambit against her opponent. The Government responds that "against" instead means "mak[ing] contact with," and so introduces the mere recipient of force rather than its "intended target."˜ As examples, the Government offers: "waves crashing against the shore or a baseball hitting against the outfield fence."˜

Borden's view of "against," as introducing the conscious object (not the mere recipient) of the force, is the right one given the rest of the elements clause. Dictionaries offer definitions of "against" consistent with both parties' view: The word can mean either "[i]n opposition to" or "in contact with," depending on the context.˜ The critical context here is the language that "against another" modifies—the "use of physical force." As just explained, "use of force" denotes volitional conduct. And the pairing of volitional action with the word "against" supports that word's oppositional, or targeted, definition. Look once more at the examples offered in the last paragraph. Borden's involve volitional conduct, by the general or chess master—essentially, each actor's "use of force." There, the "against" phrase reveals at whom the conduct is consciously directed: the rival army or player. In contrast, the Government's examples do not involve volitional conduct, because "waves" and "baseballs" have no volition—and indeed, cannot naturally be said to "use force" at all. There, an "against" clause merely names a thing with which the subject came into contact.˜ For our purpose, the more apt

examples are Borden's. As in those examples, ACCA's "against" phrase modifies volitional conduct (i.e., the use of force). So that phrase, too, refers to the conduct's conscious object.˜

On that understanding, the clause covers purposeful and knowing acts, but excludes reckless conduct (as, once again, the Government concedes).˜ Purposeful conduct is obvious. Suppose a person drives his car straight at a reviled neighbor, desiring to hit him. The driver has, in the statute's words, "use[d] ... physical force against the person of another." The same holds true for knowing behavior. Say a getaway driver sees a pedestrian in his path but plows ahead anyway, knowing the car will run him over. That driver, too, fits within the statute: Although he would prefer a clear road, he too drives his car straight at a known victim. Or said otherwise, both drivers (even though for different reasons) have consciously deployed the full force of an automobile at another person.˜ But that is not so of a reckless (or a negligent) actor. Imagine a commuter who, late to work, decides to run a red light, and hits a pedestrian whom he did not see. The commuter has consciously disregarded a real risk, thus endangering others. And he has ended up making contact with another person, as the Government emphasizes.˜ But as the Government just as readily acknowledges, the reckless driver has not directed force at another: He has not trained his car at the pedestrian understanding he will run him over.˜ To the contrary, his fault is to pay insufficient attention to the potential application of force. Because that is so—because his conduct is not opposed to or directed at another—he does not come within the elements clause. He has not used force "against" another person in the targeted way that clause requires.

Leocal confirms our conclusion. Although the Court reserved the question we decide today, its reasoning all but precludes the Government's answer. Recall that Leocal held that negligent conduct falls outside a statutory definition much like the elements clause—one requiring the use of physical force "against the person or property of another."˜ In thus excluding crimes with a negligent mens rea, the Court reasoned just as we have today. When read against the words "use of force," the "against" phrase—the definition's "critical aspect"—"suggests a higher degree of intent" than (at least) negligence.˜ That view of § 16(a)'s "against" phrase—as incorporating a mens rea requirement—contradicts the Government's (and dissent's) view here that a materially identical phrase is "not a roundabout way" of ... incorporating a mens rea requirement.˜ The Government thus asks us to read ACCA's elements clause—specifically, its "against" phrase, modifying the "use of force"—contrary to how we have read near-identical words before.˜

B

Were there any doubt about the elements clause's meaning, context and purpose would remove it.

The elements clause defines a "violent felony," and that term's ordinary meaning informs our construction. Leocal well expressed this idea: In interpreting § 16(a), "we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'"˜ Quoting that statement, Johnson v. United States said the same thing when construing language (there, the term "physical force") in ACCA's definition of "violent felony."˜ "Ultimately, context determines meaning," we wrote, and "[h]ere we are interpreting" a phrase "as used in defining" the term "violent felony."˜ With that focus in place, both decisions construed the definitions at issue to mark out a narrow "category of violent, active crimes."˜ And those crimes are best understood to involve not only a substantial degree of force, but also a purposeful or knowing mental state—a deliberate choice of wreaking harm on another, rather than mere indifference to risk. As Leocal explained: The term "crime of violence" in § 16(a) "cannot be said naturally to include DUI offenses"—typically crimes of recklessness or negligence.˜ In a case much like this one, then-Judge Alito reiterated the point. He wrote that "[t]he quintessential violent crimes," like murder or rape, "involve the intentional use" of force.˜ By contrast, drunk driving and other crimes of recklessness, though "moral[ly] culpab[le]," do not fit within "the ordinary meaning of the term 'violent' crime."˜

IV

Offenses with a mens rea of recklessness do not qualify as violent felonies under ACCA. They do not require, as ACCA does, the active employment of force against another person. And they are not the stuff of armed career criminals. The judgment below is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, CONCURRING IN THE JUDGMENT.

This case forces us to choose between aggravating a past error and committing a new one. I must choose the former. Although I am "reluctant to magnify the burdens that our [erroneous] jurisprudence imposes,"˜ I conclude that the particular provision at issue here does not encompass petitioner's conviction for reckless aggravated assault, even though the consequences of today's judgment are at odds with the larger statutory scheme. The need to make this choice is yet another consequence of the Court's vagueness-doctrine cases like Johnson v. United States, 576 U.S. 591˜ (2015).˜

The question presented here is whether the elements clause encompasses petitioner's conviction under Tennessee law for reckless aggravated assault. It does not. The plurality focuses on the latter part of the operative language: "against the person of another." I rest my analysis instead on a separate phrase: "use of physical force." As I have explained before, a crime that can be committed through mere recklessness does not have as an element the "use of physical force" because that phrase "has a well-understood meaning applying only to intentional acts designed to cause harm."˜ The elements clause does not encompass petitioner's conviction because the statute under which he was convicted could be violated through mere recklessness.

But although the Court's conclusion that petitioner's conviction does not satisfy the elements clause is sound, the implication that he is something other than an "armed career criminal" is not. The state law here prohibits "[r]ecklessly ... [c]aus[ing] serious bodily injury to another." Tenn. Code Ann. § 39–13–102(a)(2)(A) (2003). That offense would satisfy the residual clause because it "involves conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii). So although the elements clause does not make petitioner an armed career criminal, the residual clause would.

The problem is that Johnson held that the residual clause is "unconstitutionally vague" and thus unenforceable. 576 U.S., at 597˜. This left prosecutors and courts in a bind. Many offenders had committed violent felonies, but Johnson foreclosed invoking the residual clause to establish that fact. The workaround was to read the elements clause broadly. But the text of that clause cannot bear such a broad reading.

II

There is a straightforward solution to this dilemma—overrule Johnson.˜ Johnson declared the residual clause not just too vague as applied in that case but also facially vague—meaning that the residual clause could never be employed consistent with the Constitution. That decision was wrong˜.

III

I hesitate to give petitioner the benefit of Johnson, because his crime is a "violent felony" as Congress defined the term.˜ Yet I reluctantly conclude that I must accept Johnson in this case because to do otherwise would create further confusion and division about whether state laws prohibiting reckless assault satisfy the elements clause.˜ I therefore concur in the judgment.

JUSTICE KAVANAUGH, WITH WHOM THE CHIEF JUSTICE, JUSTICE ALITO, AND JUSTICE BARRETT JOIN, DISSENTING.˜

Most States criminalize reckless assault and reckless homicide. And the Model Penal Code and most States provide that recklessness as to the consequences of one's actions generally suffices for criminal liability. Importantly, moreover, Borden does not dispute that ACCA's phrase "use of physical force" on its own would include reckless offenses, such as reckless assault or reckless homicide. But Borden nonetheless contends that ACCA's phrase "use of physical force against the person of another" somehow excludes those same reckless offenses, including reckless assault and reckless homicide.

To put Borden's argument in real-world terms, suppose that an individual drives a car 80 miles per hour through a neighborhood, runs over a child, and paralyzes her. He did not intend to run over and injure the child. He did not know to a practical certainty that he would run over and injure the child. But he consciously disregarded a substantial and unjustifiable risk that he would harm another person, and he is later convicted in state court of reckless assault. Or suppose that an individual is in a dispute with someone in the neighborhood and begins firing gunshots at the neighbor's house to scare him. One shot goes through the window and hits the neighbor, killing him. The shooter may not have intended to kill the neighbor or known to a practical certainty that he would do so. But again, he consciously disregarded a substantial and unjustifiable risk that he would harm someone, and he is later convicted in state court of reckless homicide.

Surprisingly, the Court today holds that those kinds of reckless offenses such as reckless assault and reckless homicide do not qualify as ACCA predicates under the use-of-force clause. The plurality does not dispute that those offenses involve the "use of physical force," but concludes that those offenses do not involve the "use of physical force against the person of another." The plurality reaches that rather mystifying conclusion even though someone who acts recklessly, as those examples show, has made a "deliberate decision to endanger another,"˜ and even though an individual who commits a reckless assault or a reckless homicide generally inflicts injury or death on another person. The plurality reaches that conclusion even though most States (both as of 1986 and today) criminalize reckless assault and reckless homicide as offenses against the person, and even though Congress enacted ACCA's use-of-force clause in 1986 to cover the prototypical violent crimes, such as assault and homicide, that can be committed with a mens rea of recklessness. And the plurality reaches that conclusion even though the Court concluded just five years ago (when interpreting a similarly worded domestic violence statute) that reckless offenses such as reckless assault and reckless homicide do entail the use of physical force against another person—there,

"against a domestic relation" or "victim."˜ [Voisine v. United States, 579 U. S. 686 (2016).]

In my view, the Court's decision disregards bedrock principles and longstanding terminology of criminal law, misconstrues ACCA's text, and waves away the Court's own recent precedent. The Court's decision overrides Congress's judgment about the danger posed by recidivist violent felons who unlawfully possess firearms and threaten further violence.˜

3.14 Legislative Exercise

Read the following bill. Consider how the bill changes current law from a technical standpoint. (This requires consultation with your statutory supplement.) Does the bill insert new provisions? Move provisions? Consider how the bill changes current law from a substantive standpoint. Does it create new rights? Alter existing rights? Now consider the law from a policy standpoint. Is it a good idea? Why or why not? Be prepared to make arguments on both sides.

A BILL

To amend the Immigration and Nationality Act by striking marijuana use, possession, and distribution as grounds of inadmissibility and removal.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Removing Marijuana from Deportable Offenses Act".

SEC. 2. STRIKING MARIJUANA USE, POSSESSION, AND DISTRIBUTION AS GROUNDS FOR INADMISSIBILITY AND REMOVAL.

(a) In General.—The Immigration and Nationality Act (8 U.S.C. 1101 et seq.) is amended—

(1) in section 101(a)(43)(B) (8 U.S.C. 1101(a)(43)(B)), by inserting "other than the distribution of marijuana," after "(as defined in section 102 of the Controlled Substances Act)";

(2) in section 212(a)(2) (8 U.S.C. 1182(a)(2)), by amending subparagraph (F) to read as follows: "(F) Marijuana offenses.—Notwithstanding any other provision of this section, any offenses involving the use, possession, or distribution of marijuana shall not be considered as grounds of inadmissibility."; and

(3) in section 237(a)(2)(B)(i) (8 U.S.C. 1227(a)(2)(B)(i)), by striking "other than a single offense involving possession for one's own use of 30 grams or less of marijuana" and inserting "other than offenses involving the use, possession, or distribution of marijuana".

(b) Right To Reapply or Return.—

(1) Reapplication.—Any alien who was previously denied a visa to enter the United States as a direct result of the alien's use, possession, or distribution of marijuana may reapply for admission to the United States.

(2) Reissuance.—Any alien who was deported from the United States as a direct result of the alien's use, possession, or distribution of marijuana shall be readmitted to the United States and reissued the visa that they had at the time of the alien's deportation if the alien is not inadmissible under section 212(a) of the Immigration and Nationality Act, as amended by subsection (a)(2).

3.15 Waivers

There are special waivers available to noncitizens subject to INA § 212 exclusion on the basis of criminal conduct. Nonimmigrants who seek waivers look to INA § 212(d)(3)(A). Immigrants who seek waivers look to INA § 212(h). Appendix A.3 replicates a USCIS chart regarding waiver grounds.

NONIMMIGRANTS

Nonimmigrant visa ineligibility due to a crime involving moral turpitude or a controlled substance offense can be waived at the discretion of the Department of Homeland Security. INA § 212(d)(3)(A), 8 U.S.C. § 1182(d)(3)(A). The following factors are relevant to a decision regarding waiver of past criminal conduct: (1) The recency and seriousness of the activity or condition causing the alien's inadmissibility; (2) The reasons for the proposed travel to the United States; (3) The positive or negative effect, if any, of the planned travel on U.S. public interests. 9 FAM 302.3-2(D)(2).

IMMIGRANTS

Immigrant visa ineligibility due to a crime involving moral turpitude or a controlled substance offense "insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana" can be waived at the discretion of the Department of Homeland Security pursuant to INA § 212(h), 8 U.S.C. § 1182(h) if: (1) the activities for which the noncitizen is inadmissible occurred more than 15 years before the date of the alien's application for a visa for admission, or adjustment of status; (2) the noncitizen's

admission to the United States would not be contrary to the national welfare, safety, or security, and (3) the noncitizen has been rehabilitated. INA § 212(h)(1)(A).

When the spouse, parent, son, or daughter of a U.S. citizen or LPR faces immigrant visa ineligibility due to a crime involving moral turpitude or a controlled substance offense "insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana," that ineligibility can be waived at the discretion of the Department of Homeland Security pursuant to INA § 212(h) if denial of the noncitizen's admission would result in "extreme hardship" to the sponsoring family member. INA § 212(h)(1)(B).

Waivers are not available to LPRs convicted of an aggravated felony. And they are only available to LPRs who have resided continuously in the United States for at least seven years prior to removal proceedings. INA § 212(h).

3.16 Relief from Removal: Cancellation of Removal

Just because a noncitizen is subject to removal under either INA § 212 or INA § 237 (see section 3.2) does not mean that they must be removed. Noncitizens can petition for relief from removal. One of the best forms of relief from removal is called cancellation of removal. It is a "best" form of relief because cancellation allows a lawful permanent resident to keep their LPR status and it provides the means for an undocumented migrant to obtain LPR status. However, criminal conduct can affect the availability of this form of relief from removal.

There are two forms of cancellation of removal. One applies only to certain LPRs. The other applies more broadly to LPRs, nonimmigrants, and undocumented migrants.

CANCELLATION OF REMOVAL PART A

The first form of cancellation of removal is found at INA § 240A(a), 8 U.S.C. § 1229b(a). This relief is alternatively called "cancellation," "COR," "COR Part A," and "42A." That last moniker derives from the name of the government form that a noncitizen must submit when seeking this relief: EOIR 42A.

42A relief is available exclusively to lawful permanent residents who meet the following criteria:

1. The noncitizen must have been lawfully admitted for permanent residence for not less than five years;
2. The noncitizen must have resided in the United States continuously for seven years after having been admitted in any status; and

3. The noncitizen must not have been convicted of any aggravated felony.

CANCELLATION OF REMOVAL PART B

The second form of cancellation of removal is found at INA § 240A(b), 8 U.S.C. § 1229b(b). This relief is alternatively called "cancellation," "COR," "COR Part B," and "42B." As before, that last descriptor derives from the name of the government form that a noncitizen must submit when seeking this relief: EOIR 42B.

42B relief is available to noncitizens who meet the following criteria:

1. The noncitizen must have been physically present in the United States for a continuous period of not less than ten years immediately preceding the date of application;
2. The noncitizen must have been a person of good moral character during the ten-year period. See INA§ 101(f), 8 U.S.C. § 1101(f);
3. The noncitizen must not have been convicted of an offense under INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) (governing inadmissibility due to "criminal and related grounds"); INA§ 237(a)(2), 8 U.S.C. § 1227 (a) (2) (governing deportability due to "criminal offenses"); or INA§ 237(a)(3), 8 U.S.C. § 1227(a)(3), (governing deportability due to "failure to register or falsification of documents"); and
4. The noncitizen must establish that removal would result in "exceptional and extremely unusual hardship" to the noncitizen's spouse, parent, or child, who is a citizen of the United States or an LPR.˜

The second element of 42B relief—good moral character—is statutorily defined in the negative. See INA § 101(f), 8 U.S.C. § 1101(f). That is, the statute lists circumstances that would lead a court to conclude a noncitizen does not have good moral character, such as if the noncitizen has been convicted of an aggravated felony. INA § 101(f)(8), 8 U.S.C. § 1101(f)(8). Finally, even if a noncitizen does not fall within the statutorily enumerated reasons for lacking good moral character, that "shall not preclude a finding that for other reasons such person is or was not of good moral character." INA § 101(f), 8 U.S.C. § 1101(f).

CONTINUOUS RESIDENCE AND CONTINUOUS PHYSICAL PRESENCE

Some of the rules regarding continuous residence, for 42A relief, and continuous physical presence, for 42B relief, are the same. Under INA § 240A(d)(1), the end of either period is marked by the earliest of (i) when the alien is served a notice to appear

(NTA), the charging document that begins removal proceedings, or (ii) when the alien has committed a criminal offense that has rendered them excludable or deportable.

In Barton v. Barr, 590 U.S. 222 (2020), the Supreme Court considered how and when criminal conduct should "stop time" for purposes of establishing a noncitizen's continuous physical presence in the United States. Andre Barton, a Jamaican LPR, was found removable due to state firearms and drug offenses. He sought cancellation of removal. The immigration judge found Barton ineligible for cancellation of removal not because of the crimes that led to his removability but because Barton committed another offense in violation of INA § 212(a)(2) during his initial seven years of residence in the United States: state aggravated assault, a crime involving moral turpitude. The B.I.A. and Eleventh Circuit affirmed. The Supreme Court agreed, determining that although Barton was not convicted of state aggravated assault until after his initial seven years in the United States, INA § 240A(d)(1) explicitly focuses on the commission of, not the conviction for, a criminal offense. The Court further noted it was irrelevant that Barton was not found removable on the basis of the offense that made him ineligible for cancellation of removal. Finally, the Court determined that INA § 240A(d)(1) required analysis of Barton's ineligibility for cancellation of removal under INA § 212, despite the fact that Barton was removable under INA § 237.

BURDEN OF PROOF

A noncitizen applying for any form of relief from removal, including cancellation of removal, bears the burden of proof to establish that they (i) are eligible for relief and (ii) merit a favorable exercise of discretion. INA § 240(c)(4)(A), 8 U.S.C. § 1229b(c)(4)(A).

The following case discusses the implications of that burden of proof in the context of a noncitizen who is convicted of a crime. It brings us back to consideration of the categorical approach to crime-based removal discussed in section 3.7.

3.17 Case: Pereida v. Wilkinson

Pereida v. Wilkinson
592 U.S. 224 (2021)

JUSTICE GORSUCH DELIVERED THE OPINION OF THE COURT.

Everyone agrees that Clemente Avelino Pereida entered this country unlawfully, and that the government has secured a lawful order directing his removal. The only

remaining question is whether Mr. Pereida can prove his eligibility for discretionary relief.

Under the Immigration and Nationality Act (INA), individuals seeking relief from a lawful removal order shoulder a heavy burden. Among other things, those in Mr. Pereida's shoes must prove that they have not been convicted of a "crime involving moral turpitude." Here, Mr. Pereida admits he has a recent conviction, but declines to identify the crime. As a result, Mr. Pereida contends, no one can be sure whether his crime involved "moral turpitude" and, thanks to this ambiguity, he remains eligible for relief.

Like the Eighth Circuit, we must reject Mr. Pereida's argument. The INA expressly requires individuals seeking relief from lawful removal orders to prove all aspects of their eligibility. That includes proving they do not stand convicted of a disqualifying criminal offense.

I

The INA governs how persons are admitted to, and removed from, the United States. Removal proceedings begin when the government files a charge against an individual, and they occur before a hearing officer at the Department of Justice, someone the agency refers to as an immigration judge. If the proof warrants it, an immigration judge may order an individual removed for, say, entering the country unlawfully or committing a serious crime while here. See 8 U.S.C. §§ 1229a, 1182(a), 1227(a).

Even then, however, an avenue for relief remains. A person faced with a lawful removal order may still ask the Attorney General to "cancel" that order. §§ 1229a(c)(4), 1229b(b)(1). To be eligible for this form of relief, a nonpermanent resident alien like Mr. Pereida must prove four things: (1) he has been present in the United States for at least 10 years; (2) he has been a person of good moral character; (3) he has not been convicted of certain criminal offenses; and (4) his removal would impose an "exceptional and extremely unusual" hardship on a close relative who is either a citizen or permanent resident of this country. §§ 1229b(b)(1), 1229a(c)(4). Establishing all this still yields no guarantees; it only renders an alien eligible to have his removal order cancelled. The Attorney General may choose to grant or withhold that relief in his discretion, limited by Congress's command that no more than 4,000 removal orders may be cancelled each year. § 1229b(e).

This narrow pathway to relief proved especially challenging here. The government brought removal proceedings against Mr. Pereida, alleging that he had entered the country unlawfully and had never become a lawful resident. In reply, Mr. Pereida chose

not to dispute that he was subject to removal. Instead, he sought to establish only his eligibility for discretionary relief. At the same time, Mr. Pereida's lawyer explained to the immigration judge that Nebraska authorities were in the middle of prosecuting his client for a crime. Because the outcome of that case had the potential to affect Mr. Pereida's eligibility for cancellation of removal, counsel asked the immigration judge to postpone any further proceedings on Mr. Pereida's application for relief until the criminal case concluded. The immigration judge agreed.

In the criminal case, state authorities charged Mr. Pereida with attempted criminal impersonation. Under Nebraska law, a person commits criminal impersonation if he:

> "(a) Assumes a false identity and does an act in his or her assumed character with intent to gain a pecuniary benefit ... or to deceive or harm another;
>
> "(b) Pretends to be a representative of some person or organization and does an act in his or her pretended capacity with the intent to gain a pecuniary benefit ... and to deceive or harm another;
>
> "(c) Carries on any profession, business, or any other occupation without a license, certificate, or other authorization required by law; or
>
> "(d) Without the authorization ... of another and with the intent to deceive or harm another: (i) Obtains or records ... personal identifying information; and (ii) Accesses or attempts to access the financial resources of another through the use of ... personal identifying information for the purpose of obtaining credit, money ... or any other thing of value." Neb. Rev. Stat. § 28–608 (2008) (since amended and moved to Neb. Rev. Stat. § 28–638).

Ultimately, Mr. Pereida was found guilty, and this conviction loomed large when his immigration proceedings resumed. Before the immigration judge, everyone accepted that Mr. Pereida's eligibility for discretionary relief depended on whether he could show he had not been convicted of certain crimes, including ones "involving moral turpitude." 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i), 1229b(b)(1)(C). And whatever else one might say about that phrase, the parties took it as given that a crime involving "fraud [as] an ingredient" qualifies as a crime involving "moral turpitude."~

The parties' common ground left Mr. Pereida with an uphill climb. As the immigration judge read the Nebraska statute, subsections (a), (b), and (d) each stated a crime involving fraud, and thus each constituted a disqualifying offense of moral turpitude. That left only subsection (c)'s prohibition against carrying on a business without a required license. The immigration judge thought this crime likely did not require fraudulent conduct, but he also saw little reason to think it was the offense Mr.

Pereida had committed. The government presented a copy of the criminal complaint against Mr. Pereida showing that Nebraska had charged him with using a fraudulent social security card to obtain employment. Meanwhile, Mr. Pereida declined to offer any competing evidence of his own. In light of this state of proof, the immigration judge found that Mr. Pereida's conviction had nothing to do with carrying on an unlicensed business in violation of subsection (c) and everything to do with the fraudulent (and thus disqualifying) conduct made criminal by subsections (a), (b), or (d).

Mr. Pereida's efforts to undo this ruling proved unsuccessful. Both the Board of Immigration Appeals (BIA) and the Eighth Circuit agreed~ Mr. Pereida bore the burden of proving his eligibility for relief, so it was up to him to show that his crime of conviction did not involve moral turpitude. Because Mr. Pereida had not carried that burden, he was ineligible for discretionary relief all the same.

Mr. Pereida asks us to reverse. In his view, Congress meant for any ambiguity about an alien's prior convictions to work against the government, not the alien. The circuits have disagreed on this question, so we granted certiorari to resolve the conflict.~

II

A

Like any other, Mr. Pereida's claims about Congress's meaning or purpose must be measured against the language it adopted. And there, a shortcoming quickly emerges. The INA states that "[a]n alien applying for relief or protection from removal has the burden of proof to establish" that he "satisfies the applicable eligibility requirements" and that he "merits a favorable exercise of discretion." 8 U.S.C. § 1229a(c)(4)(A). To carry that burden, a nonpermanent resident alien like Mr. Pereida must prove four things, including that he "has not been convicted" of certain disqualifying offenses, like crimes involving moral turpitude. § 1229b(b)(1)(C). Thus any lingering uncertainty about whether Mr. Pereida stands convicted of a crime of moral turpitude would appear enough to defeat his application for relief, exactly as the BIA and Eighth Circuit held.

It turns out that Mr. Pereida actually agrees with much of this. He accepts that he must prove three of the four statutory eligibility requirements (his longstanding presence in the country, his good moral character, and extreme hardship on a relative). He does not dispute that ambiguity on these points can defeat his application for relief. It is only when it comes to the final remaining eligibility requirement at issue here—whether he was convicted of a disqualifying offense—that Mr. Pereida insists a different rule should apply. Yet, he identifies nothing in the statutory text singling out this lone requirement for special treatment. His concession that an alien must show his good moral character undercuts his argument too. Ambiguity about a conviction for a crime

involving moral turpitude would seem to defeat an assertion of "good moral character."˜ And if that's true, it's hard to see how the same ambiguity could help an alien when it comes to the closely related eligibility requirement at issue before us.

What the statute's text indicates, its context confirms.˜

[T]he INA assigns the government the "burden" of showing that the alien has committed a crime of moral turpitude in certain circumstances. See §§ 1229a(c)(3), 1227(a)(2)(A)(i). But the burden flips for "[a]pplications for relief from removal," like the one at issue in this case. § 1229a(c)(4). These statutory features show that Congress knows how to assign the government the burden of proving a disqualifying conviction. And Congress's decision to do so in some proceedings, but not in proceedings on an alien's application for relief, reflects its choice that these different processes warrant different treatment.

Finally, the INA often requires an alien applying for admission to show "clearly and beyond doubt" that he is "entitled to be admitted and is not inadmissible." § 1229a(c)(2)(A). As part of this showing, an alien must demonstrate that he has not committed a crime involving moral turpitude. § 1182(a)(2)(A)(i)(I). In this context, it is undisputed that an alien has the burden of proving that he has not committed a crime of moral turpitude. And Mr. Pereida has offered no account why a rational Congress might wish to place this burden on an alien seeking admission to this country, yet lift it from an alien who has entered the country illegally and is petitioning for relief from a lawful removal order.˜

B

Confronted now with a growing list of unhelpful textual clues, Mr. Pereida seeks to shift ground. Even if he must shoulder the burden of proving that he was not convicted of a crime involving moral turpitude, Mr. Pereida replies, he can carry that burden thanks to the so-called "categorical approach."

The Court first discussed the categorical approach in the criminal context, but it has since migrated into our INA cases. Following its strictures, a court does not consider the facts of an individual's crime as he actually committed it. Instead, a court asks only whether an individual's crime of conviction necessarily—or categorically—triggers a particular consequence under federal law. The categorical approach is required, we have said, because the language found in statutes like the INA provision before us don't task courts with examining whether an individual's actions meet a federal standard like "moral turpitude," but only whether the individual "has... been convicted of an offense" that does so.˜

In Mr. Pereida's view, the categorical approach makes all the difference. It does so because Nebraska's statute criminalizes at least some conduct—like carrying on a business without a license—that doesn't necessarily involve fraud. So what if Mr. Pereida actually committed fraud? Under the categorical approach, that is beside the point. Because a person, hypothetically, could violate the Nebraska statute without committing fraud, the statute does not qualify as a crime involving moral turpitude. In this way, Mr. Pereida submits, he can carry any burden of proof the INA assigns him.

This argument, however, overstates the categorical approach's preference for hypothetical facts over real ones. In order to tackle the hypothetical question whether one might complete Mr. Pereida's offense of conviction without doing something fraudulent, a court must have some idea what his actual offense of conviction was in the first place. And to answer that question, courts must examine historical facts. No amount of staring at a State's criminal code will answer whether a particular person was convicted of any particular offense at any particular time. Applying the categorical approach thus implicates two inquiries—one factual (what was Mr. Pereida's crime of conviction?), the other hypothetical (could someone commit that crime of conviction without fraud?).˜

The factual inquiry can take on special prominence when it comes to "divisible" statutes. Some statutes state only a single crime, often making it a simple thing for a judge to conclude from a defendant's criminal records that he was convicted of violating statute x and thus necessarily convicted of crime x. Not infrequently, however, a single criminal statute will list multiple, stand-alone offenses, some of which trigger consequences under federal law, and others of which do not. To determine exactly which offense in a divisible statute an individual committed, this Court has told judges to employ a "modified" categorical approach, "review[ing] the record materials to discover which of the enumerated alternatives played a part in the defendant's prior conviction."˜ In aid of the inquiry, we have said, judges may consult "a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of."˜

These nuances expose the difficulty with Mr. Pereida's argument. Both he and the government accept that Nebraska's attempted criminal impersonation statute is divisible because it states no fewer than four separate offenses in subsections (a) through (d). The immigration judge, BIA, and Eighth Circuit concluded that three of these subsections—(a), (b), and (d)—constitute crimes of moral turpitude. So that left Mr. Pereida with the burden of proving as a factual matter that his conviction was for misusing a business license under subsection (c). To be sure, in this Court Mr. Pereida now seeks to suggest that it is also possible for a hypothetical defendant to violate

subsection (a) without engaging in conduct that involves moral turpitude under federal law. But even assuming he is right about this, it still left him obliged to show in the proceedings below that he was convicted under subsection (a) or (c) rather than under (b) or (d).

Mr. Pereida failed to carry that burden. Before the immigration judge, he refused to produce any evidence about his crime of conviction even after the government introduced evidence suggesting that he was convicted under a statute setting forth some crimes involving fraud. Nor has Mr. Pereida sought a remand for another chance to resolve the ambiguity by introducing evidence about his crime of conviction; at oral argument, he even disclaimed interest in the possibility.˜ These choices may be the product of sound strategy, especially if further evidence would serve only to show that Mr. Pereida's crime of conviction did involve fraud. But whatever degree of ambiguity remains about the nature of Mr. Pereida's conviction, and whatever the reason for it, one thing remains stubbornly evident: He has not carried his burden of showing that he was not convicted of a crime involving moral turpitude.

Look at the problem this way. Mr. Pereida is right that, when asking whether a state conviction triggers a federal consequence, courts applying the categorical approach often presume that a conviction rests on nothing more than the minimum conduct required to secure a conviction. But Mr. Pereida neglects to acknowledge that this presumption cannot answer the question which crime the defendant was convicted of committing. To answer that question, parties and judges must consult evidence. And where, as here, the alien bears the burden of proof and was convicted under a divisible statute containing some crimes that qualify as crimes of moral turpitude, the alien must prove that his actual, historical offense of conviction isn't among them.˜

The INA's plain terms confirm the point. Recall that the INA places the "burden of proof " on an alien like Mr. Pereida to show four things; that one of these is the absence of a disqualifying conviction; and that the law specifies certain forms of evidence "shall" constitute "proof " of a criminal conviction.˜ In each of these ways, the statutory scheme anticipates the need for evidentiary proof about the alien's crime of conviction and imposes on the alien the duty to present it.˜

The INA adopts this approach for understandable reasons too. Not only is it impossible to discern an individual's offense of conviction without consulting at least some documentary or testimonial evidence. It's easy to imagine significant factual disputes that make these statutory instructions about the presentation of evidence and the burden of proof critically important. Suppose, for example, that the parties in this case disputed whether the criminal complaint the government introduced involved a different Clemente Avelino Pereida. Alternatively, what if Nebraska's complaint

charged Mr. Pereida with a violation of subsection (c) but the plea colloquy mentioned only subsection (d)? Or what if the relevant records were illegible or contained a material typo? Courts can resolve disputes like these only by reference to evidence, which means a statutory allocation of the burden of proof will sometimes matter a great deal.

To reach a different conclusion would require us to cast a blind eye over a good many precedents. When applying the categorical approach, this Court has long acknowledged that to ask what crime the defendant was convicted of committing is to ask a question of fact.˜ We have described the modified categorical approach as requiring courts to "review ... record materials" to determine which of the offenses in a divisible statute the defendant was convicted of committing.˜ We have acknowledged that this process calls on courts to consider "extra-statutory materials" to "discover" the defendant's crime of conviction.˜ We have observed that these "materials will not in every case speak plainly," and that any lingering ambiguity about them can mean the government will fail to carry its burden of proof in a criminal case.˜ And we have remarked that "the fact of a prior conviction" supplies an unusual and "arguable" exception to the Sixth Amendment rule in criminal cases that "any fact that increases the penalty for a crime" must be proved to a jury rather than a judge.˜

Really, this Court has never doubted that the who, what, when, and where of a conviction—and the very existence of a conviction in the first place—pose questions of fact. Nor have we questioned that, like any other fact, the party who bears the burden of proving these facts bears the risks associated with failing to do so.˜

The authorities Mr. Pereida invokes do not teach differently.˜

C

This leaves Mr. Pereida to his final redoubt. Maybe the INA works as we have described. But, Mr. Pereida worries, acknowledging as much would invite "grave practical difficulties."˜ What if the alien's record of conviction is unavailable or incomplete through no fault of his own? To deny aliens relief only because of poor state court record-keeping practices would, he submits, make for inefficient and unfair public policy.˜

Notably, though,˜ Mr. Pereida's immigration proceedings progressed in tandem with his criminal case, so it is hard to imagine how he could have been on better notice about the need to obtain and preserve relevant state court records about his crime. Represented by counsel in both proceedings, he had professional help with these tasks too. We know that relevant records were created, as well, because the government submitted documents outlining the charges brought against him. Despite all this, Mr.

Pereida simply declined to insist on clarity in his state court records or supply further evidence.

Still, even accepting that graver record-keeping problems will arise in other cases, it is not clear what that might tell us. Record-keeping problems promise to occur from time to time regardless who bears the burden of proof. And, as in most cases that come our way, both sides can offer strong policy arguments to support their positions. Mr. Pereida and the dissent say fairness and efficiency would be better served if the government bore the risk of loss associated with record-keeping difficulties. Meanwhile, the government contends that it is important for the burden of proof to rest with the alien so those seeking discretionary relief cannot gain a tactical advantage by withholding or concealing evidence they possess about their own convictions. It is hardly this Court's place to pick and choose among competing policy arguments like these along the way to selecting whatever outcome seems to us most congenial, efficient, or fair. Our license to interpret statutes does not include the power to engage in such freewheeling judicial policymaking. Congress was entitled to conclude that uncertainty about an alien's prior conviction should not redound to his benefit. Only that policy choice, embodied in the terms of the law Congress adopted, commands this Court's respect.

It seems, too, that Mr. Pereida may have overlooked some of the tools Congress afforded aliens faced with record-keeping challenges.˜ Congress has expressly authorized parties to introduce a˜ broad˜ array of proof when it comes to prior convictions—indicating, for example, that a variety of records and attestations "shall" be taken as proof of a prior conviction. 8 U.S.C. § 1229a(c)(3)(B). Nor is it even clear whether these many listed forms of proof are meant to be the only permissible ways of proving a conviction, or whether they are simply assured of special treatment when produced.˜ Congress took significant steps in the INA to ameliorate some of the record-keeping problems Mr. Pereida discusses by allowing aliens considerably more latitude in carrying their burden of proof than he seems to suppose.

*

Under the INA, certain nonpermanent aliens seeking to cancel a lawful removal order must prove that they have not been convicted of a disqualifying crime. The Eighth Circuit correctly held that Mr. Pereida failed to carry this burden. Its judgment is

Affirmed.

JUSTICE BREYER, WITH WHOM JUSTICE SOTOMAYOR AND JUSTICE KAGAN JOIN, DISSENTING.

This case, in my view, has little or nothing to do with burdens of proof. It concerns the application of what we have called the "categorical approach" to determine the nature of a crime that a noncitizen (or defendant) was previously convicted of committing. That approach sometimes allows a judge to look at, and to look only at, certain specified documents. Unless those documents show that the crime of conviction necessarily falls within a certain category (here a "crime involving moral turpitude"), the judge must find that the conviction was not for such a crime. The relevant documents in this case do not show that the previous conviction at issue necessarily was for a crime involving moral turpitude. Hence, applying the categorical approach, it was not. That should be the end of the case.˜

3.18 Cancellation of Removal: Discretion

In order to obtain cancellation of removal, whether under INA § 240A(a) or (b), a noncitizen must establish the statutory predicates outlined in section 3.16. However, the ultimate decision as to whether to grant or deny cancellation of removal rests in the discretion of the immigration judge. As the statute notes, "The Attorney General *may* cancel removal." INA § 240A(a), (b) (emphasis added). And the IJ stands in the stead of the AG to make that determination.

"In exercising discretion, the IJ must consider the record as a whole, and balance the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented [on] his (or her) behalf to determine whether the granting of ... relief appears in the best interest of this country." Ridore v. Holder, 696 F.3d 907, 920 (9th Cir. 2012).

"Favorable considerations include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred at a young age), evidence of hardship to the respondent and his family if deportation occurs, service in this country's armed forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character." Matter of C-V-T-, 22 I&N Dec. 7, 11 (BIA 1998).

"Among the factors deemed adverse to an alien are the nature and underlying circumstances of the grounds of exclusion or deportation (now removal) that are at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or

undesirability as a permanent resident of this country." Matter of C-V-T-, 22 I&N Dec. 7, 11 (BIA 1998).

3.19 Relief from Removal: The Effect of Criminal Convictions on Other Forms of Relief

As noted in Section 3.16, there are various forms of relief from removal. Criminal conduct can affect eligibility for many of them.

NATURALIZATION

Naturalization is the process by which a lawful permanent resident becomes a U.S. citizen (see section 2.2). Naturalization functions as relief from removal because, if granted, the noncitizen becomes a citizen and is therefore no longer eligible for removal at all. However, naturalization is only available to noncitizens who can presently establish their "good moral character" and that same character for the five years preceding their naturalization application (three years for those married to U.S. citizens). INA § 316(a), 8 U.S.C. § 1427(a); INA § 319(a), 8 U.S.C. § 1430(a). A conviction for an aggravated felony "at any time" means the noncitizen cannot establish good moral character. INA § 101(f)(8), 8 U.S.C. § 1101(f)(8). Crime-based inadmissibility grounds, as well as some additional crimes, if falling within the requisite 5- or 3-year period, will also prevent a noncitizen from establishing the needed good moral character. INA § 101(f)(3)-(7), 8 U.S.C. § 1101(f)(3)-(7).

ADJUSTMENT OF STATUS

Adjustment of status, discussed in section 2.11, is a procedure by which a noncitizen can gain lawful permanent resident status without leaving the United States. Adjustment of status can be sought through an affirmative application. It can also be raised as a defense in a removal proceeding. However, adjustment of status is only available to noncitizens who are "admissible." INA § 245(a), 8 U.S.C. § 1255(a). Thus, any criminal conduct that would trigger inadmissibility under INA § 212(a)(2), 8 U.S.C. § 1182(a)(2), would exclude the opportunity to seek adjustment, though adjustment could be permitted if the noncitizen received a waiver pursuant to INA § 212(h), 8 U.S.C. § 1182(h) (see section 3.15).

ADJUSTMENT OF STATUS FOR REFUGEES

There is a discretionary waiver available to individuals with refugee status (see section 2.7) that would allow them to gain lawful permanent resident status notwithstanding a criminal conviction. Under INA § 290, 8 U.S.C. § 1159, DHS "may

waive" any of the crime-based inadmissibility grounds found at INA § 212(a)(2), 8 U.S.C. § 1182(a)(2), with the exception of the provisions governing "controlled substance traffickers."

ASYLUM

Asylum is a form of relief from removal available to individuals "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~." INA § 101(a)(42), 8 U.S.C. § 1101(a)(42). A grant of asylum will give the qualifying noncitizen a path to LPR status and U.S. citizenship.

A noncitizen who has been convicted of a "particularly serious crime" (PSC) and so "constitutes a danger to the community of the United States" is ineligible for asylum. INA § 208(b)(2)(A)(ii), 8 U.S.C. § 1158(b)(2)(A)(ii). Any conviction that qualifies as an aggravated felony is a PSC. Other convictions are evaluated on a case-by-case basis to determine if they stem from "particularly serious crimes." A noncitizen who has committed a "serious nonpolitical crime outside the United States" prior to their arrival is likewise ineligible for asylum.

WITHHOLDING OF REMOVAL

Withholding of removal is similar to asylum in that it provides relief for noncitizens who can establish that their life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3). The relief provided is "withholding" of deportation.

A noncitizen who has been convicted of a "particularly serious crime" and been "sentenced to an aggregate term of imprisonment of at least 5 years" (note this is different from asylum) is ineligible for withholding relief. INA § 241(b)(3)(ii), 8 U.S.C. § 1231(b)(3)(ii). An aggravated felony is a PSC for removal only if accompanied by a sentence of at least 5 years. The court has discretion to consider other convictions as PSCs notwithstanding the length of the sentence imposed.

The burden is higher than in an asylum case: the alien must establish a clear probability of persecution. "Clear probability" is defined as "more likely than not" that the alien will be persecuted.~ If the alien satisfies this burden, removal to the designated country is prohibited. Withholding, unlike asylum, provides no means to become a permanent resident.

TEMPORARY PROTECTED STATUS

Temporary Protected Status (TPS) is a form of blanket relief from removal that is granted on a country-by-country basis. The DHS Secretary designates certain countries as meriting TPS due to ongoing armed conflict, environmental disaster, or other "extraordinary and temporary conditions" that prevent the country's nationals from safely returning. INA § 244(b)(1), 8 U.S.C. § 1254a(b)(1). Qualified nationals from TPS-designated countries will not be subject to removal and can receive authorization to work in the United States.

Noncitizens are ineligible for TPS if: (1) they would be inadmissible pursuant to INA § 212(a)(2), 8 U.S.C. § 1182(a)(2), with the exception of a single offense of simple possession of 30 grams or less of marijuana, (2) they have been convicted of any felony or 2 or more misdemeanors committed in the United States, or (3) they would be ineligible for asylum due to a conviction for a particularly serious crime or commission of a "serious nonpolitical crime outside the United States." INA § 244(c), 8 U.S.C. § 1254a(c).

PROSECUTORIAL DISCRETION

Federal agencies have wide latitude to exercise prosecutorial discretion in the immigration context. Decisions subject to prosecutorial discretion include whether to parole a noncitizen into the United States (section 2.10) and whether to pursue formal removal proceedings (sections 2.12-2.14).

Under guidance specific to the Biden Administration, attorneys who represent the government in removal proceedings—the ICE Office of Principal Legal Advisor (OPLA) —are "directed to focus efforts and prioritize cases involving noncitizens who pose a threat to ... public safety[.]" A noncitizen who "poses a current threat to public safety, typically because of serious criminal conduct, is a priority for apprehension and removal." Such noncitizens are ineligible for prosecutorial discretion. "OPLA attorneys are expected to litigate priority cases to completion."

DEFERRED ACTION FOR CHILDHOOD ARRIVALS

Deferred Action for Childhood Arrivals (DACA) is a program that was created during the Obama Administration. The program grants a two-year period of deferred action, a form of prosecutorial discretion, as well as work authorization to certain individuals who came to the United States as children.

DACA is not available to noncitizens who have been convicted of a felony offense, a significant misdemeanor offense (defined as a crime for which the maximum term of

imprisonment authorized is 1 year or less but greater than 5 days and, regardless of the sentence imposed, an offense of domestic violence, sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, or driving under the influence), three or more misdemeanor offenses, or otherwise pose a threat to national security or public safety.

3.20 Test Your Knowledge

PROBLEM 3.1

Zara entered the United States without authorization. She received a felony conviction of fraud and was thereafter put into removal proceedings. On what base(s) is Zara removable?

Zara's attorney seeks post-conviction relief in criminal court, attaching evidence of Zara's family ties in the U.S. and her work history. The motion states that her prior attorney failed to advise her that her fraud conviction would be a removable offense. The judge grants the motion for post-conviction relief, signing an order finding a Sixth Amendment violation. Will the immigration judge recognize the vacatur for immigration purposes? How would this change Zara's removability?

PROBLEM 3.2

Javier is a lawful permanent resident from Spain. He has a 2005 conviction for possession of 30 grams or less of marijuana. He traveled to Spain to celebrate La Semana Santa with his parents. On returning to the United States, can CBP place Javier in removal proceedings?

PROBLEM 3.3

A burglary offense for which a noncitizen is imprisoned for at least one year is an aggravated felony under INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G).

The generic definition of burglary is "unlawful entry or remaining in a building or structure with intent to commit a crime." In Taylor v. United States, 495 U.S. 575 (1990), the Supreme Court held that a "building or structure" did not include a vehicle. Then, in United States v. Stitt, 586 U.S. 27 (2018), the Supreme Court included entry into a vehicle that is "adapted or is customarily used for lodging."

Naomi Nikston, an LPR, has a conviction for burglary under Georgia Code § 26-1601. The statute reads: "A person commits burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling

house of another, or any building, vehicle, railroad car, aircraft, watercraft, or other such structure designed for use as the dwelling of another."

At the time of Naomi's conviction, Georgia's intermediate appellate court had held that the state's definition of burglary included entry into "any vehicle," regardless of whether it was designed for use as a dwelling.

Is there a categorical match such that Naomi should be removable under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1127(a)(2)(A)(iii)?

PROBLEM 3.4

A theft offense for which a noncitizen is imprisoned for at least one year is an aggravated felony under INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G).

The generic definition of theft is "the taking of, or exercise of control over, property without consent whenever there is criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent." Matter of Garcia-Madruga, 24 I.&N. Dec. 436, 440-41 (BIA 2008).

Greg Goppould, an international student with an F visa, has a conviction for theft under Georgia Code § 16-8-2, which reads: "A person commits the offense of theft by taking when he unlawfully takes or, being in lawful possession thereof, unlawfully appropriates any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated."

Is there a categorical match such that Greg should be removable under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1127(a)(2)(A)(iii)?

PROBLEM 3.5

A firearms offense under 18 U.S.C. § 924(b) is an aggravated felony under INA § 101(a)(43)(E)(ii), 8 U.S.C. § 1101(a)(43)(E)(ii). 18 U.S.C. § 924(b) reads: "Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both."

Patrycja Paczynski, an LPR, pled guilty to 29 Ohio Revised Code § 1280(A): Having a firearm while committing a felony. The statute provides: "Any person who, while committing or attempting to commit a felony, possesses a pistol, shotgun or rifle or any other offensive weapon in such commission or attempt, whether the pistol,

shotgun or rifle is loaded or not, or who possesses a blank or imitation pistol, altered air or toy pistol, shotgun or rifle capable of raising in the mind of one threatened with such device a fear that it is a real pistol, shotgun or rifle, or who possesses an air gun or carbon dioxide or other gas-filled weapon, electronic dart gun, conductive energy weapon, knife, dagger, dirk, switchblade knife, blackjack, ax, loaded cane, billy, hand chain or metal knuckles, in addition to the penalty provided by statute for the felony committed or attempted, upon conviction shall be guilty of a felony for possessing such weapon or device, which shall be a separate offense from the felony committed or attempted and shall be punishable by imprisonment in the custody of the Department of Corrections for a period of not less than two (2) years nor for more than ten (10) years for the first offense, and for a period of not less than ten (10) years nor more than thirty (30) years for any second or subsequent offense."

Is there a categorical match such that Patrycja should be removable under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1127(a)(2)(A)(iii)?

PROBLEM 3.6

Ilir is an LPR from Albania. The government seeks to remove Ilir as an aggravated felon, citing INA § 237(a)(2) (A)(iii) and INA § 101(a)(43)(B) ("illicit trafficking in a controlled substance"). The question is whether Ilir's conviction under FL Stat. § 893-135(1)(c)(1) constitutes an aggravated felony. The statute reads: "A person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of [certain drugs] ... commits a felony of the first degree, which felony shall be known as 'trafficking in illegal drugs.'" Should the court use the categorical or the modified categorial approach to determine if Ilir's Florida conviction renders him deportable as an aggravated felon?

PROBLEM 3.7

Amir came to the United States from the Philippines nine years ago to pursue a PhD in meteorology at the University of Oklahoma. He came on an F-1 visa as a "degree seeking" student. While at OU, Amir met and fell in love with an American citizen, Claire. They married eight years ago and welcomed daughter Betty seven years ago. Betty suffers from severe asthma. When she has a flair up, it's up to Amir to pick her up from school, take her to doctor's appointments, and care for her when she needs to stay home to recover. That's because Claire is the breadwinner of the family. Amir never ended up completing his PhD program and his visa lapsed. He's been working off-and-on as a day laborer in and around Norman for the past 4 years.

Last year, Amir was arrested in Norman, Oklahoma for possession of marijuana. Police pulled Amir over on suspicion of driving while intoxicated. Amir passed the breathalyzer test but a K-9 alerted to the presence of drugs and police found a baggie in Amir's pocket with 6 grams of marijuana. Amir was charged with possession, though he ultimately pled no contest to misdemeanor possession of paraphernalia and served no time in jail.

This past week, Amir was picked up by ICE and put in removal proceedings. What are his options?

Chapter Four: Immigration Detention

Migrants who are physically held by the government during the pendency of their removal hearings are detained pursuant to civil, not criminal, law. This is unusual. The only non-immigration examples of physical detention under civil law in the United States are imprisonment as a sanction for civil contempt and involuntary commitment to a mental hospital. Debtors' prisons, once a leading example of civil confinement, were abolished by federal law in 1883.

The sheer number of immigrant detainees has at times been staggering. In 2019, the United States maintained a daily average immigration detention population in excess of 50,000, with more than 500,000 individual migrants detained that year. In contrast, efforts to lower the risk of coronavirus transmission, coupled with different federal immigration priorities, led to a record low daily average immigrant detention population of around 13,250 during the month of February 2021. The immigration detention population has steadily risen since 2021. The average daily detention population for the first half of 2024 exceeds 37,000.

This chapter begins with a brief history of immigration detention (section 4.1). Next, it explores why the government detains noncitizens (section 4.2) as well as the different times when migrants are detained: at admission (section 4.3), during removal (sections 4.4-4.5, 4.7-4.9), and post-removal (section 4.6). It concludes with an introduction to the detention conditions faced by noncitizen adults (section 4.10), transfers between facilities (section 4.11), detention of children (section 4.12) and family units (section 4.13), as well as alternatives to detention (section 4.14).

4.1 A Brief History of Immigration Detention

The first immigrant processing facility in the United States was Castle Garden in New York City. From 1855 to 1890, an estimated 7.5 million migrants made their way through Castle Garden. Migrants found excludable on the basis of poverty or criminal records were detained at and deported from Castle Garden. Recall that the first federal immigration law was not passed until 1875 (see section 3.1). Detention and deportation at Castle Garden were, therefore, accomplished pursuant to the state's police power.

The first federal law regarding the detention of migrants was passed in 1891. It authorized inspection officers to "detain" incoming migrants "until a thorough inspection is made" as to their admissibility. The 1891 Act further provided that detained migrants should be "properly housed, fed, and cared for."

The following year, 1892, marked the opening of the first federally owned immigration inspection station: Ellis Island in New York Harbor. From 1892 to 1954, an estimated 12 million immigrants traveled through Ellis Island. From the beginning, migrants deemed excludable on grounds such as poverty, illness, or for being "contract laborers" were detained at and deported from Ellis Island.

Congress again tackled immigration detention in 1893, passing the first mandatory detention provision: "[I]t shall be the duty of every inspector of arriving alien immigrants to detain ... every person who may not appear to him to be clearly and beyond doubt entitled to admission[.]"

The U.S. Supreme Court upheld the validity of civil immigration detention in Wong Wing v. United States, 163 U.S. 228 (1896), writing: "We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation."

In 1910, Angel Island, in the San Francisco Bay, became home to the first immigration detention facility on the West Coast. Angel Island largely housed migrants from Asia including China, Japan, and India. Some 300,000 migrants were detained at the Angel Island facility between 1910 and 1940, more than half of whom were Chinese.

The Immigration and Nationality Act of 1952 (INA) continued to recognize the importance of immigration detention. It authorized immigration authorities to arrest and take into custody any noncitizen "pending a determination of deportability." That same law introduced the possibility of releasing noncitizens from detention on bond.

During the 1950s, 60s, and 70s, federal immigration authorities followed a general policy of not detaining noncitizens, absent unusual circumstances. See Ma v. Barber, 357 U.S. 185 (1958) ("Physical detention of aliens is now the exception, not the rule, and is generally employed only as to security risks or those likely to abscond."). That changed in 1981 when the United States faced the prospect of large-scale migration from Haiti. In May 1981, the U.S. began detaining all incoming Haitian migrants without any possibility of bond. Haitian migrants were not only detained, they were detained in remote locations—initially Fort Allen in Puerto Rico and thereafter Guantanamo Bay in Cuba.

In the years since, Congress has passed several laws regarding immigration detention. With the Anti-Drug Abuse Act of 1988, Congress mandated detention of noncitizens convicted of aggravated felonies. Thereafter, through the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress expanded mandatory detention to cover a wide swath of "criminal aliens." The U.S. Supreme Court has continued to uphold immigration detention, affirming that: "Detention during removal proceedings is a constitutionally permissible part of that process." Denmore v. Kim, 538 U.S. 510 (2003).

4.2 The Rationales for Detention

CRS, Immigration Detention: A Legal Overview (2019)

The Immigration and Nationality Act (INA) authorizes—and in some cases requires—the Department of Homeland Security (DHS) to detain non-U.S. nationals (aliens) arrested for immigration violations that render them removable from the United States.˜ The immigration detention regime serves two primary purposes. First, detention may ensure an apprehended alien's presence at his or her removal hearing and, if the alien is ultimately ordered removed, makes it easier for removal to be quickly effectuated.˜ Second, in some cases detention may serve the additional purpose of alleviating any threat posed by the alien to the safety of the community while the removal process is under way.˜

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Heartland Alliance for Human Needs and Human Rights v. ICE
406 F. Supp. 3d 90 (D.D.C. 2019)

On December 18, 2015, President Barack Obama signed into law the Consolidated Appropriations Act, 2016, which allocated federal funding for financial year 2016 for

the federal agency U.S. Immigrations and Customs Enforcement ("ICE").˜ The Consolidated Appropriations Act, 2016 stipulated that "funding made available under this heading shall maintain a level of not less than 34,000 detention beds...."˜ This statute thus mandated that ICE "maintain" a minimum level of detention beds, thereby continuing a requirement that was first included as a budgetary condition in 2009.˜ Since then, this requirement has been criticized by non-profit organizations and the national media on the grounds that ICE has construed "maintain" to mean "maintain and fill,"˜ the specified level of detention beds, such that the statute amounts to a "detention bed quota" or "detention bed mandate,"˜. According to such critics, the statute incentivizes ICE to fill a set number of beds in for-profit facilities as well as federal detention facilities,˜ without considering factors such as "need,"˜ "low-cost alternatives to detention,"˜ whether the detainee is a violent offender,˜ or the monetary cost of the policy˜.

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4.3 Detention of Migrants Seeking Admission at the Border, Those Who Entered Without Inspection

CRS, Immigration Detention: A Legal Overview (2019)

The INA provides for the mandatory detention of aliens who are seeking initial entry into the United States, or who have entered the United States without inspection, and who are believed to be subject to removal.˜ [INA § 235(b), 8 U.S.C. § 1225(b).]

The statute's mandatory detention scheme covers (1) applicants for admission who are subject to a streamlined removal process known as "expedited removal" [see section 2.14] and (2) applicants for admission who are not subject to expedited removal, and who are placed in formal removal proceedings.˜

APPLICANTS FOR ADMISSION SUBJECT TO EXPEDITED REMOVAL

INA Section 235(b)(1) provides for the expedited removal of arriving aliens who are inadmissible under INA Section 212(a)(6)(C) or (a)(7) because they lack valid entry documents or have attempted to procure admission by fraud or misrepresentation.˜ [See section 2.14.] The statute also authorizes the Secretary of Homeland Security to expand the use of expedited removal to aliens present in the United States without being admitted or paroled if they have been in the country less than two years and are inadmissible on the same grounds.˜ Based on this authority, DHS has employed expedited removal mainly to (1) arriving aliens; (2) aliens who arrived in the United States by sea within the last two years, who have not been admitted or paroled by

immigration authorities; and (3) aliens found in the United States within 100 miles of the border within 14 days of entering the country, who have not been admitted or paroled by immigration authorities.˜

Generally, an alien subject to expedited removal may be removed without a hearing or further review unless the alien indicates an intention to apply for asylum or a fear of persecution if removed to a particular country.˜ If the alien indicates an intention to apply for asylum or a fear of persecution, he or she will typically be referred to an asylum officer within DHS's U.S. Citizenship and Immigration Services (USCIS)˜ to determine whether the alien has a "credible fear" of persecution or torture.˜ If the alien establishes a credible fear, he or she will be placed in "formal" removal proceedings under INA Section 240, and may pursue asylum and related protections.˜

DETENTION DURING EXPEDITED REMOVAL PROCEEDINGS

INA Section 235(b)(1) and DHS regulations provide that an alien "shall be detained" pending a determination on whether the alien is subject to expedited removal, including during any credible fear determination; and if the alien is found not to have a credible fear of persecution or torture, the alien will remain detained until his or her removal.˜ Typically, the alien will be initially detained by Customs and Border Protection (CBP) for no more than 72 hours for processing (e.g., fingerprints, photographs, initial screening), and the alien will then be transferred to ICE custody pending a credible fear determination if the alien is subject to expedited removal and requests asylum or expresses a fear of persecution.˜

Under INA Section 212(d)(5), however, DHS may parole an applicant for admission (which includes an alien subject to expedited removal) on a case-by-case basis "for urgent humanitarian reasons or significant public benefit."˜ Based on this authority, DHS has issued regulations that allow parole of an alien in expedited removal proceedings, but only when parole "is required to meet a medical emergency or is necessary for a legitimate law enforcement objective."˜

ALIENS WHO ESTABLISH A CREDIBLE FEAR OF PERSECUTION OR TORTURE

INA Section 235(b)(1) provides that aliens who establish a credible fear of persecution or torture "shall be detained for further consideration of the application for asylum" in formal removal proceedings.˜ The alien will typically remain in ICE custody during those proceedings.˜ As noted above, DHS retains the authority to parole applicants for admission, and typically will interview the alien to determine his or her eligibility for parole within seven days after the credible fear finding.˜ Under DHS

regulations, the following categories of aliens may be eligible for parole, provided they do not present a security or flight risk:

- persons with serious medical conditions;
- women who have been medically certified as pregnant;
- juveniles (defined as individuals under the age of 18) who can be released to a relative or nonrelative sponsor;
- persons who will be witnesses in proceedings conducted by judicial, administrative, or legislative bodies in the United States; and
- persons "whose continued detention is not in the public interest."˜

APPLICANTS FOR ADMISSION WHO ARE NOT SUBJECT TO EXPEDITED REMOVAL

INA Section 235(b)(2) covers applicants for admission who are not subject to expedited removal.˜ This provision would thus cover, for example, unadmitted aliens who are inadmissible on grounds other than those described in INA Section 212(a)(6)(C) and (a)(7) (e.g., because the alien is deemed likely to become a public charge, or the alien has committed specified crimes).˜ The statute would also cover aliens who had entered the United States without inspection, but who are not subject to expedited removal because they were not apprehended within two years after their arrival in the country.˜

The INA provides that aliens covered by INA Section 235(b)(2) "shall be detained" pending formal removal proceedings before an IJ.˜ As discussed above, however, DHS may parole applicants for admission pending their removal proceedings, and agency regulations specify circumstances in which parole may be warranted (e.g., where detention "is not in the public interest").˜ Absent parole, aliens covered by INA Section 235(b)(2) generally must be detained and cannot seek their release on bond.˜

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4.4 Discretionary Detention During Removal Proceedings

CRS, Immigration Detention: A Legal Overview (2019)

INA Section 236(a) is the "default rule" for aliens placed in removal proceedings.˜ The statute is primarily administered by Immigration and Customs Enforcement (ICE), the agency within DHS largely responsible for immigration enforcement in the interior of the United States.˜ Section 236(a) authorizes immigration authorities to arrest and detain an alien pending his or her formal removal proceedings.˜ Detention under INA Section 236(a) is discretionary, and immigration authorities are not required to detain an alien subject to removal unless the alien falls within one of the categories of aliens

subject to mandatory detention (e.g., aliens convicted of specified crimes under INA Section 236(c))˜.

If ICE arrests and detains an alien under INA Section 236(a), and the alien is not otherwise subject to mandatory detention, the agency has two options:

1. it "may continue to detain the arrested alien" pending the removal proceedings; or
2. it "may release the alien" on bond in the amount of at least $1500, or on "conditional parole."˜

Generally, upon release (whether on bond or conditional parole), the alien may not receive work authorization unless the alien is otherwise eligible (e.g., the alien is an LPR).˜ And ICE may at any time revoke a bond or conditional parole and bring the alien back into custody.˜

In the event of an alien's release, ICE may opt to enroll the alien in an Alternatives to Detention (ATD) program [see section 4.13], which allows ICE the ability to monitor and supervise the released alien to ensure his or her eventual appearance at a removal proceeding.˜

STANDARD AND CRITERIA FOR MAKING CUSTODY DETERMINATIONS˜

[T]he BIA has held that the alien has the burden of showing that he or she should be released from custody, and "[o]nly if an alien demonstrates that he does not pose a danger to the community should an [IJ] continue to a determination regarding the extent of flight risk posed by the alien."˜

[T]he BIA has instructed that an IJ may consider, among other factors, these criteria in assessing an alien's custody status:

- whether the alien has a fixed address in the United States;
- the alien's length of residence in the United States;
- whether the alien has family ties in the United States;
- the alien's employment history;
- the alien's record of appearance in court;
- the alien's criminal record, including the extent, recency, and seriousness of the criminal offenses;
- the alien's history of immigration violations;

- any attempts by the alien to flee prosecution or otherwise escape from authorities; and
- the alien's manner of entry to the United States.˜

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4.5 Mandatory Detention During Removal Proceedings

CRS, Immigration Detention: A Legal Overview (2019)

INA Section 236(c) requires the detention of aliens who are subject to removal because of specified criminal or terrorist-related grounds.˜

ALIENS SUBJECT TO DETENTION UNDER INA SECTION 236(C)

INA Section 236(c)(1) covers aliens who fall within one of four categories:

1. An alien who is inadmissible under INA Section 212(a)(2) based on the commission of certain enumerated crimes, including a crime involving moral turpitude, a controlled substance violation, a drug trafficking offense, a human trafficking offense, money laundering, and any two or more criminal offenses resulting in a conviction for which the total term of imprisonment is at least five years.
2. An alien who is deportable under INA Section 237(a)(2) based on the conviction of certain enumerated crimes, including an aggravated felony, two or more crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, a controlled substance violation (other than a single offense involving possession of 30 grams or less of marijuana), and a firearm offense.
3. An alien who is deportable under INA Section 237(a)(2)(A)(i) based on the conviction of a crime involving moral turpitude (generally committed within five years of admission) for which the alien was sentenced to at least one year of imprisonment.
4. An alien who is inadmissible or deportable for engaging in terrorist activity, being a representative or member of a terrorist organization, being associated with a terrorist organization, or espousing or inciting terrorist activity.˜

The statute instructs that ICE "shall take into custody any alien" who falls within one of these categories "when the alien is released [from criminal custody], without regard to whether the alien is released on parole, supervised release, or probation, and

without regard to whether the alien may be arrested or imprisoned again for the same offense."˜

PROHIBITION ON RELEASE FROM CUSTODY EXCEPT IN SPECIAL CIRCUMSTANCES

While INA Section 236(c)(1) requires ICE to detain aliens who are removable on enumerated criminal or terrorist-related grounds, INA Section 236(c)(2) provides that ICE "may release an alien described in paragraph (1) only if" the alien's release "is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation," and the alien shows that he or she "will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding."˜ Under the statute, "[a] decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien."˜

Without these special circumstances, an alien detained under INA Section 236(c) generally must remain in custody pending his or her removal proceedings.˜ Furthermore, given the mandatory nature of the detention, the alien may not be released on bond or conditional parole, or request a custody redetermination at a bond hearing before an IJ.˜

CONSTITUTIONALITY OF MANDATORY DETENTION

The mandatory detention requirements of INA Section 236(c) have been challenged as unconstitutional but, to date, none of these challenges have succeeded.˜ In Demore v. Kim, [538 U.S. 510 (2003),] an LPR (Kim) who had been detained under INA Section 236(c) for six months argued that his detention violated his right to due process because immigration authorities had made no determination that he was a danger to society or a flight risk.˜ The Supreme Court [held]˜ that mandatory detention of certain aliens pending removal proceedings was "constitutionally permissible."˜ The Court noted that it had previously "endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens," and the Court also cited its "longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings, . . ."˜ The Court concluded that "Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as [Kim] be detained for the brief period necessary for their removal proceedings."˜

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4.6 Post-Removal Detention

CRS, Immigration Detention: A Legal Overview (2019)

INA Section 241(a) [8 U.S.C. § 1231(a)] governs the detention of aliens after the completion of removal proceedings.˜ The statute's detention authority covers two categories of aliens: (1) aliens with a final order of removal who are subject to detention during a 90-day "removal period" pending efforts to secure their removal; and (2) certain aliens who may (but are not required to) be detained beyond the 90-day removal period.˜ The Supreme Court has construed the post-order of removal detention statute as having implicit temporal limitations. [Zadvydas v. Davis, 533 U.S. 678 (2001).]˜

DETENTION DURING 90-DAY REMOVAL PERIOD

INA Section 241(a)(1) provides that DHS "shall remove" an alien ordered removed "within a period of 90 days," and refers to this 90-day period as the "removal period."˜ The statute specifies that the removal period "begins on the latest of the following":˜

- The date the order of removal becomes administratively final.˜
- If the alien petitions for review of the order of removal,˜ and a court orders a stay of removal, the date of the court's final order in the case.˜
- If the alien is detained or confined for nonimmigration purposes (e.g., criminal incarceration), the date the alien is released from that detention or confinement.˜

INA Section 241(a)(2) instructs that DHS "shall detain" an alien during the 90-day removal period.˜ The statute also instructs that "[u]nder no circumstance during the removal period" may DHS release an alien found inadmissible on criminal or terrorist-related grounds under INA Section 212(a)(2) or (a)(3)(B) (e.g., a crime involving moral turpitude); or who has been found deportable on criminal or terrorist-related grounds under INA Section 237(a)(2) or (a)(4)(B) (e.g., an aggravated felony conviction).˜

INA Section 241(a)(3) provides that, if the alien either "does not leave or is not removed within the removal period," the alien will be released and "subject to supervision" pending his or her removal.˜ DHS regulations state that the order of supervision must specify the conditions of release, including requirements that the alien (1) periodically report to an immigration officer and provide relevant information under oath; (2) continue efforts to obtain a travel document and help DHS obtain the document; (3) report as directed for a mental or physical examination; (4) obtain advance approval of travel beyond previously specified times and distances; and (5) provide ICE with written notice of any change of address.˜

CONTINUED DETENTION BEYOND REMOVAL PERIOD

Typically, an alien with a final order of removal is subject to detention during the 90-day removal period, and must be released under an order of supervision if the alien does not leave or is not removed within that period.[~] INA Section 241(a)(6), however, states that an alien "may be detained beyond the removal period"[~] if the alien falls within one of three categories:

1. an alien ordered removed who is inadmissible under INA Section 212(a) (e.g., an arriving alien who lacks valid entry documents);
2. an alien ordered removed who is deportable under INA Sections 237(a)(1)(C) (failure to maintain or comply with conditions of nonimmigrant status), 237(a)(2) (specified crimes including crimes involving moral turpitude, aggravated felonies, and controlled substance offenses), or 237(a)(4) (security and terrorist-related grounds); or
3. an alien whom DHS has determined "to be a risk to the community or unlikely to comply with the order of removal."[~]

DHS regulations provide that, before the end of the 90-day removal period, ICE will conduct a "custody review" for a detained alien who falls within one of the above categories, and whose removal "cannot be accomplished during the period, or is impracticable or contrary to the public interest," to determine whether further detention is warranted after the removal period ends.[~] The regulations list factors that ICE should consider in deciding whether to continue detention, including the alien's disciplinary record, criminal record, mental health reports, evidence of rehabilitation, history of flight, prior immigration history, family ties in the United States, and any other information probative of the alien's danger to the community or flight risk.[~]

ICE may release the alien after the removal period ends if the agency concludes that travel documents for the alien are unavailable (or that removal "is otherwise not practicable or not in the public interest"); the alien is "a non-violent person" and likely will not endanger the community; the alien likely will not violate any conditions of release; and the alien does not pose a significant flight risk.[~] Upon the alien's release, ICE may impose certain conditions, including (but not limited to) those specified for the release of aliens during the 90-day removal period, such as periodic reporting requirements.[~]

If ICE decides to maintain custody of the alien, it may retain custody authority for up to three months after the expiration of the 90-day removal period (i.e., up to 180 days after final order of removal).[~] At the end of that three-month period, ICE may either

release the alien if he or she has not been removed (in accordance with the factors and criteria for supervised release), or refer the alien to its Headquarters Post-Order Detention Unit (HQPDU) for further custody review.˜ If the alien remains in custody after that review, the HQPDU must conduct another review within one year (i.e., 18 months after final order of removal), and (if the alien is still detained) annually thereafter.˜

CONSTITUTIONAL LIMITATIONS TO POST-ORDER OF REMOVAL DETENTION

[I]n Zadvydas v. Davis, [533 U.S. 678 (2001),]˜ the Supreme Court considered whether INA Section 241(a)'s post-order of removal detention statute should be construed as having an implicit time limitation to avoid serious constitutional concerns.˜ The Court determined that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem" under the Due Process Clause.˜ The Court reasoned that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects," and found no justifications for the indefinite detention of aliens whose removal is no longer practicable.˜ While the Court recognized that a potentially indefinite detention scheme may be upheld if it is "limited to specially dangerous individuals and subject to strong procedural protections,"˜ INA Section 241(a)(6)'s post-removal period detention scheme was different because it applied "broadly to aliens ordered removed for many and various reasons, including tourist visa violations."˜ The Court thus concluded that the statute could not be lawfully construed as authorizing indefinite detention.˜

Notably, the Court rejected the government's contention that indefinite detention pending removal was constitutionally permissible under Shaughnessy v. United States ex rel. Mezei, [344 U.S. 809 (1952)], which, many decades earlier, had upheld the indefinite detention on Ellis Island of an alien denied admission into the United States and ordered excluded.˜ The Zadvydas Court distinguished Mezei, which involved an alien considered at the threshold of entry, because "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."˜

The Zadvydas Court determined there was no indication that Congress had intended to confer immigration authorities with the power to indefinitely confine individuals ordered removed.˜ Although INA Section 241(a)(6) states that an alien "may be detained" after the 90-day removal period, the Court reasoned, the statute's use of the word "may" is ambiguous and "does not necessarily suggest unlimited discretion."˜

For these reasons, applying the doctrine of constitutional avoidance,˜ the Court held that INA Section 241(a)(6) should be construed as authorizing detention only for "a period reasonably necessary to secure removal."˜ The Court thus construed the statute as having an implicit temporal limitation of six months following a final order of removal.˜ If that six-month period elapses, the Court held, the alien generally must be released from custody if he "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future."˜

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In Johnson v. Guzman-Chavez, 594 U.S. 523 (2021), the Supreme Court held that the detention of noncitizens subject to reinstatement of removal (see section 2.14) is also governed by INA § 241, 8 U.S.C. § 1231. In the following term, however, the Court rejected a noncitizen's quest for a bond hearing to determine whether he should be detained beyond six months while seeking withholding of removal (see section 3.20) in the context of reinstatement of removal (see section 2.14). See Johnson v. Arteaga-Martinez, 596 U.S. 573 (2022).

4.7 Judicial Review of Detention

EOUSA, OLE, Immigration Law (2005)

Under INA § 236(e), 8 U.S.C. § 1226(e), as amended by IIRIRA, no court may set aside any action or decision of the Attorney General under § 236 regarding the detention or release of an alien, or the grant, revocation, or denial of immigration bond or parole, pending removal proceedings. This provision became effective on April 1, 1997, and applies to the apprehension and detention of aliens in removal proceedings commenced on or after April 1, 1997. The government's position is that INA § 236(e), 8 U.S.C. § 1226(e), bars review of discretionary decisions made regarding detention pending removal proceedings, but does not preclude review of constitutional challenges to such detention. The Supreme Court embraced this view in Demore v. Kim, 538 U.S. 510 (2003).˜

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4.8 Case: Jennings v. Rodriguez

Jennings v. Rodriguez
583 U.S. 281 (2018)

JUSTICE ALITO DELIVERED THE OPINION OF THE COURT, EXCEPT AS TO PART II. JUSTICE SOTOMAYOR JOINS ONLY PART III-C OF THIS OPINION.

In this case we are asked to interpret three provisions of U.S. immigration law that authorize the Government to detain aliens in the course of immigration proceedings. All parties appear to agree that the text of these provisions, when read most naturally, does not give detained aliens the right to periodic bond hearings during the course of their detention. But by relying on the constitutional-avoidance canon of statutory interpretation, the Court of Appeals for the Ninth Circuit held that detained aliens have a statutory right to periodic bond hearings under the provisions at issue.

Under the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems. But a court relying on that canon still must interpret the statute, not rewrite it. Because the Court of Appeals in this case adopted implausible constructions of the three immigration provisions at issue, we reverse its judgment and remand for further proceedings.

I

A

To implement its immigration policy, the Government must be able to decide (1) who may enter the country and (2) who may stay here after entering.

1

That process of decision generally begins at the Nation's borders and ports of entry, where the Government must determine whether an alien seeking to enter the country is admissible. Under 8 U.S.C. § 1225, an alien who "arrives in the United States," or "is present" in this country but "has not been admitted," is treated as "an applicant for admission." § 1225(a)(1). Applicants for admission must "be inspected by immigration officers" to ensure that they may be admitted into the country consistent with U.S. immigration law. § 1225(a)(3).

As relevant here, applicants for admission fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2). Section 1225(b)(1) applies

to aliens initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation. See § 1225(b)(1)(A)(i) (citing §§ 1182(a)(6)(C), (a)(7)). Section 1225(b)(2) is broader. It serves as a catchall provision that applies to all applicants for admission not covered by § 1225(b)(1) (with specific exceptions not relevant here). See §§ 1225(b)(2)(A), (B).

Both § 1225(b)(1) and § 1225(b)(2) authorize the detention of certain aliens. Aliens covered by § 1225(b)(1) are normally ordered removed "without further hearing or review" pursuant to an expedited removal process. § 1225(b)(1)(A)(i). But if a § 1225(b)(1) alien "indicates either an intention to apply for asylum … or a fear of persecution," then that alien is referred for an asylum interview. § 1225(b)(1)(A)(ii). If an immigration officer determines after that interview that the alien has a credible fear of persecution, "the alien shall be detained for further consideration of the application for asylum." § 1225(b)(1)(B)(ii). Aliens who are instead covered by § 1225(b)(2) are detained pursuant to a different process. Those aliens "shall be detained for a [removal] proceeding" if an immigration officer "determines that [they are] not clearly and beyond a doubt entitled to be admitted" into the country. § 1225(b)(2)(A).

Regardless of which of those two sections authorizes their detention, applicants for admission may be temporarily released on parole "for urgent humanitarian reasons or significant public benefit." § 1182(d)(5)(A); see also 8 C.F.R §§ 212.5(b), 235.3 (2017). Such parole, however, "shall not be regarded as an admission of the alien." 8 U.S.C. § 1182(d)(5)(A). Instead, when the purpose of the parole has been served, "the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States." Ibid.

2

Even once inside the United States, aliens do not have an absolute right to remain here. For example, an alien present in the country may still be removed if he or she falls "within one or more … classes of deportable aliens." § 1227(a). That includes aliens who were inadmissible at the time of entry or who have been convicted of certain criminal offenses since admission. See §§ 1227(a)(1), (2).

Section 1226 generally governs the process of arresting and detaining that group of aliens pending their removal. As relevant here, § 1226 distinguishes between two different categories of aliens. Section 1226(a) sets out the default rule: The Attorney General may issue a warrant for the arrest and detention of an alien "pending a decision on whether the alien is to be removed from the United States." § 1226(a). "Except as

provided in subsection (c) of this section," the Attorney General "may release" an alien detained under § 1226(a) "on bond ... or conditional parole." Ibid.

Section 1226(c), however, carves out a statutory category of aliens who may not be released under § 1226(a). Under § 1226(c), the "Attorney General shall take into custody any alien" who falls into one of several enumerated categories involving criminal offenses and terrorist activities. § 1226(c)(1). The Attorney General may release aliens in those categories "only if the Attorney General decides ... that release of the alien from custody is necessary" for witness-protection purposes and "the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." § 1226(c)(2). Any release under those narrow conditions "shall take place in accordance with a procedure that considers the severity of the offense committed by the alien." Ibid. ⁴Anyone who believes that he is not covered by § 1226(c) may also ask for what is known as a "Joseph hearing." See Matter of Joseph, 22 I. & N. Dec. 799 (BIA 1999). At a Joseph hearing, that person "may avoid mandatory detention by demonstrating that he is not an alien, was not convicted of the predicate crime, or that the [Government] is otherwise substantially unlikely to establish that he is in fact subject to mandatory detention."⁵ Whether respondents are entitled to Joseph hearings is not before this Court.⁶

In sum, U.S. immigration law authorizes the Government to detain certain aliens seeking admission into the country under §§ 1225(b)(1) and (b)(2). It also authorizes the Government to detain certain aliens already in the country pending the outcome of removal proceedings under §§ 1226(a) and (c). The primary issue is the proper interpretation of §§ 1225(b), 1226(a), and 1226(c).

B

Respondent Alejandro Rodriguez is a Mexican citizen. Since 1987, he has also been a lawful permanent resident of the United States. In April 2004, after Rodriguez was convicted of a drug offense and theft of a vehicle, the Government detained him under § 1226 and sought to remove him from the country.⁷

In May 2007, while Rodriguez was still litigating his removal in the Court of Appeals, he filed a habeas petition in the District Court for the Central District of California, alleging that he was entitled to a bond hearing to determine whether his continued detention was justified. Rodriguez's case was consolidated with another, similar case brought by Alejandro Garcia, and together they moved for class certification. The District Court denied their motion, but the Court of Appeals for the Ninth Circuit reversed.⁸ It concluded that the proposed class met the certification

requirements of Rule 23 of the Federal Rules of Civil Procedure, and it remanded the case to the District Court.˜

On remand, the District Court certified the following class: "[A]ll non-citizens within the Central District of California who: (1) are or were detained for longer than six months pursuant to one of the general immigration detention statutes pending completion of removal proceedings, including judicial review, (2) are not and have not been detained pursuant to a national security detention statute, and (3) have not been afforded a hearing to determine whether their detention is justified."˜

In their complaint, Rodriguez and the other respondents argued that the relevant statutory provisions— §§ 1225(b), 1226(a), and 1226(c)—do not authorize "prolonged" detention in the absence of an individualized bond hearing at which the Government proves by clear and convincing evidence that the class member's detention remains justified. Absent such a bond-hearing requirement, respondents continued, those three provisions would violate the Due Process Clause of the Fifth Amendment. In their prayer for relief, respondents thus asked the District Court to require the Government "to provide, after giving notice, individual hearings before an immigration judge for ... each member of the class, at which [the Government] will bear the burden to prove by clear and convincing evidence that no reasonable conditions will ensure the detainee's presence in the event of removal and protect the community from serious danger, despite the prolonged length of detention at issue."˜ Respondents also sought declaratory relief.˜

As relevant here, the District Court entered a permanent injunction in line with the relief sought by respondents, and the Court of Appeals affirmed.˜ Relying heavily on the canon of constitutional avoidance, the Court of Appeals construed §§ 1225(b) and 1226(c) as imposing an implicit 6–month time limit on an alien's detention under these sections.˜ After that point, the Court of Appeals held, the Government may continue to detain the alien only under the authority of § 1226(a).˜ The Court of Appeals then construed § 1226(a) to mean that an alien must be given a bond hearing every six months and that detention beyond the initial 6–month period is permitted only if the Government proves by clear and convincing evidence that further detention is justified.˜

The Government petitioned this Court for review of that decision, and we granted certiorari.˜

II

Before reaching the merits of the lower court's interpretation, we briefly address whether we have jurisdiction to entertain respondents' claims. We discuss two potential

obstacles, 8 U.S.C. §§ 1252(b)(9) and 1226(e)[, concluding neither] bar us from considering respondents' claims.˜

III

When "a serious doubt" is raised about the constitutionality of an act of Congress, "it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."˜ Relying on this canon of constitutional avoidance, the Court of Appeals construed §§ 1225(b), 1226(a), and 1226(c) to limit the permissible length of an alien's detention without a bond hearing. Without such a construction, the Court of Appeals believed, the "prolonged detention without adequate procedural protections" authorized by the provisions "would raise serious constitutional concerns."˜

The canon of constitutional avoidance "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction."˜ In the absence of more than one plausible construction, the canon simply "has no application."˜

The Court of Appeals misapplied the canon in this case because its interpretations of the three provisions at issue here are implausible. In Parts III–A and III–B, we hold that, subject only to express exceptions, §§ 1225(b) and 1226(c) authorize detention until the end of applicable proceedings. And in Part III–C, we hold that there is no justification for any of the procedural requirements that the Court of Appeals layered onto § 1226(a) without any arguable statutory foundation.

A

As noted, § 1225(b) applies primarily to aliens seeking entry into the United States ("applicants for admission" in the language of the statute). Section 1225(b) divides these applicants into two categories. First, certain aliens claiming a credible fear of persecution under § 1225(b)(1) "shall be detained for further consideration of the application for asylum." § 1225(b)(1)(B)(ii). Second, aliens falling within the scope of § 1225(b)(2) "shall be detained for a [removal] proceeding." § 1225(b)(2)(A).

Read most naturally, §§ 1225(b)(1) and (b)(2) thus mandate detention of applicants for admission until certain proceedings have concluded. Section 1225(b)(1) aliens are detained for "further consideration of the application for asylum," and § 1225(b)(2) aliens are in turn detained for "[removal] proceeding[s]." Once those proceedings end, detention under § 1225(b) must end as well. Until that point, however, nothing in the statutory text imposes any limit on the length of detention. And neither § 1225(b)(1) nor § 1225(b)(2) says anything whatsoever about bond hearings.

Despite the clear language of §§ 1225(b)(1) and (b)(2), respondents argue—and the Court of Appeals held—that those provisions nevertheless can be construed to contain implicit limitations on the length of detention. But neither of the two limiting interpretations offered by respondents is plausible.

1

First, respondents argue that §§ 1225(b)(1) and (b)(2) contain an implicit 6–month limit on the length of detention. Once that 6–month period elapses, respondents contend, aliens previously detained under those provisions must instead be detained under the authority of § 1226(a), which allows for bond hearings in certain circumstances.

There are many problems with this interpretation. Nothing in the text of § 1225(b)(1) or § 1225(b)(2) even hints that those provisions restrict detention after six months, but respondents do not engage in any analysis of the text. Instead, they simply cite the canon of constitutional avoidance and urge this Court to use that canon to read a "six-month reasonableness limitation" into § 1225(b).˜

That is not how the canon of constitutional avoidance works. Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases. Instead, the canon permits a court to "choos[e] between competing plausible interpretations of a statutory text."˜ To prevail, respondents must thus show that § 1225(b)'s detention provisions may plausibly be read to contain an implicit 6-month limit. And they do not even attempt to defend that reading of the text.

In much the same manner, the Court of Appeals all but ignored the statutory text. Instead, it read Zadvydas v. Davis, 533 U.S. 678˜ (2001), as essentially granting a license to graft a time limit onto the text of § 1225(b). Zadvydas, however, provides no such authority.

Zadvydas concerned § 1231(a)(6), which authorizes the detention of aliens who have already been ordered removed from the country. Under this section, when an alien is ordered removed, the Attorney General is directed to complete removal within a period of 90 days, 8 U.S.C. § 1231(a)(1)(A), and the alien must be detained during that period, § 1231(a)(2). After that time elapses, however, § 1231(a)(6) provides only that certain aliens "*may* be detained" while efforts to complete removal continue. (Emphasis added.)

In Zadvydas, the Court construed § 1231(a)(6) to mean that an alien who has been ordered removed may not be detained beyond "a period reasonably necessary to secure removal,"˜ and it further held that six months is a presumptively reasonable period˜.

After that, the Court concluded, if the alien "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," the Government must either rebut that showing or release the alien.˜

The Zadvydas Court justified this interpretation by invoking the constitutional-avoidance canon, and the Court defended its resort to that canon on the ground that § 1231(a)(6) is ambiguous. Specifically, the Court detected ambiguity in the statutory phrase "may be detained." "[M]ay," the Court said, "suggests discretion" but not necessarily "unlimited discretion. In that respect the word 'may' is ambiguous."˜ The Court also pointed to the absence of any explicit statutory limit on the length of permissible detention following the entry of an order of removal.˜

Zadvydas represents a notably generous application of the constitutional-avoidance canon, but the Court of Appeals in this case went much further. It failed to address whether Zadvydas's reasoning may fairly be applied in this case despite the many ways in which the provision in question in Zadvydas, § 1231(a)(6), differs materially from those at issue here, §§ 1225(b)(1) and (b)(2). Those differences preclude the reading adopted by the Court of Appeals.

To start, §§ 1225(b)(1) and (b)(2), unlike § 1231(a)(6), provide for detention for a specified period of time. Section 1225(b)(1) mandates detention "for further consideration of the application for asylum," § 1225(b)(1)(B)(ii), and § 1225(b)(2) requires detention "for a [removal] proceeding," § 1225(b)(2)(A). The plain meaning of those phrases is that detention must continue until immigration officers have finished "consider[ing]" the application for asylum, § 1225(b)(1)(B)(ii), or until removal proceedings have concluded, § 1225(b)(2)(A). By contrast, Congress left the permissible length of detention under § 1231(a)(6) unclear.

Moreover, in Zadvydas, the Court saw ambiguity in § 1231(a)(6)'s use of the word "may." Here, by contrast, §§ 1225(b)(1) and (b)(2) do not use the word "may." Instead, they unequivocally mandate that aliens falling within their scope "shall" be detained. "Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement."˜ That requirement of detention precludes a court from finding ambiguity here in the way that Zadvydas found ambiguity in § 1231(a)(6).

Zadvydas's reasoning is particularly inapt here because there is a specific provision authorizing release from § 1225(b) detention whereas no similar release provision applies to § 1231(a)(6). With a few exceptions not relevant here, the Attorney General may "for urgent humanitarian reasons or significant public benefit" temporarily parole aliens detained under §§ 1225(b)(1) and (b)(2). 8 U.S.C. § 1182(d)(5)(A). That express exception to detention implies that there are no other circumstances under which aliens

detained under § 1225(b) may be released.˜ That negative implication precludes the sort of implicit time limit on detention that we found in Zadvydas.˜

In short, a series of textual signals distinguishes the provisions at issue in this case from Zadvydas's interpretation of § 1231(a)(6). While Zadvydas found § 1231(a)(6) to be ambiguous, the same cannot be said of §§ 1225(b)(1) and (b)(2): Both provisions mandate detention until a certain point and authorize release prior to that point only under limited circumstances. As a result, neither provision can reasonably be read to limit detention to six months.

2

In this Court, respondents advance an interpretation of the language of §§ 1225(b)(1) and (b)(2) that was never made below, namely, that the term "for," which appears in both provisions, mandates detention only until the start of applicable proceedings rather than all the way through to their conclusion. Respondents contrast the language of §§ 1225(b)(1) and (b)(2) authorizing detention "for" further proceedings with another provision's authorization of detention "pending" further proceedings. See 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) ("Any alien ... shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed"). According to respondents, that distinction between "for" and "pending" makes an enormous difference. As they see things, the word "pending" authorizes detention throughout subsequent proceedings, but the term "for" means that detention authority ends once subsequent proceedings begin. As a result, respondents argue, once the applicable proceedings commence, §§ 1225(b)(1) and (b)(2) no longer authorize detention, and the Government must instead look to § 1226(a) for continued detention authority.

That interpretation is inconsistent with ordinary English usage and is incompatible with the rest of the statute. To be sure, "for" can sometimes mean "in preparation for or anticipation of." 6 Oxford English Dictionary 24 (2d ed. 1989). But "for" can also mean "[d]uring [or] throughout," id., at 26, as well as "with the object or purpose of," id., at 23; see also American Heritage Dictionary 709 (3d ed. 1992) ("Used to indicate the object, aim, or purpose of an action or activity"; "Used to indicate amount, extent, or duration"); Random House Dictionary of the English Language 747 (2d ed. 1987) ("with the object or purpose of"; "during the continuance of"); Webster's Third New International Dictionary 886 (1993) ("with the purpose or object of"; "to the ... duration of"). And here, only that second set of definitions makes sense in the context of the statutory scheme as a whole.

For example, respondents argue that, once detention authority ends under §§ 1225(b)(1) and (b)(2), aliens can be detained only under § 1226(a). But that section authorizes detention only "[o]n a warrant issued" by the Attorney General leading to the alien's arrest. § 1226(a). If respondents' interpretation of § 1225(b) were correct, then the Government could detain an alien without a warrant at the border, but once removal proceedings began, the Attorney General would have to issue an arrest warrant in order to continue detaining the alien. To put it lightly, that makes little sense.˜

B

While the language of §§ 1225(b)(1) and (b)(2) is quite clear, § 1226(c) is even clearer. As noted, § 1226 applies to aliens already present in the United States. Section 1226(a) creates a default rule for those aliens by permitting—but not requiring—the Attorney General to issue warrants for their arrest and detention pending removal proceedings. Section 1226(a) also permits the Attorney General to release those aliens on bond, "[e]xcept as provided in subsection (c) of this section." Section 1226(c) in turn states that the Attorney General "shall take into custody any alien" who falls into one of the enumerated categories involving criminal offenses and terrorist activities. 8 U.S.C. § 1226(c)(1). Section 1226(c) then goes on to specify that the Attorney General "may release" one of those aliens "*only if* the Attorney General decides" both that doing so is necessary for witness-protection purposes and that the alien will not pose a danger or flight risk. § 1226(c)(2) (emphasis added).

Like § 1225(b), § 1226(c) does not on its face limit the length of the detention it authorizes. In fact, by allowing aliens to be released "only if" the Attorney General decides that certain conditions are met, § 1226(c) reinforces the conclusion that aliens detained under its authority are not entitled to be released under any circumstances other than those expressly recognized by the statute. And together with § 1226(a), § 1226(c) makes clear that detention of aliens within its scope must continue "pending a decision on whether the alien is to be removed from the United States." § 1226(a).

In a reprise of their interpretation of § 1225(b), respondents argue, and the Court of Appeals held, that § 1226(c) should be interpreted to include an implicit 6–month time limit on the length of mandatory detention. Once again, that interpretation falls far short of a "plausible statutory construction."

In defense of their statutory reading, respondents first argue that § 1226(c)'s "silence" as to the length of detention "cannot be construed to authorize prolonged mandatory detention, because Congress must use 'clearer terms' to authorize 'long-term detention.'"˜ But § 1226(c) is not "silent" as to the length of detention. It mandates detention "pending a decision on whether the alien is to be removed from the United

States," § 1226(a), and it expressly prohibits release from that detention except for narrow, witness-protection purposes. Even if courts were permitted to fashion 6–month time limits out of statutory silence, they certainly may not transmute existing statutory language into its polar opposite. The constitutional-avoidance canon does not countenance such textual alchemy.

Indeed, we have held as much in connection with § 1226(c) itself. In Demore v. Kim, 538 U.S. at 529˜ we distinguished § 1226(c) from the statutory provision in Zadvydas by pointing out that detention under § 1226(c) has "a definite termination point": the conclusion of removal proceedings. As we made clear there, that "definite termination point"—and not some arbitrary time limit devised by courts—marks the end of the Government's detention authority under § 1226(c).

Respondents next contend that § 1226(c)'s limited authorization for release for witness-protection purposes does not imply that other forms of release are forbidden, but this argument defies the statutory text. By expressly stating that the covered aliens may be released "only if" certain conditions are met, 8 U.S.C. § 1226(c)(2), the statute expressly and unequivocally imposes an affirmative prohibition on releasing detained aliens under any other conditions.˜

We hold that § 1226(c) mandates detention of any alien falling within its scope and that detention may end prior to the conclusion of removal proceedings "only if" the alien is released for witness-protection purposes.

C

Finally, as noted, § 1226(a) authorizes the Attorney General to arrest and detain an alien "pending a decision on whether the alien is to be removed from the United States." § 1226(a). As long as the detained alien is not covered by § 1226(c), the Attorney General "may release" the alien on "bond ... or conditional parole." § 1226(a). Federal regulations provide that aliens detained under § 1226(a) receive bond hearings at the outset of detention. See 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1).

The Court of Appeals ordered the Government to provide procedural protections that go well beyond the initial bond hearing established by existing regulations—namely, periodic bond hearings every six months in which the Attorney General must prove by clear and convincing evidence that the alien's continued detention is necessary. Nothing in § 1226(a)'s text—which says only that the Attorney General "may release" the alien "on ... bond"—even remotely supports the imposition of either of those requirements. Nor does § 1226(a)'s text even hint that the length of detention prior to a bond hearing must specifically be considered in determining whether the alien should be released.˜

VI

We reverse the judgment of the United States Court of Appeals for the Ninth Circuit and remand the case for further proceedings.

It is so ordered.˜

JUSTICE BREYER, WITH WHOM JUSTICE GINSBURG AND JUSTICE SOTOMAYOR JOIN, DISSENTING.

This case focuses upon three groups of noncitizens held in confinement. Each of these individuals believes he or she has the right to enter or to remain within the United States. The question is whether several statutory provisions of the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., forbid granting them bail.

The noncitizens at issue are asylum seekers, persons who have finished serving a sentence of confinement (for a crime), or individuals who, while lacking a clear entitlement to enter the United States, claim to meet the criteria for admission˜. The Government has held all the members of the groups before us in confinement for many months, sometimes for years, while it looks into or contests their claims. But ultimately many members of these groups win their claims and the Government allows them to enter or to remain in the United States. Does the statute require members of these groups to receive a bail hearing, after, say, six months of confinement, with the possibility of release on bail into the community provided that they do not pose a risk of flight or a threat to the community's safety?

The Court reads the statute as forbidding bail, hence forbidding a bail hearing, for these individuals. In my view, the majority's interpretation of the statute would likely render the statute unconstitutional.˜

The Constitution's language, its basic purposes, the relevant history, our tradition, and many of the relevant cases point in the same interpretive direction. They tell us that an interpretation of the statute before us that would deny bail proceedings where detention is prolonged would likely mean that the statute violates the Constitution. The interpretive principle that flows from this conclusion is clear and longstanding: "[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act."˜ And that is so even where the constitutional interpretation departs from the most natural reading of the statute's language.˜

In my view, however, we can, and should, read the relevant statutory provisions to require bail proceedings in instances of prolonged detention without doing violence to the statutory language or to the provisions' basic purposes.

A

Asylum Seekers

The relevant provision governing the first class of noncitizens, the asylum seekers, is § 1225(b)(1)(B)(ii). It says that, if an immigration "officer determines at the time" of an initial interview with an alien seeking to enter the United States "that [the] alien has a credible fear of persecution ..., the alien shall be detained for further consideration of the application for asylum."˜ Do those words mean that the asylum seeker must be detained without bail?

They do not. First, in ordinary English and in light of the history of bail, the word "detain" is ambiguous in respect to the relevant point.˜ At the very least,˜ it can readily coexist with a word such as "bail"˜. [O]ur precedent treats the statutory word "detain" as consistent with bail.˜ [T]he Board of Immigration Appeals reads the word "detain" as consistent with bail˜.

B

Criminals Who Have Served Their Sentences

The relevant statutory provision, § 1226(c), says in paragraph (1) that the "Attorney General shall take into custody any alien who ... is deportable [or inadmissible] by reason of having committed [certain crimes] when the alien is released," presumably (or ordinarily) after having served his sentence.˜

We have long interpreted "in custody" as "not requir[ing] that a prisoner be physically confined."˜ In the habeas context, we have held that "a person released on bail or on his own recognizance" is "'in custody' within the meaning of the statute."˜

Moreover, there is no reason to interpret "custody" differently than "detain."˜

C

Other Applicants for Admission

The statutory provision that governs the third category of noncitizens seeking admission at the border is § 1225(b)(2)(A). It says that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title."˜

The critical statutory words are the same˜—"shall be detained." There is no more plausible reason here than there was there to believe those words foreclose bail.˜ The constitutional considerations, the statutory language, and the purposes underlying the

statute are virtually the same. Thus, the result should be the same: Given the constitutional considerations, we should interpret the statute as permitting bail.˜

V

Conclusion

The relevant constitutional language, purposes, history, traditions, context, and case law, taken together, make it likely that, where confinement of the noncitizens before us is prolonged (presumptively longer than six months), bail proceedings are constitutionally required. Given this serious constitutional problem, I would interpret the statutory provisions before us as authorizing bail. Their language permits that reading, it furthers their basic purposes, and it is consistent with the history, tradition, and constitutional values associated with bail proceedings.˜

Because the majority does not do so, with respect, I dissent.

4.9 Case: Neilsen v. Preap

Neilsen v. Preap
586 U.S. 392 (2019)

JUSTICE ALITO ANNOUNCED THE JUDGMENT OF THE COURT AND DELIVERED THE OPINION OF THE COURT WITH RESPECT TO PARTS I, III–A, III–B-1, AND IV, AND AN OPINION WITH RESPECT TO PARTS II AND III–B–2, IN WHICH THE CHIEF JUSTICE AND JUSTICE KAVANAUGH JOIN.

Aliens who are arrested because they are believed to be deportable may generally apply for release on bond or parole while the question of their removal is being decided. These aliens may secure their release by proving to the satisfaction of a Department of Homeland Security officer or an immigration judge that they would not endanger others and would not flee if released from custody.

Congress has decided, however, that this procedure is too risky in some instances. Congress therefore adopted a special rule for aliens who have committed certain dangerous crimes and those who have connections to terrorism. Under a statutory provision enacted in 1996,˜ these aliens must be arrested "when [they are] released" from custody on criminal charges and (with one narrow exception not involved in these cases) must be detained without a bond hearing until the question of their removal is resolved.

In these cases, the United States Court of Appeals for the Ninth Circuit held that this mandatory-detention requirement applies only if a covered alien is arrested by immigration officials as soon as he is released from jail. If the alien evades arrest for some

short period of time—according to respondents, even 24 hours is too long—the mandatory-detention requirement is inapplicable, and the alien must have an opportunity to apply for release on bond or parole. Four other Circuits have rejected this interpretation of the statute, and we agree that the Ninth Circuit's interpretation is wrong. We therefore reverse the judgments below and remand for further proceedings.

I

A

Under federal immigration law, aliens present in this country may be removed if they fall "within one or more ... classes of deportable aliens." 8 U.S.C. § 1227(a). In these cases, we focus on two provisions governing the arrest, detention, and release of aliens who are believed to be subject to removal.

The first provision, § 1226(a),˜ applies to most such aliens, and it sets out the general rule regarding their arrest and detention pending a decision on removal. Section 1226(a) contains two sentences, one dealing with taking an alien into custody and one dealing with detention. The first sentence empowers the Secretary of Homeland Security˜ to arrest and hold an alien "pending a decision on whether the alien is to be removed from the United States." The second sentence generally gives the Secretary the discretion either to detain the alien or to release him on bond or parole. If the alien is detained, he may seek review of his detention by an officer at the Department of Homeland Security and then by an immigration judge (both exercising power delegated by the Secretary), see 8 CFR §§ 236.1(c)(8) and (d)(1), 1003.19, 1236.1(d)(1) (2018); and the alien may secure his release if he can convince the officer or immigration judge that he poses no flight risk and no danger to the community. See §§ 1003.19(a), 1236.1(d); Matter of Guerra, 24 I. & N. Dec. 37 (BIA 2006). But while 8 U.S.C. § 1226(a) generally permits an alien to seek release in this way, that provision's sentence on release states that all this is subject to an exception that is set out in § 1226(c).

Section 1226(c) was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, and it sprang from a "concer[n] that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers."˜ To address this problem, Congress mandated that aliens who were thought to pose a heightened risk be arrested and detained without a chance to apply for release on bond or parole.

Section 1226(c) consists of two paragraphs, one on the decision to take an alien into "[c]ustody" and another on the alien's subsequent "[r]elease."˜ The first paragraph (on custody) sets out four categories of covered aliens, namely, those who are inadmissible or deportable on specified grounds. It then provides that the Secretary must take any

alien falling into one of these categories "into custody" "when the alien is released" from criminal custody.

The second paragraph (on release from immigration custody) states that "an alien described in paragraph (1)" may be released "only if [the Secretary] decides" that release is "necessary to provide protection" for witnesses or others cooperating with a criminal investigation, or their relatives or associates. That exception is not implicated in the present cases.

The categories of predicates for mandatory detention identified in subparagraphs (A)-(D) generally involve the commission of crimes. As will become relevant to our analysis, however, some who satisfy subparagraph (D)—e.g., close relatives of terrorists and those who are thought likely to engage in terrorist activity, see 8 U.S.C. § 1182(a)(3)(B)(i)(IX)—may never have been charged with any crime in this country. Still, since the vast majority of mandatory-detention cases do involve convictions, we follow the heading of subsection (c), as well as our cases and the courts below, in referring to aliens who satisfy subparagraphs (A)-(D) collectively as "criminal aliens."

The Board of Immigration Appeals has held that subsection (c)(2), which requires the detention of aliens "described in" subsection (c)(1), applies to all aliens who fall within subparagraphs (A)-(D), whether or not they were arrested immediately "when [they were] released" from criminal custody. Matter of Rojas, 23 I. & N. Dec. 117 (BIA 2001) (en banc).

B

Respondents in the two cases before us are aliens who were detained under § 1226(c)(2)'s mandatory-detention requirement—and thus denied a bond hearing—pending a decision on their removal. See Preap v. Johnson, 831 F.3d 1193 (CA9 2016); Khoury v. Asher, 667 Fed. Appx. 966 (CA9 2016). Though all respondents had been convicted of criminal offenses covered in §§ 1226(c)(1)(A)-(D), none were arrested by immigration officials immediately after their release from criminal custody. Indeed, some were not arrested until several years later.

Respondent Mony Preap, the lead plaintiff in the case that bears his name, is a lawful permanent resident with two drug convictions that qualify him for mandatory detention under § 1226(c). Though he was released from criminal custody in 2006, immigration officials did not detain him until 2013, when he was released from jail after an arrest for another offense. His co-plaintiffs Juan Lozano Magdaleno and Eduardo Vega Padilla were taken into immigration detention, respectively, 5 and 11 years after their release from custody for a § 1226(c) predicate offense. Preap, Magdaleno, and Padilla filed habeas petitions and a class-action complaint alleging that because they were

not arrested "immediately" after release from criminal custody, they are exempt from mandatory detention under § 1226(c) and are entitled to a bond hearing to determine if they should be released pending a decision on their status.

Although the named plaintiffs in Preap were not taken into custody on immigration grounds until years after their release from criminal custody, the District Court certified a broad class comprising all aliens in California "who are or will be subjected to mandatory detention under 8 U.S.C. section 1226(c) and who were not or will not have been taken into custody by the government *immediately* upon their release from criminal custody for a [s]ection 1226(c)(1) offense." 831 F.3d at 1198 (emphasis added). The District Court granted a preliminary injunction against the mandatory detention of the members of this class, holding that criminal aliens are exempt from mandatory detention under § 1226(c) (and are thus entitled to a bond hearing) unless they are arrested "'when [they are] released,' and no later." Preap v. Johnson, 303 F.R.D. 566, 577 (N.D. Cal. 2014) (quoting 8 U.S.C. § 1226(c)(1)). The Court of Appeals for the Ninth Circuit affirmed.

Khoury, the other case now before us, involves habeas petitions and a class-action complaint filed in the Western District of Washington. The District Court certified a class comprising all aliens in that district "who were subjected to mandatory detention under 8 U.S.C. § 1226(c) even though they were not detained immediately upon their release from criminal custody." 667 Fed. Appx., at 967. The District Court granted summary judgment for respondents, and the Ninth Circuit again affirmed, citing its decision on the same day in Preap.

Because Preap and Khoury created a split with four other Courts of Appeals, we granted certiorari to review the Ninth Circuit's ruling that criminal aliens who are not arrested immediately upon release are thereby exempt from mandatory detention under § 1226(c).˜ We now reverse.

II

Before addressing the merits of the Court of Appeals' interpretation, we resolve four questions regarding our jurisdiction to hear these cases.˜

III

Having assured ourselves of our jurisdiction, we turn to the merits. Respondents contend that they are not properly subject to § 1226(c)'s mandatory-detention scheme, but instead are entitled to the bond hearings available to those held under the general arrest and release authority provided in § 1226(a). Respondents' primary textual argument turns on the interaction of paragraphs (1) and (2) of § 1226(c). Recall that

those paragraphs govern, respectively, the "[c]ustody" and "[r]elease" of criminal aliens guilty of a predicate offense. Paragraph (1) directs the Secretary to arrest any such alien "when the alien is released," and paragraph (2) forbids the Secretary to release any "alien described in paragraph (1)" pending a determination on removal (with one exception not relevant here). Because the parties' arguments about the meaning of § 1226(c) require close attention to the statute's terms and structure, we reproduce the provision in full below. But only the portions of the statute that we have highlighted are directly relevant to respondents' argument. Section 1226(c) provides: "(c) Detention of criminal aliens (1) Custody *The [Secretary] shall take into custody any alien who*— (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title, (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title, (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least 1 year, or (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title, *when the alien is released,* without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense. (2) Release *The [Secretary] may release an alien described in paragraph (1) only if* the [Secretary] decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the [Secretary] that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien." (Emphasis added.)

Respondents argue that they are not subject to mandatory detention because they are not "described in" § 1226(c)(1), even though they (and all the other members of the classes they represent) fall into at least one of the categories of aliens covered by subparagraphs (A)-(D) of that provision. An alien covered by these subparagraphs is not "described in" § 1226(c)(1), respondents contend, unless the alien was also arrested "when [he or she was] released" from criminal custody. Indeed, respondents insist that the alien must have been arrested *immediately* after release. Since they and the other class members were not arrested immediately, respondents conclude, they are not "described in" § 1226(c)(1). So to detain them, the Government must rely not on § 1226(c) but on the general provisions of § 1226(a). And thus, like others detained under § 1226(a), they are owed bond hearings in which they can earn their release by

proving that they pose no flight risk and no danger to others—or so they claim. But neither the statute's text nor its structure supports this argument. In fact, both cut the other way.

A

First, respondents' position runs aground on the plain text of § 1226(c). Respondents are right that only an alien "described in paragraph (1)" faces mandatory detention, but they are wrong about which aliens are "described in" paragraph (1).

Paragraph (1) provides that the Secretary "shall take" into custody any "alien" having certain characteristics and that the Secretary must do this "when the alien is released" from criminal custody. The critical parts of the provision consist of a verb ("shall take"), an adverbial clause ("when ... released"), a noun ("alien"), and a series of adjectival clauses ("who ... is inadmissible," "who ... is deportable," etc.). As an initial matter, no one can deny that the adjectival clauses modify (and in that sense "describ[e]") the noun "alien" or that the adverbial clause "when ... released" modifies the verb "shall take." And since an adverb cannot modify a noun, the "when released" clause cannot modify "alien." Again, what modifies (and in that sense "describe[s]") the noun "alien" are the adjectival clauses that appear in subparagraphs (A)-(D).

Respondents and the dissent contend that this grammatical point is not the end of the matter—that an adverb can "describe" a person even though it cannot modify the noun used to denote that person.˜ But our interpretation is not dependent on a rule of grammar. The preliminary point about grammar merely complements what is critical, and indeed conclusive in these cases: the particular meaning of the term "described" as it appears in § 1226(c)(2).˜ [T]he term "'describe' takes on different meanings in different contexts." A leading definition of the term is "to communicate verbally ... an account of salient *identifying* features," Webster's Third New International Dictionary 610 (1976), and that is clearly the meaning of the term used in the phrase "an alien *described* in paragraph (1)." (Emphasis added.) This is clear from the fact that the indisputable job of the "descri[ption] in paragraph (1)" is to "identif[y]" for the Secretary—to list the "salient ... features" by which she can pick out—which aliens she must arrest immediately "when [they are] released."

And here is the crucial point: The "when ... released" clause could not possibly describe aliens in that sense; it plays no role in identifying for the Secretary which aliens she must immediately arrest. If it did, the directive in § 1226(c)(1) would be nonsense. It would be ridiculous to read paragraph (1) as saying: "The Secretary must arrest, upon their release from jail, a particular subset of criminal aliens. Which ones? Only those who are arrested upon their release from jail." Since it is the Secretary's action that determines

who is arrested upon release, "being arrested upon release" cannot be one of her criteria in figuring out whom to arrest. So it cannot "describe"—it cannot give the Secretary an "identifying featur[e]" of—the relevant class of aliens. On any other reading of paragraph (1), the command that paragraph (1) gives the Secretary would be downright incoherent.

Our reading is confirmed by Congress's use of the definite article in "when the alien is released." Because "[w]ords are to be given the meaning that proper grammar and usage would assign them,"˜ the "rules of grammar govern" statutory interpretation "unless they contradict legislative intent or purpose,"˜. Here grammar and usage establish that "the" is "a function word ... indicat[ing] that a following noun or noun equivalent is definite or has been previously specified by context." Merriam-Webster's Collegiate Dictionary 1294 (11th ed. 2005).˜ For "the alien"—in the clause "when the alien is released"—to have been previously specified, its scope must have been settled by the time the "when ... released" clause appears at the tail end of paragraph (1).

For these reasons, we hold that the scope of "the alien" is fixed by the predicate offenses identified in subparagraphs (A)-(D).˜ And since only those subparagraphs settle who is "described in paragraph (1)," anyone who fits their description falls under paragraph (2)'s detention mandate—even if (as with respondents) the Secretary did not arrest them immediately "when" they were "released."

B

In reaching the contrary conclusion, the Ninth Circuit thought that the very structure of § 1226 favors respondents' reading. In particular, the Ninth Circuit reasoned, each subsection's arrest and release provisions must work together. Thus, aliens must be arrested under the general arrest authority in subsection (a) in order to get a bond hearing under subsection (a)'s release provision. And in order to face mandatory detention under subsection (c), criminal aliens must have been arrested under subsection (c). But since subsection (c) authorizes only immediate arrest, the argument continues, those arrested later fall under subsection (a), not (c). Accordingly, the court concluded, those arrested well after release escape subsection (c)'s detention mandate.˜ But this argument misreads the structure of § 1226; and in any event, the Ninth Circuit's conclusion would not follow even if we granted all its premises about statutory structure.

1

Although the Ninth Circuit viewed subsections (a) and (c) as establishing separate sources of arrest and release authority, in fact subsection (c) is simply a limit on the authority conferred by subsection (a).

Recall that subsection (a) has two sentences that provide the Secretary with general discretion over the arrest and release of aliens, respectively. We read each of subsection (c)'s two provisions—paragraph (1) on arrest, and paragraph (2) on release—as modifying its counterpart sentence in subsection (a). In particular, subsection (a) creates authority for anyone's arrest or release under § 1226—and it gives the Secretary broad discretion as to both actions—while subsection (c)'s job is to subtract some of that discretion when it comes to the arrest and release of criminal aliens. Thus, subsection (c)(1) limits subsection (a)'s first sentence by curbing the discretion to arrest: The Secretary must arrest those aliens guilty of a predicate offense. And subsection (c)(2) limits subsection (a)'s second sentence by cutting back the Secretary's discretion over the decision to release: The Secretary may not release aliens "described in" subsection (c)(1)—that is, those guilty of a predicate offense. Accordingly, all the relevant detainees will have been arrested by authority that springs from subsection (a), and so, contrary to the Court of Appeals' view, that fact alone will not spare them from subsection (c)(2)'s prohibition on release. This reading comports with the Government's practice of applying to the arrests of all criminal aliens certain procedural requirements, such as the need for a warrant, that appear only in subsection (a).˜

The text of § 1226 itself contemplates that aliens arrested under subsection (a) may face mandatory detention under subsection (c). The second sentence in subsection (a)—which generally authorizes the Secretary to release an alien pending removal proceedings—features an exception "as provided in subsection (c)." But if the Court of Appeals were right that subsection (c)(2)'s prohibition on release applies only to those arrested pursuant to subsection (c)(1), there would have been no need to specify that such aliens are exempt from subsection (a)'s release provision. This shows that it is possible for those arrested under subsection (a) to face mandatory detention under subsection (c). We draw a similar inference from the fact that subsection (c)(2), for its part, does not limit mandatory detention to those arrested "pursuant to" subsection (c)(1) or "under authority created by" subsection (c)(1)—but to anyone so much as "described in" subsection (c)(1). This choice of words marks a contrast with Congress's reference—in the immediately preceding subsection—to actions by the Secretary that are "authorized under" subsection (a). See § 1226(b). Cf. 18 U.S.C. § 3262(b) (referring to "a person *arrested under* subsection (a)" (emphasis added)). These textual cues indicate that even if an alien was not arrested under authority bestowed by subsection (c)(1), he may face mandatory detention under subsection (c)(2).

2

But even if the Court of Appeals were right to reject this reading, the result below would be wrong. To see why, assume with the Court of Appeals that only someone

arrested under authority created by § 1226(c)(1)—rather than the more general § 1226(a)—may be detained without a bond hearing. And assume that subsection (c)(1) requires immediate arrest. Even then, the Secretary's failure to abide by this time limit would not cut off her power to arrest under subsection (c)(1). That is so because, as we have held time and again, an official's crucial duties are better carried out late than never.˜ Or more precisely, a statutory rule that officials "'shall' act within a specified time" does not by itself "preclud[e] action later."˜

Especially hard to swallow is respondents' insistence that for an alien to be subject to mandatory detention under § 1226(c), the alien must be arrested on the day he walks out of jail (though respondents allow that it need not be at the jailhouse door—the "parking lot" or "bus stop" would do).˜ "Assessing the situation in realistic and practical terms, it is inevitable that" respondents' unsparing deadline will often be missed for reasons beyond the Federal Government's control.˜ To give just one example, state and local officials sometimes rebuff the Government's request that they give notice when a criminal alien will be released. Indeed, over a span of less than three years (from January 2014 to September 2016), the Government recorded "a total of 21,205 declined [requests] in 567 counties in 48 states including the District of Columbia."˜ Under these circumstances, it is hard to believe that Congress made the Secretary's mandatory-detention authority vanish at the stroke of midnight after an alien's release.

Even if subsection (c) were the only font of authority to detain aliens without bond hearings, we could not read its "when ... released" clause to defeat officials' duty to impose such mandatory detention when it comes to aliens who are arrested well after their release.

IV

Respondents protest that reading § 1226(c) in the manner set forth here would render key language superfluous, lead to anomalies, and violate the canon of constitutional avoidance. We answer these objections in turn.

A

According to respondents, the Government's reading of § 1226(c) flouts the interpretive canon against surplusage—the idea that "every word and every provision is to be given effect [and that n]one should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence."˜ Respondents' surplusage argument has two focal points.

First, respondents claim that if they face mandatory detention even though they were arrested well after their release, then "when ... released" adds nothing to paragraph

(1). In fact, however, it still has work to do. For one thing, it clarifies when the duty to arrest is triggered: upon release from criminal custody, not before such release or after the completion of noncustodial portions of a criminal sentence (such as a term of "parole, supervised release, or probation," as the paragraph goes on to emphasize). Thus, paragraph (1) does not permit the Secretary to cut short an alien's state prison sentence in order to usher him more easily right into immigration detention—much as another provision prevents officials from actually removing an alien from the country "until the alien is released from imprisonment." 8 U.S.C. § 1231(a)(4)(A). And from the other end, as paragraph (1)'s language makes clear, the Secretary need not wait for the sentencing court's supervision over the alien to expire.

The "when ... released" clause also serves another purpose: exhorting the Secretary to act quickly. And this point answers respondents' second surplusage claim: that the "Transition Period Custody Rules" enacted along with § 1226(c) would have been superfluous if § 1226(c) did not call for immediate arrests, since those rules authorized delays in § 1226(c)'s implementation while the Government expanded its capacities.˜ This argument again confuses what the Secretary is obligated to do with the consequences that follow if the Secretary fails (for whatever reason) to fulfill that obligation. The transition rules delayed the onset of the Secretary's obligation to begin making arrests as soon as covered aliens were released from criminal custody, and in that sense they were not superfluous.˜ This is so even though, had the transition rules not been adopted, the Secretary's failure to make an arrest immediately upon a covered alien's release would not have exempted the alien from mandatory detention under § 1226(c).

B

The Court of Appeals objected that the Government's reading of § 1226(c) would have the bizarre result that some aliens whom the Secretary need not arrest at all must nonetheless be detained without a hearing if they are arrested.˜ This rather complicated argument, as we understand it, proceeds as follows. Paragraph (2) requires the detention of aliens "described in paragraph (1)." While most of the aliens described there have been convicted of a criminal offense, this need not be true of aliens captured by subparagraph (D) in particular—which covers, for example, aliens who are close relatives of terrorists and those who are believed likely to commit a terrorist act. See § 1182(a)(3)(B)(i)(IX). But if, as the Government maintains, any alien who falls under subparagraphs (A)-(D) is thereby ineligible for release from immigration custody, then the Secretary would be forbidden to release even these aliens who were never convicted or perhaps even charged with a crime, once she arrested them. Yet she would be free not to arrest them to begin with (or so the Court of Appeals assumed), since she is obligated to arrest aliens "when

... released," and there was no prior custody for these aliens to be "released" from. Therefore, the court concluded, the Government's position has the absurd implication that aliens who were never charged with a crime need not be arrested pending a removal determination, but if they are arrested, they must be detained and cannot be released on bond or parole.

We agree that it would be very strange for Congress to forbid the release of aliens who need not be arrested in the first place, but the fact is that the Government's reading (and ours) does not have that incongruous result. The real anomalies here would flow instead from the Court of Appeals' interpretation.

To begin with the latter point: Under the Court of Appeals' reading, the mandatory-detention scheme would be gentler on terrorists than it is on garden-variety offenders. To see why, recall first that subparagraphs (A)–(C) cover aliens who are inadmissible or deportable based on the commission of certain criminal offenses, and there is no dispute that the statute authorizes their mandatory detention when they are released from criminal custody. And the crimes covered by these subparagraphs include, for example, any drug offense by an adult punishable by more than one year of imprisonment, see §§ 1182(a)(2), 1226(c)(1)(A), as well as a variety of tax offenses, see §§ 1226(c)(1)(B), 1227(a)(2)(A)(iii)˜. But notice that aliens who fall within subparagraph (D), by contrast, may never have been arrested on criminal charges—which according to the court below would exempt them from mandatory detention. Yet this subparagraph covers the very sort of aliens for which Congress was most likely to have wanted to require mandatory detention—including those who are representatives of a terrorist group and those whom the Government has reasonable grounds to believe are likely to engage in terrorist activities. See §§ 1182(a)(3)(B)(i)(III), (IV), 1226(c)(1)(D).˜ Thus, by the Court of Appeals' logic, Congress chose to spare terrorist aliens from the rigors of mandatory detention—a mercy withheld from almost all drug offenders and tax cheats.˜ That result would be incongruous.

Along similar lines, note that one § 1226(c)(1) predicate reaches aliens who necessarily escape conviction: those "for whom immunity from criminal jurisdiction was exercised." § 1182(a)(2)(E)(ii). See § 1226(c)(1)(A). And other predicates sweep in aliens whom there is no reason to expect police (as opposed to immigration officials) will have reason to arrest: e.g., the "spouse or child of an alien" who recently engaged in terrorist activity. § 1182(a)(3)(B)(i)(IX); see § 1226(c)(1)(D). It would be pointless for Congress to have covered such aliens in subsections (c)(1)(A)-(D) if subsection (c)'s mandates applied only to those emerging from jail.

Thus, contrary to the Court of Appeals' interpretation of the "when released" clause as limiting the class of aliens subject to mandatory detention, we read subsection

(c)(1) to specify the timing of arrest ("when the alien is released") only for the vast majority of cases: those involving criminal aliens who were once in criminal custody. The paragraph simply does not speak to the timeline for arresting the few who had no stint in jail. (And why should it? Presumably they—unlike those serving time—are to be detained as they come across the Government's radar and any relevant evidentiary standards are satisfied.˜)

In short, we read the "when released" directive to apply when there is a release. In other situations, it is simply not relevant. It follows that both of subsection (c)'s mandates—for arrest and for release—apply to any alien linked with a predicate offense identified in subparagraphs (A)-(D), regardless of exactly when or even whether the alien was released from criminal custody.

C

Finally, respondents perch their reading of § 1226(c)—unsteadily, as it turns out—on the canon of constitutional avoidance. This canon provides that "[w]hen 'a serious doubt' is raised about the constitutionality of an act of Congress, '... this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'"˜

Respondents say we should be uneasy about endorsing any reading of § 1226(c) that would mandate arrest and detention years after aliens' release from criminal custody—when many aliens will have developed strong ties to the country and a good chance of being allowed to stay if given a hearing. At that point, respondents argue, mandatory detention may be insufficiently linked to public benefits like protecting others against crime and ensuring that aliens will appear at their removal proceedings. In respondents' view, detention in that scenario would raise constitutional doubts˜. Thus, respondents urge, we should adopt a reading of § 1226(c)—their reading—that avoids this result.

The trouble with this argument is that constitutional avoidance "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction."˜ Here the text of § 1226 cuts clearly against respondents' position, see Part III, supra, making constitutional avoidance irrelevant.

We emphasize that respondents' arguments here have all been statutory. Even their constitutional concerns are offered as just another pillar in an argument for their preferred reading of the language of § 1226(c)—an idle pillar here because the statute is clear. While respondents might have raised a head-on constitutional challenge to § 1226(c), they did not. Our decision today on the meaning of that statutory provision

does not foreclose as-applied challenges—that is, constitutional challenges to applications of the statute as we have now read it.

* * *

The judgments of the Court of Appeals for the Ninth Circuit are reversed, and the cases are remanded for further proceedings.

It is so ordered.

JUSTICE KAVANAUGH, CONCURRING.

I write separately to emphasize the narrowness of the issue before us and, in particular, to emphasize what this case is not about.

This case is not about whether a noncitizen may be removed from the United States on the basis of criminal offenses. Under longstanding federal statutes, the Executive Branch may remove noncitizens from the United States when the noncitizens have been convicted of certain crimes, even when the crimes were committed many years ago.

This case is also not about whether a noncitizen may be detained during removal proceedings or before removal. Congress has expressly authorized the Executive Branch to detain noncitizens during their removal proceedings and before removal. 8 U.S.C. §§ 1226(a), (c), and 1231(a).

This case is also not about how long a noncitizen may be detained during removal proceedings or before removal.˜

This case is also not about whether Congress may mandate that the Executive Branch detain noncitizens during removal proceedings or before removal, as opposed to merely giving the Executive Branch discretion to detain.˜

The sole question before us is narrow: whether, under § 1226, the Executive Branch's mandatory duty to detain a particular noncitizen when the noncitizen is released from criminal custody remains mandatory if the Executive Branch fails to immediately detain the noncitizen when the noncitizen is released from criminal custody—for example, if the Executive Branch fails to immediately detain the noncitizen because of resource constraints or because the Executive Branch cannot immediately locate and apprehend the individual in question. No constitutional issue is presented. The issue before us is entirely statutory and requires our interpretation of the strict 1996 illegal-immigration law passed by Congress and signed by President Clinton. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009–546.

It would be odd, in my view, if the Act (1) mandated detention of particular noncitizens because the noncitizens posed such a serious risk of danger or flight that they must be detained during their removal proceedings, but (2) nonetheless allowed the noncitizens to remain free during their removal proceedings if the Executive Branch failed to immediately detain them upon their release from criminal custody. Not surprisingly, the Act does not require such an odd result. On the contrary, the relevant text of the Act is relatively straightforward, as the Court explains. Interpreting that text, the Court correctly holds that the Executive Branch's detention of the particular noncitizens here remained mandatory even though the Executive Branch did not immediately detain them. I agree with the Court's careful statutory analysis, and I join the Court's opinion in full.˜

JUSTICE BREYER, WITH WHOM JUSTICE GINSBURG, JUSTICE SOTOMAYOR, AND JUSTICE KAGAN JOIN, DISSENTING.˜

Does paragraph (1) "describ[e]" all ABCD aliens, even those whom the Secretary has "take[n] into custody" many years after their release from prison? Or does it "describ[e]" only those aliens whom the Secretary has "take[n] into custody ... when the alien [was] released" from prison?˜

The issue may sound technical. But it is extremely important. That is because the Government's reading of the statute—namely, that paragraph (2) forbids bail hearings for all ABCD aliens regardless of whether they were detained "when ... released" from criminal custody—would significantly expand the Secretary's authority to deny bail hearings. Under the Government's view, the aliens subject to detention without a bail hearing may have been released from criminal custody years earlier, and may have established families and put down roots in a community. These aliens may then be detained for months, sometimes years, without the possibility of release; they may have been convicted of only minor crimes—for example, minor drug offenses, or crimes of "moral turpitude" such as illegally downloading music or possessing stolen bus transfers; and they sometimes may be innocent spouses or children of a suspect person. Moreover, for a high percentage of them, it will turn out after months of custody that they will not be removed from the country because they are eligible by statute to receive a form of relief from removal such as cancellation of removal. These are not mere hypotheticals.˜ Thus,˜ the question before us is not a "narrow" one˜.

Why would Congress have granted the Secretary such broad authority to deny bail hearings, especially when doing so would run contrary to basic American and common-law traditions?˜ The answer is that Congress did not do so.˜

The statute's language, its structure, and relevant canons of interpretation make clear that the Secretary cannot hold an alien without a bail hearing unless the alien is "take[n] into custody ... when the alien is released" from criminal custody. § 1226(c)(1).˜

For these reasons, with respect, I dissent.

4.10 Immigration Detention Facilities

The detention of noncitizens in the United States is managed by the Enforcement and Removal Operations (ERO) division of U.S. Immigration and Customs Enforcement (ICE). ERO oversees noncitizens in approximately 190 facilities, exclusive of hospitals and hotels, across the United States and its territories. These facilities include:

- 5 ICE-owned "Service Processing Centers" that are operated by private sector companies;
- 4 ICE "staging facilities," where migrants are housed for no more than 16 hours;
- 13 ICE "contract detention facilities" that are owned and operated by private sector companies;
- 25 ICE-dedicated "Intergovernmental Service Agreement (IGSA) facilities," which are state and local facilities;
- 57 non-dedicated ICE IGSAs;
- 84 United States Marshals Service Intergovernmental Agreements and contracts, and
- 2 Federal Bureau of Prisons institutions.

Kit Johnson, Tales of a Flow Stayed by Nothing: Menstruation in Immigration Detention, 41 COLUM. J. GENDER & L. 1 (2021)

The conditions under which [adult] migrants are [detained]˜ look and feel exactly like the jails and prisons that hold criminal defendants and those convicted of crimes. Indeed, migrants are often civilly detained within existing jails and prisons alongside criminal justice detainees.˜ Even special-purpose immigration detention facilities are often designed by entities who build criminal detention sites, and their forms mimic those of traditional carceral settings.˜ Common features include remote locations, secure perimeter fencing, locked doors, surveillance machinery, immobile furniture, and 24-hour lighting.˜ Beyond their physical features, immigration detention centers are run in a parallel fashion to institutions of criminal incarceration.˜ Most facilities have

uniformed guards who enforce strict rules and count detainees several times a day.˜ Detainees frequently wear uniforms, are separated by their assessed level of risk to others, have limited time outdoors, enjoy limited mobility inside the detention facility, have limits on their personal possessions (e.g. number and type of books), experience time constraints on everything from showers to meals, and are not entitled to contact visits with their families.˜

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Immigration detention facilities have rules for detainees. Those rules might govern the cleaning of cells and common areas, using the telephone, proper wearing of uniforms, walking through hallways, and responding to guard requests. Immigrant detainees can be punished for failing to abide by facility rules. Punishment can include being moved to "segregation" cells, also known as solitary confinement. A 2024 study by Physicians for Human Rights, Harvard Law School's Immigration and Refugee Clinical Program, and researchers at Harvard Medical School, revealed that, in the past five years, solitary confinement has been used over 14,000 times in immigration detention. The average length of time spent in solitary confinement was 27 days—"well exceeding the 15-day threshold that United Nations (UN) human rights experts have found constitutes torture." Some noncitizen detainees were held in solitary confinement for much longer: 682 individuals were confined for at least 90 days and another 42 individuals were placed in solitary confinement for over a year. See *"Endless Nightmare": Torture and Inhuman Treatment in Solitary Confinement in U.S. Immigration Detention* (2024), https://phr.org/wp-content/uploads/2024/02/PHR-REPORT-ICE-Solitary-Confinement-2024.pdf.

4.11 Immigration Detention Transfers

Under INA § 241(g)(1), 8 U.S.C § 1231(g)(1), ICE has the power to "arrange for appropriate places of detention for aliens detained pending removal or a decision on removal." Courts have held that this statutory provision authorizes ICE to make decisions regarding the transfer of noncitizens to different immigration detention facilities. See, e.g., Van Dinh v. Reno, 197 F.3d 427 (10th Cir. 1999).

Human Rights Watch (HRW) examined data from Fiscal Years 1998-2010 and found that "over 46 percent of transferred detainees were moved at least two times, with 3,400 people transferred 10 times or more. One egregious case involved a detainee who was transferred 66 times. On average, each transferred detainee traveled 370 miles, and one frequent transfer route (between Pennsylvania and Texas) covered 1,642 miles." HRW, *A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant*

Detainees in the United States (2011), https://www.hrw.org/sites/default/files/reports/us0611webwcover_0.pdf. Professors Emily Ryo and Ian Peacock published an updated study of immigration detention in 2018. *A National Study of Immigration Detention in the United States*, 92 S. CAL. L. REV. 1 (2018). Professors Ryo and Peacock found that, among adults released from immigration detention in Fiscal Year 2015, 27% had experienced at least one transfer during their detention, 15% experienced two transfers, and 12% experienced three or more transfers.

4.12 Detention of Unaccompanied Migrant Children

CRS, Immigration Detention: A Legal Overview (2019)

[A] 1997 court settlement agreement (the "Flores Settlement") currently limits the period in which an alien minor (i.e., under the age of 18) may be detained by DHS.˜ Furthermore, under federal statute, an unaccompanied alien child (UAC) who is subject to removal is generally placed in the custody of the Department of Health and Human Services' Office of Refugee Resettlement (ORR), rather than DHS, pending his or her removal proceedings.˜

The Flores Settlement originates from a 1985 class action lawsuit brought by a group of UACs apprehended at or near the border, who challenged the conditions of their detention and release.˜ The parties later settled the plaintiffs' claims regarding the conditions of their detention, but the plaintiffs maintained a challenge to the INS's policy of allowing their release only to a parent, legal guardian, or adult relative.˜ Ultimately, in 1997, the parties reached a settlement agreement that created a "general policy favoring release" of alien minors in INS custody.˜ Under the Flores Settlement, the government generally must transfer within five days a detained minor to the custody of a qualifying adult˜ or a nonsecure state-licensed facility that provides residential, group, or foster care services for dependent children.˜ But the alien's transfer may be delayed "in the event of an emergency or influx of minors into the United States," in which case the transfer must occur "as expeditiously as possible."˜

In 2008, Congress enacted the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), which "partially codified the Flores Settlement by creating statutory standards for the treatment of unaccompanied minors."˜ Under the TVPRA, a UAC˜ must be placed in ORR's custody pending formal removal proceedings, and typically must be transferred to ORR within 72 hours after DHS determines that the child is a UAC.˜ Following transfer to ORR, the agency generally must place the UAC "in the least restrictive setting that is in the best interest of the

child," and may place the child with a sponsoring individual or entity who "is capable of providing for the child's physical and mental well-being."˜

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4.13 Detention of Family Units

ICE, Family Detention (2024)

In the past, ICE housed family units — which contain adult noncitizen parents or legal guardians accompanied by their own juvenile noncitizen children — in its Family Residential Centers (FRCs). In March 2021, ICE converted the Family Residential Centers (FRCs) from an over-72-hour residential program to an under-72-hour residential/staging program called Family Staging Centers (FSCs).

In FY 2022, ICE opted to shift its resources again to increase efficiencies in Alternatives to Detention (ATD) enrollment for family units. ICE worked to co-locate with U.S. Customs and Border Protection (CBP) to assist with limiting any processing slowdowns.

Once the agency determined that the FSCs were at a lower-than-expected capacity, ICE took steps to increase the use of the bed space for single adults and eventually, ICE stopped housing families entirely by December 2021.

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4.14 Alternatives to Detention

Noncitizens who could be detained during their immigration proceedings, but are not, are frequently subject to various forms of "alternatives to detention" or ATD. The forms of ATD are discussed below. ICE reports 184,677 individuals on ATD from January through May 2024, though the accuracy of this data is disputed.

ICE, Alternatives to Detention (2024)

WHAT ARE ALTERNATIVES TO DETENTION?

ICE's Alternatives to Detention (ATD) programs exist to ensure compliance with release conditions and provides important case management services for non-detained noncitizens. ATD consists of the Intensive Supervision Appearance Program (ISAP). The ATD-ISAP program utilizes case management and technology tools to support noncitizens compliance with release conditions while on ICE's non-detained docket. ATD-ISAP also increases court appearance rates.˜

ATD enables noncitizens to remain in their communities — contributing to their families and community organizations and, as appropriate, concluding their affairs in the U.S. — as they move through immigration proceedings or prepare for departure.

ATD has been in place since 2004 and the number of participants has increased over time. Through the end of July 2022, approximately 4.5 million noncitizens were being overseen on ICE's non-detained docket. Of those, more than 350,000 participated in the ATD program with absconder rates dropping dramatically over the past two years.

PARTICIPANT ENROLLMENT

Adults 18 years of age or older who are released from DHS custody, and who are generally in removal proceedings or subject to a final order of removal, may be eligible for enrollment in ICE's ATD programs. Participants are thoroughly vetted by officers before enrollment. Officers review several factors when making enrollment determinations, including:

- Criminal, immigration and supervision history
- Family and/or community ties
- Status as a caregiver or provider
- Humanitarian or medical considerations

COST EFFECTIVENESS

The daily cost per ATD participant is less than $8 per day — a stark contrast from the cost of detention, which is around $150 per day.˜

TECHNOLOGY TYPES

ISAP ATD uses three different types of technology to ensure compliance with release conditions: telephonic reporting, Global Positioning System (GPS) monitoring, and SmartLINK. In April, we announced limited testing of a wrist-worn GPS monitoring device as part of ongoing efforts to provide additional technology in the Alternatives to Detention (ATD) suite of options. The technology demonstration will begin with a limited deployment in Denver to test feasibility in an operational setting.

The telephonic reporting system allows a participant to report in via telephone. The phone calls are compared against voiceprints obtained during program enrollment to ensure identity verification.

Global Positioning System (GPS) monitoring uses satellites to monitor a participant's location and movement history. The GPS unit is ankle-worn and tracks the participant's location at pre-set intervals. It may be a program violation to remove the units, which are safe for use in wet environments, including showering. Participants with questions or concerns with their GPS monitors can always contact their case specialist for assistance.

SmartLINK is an application that utilizes several technologies. It uses facial matching technology by comparing a selfie to a set of photos taken during program enrollment to ensure identity verification. Simultaneously, SmartLINK may obtain a single GPS point to monitor participant compliance at the time of a login or scheduled check-in. SmartLINK also provides virtual case management support, notification reminders, and direct communication with the case specialist. If an ATD participant does not have a personally owned mobile phone at the time of ATD enrollment, the participant will be issued a device capable solely of running the SmartLINK application. SmartLINK devices must be returned upon the participant's re-assignment to a different level of supervision or completion of the ATD program. If a noncitizen acquires their own personally-owned phone, the SmartLINK application can be loaded onto that device. SmartLINK is intended for the sole purpose of providing immigration compliance and case management services to ATD participants. The application does not access personal data on a personally-owned phone such as call logs or history, contact information, text messages made outside of the SmartLINK application, or location data outside of single data points gathered through the application at login or pre-scheduled check-in times.

SmartLINK technology also allows for push notifications and reminders for upcoming appointments. This is particularly useful for court hearing reminders and office visit reminders. The participants can also search through a database to find community service provider information in their area. If they are looking for information on where to find a food bank, clothing, or other community services, the participant may search through their phone or tablet rather than or in addition to contacting a case specialist. SmartLINK also allows participants to upload and send documents to case specialists. Officers, case specialists, and participants may directly message each other.

The wrist-worn GPS monitoring technology provides GPS location monitoring, facial matching, and messaging functionalities. The device leverages technology similar to a consumer smartwatch, but it cannot be used for any function beyond compliance with immigration-related activities.

The majority of ATD participants are assigned to either the SmartLINK application on their own personal cell phone or to a SmartLINK Mobile device. As of December 2022, less than 20% of ATD participants have been assigned a GPS ankle monitor. Additionally, in response to the COVID-19 pandemic and to mitigate the limitations imposed by social distancing, ICE has increased reporting through phone calls and the SmartLINK application.

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4.15 Test Your Knowledge

PROBLEM 4.1

Who among the following noncitizens is likely to be detained and, if detained, pursuant to what provision(s) of the INA? Who among the following noncitizens is likely to be removed and, if removed, pursuant to what provision(s) of the INA? Note: to answer the second question, review sections 2.12-2.14 as well as 3.6.

Anna who presented herself at the San Ysidro POE. When asked for her documents, she confessed that she did not have any and stated that she was seeking asylum.

Benito who is currently in prison serving 2 years for drug trafficking. He came to the United States on an F-visa to study chemistry at the University of Oklahoma.

Chaz who was picked up by ICE after a workplace raid. He entered the US without authorization in 2017, after being removed in 2016.

Denver who was picked up by ICE after a workplace raid. ICE determined that Denver entered the U.S. in 2005 without authorization and has been working for this employer since that time.

Eugenia who presented herself at the San Ysidro POE. When asked for her documents, she presented those of her sister Elena. The officer spots the subterfuge.

Fitz, an LPR who entered the U.S. just two years ago, was convicted of fraud and sentenced to 18 months in prison.

Gerard who was an LPR in the US until an immigration judge ordered him removed pursuant to INA 237(a)(2)(A)(ii). He is a citizen of China, and China has placed a temporary hold on deportees due to a public health crisis.

Chapter Five: Noncitizens in the Criminal Justice System

Chapter 3 surveyed how a criminal case can affect a noncitizen's immigration status, while Chapter 4 specified how a criminal case could determine whether a noncitizen can or must be detained during their immigration proceedings. With those potential consequences in mind, this chapter explores how noncitizens should be treated in the U.S. criminal justice system.

Consider the following questions: What obligations, if any, should criminal defense counsel have to understand the immigration consequences of their client's criminal case? If a criminal case has been resolved by a plea agreement that has not taken into account the noncitizen's immigration status, can anything be done?

5.1 The Right to Criminal Defense Counsel

The Sixth Amendment to the U.S. Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." The Supreme Court has held that the Sixth Amendment guarantees that "with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained." Strickland v. Washington, 466 U.S. 668, 685 (1984).

"[T]he right to counsel is the right to effective assistance of counsel." Id. at 686 (citations omitted). It is not the right to perfect counsel. That said, when counsel acts "outside the wide range of professionally competent assistance," a criminal defendant may be able to seek post-conviction relief ("PCR"), including withdrawing a guilty plea and vacating a conviction on the basis of ineffective assistance of counsel ("IAC"), during the criminal proceeding.

These protections extend to noncitizen criminal defendants—whether lawful permanent residents, nonimmigrants, or undocumented migrants. Wong Wing v. United States, 163 U.S. 228 (1896) ("it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by" the Fifth and Sixth amendments "even aliens"); U.S. v. Wood, 299 U.S. 123 (1936) ("aliens are within the protection of the Sixth Amendment").

5.2 Case: Padilla v. Kentucky

Padilla v. Kentucky
559 U.S. 356 (2010)

JUSTICE STEVENS DELIVERED THE OPINION OF THE COURT.

Petitioner Jose Padilla, a native of Honduras, has been a lawful permanent resident of the United States for more than 40 years. Padilla served this Nation with honor as a member of the U.S. Armed Forces during the Vietnam War. He now faces deportation after pleading guilty to the transportation of a large amount of marijuana in his tractor-trailer in the Commonwealth of Kentucky.˜

In this postconviction proceeding, Padilla claims that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he "did not have to worry about immigration status since he had been in the country so long."˜ Padilla relied on his counsel's erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory. He alleges that he would have insisted on going to trial if he had not received incorrect advice from his attorney.

Assuming the truth of his allegations, the Supreme Court of Kentucky denied Padilla postconviction relief without the benefit of an evidentiary hearing. The court held that the Sixth Amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a "collateral" consequence of his conviction.˜ In its view, neither counsel's failure to advise petitioner about the possibility of removal, nor counsel's incorrect advice, could provide a basis for relief.

We granted certiorari,˜ to decide whether, as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country. We agree with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation. Whether he is entitled to relief depends on whether he has been prejudiced, a matter that we do not address.

I

The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The "drastic measure" of deportation or removal,˜ is now virtually inevitable for a vast number of noncitizens convicted of crimes.˜

These changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part˜—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

II

Before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel."˜ [*Strickland v. Washington*, 466 U.S. 668, 686 (1984).] The Supreme Court of Kentucky rejected Padilla's ineffectiveness claim on the ground that the advice he sought about the risk of deportation concerned only collateral matters, *i.e.,* those matters not within the sentencing authority of the state trial court.˜ In its view, "collateral consequences are outside the scope of representation required by the Sixth Amendment," and, therefore, the "failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel."˜ The Kentucky high court is far from alone in this view.˜

We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally "reasonable professional assistance" required under *Strickland*˜. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.

We have long recognized that deportation is a particularly severe "penalty," *Fong Yue Ting v. United States,* 149 U.S. 698, 740˜ (1893); but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature,˜ deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century˜. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the

penalty from the conviction in the deportation context.˜ Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult.˜

Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to Padilla's claim.

III

Under *Strickland,* we first determine whether counsel's representation "fell below an objective standard of reasonableness."˜ Then we ask whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."˜ The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."˜ We long have recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable ... ."˜ Although they are "only guides,"˜ not "inexorable commands,"˜ these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.

The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.˜ "[A]uthorities of every stripe—including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications—universally require defense attorneys to advise as to the risk of deportation consequences for noncitizen clients ... ." Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as *Amici Curiae* 12–14 (footnotes omitted) (citing, *inter alia,* National Legal Aid and Defender Assn., Performance Guidelines for Criminal Prosecution, §§ 6.2–6.4 (1997); S. Bratton & E. Kelley, Practice Points: Representing a Noncitizen in a Criminal Case, 31 The Champion 61 (Jan./ Feb.2007); N. Tooby, Criminal Defense of Immigrants § 1.3 (3d ed.2003); 2 Criminal Practice Manual §§ 45:3, 45:15 (West 2009)).

We too have previously recognized that "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence."˜ Likewise, we have recognized that "preserving the possibility of" discretionary relief

from deportation˜, "would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial."˜ We expected that counsel who were unaware of the discretionary relief measures would "follo[w] the advice of numerous practice guides" to advise themselves of the importance of this particular form of discretionary relief.˜

In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla's conviction. See [INA § 237(a)(2)(B)(i)] ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance ..., other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable"). Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. Instead, Padilla's counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect.

Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice ALITO), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.˜ But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Accepting his allegations as true, Padilla has sufficiently alleged constitutional deficiency to satisfy the first prong of *Strickland*. Whether Padilla is entitled to relief on his claim will depend on whether he can satisfy *Strickland*'s second prong, prejudice, a matter we leave to the Kentucky courts to consider in the first instance.

IV

The Solicitor General has urged us to conclude that *Strickland* applies to Padilla's claim only to the extent that he has alleged affirmative misadvice. In the United States' view, "counsel is not constitutionally required to provide advice on matters that will not be decided in the criminal case ...," though counsel is required to provide accurate advice if she chooses to discuss these matters.˜

A holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of "the advantages and disadvantages of a plea agreement."˜ When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all.˜ Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so "clearly satisfies the first prong of the *Strickland* analysis."˜

We have given serious consideration to the concerns that the Solicitor General, respondent, and *amici* have stressed regarding the importance of protecting the finality of convictions obtained through guilty pleas. We confronted a similar "floodgates" concern in *Hill*˜ but nevertheless applied *Strickland* to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty.˜

A flood did not follow in that decision's wake. Surmounting *Strickland*'s high bar is never an easy task.˜ Moreover, to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.˜ There is no reason to doubt that lower courts—now quite experienced with applying *Strickland*—can effectively and efficiently use its framework to separate specious claims from those with substantial merit.

It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea.˜ We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty.˜

Likewise, although we must be especially careful about recognizing new grounds for attacking the validity of guilty pleas, in the 25 years since we first applied *Strickland* to claims of ineffective assistance at the plea stage, practice has shown that pleas are less

frequently the subject of collateral challenges than convictions obtained after a trial. Pleas account for nearly 95% of all criminal convictions.˜ But they account for only approximately 30% of the habeas petitions filed.˜ The nature of relief secured by a successful collateral challenge to a guilty plea—an opportunity to withdraw the plea and proceed to trial—imposes its own significant limiting principle: Those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea. Thus, a different calculus informs whether it is wise to challenge a guilty plea in a habeas proceeding because, ultimately, the challenge may result in a *less favorable* outcome for the defendant, whereas a collateral challenge to a conviction obtained after a jury trial has no similar downside potential.

Finally, informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.

In sum, we have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.˜ The severity of deportation—"the equivalent of banishment or exile,"˜—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.

V

It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the "mercies of incompetent counsel."˜ To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.

Taking as true the basis for his motion for postconviction relief, we have little difficulty concluding that Padilla has sufficiently alleged that his counsel was constitutionally deficient. Whether Padilla is entitled to relief will depend on whether he can demonstrate prejudice as a result thereof, a question we do not reach because it was not passed on below.˜

The judgment of the Supreme Court of Kentucky is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE ALITO, WITH WHOM THE CHIEF JUSTICE JOINS, CONCURRING IN THE JUDGMENT.

I concur in the judgment because a criminal defense attorney fails to provide effective assistance within the meaning of *Strickland*˜ if the attorney misleads a noncitizen client regarding the removal consequences of a conviction. In my view, such an attorney must (1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney. I do not agree with the Court that the attorney must attempt to explain what those consequences may be. As the Court concedes, "[i]mmigration law can be complex"; "it is a legal specialty of its own"; and "[s]ome members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it."˜ The Court nevertheless holds that a criminal defense attorney must provide advice in this specialized area in those cases in which the law is "succinct and straightforward"—but not, perhaps, in other situations.˜ This vague, halfway test will lead to much confusion and needless litigation.

I

Under *Strickland,* an attorney provides ineffective assistance if the attorney's representation does not meet reasonable professional standards.˜ Until today, the longstanding and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the *direct* consequences of a criminal conviction.˜ While the line between "direct" and "collateral" consequences is not always clear,˜ the collateral-consequences rule expresses an important truth: Criminal defense attorneys have expertise regarding the conduct of criminal proceedings. They are not expected to possess—and very often do not possess—expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on matters that lie outside their area of training and experience.

This case happens to involve removal, but criminal convictions can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses.˜ A criminal conviction may also severely damage a defendant's reputation and thus impair the defendant's ability to obtain future employment or business opportunities. All of those consequences are "seriou[s],"˜ but this Court has never held that a criminal defense attorney's Sixth Amendment duties extend to providing advice about such matters.

The Court tries to justify its dramatic departure from precedent by pointing to the views of various professional organizations.˜ However, ascertaining the level of professional competence required by the Sixth Amendment is ultimately a task for the courts.˜ Although we may appropriately consult standards promulgated by private bar groups, we cannot delegate to these groups our task of determining what the Constitution commands.˜ And we must recognize that such standards may represent only the aspirations of a bar group rather than an empirical assessment of actual practice.

Even if the only relevant consideration were "prevailing professional norms," it is hard to see how those norms can support the duty the Court today imposes on defense counsel. Because many criminal defense attorneys have little understanding of immigration law,˜ it should follow that a criminal defense attorney who refrains from providing immigration advice does not violate prevailing professional norms. But the Court's opinion would not just require defense counsel to warn the client of a general *risk* of removal; it would also require counsel in at least some cases, to specify what the removal *consequences* of a conviction would be.˜

The Court's new approach is particularly problematic because providing advice on whether a conviction for a particular offense will make an alien removable is often quite complex. "Most crimes affecting immigration status are not specifically mentioned by the [Immigration and Nationality Act (INA)], but instead fall under a broad category of crimes, such as *crimes involving moral turpitude* or *aggravated felonies*."˜ As has been widely acknowledged, determining whether a particular crime is an "aggravated felony" or a "crime involving moral turpitude [(CIMT)]" is not an easy task.˜

Defense counsel who consults a guidebook on whether a particular crime is an "aggravated felony" will often find that the answer is not "easily ascertained."˜

Determining whether a particular crime is one involving moral turpitude is no easier.˜

Many other terms of the INA are similarly ambiguous or may be confusing to practitioners not versed in the intricacies of immigration law.˜ To take just a few examples, it may be hard, in some cases, for defense counsel even to determine whether a client is an alien,˜ or whether a particular state disposition will result in a "conviction" for purposes of federal immigration law.˜

The Court tries to downplay the severity of the burden it imposes on defense counsel by suggesting that the scope of counsel's duty to offer advice concerning deportation consequences may turn on how hard it is to determine those consequences.˜ This approach is problematic for at least four reasons.

First, it will not always be easy to tell whether a particular statutory provision is "succinct, clear, and explicit." How can an attorney who lacks general immigration law expertise be sure that a seemingly clear statutory provision actually means what it seems to say when read in isolation?˜

Second, if defense counsel must provide advice regarding only one of the many collateral consequences of a criminal conviction, many defendants are likely to be misled. To take just one example, a conviction for a particular offense may render an alien excludable but not removable. If an alien charged with such an offense is advised only that pleading guilty to such an offense will not result in removal, the alien may be induced to enter a guilty plea without realizing that a consequence of the plea is that the alien will be unable to reenter the United States if the alien returns to his or her home country for any reason, such as to visit an elderly parent or to attend a funeral.˜ Incomplete legal advice may be worse than no advice at all because it may mislead and may dissuade the client from seeking advice from a more knowledgeable source.

Third, the Court's rigid constitutional rule could inadvertently head off more promising ways of addressing the underlying problem—such as statutory or administrative reforms requiring trial judges to inform a defendant on the record that a guilty plea may carry adverse immigration consequences.˜

Fourth, the Court's decision marks a major upheaval in Sixth Amendment law. This Court decided *Strickland* in 1984, but the majority does not cite a single case, from this or any other federal court, holding that criminal defense counsel's failure to provide advice concerning the removal consequences of a criminal conviction violates a defendant's Sixth Amendment right to counsel.˜

The majority seeks to downplay its dramatic expansion of the scope of criminal defense counsel's duties under the Sixth Amendment˜.

II

While mastery of immigration law is not required by *Strickland,* several considerations support the conclusion that affirmative misadvice regarding the removal consequences of a conviction may constitute ineffective assistance.

First, a rule prohibiting affirmative misadvice regarding a matter as crucial to the defendant's plea decision as deportation appears faithful to the scope and nature of the Sixth Amendment duty this Court has recognized in its past cases.˜ As the Court appears to acknowledge, thorough understanding of the intricacies of immigration law is not "within the range of competence demanded of attorneys *in criminal cases*."˜ By contrast, reasonably competent attorneys should know that it is not appropriate or responsible to hold themselves out as authorities on a difficult and complicated subject matter with which they are not familiar. Candor concerning the limits of one's professional expertise, in other words, is within the range of duties reasonably expected of defense attorneys in criminal cases. As the dissenting judge on the Kentucky Supreme Court put it, "I do not believe it is too much of a burden to place on our defense bar the duty to say, 'I do not know.'"˜

Second, incompetent advice distorts the defendant's decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question.˜ When˜ a defendant bases the decision to plead guilty on counsel's express misrepresentation that the defendant will not be removable˜, it seems hard to say that the plea was entered with the advice of constitutionally competent counsel—or that it embodies a voluntary and intelligent decision to forsake constitutional rights.˜

Third, a rule prohibiting unreasonable misadvice regarding exceptionally important collateral matters would not deter or interfere with ongoing political and administrative efforts to devise fair and reasonable solutions to the difficult problem posed by defendants who plead guilty without knowing of certain important collateral consequences.

Finally, the conclusion that affirmative misadvice regarding the removal consequences of a conviction can give rise to ineffective assistance would, unlike the Court's approach, not require any upheaval in the law.˜

In concluding that affirmative misadvice regarding the removal consequences of a criminal conviction may constitute ineffective assistance, I do not mean to suggest that the Sixth Amendment does no more than require defense counsel to avoid misinformation. When a criminal defense attorney is aware that a client is an alien, the attorney should advise the client that a criminal conviction may have adverse consequences under the immigration laws and that the client should consult an

immigration specialist if the client wants advice on that subject. By putting the client on notice of the danger of removal, such advice would significantly reduce the chance that the client would plead guilty under a mistaken premise.

III

In sum, a criminal defense attorney should not be required to provide advice on immigration law, a complex specialty that generally lies outside the scope of a criminal defense attorney's expertise. On the other hand, any competent criminal defense attorney should appreciate the extraordinary importance that the risk of removal might have in the client's determination whether to enter a guilty plea. Accordingly, unreasonable and incorrect information concerning the risk of removal can give rise to an ineffectiveness claim. In addition, silence alone is not enough to satisfy counsel's duty to assist the client. Instead, an alien defendant's Sixth Amendment right to counsel is satisfied if defense counsel advises the client that a conviction may have immigration consequences, that immigration law is a specialized field, that the attorney is not an immigration lawyer, and that the client should consult an immigration specialist if the client wants advice on that subject.

JUSTICE SCALIA, WITH WHOM JUSTICE THOMAS JOINS, DISSENTING.

In the best of all possible worlds, criminal defendants contemplating a guilty plea ought to be advised of all serious collateral consequences of conviction, and surely ought not to be misadvised. The Constitution, however, is not an all-purpose tool for judicial construction of a perfect world; and when we ignore its text in order to make it that, we often find ourselves swinging a sledge where a tack hammer is needed.

The Sixth Amendment guarantees the accused a lawyer "for his defence" against a "criminal prosecutio[n]"—not for sound advice about the collateral consequences of conviction. For that reason, and for the practical reasons set forth in Part I of Justice ALITO's concurrence, I dissent from the Court's conclusion that the Sixth Amendment requires counsel to provide accurate advice concerning the potential removal consequences of a guilty plea. For the same reasons, but unlike the concurrence, I do not believe that affirmative misadvice about those consequences renders an attorney's assistance in defending against the prosecution constitutionally inadequate; or that the Sixth Amendment requires counsel to warn immigrant defendants that a conviction may render them removable. Statutory provisions can remedy these concerns in a more targeted fashion, and without producing permanent, and legislatively irreparable, overkill.

* * *

The Sixth Amendment as originally understood and ratified meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel.˜ We have held, however, that the Sixth Amendment requires the provision of counsel to indigent defendants at government expense,˜ and that the right to "the assistance of counsel" includes the right to *effective* assistance˜. Even assuming the validity of these holdings, I reject the significant further extension that the Court, and to a lesser extent the concurrence, would create. We have until today at least retained the Sixth Amendment's textual limitation to criminal prosecutions.˜ We have limited the Sixth Amendment to legal advice directly related to defense against prosecution of the charged offense˜.

There is no basis in text or in principle to extend the constitutionally required advice˜.

Adding to counsel's duties an obligation to advise about a conviction's collateral consequences has no logical stopping-point.˜

But it seems to me that the concurrence suffers from the same defect. The same indeterminacy, the same inability to know what areas of advice are relevant, attaches to misadvice. And the concurrence's suggestion that counsel must warn defendants of potential removal consequences,˜—what would come to be known as the "*Padilla* warning"—cannot be limited to those consequences except by judicial caprice. It is difficult to believe that the warning requirement would not be extended, for example, to the risk of heightened sentences in later federal prosecutions pursuant to the Armed Career Criminal Act˜.

The Court's holding prevents legislation that could solve the problems addressed by today's opinions in a more precise and targeted fashion. If the subject had not been constitutionalized, legislation could specify which categories of misadvice about matters ancillary to the prosecution invalidate plea agreements, what collateral consequences counsel must bring to a defendant's attention, and what warnings must be given.˜ Moreover, legislation could provide consequences for the misadvice, nonadvice, or failure to warn, other than nullification of a criminal conviction after the witnesses and evidence needed for retrial have disappeared. Federal immigration law might provide, for example, that the near-automatic removal which follows from certain criminal convictions will not apply where the conviction rested upon a guilty plea induced by counsel's misadvice regarding removal consequences. Or legislation might put the government to a choice in such circumstances: Either retry the defendant or forgo the removal. But all that has been precluded in favor of today's sledge hammer.˜

5.3 Case: Diaz v. Iowa

Diaz v. Iowa
896 N.W.2d 723 (Supreme Court of Iowa 2017)

CADY, CHIEF JUSTICE.

In this case, we consider the scope of an attorney's responsibility to advise a client who is an unauthorized alien in the United States of the immigration consequences of pleading guilty to a criminal offense. The district court held the attorney's advice was insufficient and ordered the defendant, Roberto Morales Diaz, be allowed to withdraw his plea. On appeal, we transferred the case to the court of appeals. The court of appeals reversed, finding counsel had no duty to provide specific advice on the immigration consequences of pleading guilty. The court of appeals also held Morales Diaz failed to show any deficiency of counsel caused him prejudice. On further review, we vacate the court of appeals and affirm the district court. We conclude Morales Diaz's attorney failed in his duty to advise his client of the direct and severe immigration consequences of pleading guilty to the crime of aggravated misdemeanor forgery, leading Morales Diaz to plead guilty and subject himself to automatic and permanent removal. We remand this case for further proceedings.

I. Factual Background and Proceedings

Roberto Morales Diaz began residing in the United States in 2002. He entered this country without examination by the Department of Homeland Security. Morales Diaz has a young daughter who is a U.S. citizen. He was her primary caregiver until he was taken into custody and removed to Mexico. Until this case, Morales Diaz had no criminal record.

On January 24, 2013, a City of Toledo police officer responded to a report of a domestic disturbance. The mother of Morales Diaz's daughter reported she felt threatened by Morales Diaz during an argument. The altercation did not include physical violence. The officer placed Morales Diaz in a squad car and asked for identification. Morales Diaz produced a Texas identification card bearing his name. The officer then learned the identification number on the card was registered to a different name. The officer also observed the card had no security features. The officer decided to transport Morales Diaz to the Toledo police station for further questioning.

At the station, the officer interrogated Morales Diaz with the aid of an interpreter. The officer told Morales Diaz he was not going to be arrested for the reported domestic disturbance, but he was going to be questioned about the identification card. Morales

Diaz explained he obtained the card from an office building in Houston he thought was the Texas Department of Public Safety. He stated he paid $100 for the card and was advised he could use it to operate a motor vehicle and open bank accounts. The officer asked Morales Diaz if he was in the United States legally. Morales Diaz initially responded he legally immigrated to the United States, but later admitted he was residing here without authorization. After this admission, the officer placed Morales Diaz under arrest. Morales Diaz continued to deny knowledge of any illegality with the identification card. The officer transported Morales Diaz to the county jail and contacted Immigration and Customs Enforcement (ICE). ICE began removal proceedings. The county attorney filed a trial information charging Morales Diaz with forgery as a class "D" felony under Iowa Code section 715A.2(1)(d) and (2)(a) (2013).

Morales Diaz was released on bail. He retained counsel. The court continued the state forgery proceedings against him several times to give him time to resolve his federal immigration status. On July 8, 2014, however, he failed to appear at an immigration hearing in Omaha, Nebraska. He also failed to appear at a scheduled plea hearing in Iowa state court. After a Tama County court issued an arrest warrant, he turned himself in and was held in the county jail.

Morales Diaz's counsel visited him in jail. According to Morales Diaz, his counsel gave him a written guilty plea to sign, but did not advise him of any of the immigration consequences of pleading guilty. According to his counsel, counsel advised Morales Diaz that because he missed his immigration hearing he was "probably going to be deported no matter what happened." Counsel stated Morales Diaz responded that he "just wanted to get this over with," before he signed the written plea of guilty to aggravated misdemeanor forgery under Iowa Code section 715A.2(2)(b). Consistent with the plea agreement, the court imposed a two-year suspended sentence. Nevertheless, based on this conviction, federal authorities subsequently removed him from the United States to Mexico.

Morales Diaz returned to the United States in Department of Homeland Security custody and filed for postconviction relief in district court. He asserted he was denied his right to the effective assistance of counsel under the Sixth Amendment to the U.S. Constitution. He argued his counsel should have advised him that forgery under Iowa Code section 715A.2(2)(b) constituted an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(R) (2012). In turn, he argued his counsel should have advised him that pleading guilty to an aggravated felony has severe, automatic, and irreversible immigration consequences, including foreclosure of "cancellation of removal," a proceeding by which the Attorney General may adjust the status of a removable alien to that of a lawful permanent resident. See 8 U.S.C. § 1229b(b)(1)(C). Additionally, he

argued his counsel should have advised him that his physical presence in the United States for more than ten years and his good moral character would have allowed him to seek this relief if he could establish his removal would result in "exceptional and extremely unusual hardship" to his daughter. Id. § 1229b(b)(1)(A)-(D). Because his counsel failed to advise him of these immigration consequences of his plea, Morales Diaz argued he should be allowed to withdraw his plea and defend the charges at trial.

The district court agreed and vacated his conviction. The court found Morales Diaz's counsel had a duty to advise him of the clear and foreseeable immigration consequences of pleading guilty, not just that there was a possibility he could be removed. It found Morales Diaz's counsel failed to perform this duty and Morales Diaz could prove prejudice because, based on his counsel's failure, he gave up his right to a trial, which he would not have done had he known that pleading guilty to forgery would permanently separate him from his daughter.

The State appealed, and the court of appeals reversed. The court of appeals found counsel for Morales Diaz had no duty to advise him of the specific immigration consequences of his plea, and in the alternative, that he could not show he was prejudiced by counsel's failure. We granted further review.˜

III. Analysis

The right to counsel guaranteed by the Sixth Amendment to the U.S. Constitution is a "right to the effective assistance of counsel." ˜Article I, section 10 of the Iowa Constitution also guarantees a right to the effective assistance of counsel.˜ However, Morales Diaz specifically raised only the U.S. Constitution in his application for postconviction relief and in his arguments on appeal. Therefore, we will confine our analysis to the U.S. Constitution.˜ Doing so, we reserve the right to interpret the Iowa Constitution more stringently than its federal counterpart in future cases.˜˜˜ This right is not limited to trial. Instead, the Sixth Amendment right to counsel "at least" extends to all critical stages of the prosecution after the initiation of formal proceedings.˜ Thus, the right to counsel plainly extends to that critical stage of the prosecution in which a defendant considers pleading guilty to the charges.˜ Counsel's duty at this stage is no less important than it is at trial.˜ It is a duty to provide competent and thorough advice, to represent the client's interests with vigor and diligence, and to fulfill those "anxious responsibilities" with which we have entrusted the bar.˜ It is a duty that is embodied in the very name the profession has appropriated: to counsel. Moreover, it is a duty that exists separate from the colloquy engaged in by the district court under Iowa Rule of Criminal Procedure 2.8. See State v. Rhodes, 243 N.W.2d 544, 545 (Iowa 1976) ("The court's inquiry is intended to supplement but not supplant advice of counsel.").

An attorney fails to fulfill this duty when the attorney fails to advise a client of the immigration consequences of a plea. See Padilla v. Kentucky, 559 U.S. 356, 367–68˜ (2010). Immigrant clients rely on criminal defense counsel to advise them of immigration consequences because these consequences are of great, even overwhelming, importance to them.˜ Changes in immigration law have increased enforcement and reduced discretion in the event of a criminal conviction.˜ These changes have shifted the responsibility to protect immigrants from potential inequities in the immigration system to criminal defense counsel.˜ In response, many new resources have emerged to assist the defense bar in this growing responsibility, including quick-access charts, frequently asked questions and answers, opportunities for legal training, and free consultations with immigration experts.˜ As states and localities struggle to define their role, desired or not, as partners in immigration enforcement,˜ defense counsel must embrace his or her new role as a "crimmigration" attorney,˜ if counsel is to provide effective assistance.

To establish counsel provided constitutionally deficient representation, the defendant must establish counsel's representation "fell below an objective standard of reasonableness."˜ We look to "the practice and expectations of the legal community" in defining this standard.˜ If the defendant makes the requisite showing under this first prong, the defendant must then show that, but for counsel's ineffective assistance, he or she "would not have pleaded guilty and would have insisted on going to trial."˜ This does not mean the defendant must show he or she would have prevailed at trial. Rather, the defendant must only show the "decision to reject the plea bargain would have been rational under the circumstances."˜

A. Constitutional Deficiency

Morales Diaz argues his counsel should have advised him of the immigration consequences of the plea. If we accept counsel's testimony, counsel advised Morales Diaz that whether he pled or went to trial, he would "probably" be deported. We must decide whether the Constitution required more. In doing so, we examine, in light of Padilla's holding, the State's argument that Morales Diaz's counsel was not required to advise him any more than that deportation was possible and Morales Diaz's argument that trial counsel's advice was deficient because he was not told a guilty plea meant deportation was virtually certain under the immigration statute.˜

[T]he Padilla Court held the right to effective counsel included a duty to advise a defendant of the risk of deportation˜. In addressing the nature of the advice, the Court indicated if the crime clearly falls under the statute, counsel must provide equally clear advice that deportation is a consequence of pleading guilty.˜ If the crime is not clearly

within the immigration statute, counsel must advise that a plea of guilty may result in adverse immigration consequences.˜

It must be observed that deportation is a broad concept, and the adverse immigration consequences of a criminal conviction to a noncitizen under the immigration statute are not limited to removal from this country. In addition to removal from the country, the immigration statute also carries consequences associated with removal, such as exclusion, denial of citizenship, immigration detention, and bar to relief from removal.˜ Thus, in addition to deciding if the conviction is a deportable conviction under the statute, a question also exists whether or not counsel must describe the associate statutory consequences. In other words, the question is whether counsel must not only consider if the conviction is a deportable conviction under the statute, but must also explain the meaning of deportation by identifying the specific statutory consequences.

We find the "clear" and "unclear" dichotomy in Padilla relates only to whether the crime charged is a crime covered under the immigration statute. In turn, the distinction relates to the likelihood that immigration consequences will follow a conviction of the crime. If the crime faced by a defendant is clearly covered under the immigration statute, counsel must advise the defendant that the immigration consequences will almost certainly follow. If the crime is not clearly covered under the statute, counsel must advise the defendant that immigration consequences may follow. Yet, the more vexing question is the extent to which counsel must advise of the specific consequences beyond deportation. We must answer this question to complete the analysis in Padilla and address the State's argument that Morales Diaz's counsel was not required to advise him on anything other than the risk of deportation, as well as Morales Diaz's argument that he was entitled to complete advice on the foreseeable immigration consequences of his plea.˜

We recognize Padilla has been read to impose a duty on counsel only to warn of the risk of deportation, not of other consequences such as foreclosure of cancellation of removal or a permanent bar on reentry.˜ Yet, we do not believe the Court intended to create a new standard for determining effective assistance of counsel or to limit the advice of counsel to exclude a full explanation of the various immigration consequences of pleading guilty. Instead, counsel after Padilla is held to the same standard counsel was before Padilla: to provide objectively reasonable assistance as measured by prevailing professional norms.˜ Counsel's duty as interpreted in Padilla does not depend on an assessment of the clarity of the consequences or on categorizing them as strictly related to deportation. Instead, consistent with the approach we have always taken, counsel's duty depends on society's expectations of its attorneys.

In Padilla, the U.S. Supreme Court looked to "norms of practice as reflected in American Bar Association standards and the like" to measure counsel's performance.˜ Consulting the current version of the American Bar Association guidelines now, we find they recommend the following: "(a) Defense counsel should determine a client's citizenship and immigration status˜. (b) If defense counsel determines that a client may not be a United States citizen, counsel should investigate and identify particular immigration consequences that might follow possible criminal dispositions.˜ (c) After determining the client's immigration status and potential adverse consequences from the criminal proceedings, including removal, exclusion, bars to relief from removal, immigration detention, denial of citizenship, and adverse consequences to the client's immediate family, counsel should advise the client of all such potential consequences and determine with the client the best course of action for the client's interests and how to pursue it. (d) If a client is convicted of a removable offense, defense counsel should advise the client of the serious consequences if the client illegally returns to the United States." ABA Standards for Criminal Justice: Prosecution Function and Def. Function 4-5.5 (4th ed. 2015) [hereinafter ABA Standards]. We recognize these recommendations are demanding, but we do not find them too onerous a burden to place on the professional advisers employed to represent their clients' best interests.

Additionally, we observe a proliferation of reference guides since the Padilla decision.˜ Regarding Morales Diaz's case, even a brief review of these guides reveals the crime of aggravated misdemeanor forgery is an aggravated felony for purposes of immigration law if it results in a sentence of a year or more.˜ They also reveal that a conviction of an aggravated felony has immediate and far-reaching immigration consequences.˜

Aided by these guides and turning to the clear language of the immigration statute, we find these consequences include, to begin with, rendering any alien immediately removable.˜ They also include subjecting the alien to mandatory detention during expedited removal proceedings.˜ They include foreclosure of a cancellation of removal proceeding,˜ and they include a permanent bar on legal reentry with narrow exception˜. Finally, they include a fine and twenty years of incarceration if the alien tries to reenter the country and is apprehended.˜

Our review of these professional norms shows us that counsel has an obligation to inform his or her client of all the adverse immigration consequences that competent counsel would uncover. We do not believe clients expect their counsel to only advise them that the chances of deportation are certain or possible.˜ Instead, clients expect their counsel to conform to the "practice and expectations of the legal community,"˜ which in this case is an expectation enhanced by vast professional support. Whether or not

deportation consequences are certain or possible under a criminal charge, the specific statutory consequences need to be explained with reasonable clarity so a full and measured decision to plead guilty can be made. This approach is integrated into the ABA guidelines, which instruct counsel to determine and advise of the "potential adverse consequences from the criminal proceedings, including removal, exclusion, bars to relief from removal, immigration detention, denial of citizenship, and adverse consequences to the client's immediate family." ABA Standards 4-5.5(c). Certainly, any person contemplating a plea of guilty to a crime that could lead to deportation would want to know the full meaning and consequences of deportation.

In this case, counsel for Morales Diaz did not inform him of the direct, severe, and certain immigration consequences of pleading guilty to forgery. Instead, counsel relied on an erroneous belief that missing an immigration hearing foreclosed all relief.˜ Even if removal was highly likely following Morales Diaz's failure to appear,˜ counsel never mentioned the crime constituted an aggravated felony,˜ and never attempted to explain the sweeping ramifications of that classification. The practice and expectations of the legal community, and its clients, reveals counsel has a duty to provide that information. Therefore, counsel for Morales Diaz provided constitutionally deficient representation by not doing so.

B. Prejudice

Having established counsel provided constitutionally deficient performance, Morales Diaz must still show this deficiency resulted in prejudice to succeed on his claim of ineffective assistance of counsel. Morales Diaz testified that had his counsel informed him of the immigration consequences of his plea, he never would have entered it. We must decide whether this would have been a rational choice.˜

The State asserts Morales Diaz is unable to show prejudice for two basic reasons. First, the State notes he was an unauthorized alien and was subject to deportation before he pled guilty, just as he was after he pled guilty. The State argues any relief from deportation under federal law based on his length of stay and family ties in the United States was too speculative. Second, the State argues the evidence against Morales Diaz overwhelmingly supported a conviction to the charged offense, and the plea to the lesser offense was rational even if he had been informed of the immigration consequences because it afforded him an opportunity to obtain temporary release and make arrangements for his daughter before deportation proceedings commenced.

Generally, a decision to reject a plea bargain may be rational for many reasons. The defendant could have a legal or factual defense to the crime charged.˜ The defendant could be hoping to obtain a better plea bargain,˜ or leniency at sentencing˜. The

defendant could lack all of these things, but nevertheless rationally decide to "roll the dice" if presented with a plea deal certain to be almost as damaging as a loss at trial.˜

The State essentially claims unauthorized aliens cannot be prejudiced under a Sixth Amendment challenge because they are already subject to removal. We reject this claim for several reasons. There is a vast difference for an unauthorized alien between being generally subject to removal and being convicted of a crime that subjects an unauthorized alien to automatic, mandatory, and irreversible removal. Additionally, removal is not a foregone conclusion for every unauthorized alien. Immigration policy is subject to change, as is enforcement. Furthermore, unauthorized aliens may seek lawful permanent resident status under the law if they meet certain qualifications.˜ A plea of guilty to certain offenses can foreclose this process.˜ Finally, an unauthorized alien may rationally choose to reject a plea deal for the same reasons a U.S. citizen might.˜

We find it unnecessary to decide if "'overwhelming evidence' of guilt" forecloses a showing of prejudice.˜ The State charged Morales Diaz with forgery under Iowa Code section 715A.2(2)(a)(4), for possession of a document required for or as evidence of authorized stay in the United States. Morales Diaz asserts various evidentiary issues and challenges the State's ability to meet its burden of proof. Additionally, we note the crime of forgery requires a specific intent to defraud or injure another or have knowledge of the facilitation of a fraud or injury, Iowa Code § 715A.2(1), and Morales Diaz maintained he believed the identification card he obtained in Texas was legitimate. We find the evidence of guilt is not overwhelming.

We conclude the record supports the finding of prejudice. Morales Diaz has a daughter in this country. By pleading guilty, he all but guaranteed he would never be physically present in her life to help her grow. If he had not pled guilty, he could have defended himself at trial. He could have asserted various evidentiary issues and challenged the State's ability to prove all elements of the charge.˜ He could have hoped for a better plea bargain by holding out for a plea of guilty to simple misdemeanor possession of a fraudulently altered identification card.˜ Finally, he could have otherwise rationally decided to hold the State to its burden of proof.˜ Cancellation of removal under 8 U.S.C. § 1229b was available to him—until he pled guilty. Like the district court, we are not convinced Morales Diaz would have "just wanted to get this over with" had counsel provided effective assistance by advising him of the immigration consequences a plea entailed.

IV. Conclusion

According to the State, Roberto Morales Diaz was found in possession of a fake identification card. Based on this information, the State charged him with a crime

carrying a mandatory term of five years' incarceration. On advice from counsel, he pled guilty to a crime with a suspended sentence. In doing so, he gave up the chance to stay in the country where he has resided peacefully for the past decade. Instead, he was promptly and permanently removed to Mexico. We conclude Morales Diaz would not have accepted this plea agreement if he had been provided the effective assistance of counsel to which he was entitled under the Sixth Amendment to the U.S. Constitution. Therefore, we must vacate the court of appeals, affirm the district court, and remand this case to allow him to withdraw his plea and stand for trial.

DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT JUDGMENT AFFIRMED AND CASE REMANDED.

All justices concur except Mansfield, Waterman, and Zager, JJ., who concur specially.

MANSFIELD, JUSTICE (CONCURRING SPECIALLY).

I concur in the result and in most of the court's opinion. I agree that the defendant's trial counsel provided ineffective assistance by failing to advise his client that he would be deported based on his guilty plea. This was a "truly clear" consequence, and counsel had a duty to tell his client about it.˜ Additionally, Roberto Morales Diaz suffered prejudice because, as the district court found, he would not have pled guilty had he been properly advised on this point. Therefore, I agree the district court's judgment should be affirmed.

However, the court today goes a step further. It imposes a duty on counsel to explain to the client "the full meaning and *consequences* of deportation." (Emphasis added.) The parties have not briefed or argued this issue. Both here and in the district court, the alleged breach of duty involved trial counsel's incorrect advice that Morales Diaz might be deported if he pled guilty, when in fact it was certain Morales Diaz would be deported. The majority confuses this straightforward argument on breach of duty with the more elaborate argument Morales Diaz made to establish prejudice—i.e., to show that he would have gone to trial if he had been told the guilty plea would result in automatic deportation. Thus, contrary to what the court says, eligibility for "cancellation of removal" was raised not as something that criminal defense counsel has a duty to explain to the client, but as an explanation for why a rational criminal defendant would have taken his chances at trial. Hence, this case does not present the alleged duty of counsel to "advise of the specific consequences beyond deportation." We do not need to decide whether such a duty exists to resolve the present case. I would not decide the issue today sua sponte.˜

I seriously question whether the State Public Defender's Office has the resources to meet the new duty fashioned by today's decision. Appointed counsel will have to advise noncitizen defendants not only on the likelihood of deportation, but also on other legal consequences that may result from the deportation, potentially months or years later. I fear there will need to be a phalanx of immigration lawyers on call.

And today's decision could tax our own judicial system as well. For example, will we see a slew of postconviction relief proceedings filed by defendants who received Padilla-compliant advice on deportation but were not told about one or more other immigration consequences?

For all these reasons, I concur in the result and much of the court's analysis but cannot join Part III.A of the court's opinion.

WATERMAN AND ZAGER, JJ., JOIN THIS SPECIAL CONCURRENCE.

5.4 Case: Lee v. United States

Lee v. United States
582 U.S. 357 (2017)

CHIEF JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

Petitioner Jae Lee was indicted on one count of possessing ecstasy with intent to distribute. Although he has lived in this country for most of his life, Lee is not a United States citizen, and he feared that a criminal conviction might affect his status as a lawful permanent resident. His attorney assured him there was nothing to worry about—the Government would not deport him if he pleaded guilty. So Lee, who had no real defense to the charge, opted to accept a plea that carried a lesser prison sentence than he would have faced at trial.

Lee's attorney was wrong: The conviction meant that Lee was subject to mandatory deportation from this country. Lee seeks to vacate his conviction on the ground that, in accepting the plea, he received ineffective assistance of counsel in violation of the Sixth Amendment. Everyone agrees that Lee received objectively unreasonable representation. The question presented is whether he can show he was prejudiced as a result.

I

Jae Lee moved to the United States from South Korea in 1982. He was 13 at the time. His parents settled the family in New York City, where they opened a small coffee

shop. After graduating from a business high school in Manhattan, Lee set out on his own to Memphis, Tennessee, where he started working at a restaurant. After three years, Lee decided to try his hand at running a business. With some assistance from his family, Lee opened the Mandarin Palace Chinese Restaurant in a Memphis suburb. The Mandarin was a success, and Lee eventually opened a second restaurant nearby. In the 35 years he has spent in the country, Lee has never returned to South Korea. He did not become a United States citizen, living instead as a lawful permanent resident.

At the same time he was running his lawful businesses, Lee also engaged in some illegitimate activity. In 2008, a confidential informant told federal officials that Lee had sold the informant approximately 200 ecstasy pills and two ounces of hydroponic marijuana over the course of eight years. The officials obtained a search warrant for Lee's house, where they found 88 ecstasy pills, three Valium tablets, $32,432 in cash, and a loaded rifle. Lee admitted that the drugs were his and that he had given ecstasy to his friends.

A grand jury indicted Lee on one count of possessing ecstasy with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Lee retained an attorney and entered into plea discussions with the Government. The attorney advised Lee that going to trial was "very risky" and that, if he pleaded guilty, he would receive a lighter sentence than he would if convicted at trial.˜ Lee informed his attorney of his noncitizen status and repeatedly asked him whether he would face deportation as a result of the criminal proceedings. The attorney told Lee that he would not be deported as a result of pleading guilty.˜ Based on that assurance, Lee accepted the plea and the District Court sentenced him to a year and a day in prison, though it deferred commencement of Lee's sentence for two months so that Lee could manage his restaurants over the holiday season.

Lee quickly learned, however, that a prison term was not the only consequence of his plea. Lee had pleaded guilty to what qualifies as an "aggravated felony" under the Immigration and Nationality Act, and a noncitizen convicted of such an offense is subject to mandatory deportation.˜ Upon learning that he would be deported after serving his sentence, Lee filed a motion under 28 U.S.C. § 2255 to vacate his conviction and sentence, arguing that his attorney had provided constitutionally ineffective assistance.

At an evidentiary hearing on Lee's motion, both Lee and his plea-stage counsel testified that "deportation was the determinative issue in Lee's decision whether to accept the plea."˜ In fact, Lee explained, his attorney became "pretty upset because every time something comes up I always ask about immigration status," and the lawyer "always said why [are you] worrying about something that you don't need to worry about."˜ According to Lee, the lawyer assured him that if deportation was not in the

plea agreement, "the government cannot deport you."˜ Lee's attorney testified that he thought Lee's case was a "bad case to try" because Lee's defense to the charge was weak.˜ The attorney nonetheless acknowledged that if he had known Lee would be deported upon pleading guilty, he would have advised him to go to trial.˜ Based on the hearing testimony, a Magistrate Judge recommended that Lee's plea be set aside and his conviction vacated because he had received ineffective assistance of counsel.

The District Court, however, denied relief. Applying our two-part test for ineffective assistance claims from Strickland v. Washington, 466 U.S. 668˜ (1984), the District Court concluded that Lee's counsel had performed deficiently by giving improper advice about the deportation consequences of the plea. But, "[i]n light of the overwhelming evidence of Lee's guilt," Lee "would have almost certainly" been found guilty and received "a significantly longer prison sentence, and subsequent deportation," had he gone to trial.˜ Lee therefore could not show he was prejudiced by his attorney's erroneous advice. Viewing its resolution of the issue as debatable among jurists of reason, the District Court granted a certificate of appealability.

The Court of Appeals for the Sixth Circuit affirmed the denial of relief. On appeal, the Government conceded that the performance of Lee's attorney had been deficient. To establish that he was prejudiced by that deficient performance, the court explained, Lee was required to show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."˜ Lee had "no bona fide defense, not even a weak one," so he "stood to gain nothing from going to trial but more prison time."˜ Relying on Circuit precedent holding that "no rational defendant charged with a deportable offense and facing overwhelming evidence of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence," the Court of Appeals concluded that Lee could not show prejudice.˜ We granted certiorari.˜

II

The Sixth Amendment guarantees a defendant the effective assistance of counsel at "critical stages of a criminal proceeding," including when he enters a guilty plea.˜ To demonstrate that counsel was constitutionally ineffective, a defendant must show that counsel's representation "fell below an objective standard of reasonableness" and that he was prejudiced as a result. Strickland, 466 U.S., at 688, 692˜. The first requirement is not at issue in today's case: The Government concedes that Lee's plea-stage counsel provided inadequate representation when he assured Lee that he would not be deported if he pleaded guilty.˜ The question is whether Lee can show he was prejudiced by that erroneous advice.

A

A claim of ineffective assistance of counsel will often involve a claim of attorney error "during the course of a legal proceeding"—for example, that counsel failed to raise an objection at trial or to present an argument on appeal.˜ A defendant raising such a claim can demonstrate prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."˜

But in this case counsel's "deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself."˜ When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial "would have been different" than the result of the plea bargain. That is because, while we ordinarily "apply a strong presumption of reliability to judicial proceedings," "we cannot accord" any such presumption "to judicial proceedings that never took place."˜

We instead consider whether the defendant was prejudiced by the "denial of the entire judicial proceeding ... to which he had a right."˜ As we held in Hill v. Lockhart, when a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."˜

The dissent contends that a defendant must also show that he would have been better off going to trial. That is true when the defendant's decision about going to trial turns on his prospects of success and those are affected by the attorney's error—for instance, where a defendant alleges that his lawyer should have but did not seek to suppress an improperly obtained confession.˜

Not all errors, however, are of that sort. Here Lee knew, correctly, that his prospects of acquittal at trial were grim, and his attorney's error had nothing to do with that. The error was instead one that affected Lee's understanding of the consequences of pleading guilty. The Court confronted precisely this kind of error in Hill.˜ Rather than asking how a hypothetical trial would have played out absent the error, the Court considered whether there was an adequate showing that the defendant, properly advised, would have opted to go to trial. The Court rejected the defendant's claim because he had "alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty."˜

Lee, on the other hand, argues he can establish prejudice under Hill because he never would have accepted a guilty plea had he known that he would be deported as a result. Lee insists he would have gambled on trial, risking more jail time for whatever small chance there might be of an acquittal that would let him remain in the United States.˜ The Government responds that, since Lee had no viable defense at trial, he would almost certainly have lost and found himself still subject to deportation, with a lengthier prison sentence to boot. Lee, the Government contends, cannot show prejudice from accepting a plea where his only hope at trial was that something unexpected and unpredictable might occur that would lead to an acquittal.

B

The Government asks that we, like the Court of Appeals below, adopt a per se rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial.˜ As a general matter, it makes sense that a defendant who has no realistic defense to a charge supported by sufficient evidence will be unable to carry his burden of showing prejudice from accepting a guilty plea. But in elevating this general proposition to a per se rule, the Government makes two errors. First, it forgets that categorical rules are ill suited to an inquiry that we have emphasized demands a "case-by-case examination" of the "totality of the evidence."˜ And, more fundamentally, the Government overlooks that the inquiry we prescribed in Hill v. Lockhart focuses on a defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial.

A defendant without any viable defense will be highly likely to lose at trial. And a defendant facing such long odds will rarely be able to show prejudice from accepting a guilty plea that offers him a better resolution than would be likely after trial. But that is not because the prejudice inquiry in this context looks to the probability of a conviction for its own sake. It is instead because defendants obviously weigh their prospects at trial in deciding whether to accept a plea.˜ Where a defendant has no plausible chance of an acquittal at trial, it is highly likely that he will accept a plea if the Government offers one.

But common sense (not to mention our precedent) recognizes that there is more to consider than simply the likelihood of success at trial. The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea.˜ When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive. For example, a defendant with no realistic defense to a charge carrying a 20–year sentence may nevertheless choose trial, if the prosecution's plea offer is 18 years. Here Lee alleges that avoiding deportation was the determinative factor for him; deportation after some time in prison was not meaningfully different from deportation after somewhat less time. He says he

accordingly would have rejected any plea leading to deportation—even if it shaved off prison time—in favor of throwing a "Hail Mary" at trial.

The Government urges that, in such circumstances, the possibility of an acquittal after trial is "irrelevant to the prejudice inquiry," pointing to our statement in Strickland that "[a] defendant has no entitlement to the luck of a lawless decisionmaker."~ That statement, however, was made in the context of discussing the presumption of reliability we apply to judicial proceedings. As we have explained, that presumption has no place where, as here, a defendant was deprived of a proceeding altogether.~ In a presumptively reliable proceeding, "the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like" must by definition be ignored.~ But where we are instead asking what an individual defendant would have done, the possibility of even a highly improbable result may be pertinent to the extent it would have affected his decisionmaking.~

C

"Surmounting Strickland's high bar is never an easy task," Padilla v. Kentucky, 559 U.S. 356, 371~ (2010), and the strong societal interest in finality has "special force with respect to convictions based on guilty pleas."~ Courts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences.

In the unusual circumstances of this case, we conclude that Lee has adequately demonstrated a reasonable probability that he would have rejected the plea had he known that it would lead to mandatory deportation. There is no question that "deportation was the determinative issue in Lee's decision whether to accept the plea deal."~ Order, at 14 (noting Government did not dispute testimony to this effect). Lee asked his attorney repeatedly whether there was any risk of deportation from the proceedings, and both Lee and his attorney testified at the evidentiary hearing below that Lee would have gone to trial if he had known about the deportation consequences.~

Lee demonstrated as much at his plea colloquy: When the judge warned him that a conviction "could result in your being deported," and asked "[d]oes that at all affect your decision about whether you want to plead guilty or not," Lee answered "Yes, Your Honor."~ When the judge inquired "[h]ow does it affect your decision," Lee responded "I don't understand," and turned to his attorney for advice.~ Only when Lee's counsel assured him that the judge's statement was a "standard warning" was Lee willing to proceed to plead guilty.~

There is no reason to doubt the paramount importance Lee placed on avoiding deportation. Deportation is always "a particularly severe penalty,"~ and we have

"recognized that 'preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence,'"~. At the time of his plea, Lee had lived in the United States for nearly three decades, had established two businesses in Tennessee, and was the only family member in the United States who could care for his elderly parents—both naturalized American citizens. In contrast to these strong connections to the United States, there is no indication that he had any ties to South Korea; he had never returned there since leaving as a child.

The Government argues, however, that under Padilla v. Kentucky, a defendant "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances."~ The Government contends that Lee cannot make that showing because he was going to be deported either way; going to trial would only result in a longer sentence before that inevitable consequence.~

We cannot agree that it would be irrational for a defendant in Lee's position to reject the plea offer in favor of trial. But for his attorney's incompetence, Lee would have known that accepting the plea agreement would certainly lead to deportation. Going to trial? Almost certainly. If deportation were the "determinative issue" for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that "almost" could make all the difference. Balanced against holding on to some chance of avoiding deportation was a year or two more of prison time.~ Not everyone in Lee's position would make the choice to reject the plea. But we cannot say it would be irrational to do so.

Lee's claim that he would not have accepted a plea had he known it would lead to deportation is backed by substantial and uncontroverted evidence. Accordingly we conclude Lee has demonstrated a "reasonable probability that, but for [his] counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S., at 59~.

* * *

The judgment of the United States Court of Appeals for the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GORSUCH TOOK NO PART IN THE CONSIDERATION OR DECISION OF THIS CASE.

JUSTICE THOMAS, WITH WHOM JUSTICE ALITO JOINS EXCEPT FOR PART I, DISSENTING.

The Court today holds that a defendant can undo a guilty plea, well after sentencing and in the face of overwhelming evidence of guilt, because he would have chosen to pursue a defense at trial with no reasonable chance of success if his attorney had properly advised him of the immigration consequences of his plea. Neither the Sixth Amendment nor this Court's precedents support that conclusion. I respectfully dissent.

I

As an initial matter, I remain of the view that the Sixth Amendment to the Constitution does not "requir[e] counsel to provide accurate advice concerning the potential removal consequences of a guilty plea." Padilla v. Kentucky, 559 U.S. 356, 388˜ (2010) (Scalia, J., joined by THOMAS, J., dissenting). I would therefore affirm the Court of Appeals on the ground that the Sixth Amendment does not apply to the allegedly ineffective assistance in this case.˜

III

Applying the ordinary Strickland standard in this case, I do not think a defendant in petitioner's circumstances could show a reasonable probability that the result of his criminal proceeding would have been different had he not pleaded guilty. Petitioner does not dispute that he possessed large quantities of illegal drugs or that the Government had secured a witness who had purchased the drugs directly from him. In light of this "overwhelming evidence of ... guilt,"˜ the Court of Appeals concluded that petitioner had "no bona fide defense, not even a weak one,"˜. His only chance of succeeding would have been to "thro[w] a 'Hail Mary' at trial."˜ As I have explained, however, the Court in Strickland expressly foreclosed relying on the possibility of a "Hail Mary" to establish prejudice.˜ Strickland made clear that the prejudice assessment should "proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision."˜

In the face of overwhelming evidence of guilt and in the absence of a bona fide defense, a reasonable court or jury applying the law to the facts of this case would find the defendant guilty. There is no reasonable probability of any other verdict. A defendant in petitioner's shoes, therefore, would have suffered the same deportation consequences regardless of whether he accepted a plea or went to trial. He is thus plainly better off for having accepted his plea: had he gone to trial, he not only would have faced the same deportation consequences, he also likely would have received a higher prison sentence. Finding that petitioner has established prejudice in these circumstances turns Strickland on its head.

IV

The Court's decision today will have pernicious consequences for the criminal justice system. This Court has shown special solicitude for the plea process, which brings "stability" and "certainty" to "the criminal justice system."~

The Court today provides no assurance that plea deals negotiated in good faith with guilty defendants will remain final.~

In addition to undermining finality, the Court's rule will impose significant costs on courts and prosecutors. Under the Court's standard, a challenge to a guilty plea will be a highly fact-intensive, defendant-specific undertaking.~ Given that more than 90 percent of criminal convictions are the result of guilty pleas~, the burden of holding evidentiary hearings on these claims could be significant. In circumstances where a defendant has admitted his guilt, the evidence against him is overwhelming, and he has no bona fide defense strategy, I see no justification for imposing these costs.

* * *

For these reasons, I would affirm the judgment of the Court of Appeals. I respectfully dissent.

5.5 Crime-Based Deportation: Judicial Recommendation Against Deportation (JRAD)

Prior to 1990, attorneys could ask a sentencing judge, at the time of sentencing or within 30 days thereafter, to recommend against the deportation of a noncitizen criminal defendant. INA § 241(b)(2) (repealed). This procedure was known as a "judicial recommendation against deportation" or JRAD (pronounced jay-rad). Since its repeal in 1990, there have been multiple (as yet unsuccessful) calls to reinstate the JRAD.

Here is the text of former INA § 241(b)(2): "The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply ... if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter. The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the

United States under subsection (a)(11) of this chapter." That last bit meant narcotics convictions were ineligible for JRAD relief.

5.6 Test Your Knowledge

PROBLEM 5.1

Petra is a lawful permanent resident who has lived in the United States for 20 years. She is married to a U.S. citizen and has two U.S. citizen children, aged 7 and 4. She is working with an immigration attorney to put together an application to become a naturalized U.S. citizen. It has not yet been submitted.

Petra was recently pulled over by local police for failing to signal before changing lanes. During that encounter, police found a plastic baggie containing 10 marijuana joints, each weighing approximately 0.5 grams.

Consider Petra's case from the following perspectives, either by yourself or role-playing with classmates:

- The prosecutor: What do you want to charge Petra with and why?
- The defense attorney: Is there anything special you need to consider when representing Petra? What do you hope to get out of any negotiations with the prosecutor?
- The immigration attorney: What questions do you want to ask the defense attorney? What are foreseeable areas of potential miscommunication with the defense counsel? What concerns, if any, do you have regarding Petra's immigration status and naturalization application?

Chapter Six: Federal Immigration Crimes

Immigration crimes dominate federal criminal prosecutions. Here are just a few statistics from the Federal Justice Statistics, regarding FY 2022, available at https://bjs.ojp.gov/library/publications/federal-justice-statistics-2022:

- An immigration offense was the most serious arrest offense in 24% of federal arrests.
- The five federal judicial districts along the U.S.-Mexico border (California Southern, Arizona, New Mexico, Texas Southern, and Texas Western) accounted for 40% of all federal arrests.
- 74% of immigration arrests were prosecuted.
- Twelve percent of matters concluded by U.S. attorneys in FY 2022 were disposed of by U.S. magistrates. 25% of the offenses disposed of by U.S. magistrates were misdemeanor immigration cases.
- Nearly all defendants (98%) charged with immigration offenses were convicted.

Immigration crimes include a wide range of conduct, from misuse of a U.S. passport to falsely claiming U.S. citizenship. This chapter begins with a historical look at U.S. criminalization of immigration (section 6.1). Next, this chapter examines the two most prosecuted federal immigration crimes—improper entry by an alien, 8 U.S.C. § 1325, and reentry of a removed alien, 8 U.S.C. § 1326—as well as available defenses (sections 6.2-6.8). What follows is discussion of other commonly charged crimes including those related to smuggling and transporting (section 6.9) and fraud (section 6.10), along with other crimes (sections 6.11-6.12, 6.14). You'll also find readings regarding unlawful employment of noncitizens without authorization to work—conduct that can have both civil and criminal consequences (section 6.13). Finally,

you'll be introduced to the federal sentencing guidelines (section 6.15) and test your ability to predict sentencing outcomes for clients (section 6.16).

6.1 A Brief History of Federal Immigration Crimes

In 1882, Congress passed the Chinese Exclusion Act, imposing a ten-year ban on the immigration of Chinese laborers. Some Chinese migrants sought to evade this ban by traveling first to Canada and then entering the United States through its Northern border. When caught, authorized migrants were charged with unlawful entry and imprisoned until such time that they could be removed to the "country from whence [they] came." The quoted language evidences how the Act contemplated deportation of unlawful migrants. Despite the arrest and detention of such migrants, the Act did not specifically criminalize unlawful entry.

The Chinese Exclusion Act did explicitly criminalize two things: (1) alteration or and forgery of certificates for Chinese laborers authorized to be present in the United States; and (2) aiding and abetting entry by unauthorized Chinese nationals. Both were classified as misdemeanors with attendant fines of $1,000. Sentencing limits, however, differed. Certificate fraud was punishable by not more than 5 years, aiding and abetting by not more than a year.

In 1884, Congress amended the Chinese Exclusion Act that it had passed just two years earlier. Section 16 of the 1884 act made "any violation of any provision of this act" a misdemeanor subject to a $1000 fine as well as imprisonment of up to a year. The U.S. Attorney in Washington Territory used this provision to criminally prosecute undocumented Chinese for "unlawful presence" or "violation of [the] restriction act."

Congress leaned harder into the criminalization of unlawful entry of Chinese laborers in 1892 with passage of the Geary Act. Section 4 of the Geary Act specified that "Chinese person[s] or person[s] of Chinese descent convicted and adjudged to be not lawfully entitled to be or remain in the United States" were to be "imprisoned at hard labor for a period of not exceeding one year, and thereafter removed from the United States." The U.S. Supreme Court considered the validity of this provision in Wong Wing v. United States, 163 U.S. 228 (1896). The Court noted that Chinese migrants were being sentenced to hard labor after only a summary hearing before a judge. They were, the Court held, entitled to jury trials. And so, this provision of the Geary Act was declared unconstitutional.

Congressional concern about the racial makeup of migrants arriving in the United States was not limited to Chinese nationals. As explained in section 3.1, Congress imposed numerical limits on migration in 1921 and 1924, pegging the admission of new

migrants to the racial makeup of the United States in 1910 and 1890 respectively. Recall that these laws did not apply to migration from the Western Hemisphere. James Davis, Secretary of Labor for most of the 1920s, characterized this exception as "closing the front door to immigration and leaving the back door wide open."

In 1928, Senator Coleman Livingston Blease of South Carolina proposed a solution to close the back door left open by the 1924 law. Blease drafted legislation that would criminalize the reentry of deported noncitizens. When the Blease bill passed the Senate and headed to the House of Representatives for consideration, Congressman Albert Johnson of Washington, chair of the House Committee on Immigration, led support for the Blease proposal. Johnson's committee amended the proposed legislation to further criminalize any unauthorized entry of noncitizens into the United States—something Johnson had been trying, unsuccessfully, to accomplish since 1925. Unsurprisingly, Secretary of Labor James Davis supported the amended bill and, in 1929, it became law.

Two things are especially notable about the 1929 law. First, lawmakers chose to criminalize unauthorized entry and reentry in order to shore up enforcement of U.S. immigration law. That is, lawmakers believed that making violation of the civil immigration law a federal crime would increase compliance with the civil immigration law. Second, the law was racially motivated. Blease, Johnson, and Davis were all members of white supremacist or eugenics movements, concerned about migration by Mexicans who they perceived as racially inferior.

From 1929 to 1939, there were 44,000 prosecutions of these two immigration crimes. Prosecutors consistently achieved a conviction rate of 93% or above. As for those prosecuted, in some years 99% were Mexican nationals. Indeed, some 71% of Mexican nationals in federal prison during these years were there on the basis of immigration crimes.

Congress returned to immigration crimes in 1986. The Immigration Reform & Control Act of 1986 (IRCA) made it a crime for employers to hire noncitizens lacking work authorization and increased the penalties for both bringing unauthorized noncitizens into the United States and also for possession or use of false immigration documents. The Immigration Marriage Fraud Amendments of 1986 (IMFA), meanwhile, made it a crime for noncitizens to marry solely for the purpose of obtaining immigration benefits.

The Anti-Drug Abuse Act of 1988 introduced a new term to immigration law: "aggravated felony" (see sections 3.1, 3.6). The act also introduced new, heightened

penalties for noncitizens who reenter the United States after deportation on the basis of an aggravated felony.

Less than ten years later, Congress passed the Illegal Immigration Reform & Immigrant Responsibility Act of 1996 (IIRIRA). IIRIRA created a host of new immigration crimes including falsely claiming to be a U.S. citizen, noncitizen voting in a federal election, and preparing a false immigration application.

Returning to the key crimes of unauthorized entry and reentry, prosecutions for such criminal activity began to exponentially rise at the tail end of President George W. Bush's administration. In fiscal year 2013 alone, there were over 97,000 prosecutions for unauthorized entry and reentry—a stark contrast to the 44,000 prosecuted for such crimes in the ten years between 1929 and 1939. Today, unauthorized entry and reentry continue to be frequently prosecuted (see section 6.2). Both offenses continue to have a high conviction rate (98%). Mexican nationals continue to dominate prosecutions (over 70%). And immigration crimes are the reason most noncitizens are serving time in federal prison (72.6%).

6.2 Improper Entry and Unlawful Reentry

Unauthorized entry and post-deportation reentry have been called the "low-hanging fruit of the federal legal system." The description is apt, as both are crimes with few elements and minimal evidentiary burdens.

CRS, Immigration-Related Criminal Offenses (2023)

IMPROPER ENTRY

8 U.S.C. § 1325 makes it a criminal offense to enter or attempt to enter the United States without authorization. A violation may result in a fine and imprisonment for up to six months for a first offense and up to two years for a subsequent violation. An alien may commit improper entry in three ways:

1. entering or attempting to enter the United States at any time or place other than a designated port of entry;
2. eluding examination or inspection by immigration officers; or
3. attempting to enter or obtaining entry by a willfully false or misleading representation or the willful concealment of a material fact.

Illegal Reentry

8 U.S.C. § 1326 makes it a felony for an alien previously denied admission or removed from the United States, or who departed the country while an order of removal was outstanding, to enter, attempt to enter, or be found in the United States without prior authorization. Absent certain factors, a conviction carries a punishment of a fine and a term of imprisonment for up to two years. Aliens may face enhanced penalties if they were previously removed or excluded on certain grounds, or had committed specified crimes. See 8 U.S.C. § 1326(b). In some cases, the maximum penalty may be up to 20 years' imprisonment.

Some reviewing courts have held that the alien must have entered "free from official restraint." See United States v. Gaspar-Miguel, 947 F.3d 632, 633-34 (10th Cir. 2020) (detailing history of the concept of "freedom from official restraint"); United States v. Pacheco-Medina, 212 F.3d 1162 (9th Cir. 2000) (reversing conviction for illegal reentry where the defendant was immediately apprehended when stepping on U.S. soil and therefore was never free from official restraint); United States v. Morales-Palacios, 369 F.3d 442 (5th Cir. 2004); see also United States v. Lombera-Valdovinos, 429 F.3d 927 (9th Cir. 2005) (overturning conviction for attempted illegal reentry because the alien crossed with the specific intent to be imprisoned). Some circuits have neither explicitly endorsed nor rejected the doctrine. See, e.g., United States v. Rojas, 770 F.3d 366, 368 (5th Cir. 2014) (deciding case without reaching the question of whether the circuit should recognize the official restraint doctrine).

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Kit Johnson, A Cost-Benefit Analysis of the Federal Prosecution of Immigration Crimes, 92 Denv. U. L. Rev. 863 (2015)

[The crime of improper entry is] known as "a 1325" in reference to its statutory basis in 8 U.S.C. § 1325. Conviction requires proof that the defendant (1) is not a U.S. citizen, (2) was found in or trying to enter the United States, and (3) did not have permission to be in the country.˜ [This crime is also referred to as "unlawful entry," "unauthorized entry" and EWI, short for "entry without inspection."]

[The crime of reentry after deportation is]˜ called "a 1326" because of its basis in 8 U.S.C. § 1326.˜ [A 1326 conviction requires the same proof as § 1325 with the addition of] proof that the defendant (4) had previously been removed or deported from the United States.˜

The evidence required to prove these elements is not hard to come by.˜ To prove citizenship, a prosecutor might have the defendant's own admission, a birth certificate,

or fingerprint data.˜ To prove presence, a prosecutor can simply point to the defendant in the courtroom— though, in practice, prosecutors generally use the arresting officer's testimony.˜ For lack of permission, the prosecutor might present a Certificate of Non-Existence from the USCIS indicating a lack of any paperwork regarding formal admission.˜ As for prior removal, the prosecutor need only introduce certified copies of the prior order of removal and warrant of removal.˜ To do all this, a prosecutor would need, at most, two witnesses—a records custodian and the arresting officer.˜

It should come as no surprise that prosecution of § 1325 and § 1326 cases are "lightning quick."˜ And the process moves even faster with routine plea agreements.˜ Many defendants who might be tried for felony reentry are offered the following deal: Don't fight prosecution, and receive instead a misdemeanor conviction for unauthorized entry.˜ Such pleas can take prosecutions from a two-day endeavor˜ to a process lasting just seconds.˜ That's not hyperbole. Section 1325 pleas are handled en masse in many courts along the southern border˜ where the initial appearance, arraignment, plea and sentencing all take place in one hearing.˜ Magistrate Judge Bernardo P. Velasco of the U.S. District Court for the District of Arizona can routinely process seventy pleas to § 1325 charges in thirty minutes, averaging out to just under twenty-six seconds per defendant.˜

The quickness of prosecution contrasts strongly with the length of incarceration. The maximum sentence for a § 1325 conviction is six months for a first offense,˜ and a second unauthorized entry conviction can result in a two-year prison term.˜ The maximum sentence for a § 1326 conviction is two years.˜ But there's a hitch: If the defendant was removed on the basis of a conviction for three or more misdemeanors involving drugs, crimes against the person, or certain felonies, the maximum sentence jumps to ten years.˜ And if the defendant was removed on the basis of a conviction for an aggravated felony,˜ the maximum sentence is twenty years.˜

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6.3 Defenses to Improper Entry and Unlawful Reentry: Citizenship

Both 8 U.S.C. § 1325 and 8 U.S.C. § 1326 apply only to "any alien" who violates the proscribed conduct. Thus, U.S. citizenship is an absolute defense to a criminal prosecution under either of these statutes.

Sometimes, determining citizenship is straightforward. A defendant born in the United States is a U.S. citizen (see section 2.2). Establishing that fact will be easy if the individual was born in a U.S. hospital, obtained an official birth certificate, or holds a U.S. passport.

Other times, determining citizenship can be quite complicated. For defendants born abroad, citizenship is determined by statute, and the statutory language has gone through many changes. It is necessary to identify the statutory language that was in place at the time of the defendant's birth. It is also necessary to know the citizenship of the parents of the defendant, which, in turn, depends on where those parents were born, the citizenship of their parents (the defendant's grandparents), and the statutory language in place at the time of the parents' births. The biographical data is relevant to establishing "citizenship by descent," meaning, through family ties. Note too that if a defendant's custodial parent naturalized before the defendant turned 18, the defendant would also have U.S. citizenship. A defendant may have U.S. citizenship through family ties or due to naturalization and be wholly unaware of their citizenship status.

Competent criminal counsel will ask clients detailed questions about where they were born, where their parents were born, where their grandparents were born, and whether any of those family members were U.S. citizens at birth or later became naturalized U.S. citizens. Criminal counsel should review those answers with immigration counsel to determine if there is the possibility of unknown U.S. citizenship.

6.4 Defenses to Improper Entry and Unlawful Reentry: Statutes of Limitation

Neither 8 U.S.C. § 1325 nor 8 U.S.C. § 1326 reference a specific statute of limitations. However, pursuant to 18 U.S.C. § 3282(a), both are subject to a five-year statute of limitations. The limitations period runs from the moment when the crime is said to be complete. What does this mean in practice?

For 8 U.S.C. § 1325 cases, the statute of limitations runs from the date of the noncitizen's unlawful entry into the United States. That is when a 1325 crime is complete.

For 8 U.S.C. § 1326 cases, in contrast, the statute of limitations runs from different dates, depending on which provision of 1326 the noncitizen is charged with violating. The offenses of "entry" and "attempted entry" under 8 U.S.C. § 1326 are complete when the deported noncitizen enters or attempts to enter through a recognized port of entry. In contrast, the offense of being "found in" the United States after surreptitious entry is considered a "continuing violation" that is not complete until the noncitizen is "discovered" by immigration authorities. Accordingly, this latter category of 1326 prosecutions are difficult to challenge on statute of limitations grounds.

6.5 Defenses to Unlawful Reentry: Equal Protection

Federal public defenders have endeavored to challenge the constitutional validity of 8 U.S.C. § 1326 on equal protection grounds. They have argued that Section 1326 was enacted with a discriminatory purpose (see section 6.1) and continues to have a racially disparate impact. The basis for these challenges is the equal protection guarantee of the Fifth Amendment. See Village of Arlington Heights v. Metropolitan Housing Development Corp, 429 U.S. 252 (1977).

A U.S. District Judge in Nevada agreed with this analysis in United States v. Gustavo Carrillo-Lopez, No. 3:20-cr-00026-MMD-WGC (D. Nev. Aug. 18, 2021) (ECF No. 60). That decision, however, was overturned by the Ninth Circuit in the opinion that follows.

6.6 Case: United States v. Carillo-Lopez

United States v. Carillo-Lopez
68 F.4th 1133 (9th Cir. 2023)

IKUTA, CIRCUIT JUDGE:

Gustavo Carrillo-Lopez, a citizen of Mexico, was indicted for illegally reentering the United States following prior removal, in violation of 8 U.S.C. § 1326. He successfully moved to dismiss the indictment on the ground that § 1326 violates the equal protection guarantee of the Fifth Amendment and is therefore facially invalid. Because Carrillo-Lopez did not carry his burden of proving that § 1326 was enacted with the intent to be discriminatory towards Mexicans and other Central and South Americans, and the district court erred factually and legally in holding otherwise, we reverse.˜

II

The Supreme Court has determined that "the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups." ˜

A statute that is facially neutral may˜ violate equal protection principles, but only if a discriminatory purpose was a motivating factor for the legislation.˜ "Whenever a challenger claims that a ... law was enacted with discriminatory intent, the burden of proof lies with the challenger."˜ To establish that the lawmakers had a discriminatory purpose in enacting specific legislation, it is not enough to show that the lawmakers had an "awareness of [the] consequences" of the legislation for the affected group, that those

consequences were "foreseeable,"˜ or that the legislature acted "with indifference to" the effect on that group˜. Rather, the lawmaking body must have "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."˜ Therefore, the plaintiff must "prove by an evidentiary preponderance that racial discrimination was a substantial or motivating factor in enacting the challenged provision."˜

There is no bright-line rule for determining whether the plaintiff has carried this burden. Rather, the Supreme Court has recognized that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."˜ Courts must consider the totality of the evidence presented by the plaintiff in light of certain presumptions and principles established by the Supreme Court.

The most important evidence of legislative intent is the historical evidence relating to the enactment at issue. The Court considers factors such as (1) the "historical background of the decision," (2) the "specific sequence of events leading up to the challenged decision," (3) "[d]epartures from the normal procedural sequence," (4) "[s]ubstantive departures," and (5) "legislative or administrative history."˜

This evidence must be considered in light of the strong "presumption of good faith" on the part of legislators.˜ We must also consider the evidence in context. In evaluating "contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports,"˜ a court must be aware that the statements of a handful of lawmakers may not be probative of the intent of the legislature as a whole.˜

Because "[p]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful,"˜ "the presumption of legislative good faith [is] not changed by a finding of past discrimination˜."

In addition to historical evidence relating to the enactment at issue, courts may consider evidence that the legislation at issue has a disproportionate impact on an identifiable group of persons. But while "[d]isproportionate impact is not irrelevant," it is generally not dispositive, and there must be other evidence of a discriminatory purpose.˜ A court may not infer a discriminatory motive based solely on evidence of a disproportionate impact except in rare cases where "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action."˜ Moreover, if the enactment of the legislation and the disproportionate impact are not close in time, the inference that a statute was enacted "because of" its impact on an identifiable group is limited.˜

III˜

As drafted, § 1326 is facially neutral as to race. Therefore, we turn to the question whether Carrillo-Lopez has carried his burden of showing "that racial discrimination was a substantial or motivating factor in" enacting § 1326.˜ Because the most important evidence of legislative intent is the relevant historical evidence, we start with the history of § 1326, which was enacted in 1952 as part of the Immigration and Nationality Act.˜

The history of the INA began in 1947, when the Senate directed the Senate Committee on the Judiciary "to make a full and complete investigation of [the country's] entire immigration system" and to provide "recommendations for changes in the immigration and naturalization laws as it may deem advisable."˜ This effort was "a most intensive and searching investigation and study over a three year period."˜ The subcommittee tasked with this investigation examined "a great volume of reports, exhibits, and statistical data," examined officials and employees of the Immigration and Naturalization Service (INS) and various divisions of the State Department, and made field investigations throughout Europe and the United States, as well as at the Mexican border, in Canadian border cities, and in Havana, Cuba.˜ Recognizing that the immigration law of the United States was established by "2 comprehensive immigration laws which are still in effect" and "over 200 additional legislative enactments," as well as "treaties, Executive orders, proclamations, and a great many rules, regulations and operations instructions," the subcommittee determined that it would "draft one complete omnibus bill which would embody all of the immigration and naturalization laws."˜

The extensive 925-page Senate Report provided a comprehensive analysis of immigration law. Part 1 set out a detailed review of the immigration system, providing (among other things) a description of the "[r]aces and peoples of the world," a "[h]istory of the immigration policy of the United States," a "[s]ummary of the immigration laws," and a discussion of the "characteristics of the population of the United States."˜ It included a discussion of excludable and deportable classes of aliens, as well as discussing admissible aliens, with special focus on so-called "quota" and "nonquota" immigrants.˜

In connection with the discussion of the characteristics of the population of the United States in Part 1, the Senate Report provided an overview of specified characteristics of different population groups in the Americas, including Canadians and Mexicans. These sections all followed the same template for each population group. In discussing Mexicans, the Senate Report covered (among other things) the population change since 1820 due to Mexican immigrants who had legally and illegally entered the United States, the geographical distribution of native-born and foreign-born Mexicans,

the "naturalization and assimilation" of Mexicans, and employment and crime data.˜ This section also included this data for "other Latin Americans."˜

One of the longest sections in Part 1, covering some 173 pages, discussed whether to continue "the numerical restriction of immigration through the imposition of quotas."˜ Historically, "[t]he first numerical restriction" on immigration into the United States "was imposed by the Quota Act of May 19, 1921," to address concerns "in the period immediately following [World War I], as a result of growing labor unrest, increasing unemployment, and general alarm over the potential flood of 'newer' immigrants from war-torn Europe."˜ Over the decades, limitations on quota immigrants changed, such as the removal of the bar to Chinese immigration.˜ Immigrants from Western Hemisphere countries (including Mexico and other countries in Central and South America) were excluded from this national-origin quota system.˜

The Senate Report acknowledged that the national-origin quota system was controversial because some opponents labeled it as "discriminatory in the treatment of certain nationalities of Europe,"˜ and therefore attempted to "examine this controversial subject objectively in order to present an unbiased appraisal of the quota system."˜ The Senate Report ultimately recommended retaining the quota system, but making "changes in existing law both with respect to the manner in which quotas [were] established for intending immigrants and the determination of preferences within the quotas."˜

Part 1 also included a chapter on procedures˜ for admission, exclusion, expulsion, bonds, and immigration offenses.˜ In the section on immigration offenses, the Senate Report discussed illegal reentry after deportation, and explained that a prior immigration law, the Act of March 4, 1929, "ma[de] it a felony for any deported alien who ha[d] not received permission to reapply for admission to enter or attempt to enter the United States."˜ In making "[s]uggestions relating to criminal provisions," the Senate Report noted that statements from witnesses and field offices of the INS stressed the "difficulties encountered in getting prosecutions and convictions, especially in the Mexican border area" because "many flagrant violators of the immigration laws [were] not prosecuted or, if prosecuted, [got] off with suspended sentences or probation."˜ The Senate Report recommended that "enact[ing] legislation providing for a more severe penalty for illegal entry and smuggling, as suggested by many, would not solve the problem."˜ Instead, it recommended that the "provisions relating to reentry after deportation ... be carried forward in one section and apply to any alien deported for any reason and provide for the same penalty."˜

Part 2 of the Senate Report provided a detailed overview of the naturalization system˜, state[ing] that the subcommittee had held "special hearings" on "[t]he subject of racial eligibility to naturalization."˜ The subcommittee concluded that "in consideration of our immigration laws, the subcommittee fe[lt] that the time ha[d] come to erase from our statute books any discrimination against a person desiring to immigrate to this country or to become a naturalized citizen, if such discrimination [was] based solely on race."˜ The subcommittee recommended that "all prerequisites for naturalization based solely on the race of the petitioner be eliminated from our naturalization laws," as set forth in the Senate Report.˜

After the issuance of the Senate Report,˜ input from the staff of the Senate Immigration Subcommittee as well as experts from the INS and the Department of State, ˜ extensive revisions˜ and˜ joint hearings,˜ Senator McCarran and Representative Walter introduced the final versions of the bill in the Senate and the House˜. According to a Senate Judiciary Committee Report, the revised bill made several significant changes from prior law. The changes included˜ a new formula and with an alteration in quota preferences to aliens with specified skills and relatives of United States citizens and alien residents.˜ The bills also removed "[r]acial discriminations and discriminations based upon sex."˜ Further,˜ the bills strengthened "[t]he exclusion and deportation procedures."˜ The Senate Judiciary Committee Report made only one mention of the reentry provisions. It stated: "In addition to the foregoing, criminal sanctions are provided for entry of an alien at an improper time or place, for misrepresentation and concealment of facts, for reentry of certain deported aliens, for aiding and assisting subversive aliens to enter the United States, and for importation of aliens for immoral purposes."˜ The Senate Judiciary Committee Report did not specifically reference the provision that penalized reentry after removal ˜.

Congressional debates over the final bill focused on the national-origin quota system. Critics argued that this system was arbitrary because it favored the "so-called Nordic strain" of immigrants but disfavored "people from southern or eastern Europe."˜

Congressional debates did not mention the illegal reentry provision, Section 276. "An exhaustive reading of the congressional debate indicates that Congress was deeply concerned with many facets of the [INA], but §§ 1325 and 1326 were not among the debated sections."˜ Carrillo-Lopez concedes that "[c]ongressional debate focused on the national-origins provisions, not the illegal reentry statute." There was no discussion of Section 276's impact on Mexicans or other Central and South Americans.

The controversy over the national-origin quota system continued even after the bill˜ passed both houses of Congress, because President Truman vetoed the bill due to

his opposition to the national-origin quota system.˜ In his veto statement, President Truman first made clear that the bill "contains certain provisions that meet with my approval," including removing "[a]ll racial bars to naturalization."˜ Nevertheless, President Truman opposed a number of the bill's features, most significantly its provisions continuing "the national origins quota system."˜ President Truman explained that he had "no quarrel" with the general idea of quotas, but stated that the national-origin quota system˜ perpetuated by the bill discriminated against people of Southern and Eastern Europe, in favor of immigrants from England, Ireland, and Germany, which President Truman argued was improper both on moral and political grounds.˜ In particular, President Truman noted the United States' alliance with Italy, Greece, and Turkey, and the need to help immigrants from Eastern Europe who were escaping communism.˜ President Truman did not mention Mexicans or other Central and South Americans, to whom the national-origin quota system did not apply.˜ Nor did he mention the provision criminalizing reentry˜. Congress enacted the INA over President Truman's veto.˜

As enacted,˜ 8 U.S.C. § 1326˜, replaced the reentry offenses set forth in three prior statutory sections.˜ In creating a single offense, it also eliminated the three different criminal penalties imposed by these three prior statutes, and instead subjected all reentry defendants to the same penalty: two years' imprisonment and a fine.˜ The new Section˜ also added a new basis for liability: "being 'found in' the United States" after a prior deportation—a "continuing" offense that "commences with the illegal entry, but is not completed until" the defendant is discovered.˜ Finally, § 1326 eliminated the language that would permit aliens to bring collateral challenges to the validity of their deportation proceedings in subsequent criminal proceedings.˜

We now turn to Carrillo-Lopez's arguments that Congress was motivated in part by discrimination against Mexicans and other Central and South Americans in enacting § 1326 as part of the INA in 1952.

1˜

Carrillo-Lopez begins by arguing that the Senate Report, the basis for the 1952 legislation, is "replete with racism." He points to certain statements in Part 1 of the Senate Report, which discussed different population groups. In the subsection on Mexicans, the Senate Report stated that since 1820, "over 800,000 immigrants have legally entered," and "it has been reliably estimated that Mexican aliens are coming into the United States illegally at a rate of 20,000 per month."˜ Later in Part 1, a chapter discussing the historical background and current law regarding excludable and deportable classes of aliens noted that a 1917 immigration law excluded from admission aliens who were previously deported from the United States.˜ The Senate Report stated

that "[t]he largest number of persons, who as aliens are deported twice, are deported to Mexico. The problem appears, therefore, to be principally a southern border problem and is discussed in the section on deportation problems."˜

Carrillo-Lopez argues that the statements that "Latino immigrants were 'coming into the United States illegally at a rate of 20,000 per month,' and the statement that people entering illegally after being deported is 'principally a southern border problem,'" evince racism. Carrillo-Lopez also describes statements in Part 1 as "denigrat[ing] Latino immigrants as particularly undesirable due to alleged: low-percentage of English speakers; inability to assimilate to 'Anglo-American' culture and education, with Latino students believed to be 'as much as 3 years behind'; and a high number receiving 'public relief.'" ˜

We disagree. In context, the statements Carrillo-Lopez identified in the Senate Report merely provided a factual description of Mexicans and other Latin Americans, along with all other "races and peoples." There is no language that "denigrates Latino immigrants as particularly undesirable." Indeed, neither Carrillo-Lopez nor the district court identified any racist or derogatory language regarding Mexicans or other Central and South Americans in these pages, or anywhere else in the 925-page Senate Report.

Second, Carrillo-Lopez contends that Congress's discriminatory intent in enacting § 1326 can be inferred from Congress's decision to enact the INA over President Truman's veto. The district court agreed with this argument.˜ But President Truman's opposition to the national-origin quota system, the central reason for his veto, sheds no light on whether Congress had an invidious intent to discriminate against Mexicans and other Central and South Americans in enacting § 1326. Mexicans and other Central and South Americans were not part of the national-origin quota system,˜ and as the district court conceded, "President Truman did not explicitly address racism as to Mexican[s] or" other Central and South Americans, and "did not address Section 1326 specifically." Further, President Truman's opinion on the legislation is not evidence of Congress's motivation in enacting § 1326.˜ The district court clearly erred when it relied on Congress's decision to override President Truman's veto as evidence that § 1326 was enacted in part by discriminatory animus.

Finally, Carrillo-Lopez contends that Congress's intent to discriminate against Mexicans and other Central and South Americans can be inferred from the Department of Justice's use of the word "wetback" in a letter commenting on the INA. The district court agreed. The record shows that after Senator McCarran introduced S. 716 (a revised version of S. 3455), the Senate Judiciary Committee "request[ed] the views of the Department of Justice" relating to this draft.˜ As requested, Deputy Attorney General Peyton Ford provided a comment letter.˜ In commenting on Sections 201 and

202, which removed racial ineligibility from the quota system, the Ford letter stated that the "Department of Justice favors the removal of racial bars to immigration."˜ Next, in commenting on Section 276 (the provision at issue here), the Ford letter stated that Section 276 "adds to existing law by creating a crime which will be committed if a previously deported alien is subsequently found in the United States," and observed that "[t]his change would overcome the inadequacies in existing law which have been observed in those cases in which it is not possible for the [INS] to establish the place of reentry."˜ The Ford letter recommended some clarifications in the language of this section.˜ Finally, in commenting on Section 287 of the proposed act, which granted authority to officers of the INS to conduct searches of applicants for admission under certain circumstances, the Ford letter asked that Congress give specific authority to immigration officers to go onto private property to search for "aliens or persons believed to be aliens."˜ In making this suggestion, the letter quoted a 1951 "report of the President's Commission on Migratory Labor," which recommended that immigration officers be given authority to investigate private farms, in order to assist in "taking action against the conveyors and receivers of the wetback," referring to alien smugglers and employers who harbor aliens.˜ Carrillo-Lopez argues that this letter is probative of Congress's discriminatory intent because it refers to Mexicans as "wetback[s]," which shows an animus that Carrillo-Lopez claims should be imputed to Congress.

We reject this attenuated argument. The Ford letter's use of the term "wetback" sheds no light on Congress's views. The Ford letter quoted a separate report that employed that term when recommending that Congress clarify immigration officers' search authority to assist in enforcing the law against smugglers and persons who harbored illegal entrants. ˜The district court also erred in relying on the passage of an act some dubbed the "Wetback Bill" as evidence of Congress's discriminatory intent. The district court held that "both the derogatory nickname of the Wetback Bill and its criminalization of Mexican immigrant laborers while shielding employers evidence[d] the racially discriminatory motives and intent of the same Congress who enacted Section 1326 only two months later." But individual lawmakers' name for a separate bill is not sufficient evidence to meet Carrillo-Lopez's burden of showing that Congress acted with racial animus when it enacted § 1326. Further, the district court's depiction of the act was erroneous. The act provided that any person who knowingly transports into the United States, harbors, or conceals a person in the country illegally, or encourages such a person to enter the United States, is guilty of a felony, and included a proviso that "employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring."˜ Based on the statement of senators in the congressional record, the act was enacted in connection with negotiations with Mexico to secure an extension of an existing migratory-labor agreement, because Mexico wanted

the United States to strengthen its immigration laws to restrict migration of Mexicans to the United States.˜ The act did not impose criminal penalties on Mexicans or other Central and South Americans.↵ And contrary to Carrillo-Lopez's argument, the Ford letter did not recommend that Congress add a provision allowing enforcement when an alien was "found in" the United States that was then adopted by Congress. Rather, both prior drafts of the bill that became the INA included this offense; the Ford letter merely suggested clarifying language.14 Because the Ford letter did not evince discriminatory intent, the argument that it shows Congress's discriminatory intent fails.

Given the lack of historical evidence that the Congress that enacted § 1326 in 1952 was motivated in part by a desire to discriminate against Mexicans or other Central and South Americans, Carrillo-Lopez next turns to the legislative history of a prior immigration law, the 1929 Act. The 1929 Act was one of three statutes that "imposed criminal penalties upon aliens who reentered the country after deportation."˜ The parties do not dispute that the 1929 Act was motivated in part by racial animus against Mexicans and other Central and South Americans.

Carrillo-Lopez argues that the discriminatory purpose motivating the 1929 Act tainted the INA and § 1326 because some of the legislators were the same in 1952 as in 1929. In particular, Carrillo-Lopez observes that two of the members of Congress who had participated in enacting the 1929 Act praised the 1952 Congress for protecting American homogeneity and keeping "undesirables" away from American shores. See 98 Cong. Rec. 5774 (1952) (statement of Sen. George) (stating that the purpose of the 1924 immigration law was to "preserve something of the homogeneity of the American people"); id. at 4442 (statement of Rep. Jenkins) (stating that the House debate had "been reminiscent of the days of 20 years ago when the wishes of the Members was to keep away from our shores the thousands of undesirables just as it is their wish now"). Carrillo-Lopez also argues that the fact that the 1952 Congress did not expressly disavow the 1929 Act indicates that Congress was motivated by the same discriminatory intent. Finally, Carrillo-Lopez argues that the INA constituted a reenactment of the 1929 Act. The district court largely agreed with each of these points.

This interpretation of the legislative history is clearly erroneous. The INA was enacted 23 years after the 1929 Act, and was attributable to a legislature with "a substantially different composition," in that Congress experienced a more than 96 percent turnover of its personnel in the intervening years.˜ The statements of Representative Thomas Jenkins and Senator Walter George, which in any event were made in the context of debating the national-origin quota system rather than in discussing § 1326, are not probative of the intent of the legislature as a whole.˜

Further, the Supreme Court has rejected the argument that a new enactment can be deemed to be tainted by the discriminatory intent motivating a prior act unless legislators expressly disavow the prior act's racism.˜ Contrary to Carrillo-Lopez and the district court's reasoning, a legislature has no duty "to purge its predecessor's allegedly discriminatory intent."˜ ↵Further weakening the claim that § 1326, in its current form, was motivated by discriminatory animus, is the fact that § 1326 has been amended multiple times since its enactment.˜ Carrillo-Lopez does not allege that each successive Congress was motivated by discriminatory purpose.˜ [T]he district court˜ failed to recognize that "by amendment, a facially neutral provision ... might overcome its odious origin."˜↵ The district court suggested that it "might be persuaded that the 1952 Congress' silence alone is evidence of a failure to repudiate a racially discriminatory taint," but stopped short of reaching this issue, and such a ruling would be contrary to Supreme Court precedent. Therefore, the evidence of the discriminatory motivation for the 1929 Act lacks probative value for determining the motivation of the legislature that enacted the INA.˜

Finally, the INA was not a "reenactment" of the 1929 Act, but rather a broad reformulation of the nation's immigration laws, which included a recommendation "that the time ha[d] come to erase from our statute books any discrimination against a person desiring to immigrate to this country or to become a naturalized citizen, if such discrimination [was] based solely on race."˜ Section 1326 itself incorporated provisions from three acts and made substantial revisions and additions˜. The district court therefore clearly erred in stating that § 1326 was not "substantially different" from the 1929 Act.

2

In addition to the legislative history, Carrillo-Lopez argues that § 1326's disproportionate impact on Mexicans and other Central and South Americans is evidence that Congress was motivated by a discriminatory intent in enacting the statute. Evidence that legislation had a disproportionate impact on an identifiable group is generally not adequate to show a discriminatory motive, and here, the evidence that § 1326 had a disparate impact on Mexicans and other Central and South Americans—and that Congress knew of this impact and enacted § 1326 because of the impact—is highly attenuated.

Carrillo-Lopez does not provide direct evidence of the impact of § 1326 on Mexicans and other Central and South Americans in the years following the 1952 enactment of the INA. Rather, Carrillo-Lopez points to evidence that Mexicans were apprehended at the border and subject to immigration laws. He first points to the Senate Report's statements (in a subsection on problems with deportation procedures) that

"[i]n 1946 and 1947 the percentages of voluntary departures were 90 percent and 94 percent Mexicans, respectively,"˜ and that "[d]eportations and voluntary departures to Canada were very small, since approximately 90 percent of the cases were Mexicans˜." In the same vein, the district court stated that the 1952 Congress knew that § 1326 would "disparately impact Mexican[s]" and other Central and South Americans because the Senate Report discussed "difficulties encountered in getting prosecutions and convictions, especially in the Mexican border area." While these statements indicate that Mexicans and other Central and South Americans were apprehended at the border and deported when they entered illegally, and that there was a lack of enforcement of immigration laws at the Mexican border area, the statements do not show that a statute criminalizing illegal reentry disproportionately impacted Mexicans and other Central and South Americans. ˜Carrillo-Lopez and the district court rely on a declaration by UCLA Professor Kelly Lytle Hernandez, which states that in the late 1930s, before the enactment of the INA, "the U.S. Bureau of Prisons reported that Mexicans never comprised less than 84.6 percent of all imprisoned immigrants" and that "[s]ome years, Mexicans comprised 99 percent of immigration offenders." The declaration concludes that "[t]herefore, by the end of the 1930s, tens of thousands of Mexicans had been arrested, charged, prosecuted, and imprisoned for unlawfully entering the United States." But the declaration does not provide a source for its statements or conclusion, or any basis for the conclusion that Mexicans had been imprisoned for illegal reentry, and so provides little support for Carrillo-Lopez's claims.˜

Carrillo-Lopez also provides information about the current impact of § 1326. Before the district court, Carrillo-Lopez provided statistics regarding border apprehensions from 2000 to 2010, which showed that the majority of persons apprehended at the border during that period were of Mexican descent, and argued that the Department of Justice had a policy of prosecuting apprehensions. On appeal, Carrillo-Lopez cites additional information from the United States Sentencing Commission in 2020 for the proposition that 99% of prosecutions for illegal reentry are against Mexican or Central and South American defendants.˜ He also argues that in 2018, the Department of Justice's policy was to prosecute "100% of southern border crossings."˜ This data has little probative value, however, because it relates to a period that is more than 45 years after the INA was enacted. After such a long passage of time, this information does not raise the inference that Congress enacted § 1326 in 1952 because of its impact on Mexicans and other Central and South Americans.˜ The district court's reliance on this contemporaneous data was clearly erroneous.

But even if Carrillo-Lopez had provided direct evidence that § 1326 had a disproportionate impact on Mexicans and other Central and South Americans in the

years following the enactment of the INA, he would still not carry his burden of showing that Congress enacted § 1326 because of its impact on this group, because the clear geographic reason for disproportionate impact on Mexicans and other Central and South Americans undermines any inference of discriminatory motive. "The United States' border with Mexico extends for 1,900 miles, and every day thousands of persons ... enter this country at ports of entry on the southern border."˜ Therefore, it is "common sense ... that it would be substantially more difficult for an alien removed to China to return to the United States than for an alien removed to Mexico to do so."˜ The Court has explained that "because Latinos make up a large share of the unauthorized alien population,˜ virtually any generally applicable immigration policy could be challenged on equal protection grounds" if disproportionate impact were sufficient to state a claim˜. Therefore, the claim that a law has a "disparate impact ... on Latinos from Mexico" is not "sufficient to state" a "plausible equal protection claim."˜ Applied here, the fact that § 1326, which criminalizes reentry, has a greater impact on the individuals who share a border with the United States, and "make up a large share of the unauthorized alien population,"˜ than those who do not, does not prove that penalizing such individuals was a purpose of this legislation. ˜The district court stated it was "unpersuaded by the government's argument that geography explains [§ 1326's] disparate impact" because a group can raise an equal protection challenge against legislation that has a disproportionate impact on a racial group even when "'geography' might arguably explain the disparity." To the extent the district court meant that a group may succeed on such a claim merely because the challenged legislation "bears more heavily on" one race than another, it was incorrect. The Supreme Court has made clear that a group may raise an equal protection claim only if a discriminatory purpose was a motivating factor for the legislation˜, and evidence that a disproportionate impact was not "because of" a discriminatory purpose may defeat the claim˜.˜ The district court clearly erred when it relied on the evidence of disproportionate impact without further evidence demonstrating that racial animus was a motivating factor in the passage of the INA.

3

We hold that the district court clearly erred in its finding that Congress's enactment of § 1326 was motivated in part by the purpose of discriminating against Mexicans or other Central and South Americans. The strong "presumption of good faith" on the part of the 1952 Congress is central to our analysis.˜ Rather than applying this presumption, the district court construed evidence in a light unfavorable to Congress, including finding that evidence unrelated to § 1326 indicated that Congress enacted § 1326 due to discriminatory animus against Mexicans and other Central and South

Americans. The district court also erred in finding that Congress's failure "to repudiate the racial animus clearly present in 1929" was indicative of Congress's discriminatory motive in enacting the INA.

We conclude that Carrillo-Lopez did not meet his burden to prove that Congress enacted § 1326 because of discriminatory animus against Mexicans or other Central and South Americans. "This conclusion ends the constitutional inquiry,"˜ and we reject Carrillo-Lopez's equal protection claim.˜

REVERSED AND REMANDED.

6.7 Defenses to Unlawful Reentry: Challenging Initial Deportation

Prosecution under 8 U.S.C. § 1326 requires proof of an earlier "order of exclusion, deportation, or removal." 8 U.S.C. § 1326(a)(1). One defense to a 1326 prosecution is to challenge the validity of the initial order of deportation. However, in 1996, Congress limited the availability of this defense by requiring administrative exhaustion. 8 U.S.C. § 1326(d). The following case, United States v. Palomar-Santiago, sheds light on the stringent requirements of 1326(d).

6.8 Case: United States v. Palomar-Santiago

United States v. Palomar-Santiago
593 U.S. 321 (2021)

JUSTICE SOTOMAYOR DELIVERED THE OPINION OF THE COURT.

In 1998, respondent Refugio Palomar-Santiago was removed from the United States based on a conviction for felony driving under the influence (DUI). He later returned to the United States and was indicted on one count of unlawful reentry in violation of 8 U.S.C. § 1326(a). Between Palomar-Santiago's removal and indictment, this Court held that offenses like his DUI conviction do not in fact render noncitizens removable. Palomar-Santiago now seeks to defend against his unlawful-reentry charge by challenging the validity of his 1998 removal order.

By statute, defendants "may not" bring such collateral attacks "unless" they "demonstrat[e]" that (1) they "exhausted any administrative remedies that may have been available to seek relief against the [removal] order," (2) the removal proceedings "improperly deprived [them] of the opportunity for judicial review," and (3) "entry of the order was fundamentally unfair." § 1326(d).

The question for the Court is whether Palomar-Santiago is excused from making the first two of these showings, as the Court of Appeals for the Ninth Circuit held, because his prior removal order was premised on a conviction that was later found not to be a removable offense. The Court holds that the statute does not permit such an exception.

I

A

Foreign nationals may be removed from the United States if they are convicted of an "aggravated felony." 8 U.S.C. § 1227(a)(2)(A)(iii). Among the offenses that qualify as aggravated felonies are "crime[s] of violence ... for which the term of imprisonment [is] at least one year." § 1101(a)(43)(F). The term "crime of violence" includes "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a).

Noncitizens facing removal generally receive a hearing before an immigration judge. Noncitizens can proffer defenses at that hearing, including that the conviction identified in the charging document is not a removable offense. If unsuccessful, they may appeal to the Board of Immigration Appeals (BIA). See 8 U.S.C. § 1229a(c)(5); 8 C.F.R. §§ 1003.1(b), (d)(3), 1240.15 (2021). If unsuccessful again, they can seek review of the BIA's decision before a federal court of appeals. See 8 U.S.C. §§ 1101(a)(47), 1252.

Once a noncitizen is removed, it is a crime to return to the United States without authorization. § 1326(a). The statute criminalizing unlawful reentry did not originally allow defendants to raise the invalidity of their underlying removal orders as an affirmative defense. This Court later held, however, that the statute "does not comport with the constitutional requirement of due process" insofar as it "impose[s] a criminal penalty for reentry after any deportation, regardless of how violative of the rights of the [noncitizen] the deportation proceeding may have been." United States v. Mendoza-Lopez, 481 U.S. 828, 837˜ (1987). "[A]t a minimum," "a collateral challenge to the use of a deportation proceeding as an element of a criminal offense must be permitted where the deportation proceeding effectively eliminates the right of the [noncitizen] to obtain judicial review." Id., at 839˜.

Congress responded by enacting § 1326(d). See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), § 441, 110 Stat. 1279. Entitled "Limitation on collateral attack on underlying deportation order," § 1326(d) establishes three prerequisites that defendants facing unlawful-reentry charges must satisfy before they can challenge their original removal orders. The statute provides: "In a criminal proceeding under this

section, an alien may not challenge the validity of the deportation order ... unless the alien demonstrates that—(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order; (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair." 8 U.S.C. § 1326(d).

B

Palomar-Santiago is a Mexican national who obtained permanent resident status in 1990. The following year, he was convicted in California state court of a felony DUI. In 1998, Palomar-Santiago received a Notice to Appear from the Immigration and Naturalization Service stating that he was subject to removal because his DUI offense was an aggravated felony. Following a hearing, an immigration judge ordered Palomar-Santiago's removal on that ground. Palomar-Santiago waived his right to appeal and was removed to Mexico the next day.

Six years later, this Court held in Leocal v. Ashcroft, 543 U.S. 1˜ (2004), that "a higher mens rea than the merely accidental or negligent conduct involved in a DUI offense" is necessary for an offense to qualify as a crime of violence. Id., at 11˜. Accordingly, Palomar-Santiago's DUI conviction was not a crime of violence under 18 U.S.C. § 16(a), and so not an aggravated felony under 8 U.S.C. § 1101(a)(43). Palomar-Santiago's removal order thus never should have issued.˜

In 2017, Palomar-Santiago was found again living in the United States. A grand jury indicted him on one count of unlawful reentry after removal. Palomar-Santiago moved to dismiss the indictment on the ground that his prior removal order was invalid in light of Leocal. The District Court granted the motion, and the Court of Appeals for the Ninth Circuit affirmed.˜

Both courts were bound by Ninth Circuit precedent providing that defendants are "excused from proving the first two requirements" of § 1326(d) if they were "not convicted of an offense that made [them] removable."˜ Other Courts of Appeals do not excuse similarly situated unlawful-reentry defendants from meeting § 1326(d)'s first two requirements.˜ This Court granted certiorari to resolve this disagreement.˜

II

The Ninth Circuit's interpretation is incompatible with the text of § 1326(d). That section provides that defendants charged with unlawful reentry "may not" challenge their underlying removal orders "unless" they "demonstrat[e]" that three conditions are met: (1) they have "exhausted any administrative remedies," (2) they were "deprived ... of the opportunity for judicial review," and (3) "the entry of the order was

fundamentally unfair." 8 U.S.C. § 1326(d). The requirements are connected by the conjunctive "and," meaning defendants must meet all three. When Congress uses "mandatory language" in an administrative exhaustion provision, "a court may not excuse a failure to exhaust."˜ Yet that is what the Ninth Circuit's rule does.

Without the benefit of the Ninth Circuit's extrastatutory exception, § 1326(d)'s first two procedural requirements are not satisfied just because a noncitizen was removed for an offense that did not in fact render him removable. Indeed, the substantive validity of the removal order is quite distinct from whether the noncitizen exhausted his administrative remedies (by appealing the immigration judge's decision to the BIA) or was deprived of the opportunity for judicial review (by filing a petition for review of a BIA decision with a Federal Court of Appeals).

III

Palomar-Santiago raises two counterarguments based on the text of § 1326(d).˜ Neither is persuasive. First, he contends that further administrative review of a removal order is not "available" when an immigration judge erroneously informs a noncitizen that his prior conviction renders him removable. Noncitizens, the argument goes, cannot be expected to know that the immigration judge might be wrong. Because noncitizens will not recognize a substantive basis for appeal to the BIA, that administrative review is not practically "available" under § 1326(d)(1).˜

Administrative review of removal orders exists precisely so noncitizens can challenge the substance of immigration judges' decisions. The immigration judge's error on the merits does not excuse the noncitizen's failure to comply with a mandatory exhaustion requirement if further administrative review, and then judicial review if necessary, could fix that very error.

Second, Palomar-Santiago contends that the § 1326(d) prerequisites apply only when a defendant argues that his removal order was procedurally flawed rather than substantively invalid. There can be no "challenge" to or "collateral attack" on the validity of substantively flawed orders, he reasons, because such orders are invalid from the moment they are entered. Palomar-Santiago's position ignores the plain meaning of both "challenge" and "collateral attack." Arguing that a prior removal order was substantively unlawful is a "challenge" to that order. See Black's Law Dictionary 230 (6th ed. 1990) ("Challenge" means "[t]o object or except to" or "to put into dispute"). When a challenge to an order takes place in a separate "proceeding that has an independent purpose," such as a later criminal prosecution, it is a "collateral attack." Id., at 261.

Palomar-Santiago last invokes the canon of constitutional avoidance.˜ Courts should indeed construe statutes "to avoid not only the conclusion that [they are] unconstitutional, but also grave doubts upon that score."˜ But this canon "has no application in the absence of statutory ambiguity."˜ Here, the text of § 1326(d) unambiguously forecloses Palomar-Santiago's interpretation.

* * *

The Court holds that each of the statutory requirements of § 1326(d) is mandatory. The judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

6.9 Smuggling, Transporting

CRS, Immigration-Related Criminal Offenses (2023)

Several provisions in federal law criminalize activities that involve smuggling aliens into the United States, transporting aliens within the United States, or otherwise assisting unlawfully present aliens to remain in the country. Located in 8 U.S.C. § 1324, these offenses typically constitute felonies and may sometimes carry lengthy prison terms, including enhanced penalties when the offense is performed for commercial advantage or private financial gain. In a few instances, such as alien smuggling offenses resulting in serious harm to or the death of a person, the maximum available penalty may be life imprisonment or death. Additionally, any vehicle, vessel, or aircraft that was used in the commission of the crime or otherwise traceable to gross proceeds from a violation of 8 U.S.C. § 1324 may be seized and subject to forfeiture. Humanitarian concerns are not a defense to a charge of transporting or harboring aliens. United States v. Aguilar, 883 F.2d 662 (9th Cir. 1989); see also Dimova v. Holder, 783 F.3d 30 (1st Cir. 2015) (reasoning that the statute's plain language does not contain an exception for humanitarian assistance).

SMUGGLING

8 U.S.C. § 1324(a)(1)(A)(i) makes it a crime for any individual to bring or attempt to bring a person to the United States between ports of entry knowing that person is an alien. The individual may be convicted even if the smuggled alien had received prior authorization to enter, come to, or reside in the United States and regardless of any future official action that might be taken with respect to the alien. The defendant must have made an affirmative and knowing act of help or assistance. An individual's mere

presence during the commission of the crime is insufficient. See Altamirano v. Gonzalez, 427 F.3d 586 (9th Cir. 2005).

TRANSPORTING

To be guilty of the crime of transporting under 8 U.S.C. § 1324(a)(1)(A)(ii), a person must—knowing or in reckless disregard of the fact that an alien "has come to, entered, or remains in the United States in violation of law"— have knowingly transported the alien for the purpose of helping him or her further such violation of the law. A defendant acts with "reckless disregard" if he or she is aware of but consciously disregards facts and circumstances indicating that the person being transported was an alien who had unlawfully entered or remained in the United States. See, e.g., United States v. Tydingco, 909 F.3d 297 (9th Cir. 2018).

HARBORING

8 U.S.C. § 1324(a)(1)(A)(iii) penalizes any person who—knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of the law—conceals, harbors, or shields from detection an alien in any place, including any building or means of transportation. Likewise, attempts to engage in the proscribed activity are punishable under the provision. Courts have generally defined harboring as conduct that substantially facilitates an alien's unlawful presence in the United States and prevents authorities from detecting the alien's unlawful presence. See, e.g., United States v. Kim, 193 F.3d 567 (2d Cir. 1999). Any surreptitious shielding violates this provision, including giving shelter from or warning as to the presence of immigration officers. See, e.g., United States v. Rubio-Gonzalez, 674 F.2d 1067 (5th Cir. 1982) (holding that a warning given to unlawfully present alien workers about a federal immigration enforcement inspection constituted concealing or shielding).

INDUCING OR ENCOURAGING

8 U.S.C. § 1324(a)(1)(A)(iv) bars persons from encouraging or inducing an alien to come to, enter, or reside in the United States while knowing or in reckless disregard of the fact that the alien's entry or presence is or will be in violation of law. See, e.g., United States v. Anderton, 901 F.3d 278 (5th Cir.2018) (affirming conviction where the employer knew workers were not lawfully present, continued to employ them, facilitated housing, and assisted aliens in obtaining public benefits). There has been some debate over what conduct falls within this provision and whether the provision is overbroad in violation of the Free Speech Clause of the First Amendment. See United States v. Hansen, 25 F.4th 1103, 1107 (9th Cir. 2022), cert. granted, 2022 WL 17544995

(Dec. 9, 2022); see also CRS Legal Sidebar LSB10705, Ninth Circuit Holds that Criminal Penalties for Encouraging or Inducing Illegal Immigration Violate First Amendment, by Kelsey Y. Santamaria.

BRINGING TO THE UNITED STATES:

It is a criminal offense under 8 U.S.C. § 1324(a)(2) for any person to—knowing or in reckless disregard of the fact that an alien had not received prior authorization to come to, enter, or reside in the United States—bring or attempt to bring an alien to the United States in any manner, regardless of whether any future official action may occur with respect to that alien. See, e.g., United States v. Yoshida, 303 F.3d 1145 (9th Cir. 2002) (affirming conviction where defendant guided aliens to aircraft heading to the United States). A conviction for "bringing to" may result in a fine and imprisonment up to one year. A vehicle, vessel, or aircraft used in or traceable to the commission of the violation may be subject to forfeiture. Notably, this is a separate crime from smuggling under 8 U.S.C. § 1324(a)(1)(A)(i), which applies when the unlawful entry is between ports of entry.

OTHER OFFENSES:

Other offenses related to alien smuggling, harboring, or transporting include failure by owners, officers, or agents of any vessel to prevent the landing of an alien (8 U.S.C. § 1321); bringing in aliens who are inadmissible on health-related grounds (8 U.S.C. § 1322); unlawful bringing of aliens into the United States by a carrier (8 U.S.C. § 1323); knowingly hiring 10 or more aliens within a 12-month period while having actual knowledge that they were unlawfully brought to the United States (8 U.S. Code § 1324(a)(3)); and aiding or assisting certain aliens to enter the country who are inadmissible for certain criminal, subversive, or terrorist activity (8 U.S.C. § 1327).

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6.10 Federal Immigration Crimes Related to Fraud

Federal law also penalizes fraudulent conduct that undermines the immigration regulatory scheme.

CRS, Immigration-Related Criminal Offenses (2023)

VISA FRAUD AND FALSE STATEMENTS

Under 18 U.S.C. § 1546, it is a felony to knowingly forge, counterfeit, alter, or falsely make visas, permits, and other immigration-related documents, as well as to

knowingly use a false identification document or make a false attestation. Offenders may be subject to a criminal penalty of a fine and a term of imprisonment ranging from 10 to 25 years.

MARRIAGE FRAUD

Under 8 U.S.C. § 1325(c), marriage fraud is committed by a person who knowingly enters into a marriage to evade immigration rules. A conviction carries a penalty of a fine and imprisonment for no more than five years.

FALSE CLAIM OF U.S. CITIZENSHIP

Under 18 U.S.C. § 911, whoever falsely and willfully represents to be a U.S. citizen may be subject to a fine and imprisonment for up to three years.

PASSPORT FRAUD:

18 U.S.C. § 1542 makes it a criminal offense to willfully and knowingly make a false statement in a passport application or willfully and knowingly use or attempt to use a passport secured by a false statement. This offense carries a penalty of a fine and term of imprisonment ranging from 10 to 25 years.

PROCUREMENT OF CITIZENSHIP OR NATURALIZATION UNLAWFULLY

18 U.S.C. § 1425 makes it a felony to knowingly procure or attempt to procure, contrary to law, the naturalization of any person. This offense carries a fine and a term of imprisonment ranging from 10 to 25 years.

Immigration-related identity theft may be prosecuted under laws of general applicability targeting identity theft or making false statements to the government. See 18 U.S.C. §§ 1001, 1028A.

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6.11 Firearms Offenses

Kit Johnson, The Unusual History of 18 USC 922(g)(5), Criminalizing Noncitizen Possession of a Firearm, ImmigrationProfBlog (2023)

Under 18 USC § 922(g)(5), it is a crime for undocumented migrants or nonimmigrants to be in possession of a firearm.˜

The provision dates to the 1968 Omnibus Crime Control and Safe Streets Act. As explored by [Professor] William J. Vizzard˜, Senator Thomas Dodd (D-CT) was a

significant driver of the passage of this act. He'd been working on federal gun control laws for years in advance of this legislation.

But the specific inclusion of a law restricting non-citizens from possessing firearms came from Senator Russell Long (D-LA) who proposed Title VII as a late addition to the omnibus bill. As Vizzard writes: "At the last minute, the Senate inserted Title VII into its version of the Omnibus Act by voice vote. Proposed by Senator Russell Long (D-LA) and considered without hearings, the bill suffered from poor drafting which would bedevil its enforcers and confound the courts. Title VII addressed simple firearm possession for the first time at the federal level. The bill included a finding that strongly implied such intent, and Senator Long's statements on the Senate floor likewise support such an interpretation. Apparently, a bill intended to significantly alter federal policy became law with little analysis largely as a political favor to improve its author's image as tough on crime."

So, why the beef with noncitizens?

The answer, according to [former Federal Public Defendant and current law professor Brandon E.] Beck, might just be Lee Harvey Oswald. Oswald assassinated President John F. Kennedy in 1963. Four years before that fateful event, Harvey presented himself at the American Embassy in Russia in order to "dissolve his American citizenship." Oswald was not allowed to renounce his citizenship, but it's clear he intended to.

Moreover, the fear of non-citizen gun-holders ramped up in 1968 when Jordanian citizen Sirhan Sirhan assassinated presidential candidate (and JFK brother) Robert F. Kennedy. As Vizzard writes, the U.S. House of Representatives passed the 1968 Omnibus Crime Control and Safe Streets Act, including Sen. Long's Title VII, the day after RFK's assassination.

The legislative history gets a little complicated from there. Ultimately, Title VII of the Omnibus Act became part of the Gun Control Act of 1968.

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In the following case, the U.S. Supreme Court considered the mens rea element of 18 U.S.C. § 922(g)(5).

6.12 Case: Rehaif v. United States

Rehaif v. United States
588 U.S. 225 (2019)

JUSTICE BREYER DELIVERED THE OPINION OF THE COURT.

A federal statute, 18 U.S.C. § 922(g), provides that "[i]t shall be unlawful" for certain individuals to possess firearms. The provision lists nine categories of individuals subject to the prohibition, including felons and aliens who are "illegally or unlawfully in the United States."˜ A separate provision, § 924(a)(2), adds that anyone who "knowingly violates" the first provision shall be fined or imprisoned for up to 10 years. (Emphasis added.)

The question here concerns the scope of the word "knowingly." Does it mean that the Government must prove that a defendant knew both that he engaged in the relevant conduct (that he possessed a firearm) and also that he fell within the relevant status (that he was a felon, an alien unlawfully in this country, or the like)? We hold that the word "knowingly" applies both to the defendant's conduct and to the defendant's status. To convict a defendant, the Government therefore must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it.

I

Petitioner Hamid Rehaif entered the United States on a nonimmigrant student visa to attend university. After he received poor grades, the university dismissed him and told him that his "immigration status" would be terminated unless he transferred to a different university or left the country.˜

Rehaif subsequently visited a firing range, where he shot two firearms. The Government learned about his target practice and prosecuted him for possessing firearms as an alien unlawfully in the United States, in violation of § 922(g) and § 924(a)(2). At the close of Rehaif's trial, the judge instructed the jury (over Rehaif's objection) that the "United States is not required to prove" that Rehaif "knew that he was illegally or unlawfully in the United States."˜ The jury returned a guilty verdict, and Rehaif was sentenced to 18 months' imprisonment.

Rehaif appealed. He argued that the judge erred in instructing the jury that it did not need to find that he knew he was in the country unlawfully. The Court of Appeals for the Eleventh Circuit, however, concluded that the jury instruction was correct, and it affirmed Rehaif's conviction.˜ We granted certiorari to consider whether, in

prosecutions under § 922(g) and § 924(a)(2), the Government must prove that a defendant knows of his status as a person barred from possessing a firearm. We now reverse.

II

Whether a criminal statute requires the Government to prove that the defendant acted knowingly is a question of congressional intent.˜ In determining Congress' intent, we start from a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding "each of the statutory elements that criminalize otherwise innocent conduct."˜ We normally characterize this interpretive maxim as a presumption in favor of "scienter," by which we mean a presumption that criminal statutes require the degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission." Black's Law Dictionary 1547 (10th ed. 2014).

We apply the presumption in favor of scienter even when Congress does not specify any scienter in the statutory text.˜ But the presumption applies with equal or greater force when Congress includes a general scienter provision in the statute itself.˜

A

Here we can find no convincing reason to depart from the ordinary presumption in favor of scienter. The statutory text supports the presumption. The text of § 924(a)(2) says that "[w]hoever knowingly violates" certain subsections of § 922, including § 922(g), "shall be" subject to penalties of up to 10 years' imprisonment. The text of § 922(g) in turn provides that it "shall be unlawful for any person ..., being an alien ... illegally or unlawfully in the United States," to "possess in or affecting commerce, any firearm or ammunition."

The term "knowingly" in § 924(a)(2) modifies the verb "violates" and its direct object, which in this case is § 922(g). The proper interpretation of the statute thus turns on what it means for a defendant to know that he has "violate[d]" § 922(g). With some here-irrelevant omissions, § 922(g) makes possession of a firearm or ammunition unlawful when the following elements are satisfied: (1) a status element (in this case, "being an alien ... illegally or unlawfully in the United States"); (2) a possession element (to "possess"); (3) a jurisdictional element ("in or affecting commerce"); and (4) a firearm element (a "firearm or ammunition").˜

[T]he text of § 922(g) simply lists the elements that make a defendant's behavior criminal. As "a matter of ordinary English grammar," we normally read the statutory term "'knowingly' as applying to all the subsequently listed elements of the crime."

Flores-Figueroa v. United States, 556 U.S. 646, 650˜ (2009)˜. This is notably not a case where the modifier "knowingly" introduces a long statutory phrase, such that questions may reasonably arise about how far into the statute the modifier extends.˜ And everyone agrees that the word "knowingly" applies to § 922(g)'s possession element, which is situated after the status element. We see no basis to interpret "knowingly" as applying to the second § 922(g) element but not the first.˜ To the contrary, we think that by specifying that a defendant may be convicted only if he "knowingly violates" § 922(g), Congress intended to require the Government to establish that the defendant knew he violated the material elements of § 922(g).

B

Beyond the text, our reading of § 922(g) and § 924(a)(2) is consistent with a basic principle that underlies the criminal law, namely, the importance of showing what Blackstone called "a vicious will." 4 W. Blackstone, Commentaries on the Laws of England 21 (1769). As this Court has explained, the understanding that an injury is criminal only if inflicted knowingly "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."˜ Scienter requirements advance this basic principle of criminal law by helping to "separate those who understand the wrongful nature of their act from those who do not."˜

The cases in which we have emphasized scienter's importance in separating wrongful from innocent acts are legion.˜

Applying the word "knowingly" to the defendant's status in § 922(g) helps advance the purpose of scienter, for it helps to separate wrongful from innocent acts. Assuming compliance with ordinary licensing requirements, the possession of a gun can be entirely innocent.˜ It is therefore the defendant's status, and not his conduct alone, that makes the difference. Without knowledge of that status, the defendant may well lack the intent needed to make his behavior wrongful. His behavior may instead be an innocent mistake to which criminal sanctions normally do not attach.˜

III

The Government's arguments to the contrary do not convince us that Congress sought to depart from the normal presumption in favor of scienter.

The Government argues that Congress does not normally require defendants to know their own status. But the Government supports this claim primarily by referring to statutes that differ significantly from the provisions at issue here.˜

In the provisions at issue here, the defendant's status is the "crucial element" separating innocent from wrongful conduct.˜ But in the statutes cited by the Government, the conduct prohibited˜ would be wrongful irrespective of the defendant's status. This difference assures us that the presumption in favor of scienter applies here even assuming the Government is right that these other statutes do not require knowledge of status.

Nor do we believe that Congress would have expected defendants under § 922(g) and § 924(a)(2) to know their own statuses. If the provisions before us were construed to require no knowledge of status, they might well apply to an alien who was brought into the United States unlawfully as a small child and was therefore unaware of his unlawful status. Or these provisions might apply to a person who was convicted of a prior crime but sentenced only to probation, who does not know that the crime is "punishable by imprisonment for a term exceeding one year."˜ As we have said, we normally presume that Congress did not intend to impose criminal liability on persons who, due to lack of knowledge, did not have a wrongful mental state. And we doubt that the obligation to prove a defendant's knowledge of his status will be as burdensome as the Government suggests.˜

The Government also argues that whether an alien is "illegally or unlawfully in the United States" is a question of law, not fact, and thus appeals to the well-known maxim that "ignorance of the law" (or a "mistake of law") is no excuse. Cheek v. United States, 498 U.S. 192, 199˜ (1991).

This maxim, however, normally applies where a defendant has the requisite mental state in respect to the elements of the crime but claims to be "unaware of the existence of a statute proscribing his conduct."˜ In contrast, the maxim does not normally apply where a defendant "has a mistaken impression concerning the legal effect of some collateral matter and that mistake results in his misunderstanding the full significance of his conduct," thereby negating an element of the offense.˜ Model Penal Code § 2.04, at 27 (a mistake of law is a defense if the mistake negates the "knowledge ... required to establish a material element of the offense").˜

We applied this distinction in Liparota, where we considered a statute that imposed criminal liability on "whoever knowingly uses, transfers, acquires, alters, or possesses" food stamps "in any manner not authorized by the statute or the regulations."˜ We held that the statute required scienter not only in respect to the defendant's use of food stamps, but also in respect to whether the food stamps were used in a "manner not authorized by the statute or regulations."˜ We therefore required the Government to prove that the defendant knew that his use of food stamps was unlawful—even though that was a question of law.˜

This case is similar. The defendant's status as an alien "illegally or unlawfully in the United States" refers to a legal matter, but this legal matter is what the commentators refer to as a "collateral" question of law. A defendant who does not know that he is an alien "illegally or unlawfully in the United States" does not have the guilty state of mind that the statute's language and purposes require.˜

* * *

The Government asks us to hold that any error in the jury instructions in this case was harmless. But the lower courts did not address that question. We therefore leave the question for those courts to decide on remand.˜

We conclude that in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.˜ We accordingly reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO, WITH WHOM JUSTICE THOMAS JOINS, DISSENTING.

The Court casually overturns the long-established interpretation of an important criminal statute, 18 U.S.C. § 922(g), an interpretation that has been adopted by every single Court of Appeals to address the question. That interpretation has been used in thousands of cases for more than 30 years. According to the majority, every one of those cases was flawed. So today's decision is no minor matter. And § 922(g) is no minor provision. It probably does more to combat gun violence than any other federal law. It prohibits the possession of firearms by, among others, convicted felons, mentally ill persons found by a court to present a danger to the community, stalkers, harassers, perpetrators of domestic violence, and illegal aliens.

Today's decision will make it significantly harder to convict persons falling into some of these categories, and the decision will create a mountain of problems with respect to the thousands of prisoners currently serving terms for § 922(g) convictions. Applications for relief by federal prisoners sentenced under § 922(g) will swamp the lower courts. A great many convictions will be subject to challenge, threatening the release or retrial of dangerous individuals whose cases fall outside the bounds of harmless-error review.˜

If today's decision were compelled by the text of § 922(g) or by some other clear indication of congressional intent, what the majority has done would be understandable. We must enforce the laws enacted by Congress even if we think that

doing so will bring about unfortunate results. But that is not the situation in this case. There is no sound basis for today's decision. Indeed, there was no good reason for us to take this case in the first place. No conflict existed in the decisions of the lower courts, and there is no evidence that the established interpretation of § 922(g) had worked any serious injustice.˜

The majority wants readers to have in mind an entirely imaginary case, a heartless prosecution of "an alien who was brought into the United States unlawfully as a small child and was therefore unaware of his unlawful status."˜ Such a defendant would indeed warrant sympathy, but that is not petitioner˜.

Here is what really happened. Petitioner, a citizen of the United Arab Emirates, entered this country on a visa that allowed him to stay here lawfully only so long as he remained a full-time student.˜ He enrolled at the Florida Institute of Technology, but he withdrew from or failed all of his classes and was dismissed.˜ After he was conditionally readmitted, he failed all but one of his courses. His enrollment was then terminated, and he did not appeal. The school sent him e-mails informing him that he was no longer enrolled and that, unless he was admitted elsewhere, his status as a lawful alien would be terminated.˜ Petitioner's response was to move to a hotel and frequent a firing range. Each evening he checked into the hotel and always demanded a room on the eighth floor facing the airport. Each morning he checked out and paid his bill with cash, spending a total of more than $11,000. This went on for 53 days.˜ A hotel employee told the FBI that petitioner claimed to have weapons in his room. Arrested and charged under § 922(g)˜, petitioner claimed at trial that the Government had to prove beyond a reasonable doubt that he actually knew that his lawful status had been terminated. Following what was then the universal and long-established interpretation of § 922(g), the District Court rejected this argument, and a jury found him guilty.˜ The Eleventh Circuit affirmed.˜ Out of the more than 8,000 petitions for a writ of certiorari that we expected to receive this Term, we chose to grant this one to see if petitioner had been deprived of the right to have a jury decide whether, in his heart of hearts, he really knew that he could not lawfully remain in the United States on a student visa when he most certainly was no longer a student.˜

The majority today opens the gates to a flood of litigation that is sure to burden the lower courts with claims for relief in a host of cases where there is no basis for doubting the defendant's knowledge. The majority's interpretation of § 922(g) is not required by the statutory text, and there is no reason to suppose that it represents what Congress intended.

I respectfully dissent.

6.13 Unlawful Employment

Kit Johnson, Lawful Work While Undocumented: Business Entity Solutions, 64 ARIZ. L. REV. 89 (2022)

There is a commonly held misconception that it is a crime to be present in the United States without authorization. This is, however, not true.˜ Despite ubiquitous use of the phrase "illegal alien" to describe a noncitizen present in the United States without authorization, presence is not a criminally-punishable offense.˜

There is a natural corollary that is also a misconception—that noncitizens present in the United States "illegally" must be engaged in unlawful conduct if they work without authorization.˜ To the contrary, it is not a crime to work in the United States without authorization.˜ The potential for criminal liability is on the other side of the transaction, with the employer. It is "unlawful for a person or other entity ... to hire ... for employment in the United States an alien knowing the alien is an unauthorized alien ... with respect to such employment."˜ [8 U.S.C. § 1324a(a)(2).] In addition, should an employer find out that an employee "is (or has become) an unauthorized alien with respect to such employment," it is unlawful to continue their employment.˜ [8 U.S.C. § 1324a(a)(4).]

Notably, an employer cannot avoid these prohibitions with obvious work-arounds such as a contracting or subcontracting relationship.˜ If a "person or other entity" manages to "obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien ... with respect to performing such labor," that person or entity will be "consider[ed] to have hired the alien for employment" in violation of law.˜ [8 U.S.C. § 1324a(a)(4).] Wal-Mart famously fell afoul of this provision, ultimately paying $11 million to settle accusations that the company benefitted from janitorial service contractors who employed undocumented laborers to undertake overnight cleaning in stores across several states.˜

Knowledge is an important part of these IRCA provisions˜ "Knowing" is defined by regulation.˜ It includes actual knowledge.˜ It also includes constructive knowledge: "knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition."˜

Employers face federal civil and criminal penalties for violating these rules. On the civil side, employers as individuals or entities can be ordered to pay fines that escalate for repeat offenders.˜ Fines start at $583 and are capped at $23,331 per undocumented worker.˜ On the criminal side, individuals or entities engaged in a "pattern or practice" of employing undocumented workers face mandatory fines—$3,000 per

undocumented worker—six months of imprisonment, or both.˜ If an employer knowingly hires 10 or more undocumented workers during any 12 month period, the potential jailtime increases to five years.˜ [That said, the odds of catching the government's enforcement eye are long. Fewer than 0.02% of U.S. employers are civilly fined for unlawful employment. Criminal convictions are rare. Prison-time is rarer still.]

Federal penalties for unauthorized work are fairly new—at least in the long history of immigration law. The prohibitions came into being as part of the Immigration Reform and Control Act of 1986 ("IRCA," commonly pronounced "irk-uh").˜ Congress had started considering the possibility of employer sanctions in 1952, but those efforts went nowhere until 1986.˜ For 210 years of the United States' existence prior to passage of IRCA, such employment was generally lawful.˜

What, then, accounts for the radical reshaping of U.S. law in 1986? For one, IRCA was greatly influenced by the work of the Select Commission on Immigration and Refugee Policy ("SCIRP").˜ SCRIP was created in 1978 to study then-existing immigration law and its effects on the United States as well as to recommend changes to governing law.˜ After reviewing testimony and expert research, the commission released a final report on March 1, 1981.˜ In that report, the commission noted that "Many undocumented/illegal migrants were induced to come to the United States by offers of work from U.S. employers who recruited and hired them under protection of present U.S. law."˜ The commission saw employment opportunities in the United States as a significant factor inducing migrants to come to the United States without permission.˜ In addition to exploring why migrants came to the United States without authorization, the SCRIP report also addressed perceived consequences of such migration, including "job displacement" and "wage depression" affecting working Americans.˜ The commission concluded that "some form of employer sanctions is necessary if illegal migration is to be curtailed."˜ Specifically, the commission recommended "legislation be passed making it illegal for employers to hire undocumented workers."˜

IRCA, influenced by SCRIP, created employment sanctions in an effort to eliminate the availability of U.S. jobs identified as the "pull factor" drawing undocumented migrants to the United States.˜ This, legislators hoped, would also help protect U.S.-born workers.˜ Another important factor in the creation of employment sanctions was the fact that IRCA included an amnesty provision, granting legal status to many individuals then living in the United States without authorization.˜ Employer sanctions were, in the words of Professor Wishnie, "part of a grand bargain and the principal quid pro quo" for amnesty.˜

The employment sanctions put into place by IRCA dramatically shifted the legal landscape regarding the hiring of unauthorized workers. Yet the law does not reach every category of employment in the United States.

"Employment" under IRCA is "any service or labor performed by an employee for an employer within the United States."˜ Within this language, an "employee," is "an individual who provides services or labor for an employer for wages or other remuneration."˜ And an "employer" is an individual or entity "who engages the services or labor of an employee to be performed in the United States for wages or other remuneration."˜

By statute, the term "employee" does not include those engaged in casual domestic employment˜ nor independent contractors.˜

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6.14 Other Federal Immigration Crimes

CRS, Immigration-Related Criminal Offenses (2023)

There are numerous other immigration-related offenses in federal statutes, such as high speed flight from an immigration checkpoint (18 U.S.C. § 758); importation, holding, or keeping of an alien for prostitution or "any other immoral purpose" (8 U.S.C. § 1328); failure to depart after a final order of removal (8 U.S.C. § 1253(a)); willful failure to comply with terms of release under supervision (8 U.S.C. § 1253(b)); willful failure by an alien to apply for registration and be fingerprinted (8 U.S.C. § 1306(a)); failure to notify of a change of address (8 U.S.C. § 1306(b)); making fraudulent statements in application for registration (8 U.S.C. § 1306(c)); and counterfeiting photographs or prints in any alien registration certificate or card (8 U.S.C. § 1306(d)).

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6.15 Federal Sentencing

The following provisions come from 2023 Guidelines Manual published by the United States Sentencing Commission ("USSG"). This is the document consulted by federal judges, prosecutors, and defense attorneys to estimate and set criminal sentences.

USSG CH.1, PT.A, 1.3

To understand the guidelines and their underlying rationale, it is important to focus on the three objectives that Congress sought to achieve in enacting the Sentencing Reform Act of 1984. The Act's basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system. To achieve this end, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system which required the court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison. This practice usually resulted in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence imposed by the court.

Second, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.˜

USSG § 2L1.1

Smuggling, Transporting, or Harboring an Unlawful Alien

(a) Base Offense Level:

(1) 25, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who was inadmissible under 8 U.S.C. § 1182(a)(3);

(2) 23, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony; or

(3) 12, otherwise.

(b) Specific Offense Characteristics

(1) If (A) the offense was committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child (or both the defendant's spouse and child), and (B) the base offense level is determined under subsection (a)(3), decrease by 3 levels.

(2) If the offense involved the smuggling, transporting, or harboring of six or more unlawful aliens, increase as follows:

Number of Unlawful Aliens Smuggled, Transported, or Harbored	Increase in Level
(A) 6-24	add 3
(B) 25-99	add 6
(C) 100 or more	add 9.

(3) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by 2 levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by 4 levels.

(4) If the offense involved the smuggling, transporting, or harboring of a minor who was unaccompanied by the minor's parent, adult relative, or legal guardian, increase by 4 levels.

(5) (Apply the Greatest):

(A) If a firearm was discharged, increase by 6 levels, but if the resulting offense level is less than level 22, increase to level 22.

(B) If a dangerous weapon (including a firearm) was brandished or otherwise used, increase by 4 levels, but if the resulting offense level is less than level 20, increase to level 20.

(C) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels, but if the resulting offense level is less than level 18, increase to level 18.

(6) If the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person, increase by 2 levels, but if the resulting offense level is less than level 18, increase to level 18.

(7) If any person died or sustained bodily injury, increase the offense level according to the seriousness of the injury:

Death or Degree of Injury	Increase in Level
(A) Bodily Injury	add 2 levels

(B) Serious Bodily Injury	add 4 levels
(C) Permanent or Life-Threatening Bodily Injury	add 6 levels
(D) Death	add 10 levels

(8) (Apply the greater):

(A) If an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, (i) after the alien was smuggled into the United States; or (ii) while the alien was transported or harbored in the United States, increase by 2 levels. If the resulting offense level is less than level 18, increase to level 18.

(B) If (i) the defendant was convicted of alien harboring, (ii) the alien harboring was for the purpose of prostitution, and (iii) the defendant receives an adjustment under §3B1.1 (Aggravating Role), increase by 2 levels, but if the alien engaging in the prostitution had not attained the age of 18 years, increase by 6 levels.

(9) If the defendant was convicted under 8 U.S.C. § 1324(a)(4), increase by 2 levels.

(c) Cross Reference

(1) If death resulted, apply the appropriate homicide guideline from Chapter Two, Part A, Subpart 1, if the resulting offense level is greater than that determined under this guideline.

Application Notes:

1. Definitions.—For purposes of this guideline:

"The offense was committed other than for profit" means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens.

"Number of unlawful aliens smuggled, transported, or harbored" does not include the defendant.

"Aggravated felony" has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.

"Child" has the meaning set forth in section 101(b)(1) of the Immigration and Nationality Act (8 U.S.C. § 1101(b)(1)).

"Spouse" has the meaning set forth in 101(a)(35) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(35)).

"Immigration and naturalization offense" means any offense covered by Chapter Two, Part L.

"Minor" means an individual who had not attained the age of 18 years.

"Parent" means (A) a natural mother or father; (B) a stepmother or stepfather; or (C) an adoptive mother or father.

"Bodily injury," "serious bodily injury," and "permanent or life-threatening bodily injury" have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).

2. Prior Convictions Under Subsection (b)(3).—Prior felony conviction(s) resulting in an adjustment under subsection (b)(3) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

3. Application of Subsection (b)(6).—Reckless conduct to which the adjustment from subsection (b)(6) applies includes a wide variety of conduct (e.g., transporting persons in the trunk or engine compartment of a motor vehicle; carrying substantially more passengers than the rated capacity of a motor vehicle or vessel; harboring persons in a crowded, dangerous, or inhumane condition; or guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements). If subsection (b)(6) applies solely on the basis of conduct related to fleeing from a law enforcement officer, do not apply an adjustment from §3C1.2 (Reckless Endangerment During Flight). Additionally, do not apply the adjustment in subsection (b)(6) if the only reckless conduct that created a substantial risk of death or serious bodily injury is conduct for which the defendant received an enhancement under subsection (b)(5).

4. Application of Subsection (b)(7) to Conduct Constituting Criminal Sexual Abuse.—Consistent with Application Note 1(M) of §1B1.1 (Application Instructions), "serious bodily injury" is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.

5. Inapplicability of §3A1.3.—If an enhancement under subsection (b)(8)(A) applies, do not apply §3A1.3 (Restraint of Victim).

6. Interaction with §3B1.1.—For the purposes of §3B1.1 (Aggravating Role), the aliens smuggled, transported, or harbored are not considered participants unless they actively assisted in the smuggling, transporting, or harboring of others. In large scale smuggling, transporting, or harboring cases, an additional adjustment from §3B1.1 typically will apply.

7. Upward Departure Provisions.—An upward departure may be warranted in any of the following cases:

   (A) The defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious criminal behavior.

   (B) The defendant smuggled, transported, or harbored an alien the defendant knew was inadmissible for reasons of security and related grounds, as set forth under 8 U.S.C. § 1182(a)(3).

   (C) The offense involved substantially more than 100 aliens.

USSG § 2L1.2

Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: 8

(b) Specific Offense Characteristics

(1) (Apply the Greater) If the defendant committed the instant offense after sustaining—

(A) a conviction for a felony that is an illegal reentry offense, increase by 4 levels; or

(B) two or more convictions for misdemeanors under 8 U.S.C. § 1325(a), increase by 2 levels.

(2) (Apply the Greatest) If, before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct that, at any time, resulted in—

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by 10 levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by 8 levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by 6 levels;

(D) a conviction for any other felony offense (other than an illegal reentry offense), increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 2 levels.

(3) (Apply the Greatest) If, after the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct that, at any time, resulted in—

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by 10 levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by 8 levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by 6 levels;

(D) a conviction for any other felony offense (other than an illegal reentry offense), increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 2 levels.

Application Notes:

1. In General.—

(A) "Ordered Deported or Ordered Removed from the United States for the First Time".—For purposes of this guideline, a defendant shall be considered "ordered deported or ordered removed from the United States" if the defendant was ordered deported or ordered removed from the United States based on a final order of exclusion, deportation, or removal, regardless

of whether the order was in response to a conviction. "For the first time" refers to the first time the defendant was ever the subject of such an order.

(B) Offenses Committed Prior to Age Eighteen.—Subsections (b)(1), (b)(2), and (b)(3) do not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

2. Definitions.—For purposes of this guideline:

"Crime of violence" means any of the following offenses under federal, state, or local law: murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c), or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another. "Forcible sex offense" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States. "Extortion" is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

"Drug trafficking offense" means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

"Felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

"Illegal reentry offense" means (A) an offense under 8 U.S.C. § 1253 or § 1326, or (B) a second or subsequent offense under 8 U.S.C. § 1325(a).

"Misdemeanor" means any federal, state, or local offense punishable by a term of imprisonment of one year or less.

"Sentence imposed" has the meaning given the term "sentence of imprisonment" in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History). The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, regardless of when the revocation occurred.

3. Criminal History Points.—For purposes of applying subsections (b)(1), (b)(2), and (b)(3), use only those convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of subsections (b)(1)(B), (b)(2)(E), and (b)(3)(E), use only those convictions that are counted separately under §4A1.2(a)(2).

   A conviction taken into account under subsection (b)(1), (b)(2), or (b)(3) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

4. Cases in Which Sentences for An Illegal Reentry Offense and Another Felony Offense were Imposed at the Same Time.—There may be cases in which the sentences for an illegal reentry offense and another felony offense were imposed at the same time and treated as a single sentence for purposes of calculating the criminal history score under §4A1.1(a), (b), and (c). In such a case, use the illegal reentry offense in determining the appropriate enhancement under subsection (b)(1), if it independently would have received criminal history points. In addition, use the prior sentence for the other felony offense in determining the appropriate enhancement under subsection (b)(2) or (b)(3), as appropriate, if it independently would have received criminal history points.

5. Cases in Which the Criminal Conduct Underlying a Prior Conviction Occurred Both Before and After the Defendant Was First Ordered Deported or Ordered Removed.—There may be cases in which the criminal conduct underlying a prior conviction occurred both before and after the defendant was ordered deported or ordered removed from the United States for the first time. For purposes of subsections (b)(2) and (b)(3), count such a conviction only under subsection (b)(2).

6. Departure Based on Seriousness of a Prior Offense.—There may be cases in which the offense level provided by an enhancement in subsection (b)(2) or (b)(3) substantially understates or overstates the seriousness of the conduct underlying the prior offense, because (A) the length of the sentence imposed does not reflect the seriousness of the prior offense; (B) the prior conviction is

too remote to receive criminal history points (see §4A1.2(e)); or (C) the time actually served was substantially less than the length of the sentence imposed for the prior offense. In such a case, a departure may be warranted.

7. Departure Based on Time Served in State Custody.—In a case in which the defendant is located by immigration authorities while the defendant is serving time in state custody, whether pre- or post-conviction, for a state offense, the time served is not covered by an adjustment under §5G1.3(b) and, accordingly, is not covered by a departure under §5K2.23 (Discharged Terms of Imprisonment). See §5G1.3(a). In such a case, the court may consider whether a departure is appropriate to reflect all or part of the time served in state custody, from the time immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

   Such a departure should be considered only in cases where the departure is not likely to increase the risk to the public from further crimes of the defendant. In determining whether such a departure is appropriate, the court should consider, among other things, (A) whether the defendant engaged in additional criminal activity after illegally reentering the United States; (B) the seriousness of any such additional criminal activity, including (1) whether the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon (or induced another person to do so) in connection with the criminal activity, (2) whether the criminal activity resulted in death or serious bodily injury to any person, and (3) whether the defendant was an organizer, leader, manager, or supervisor of others in the criminal activity; and (C) the seriousness of the defendant's other criminal history.

8. Departure Based on Cultural Assimilation.—There may be cases in which a downward departure may be appropriate on the basis of cultural assimilation. Such a departure should be considered only in cases where (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.

   In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long

the defendant attended school in the United States, (3) the duration of the defendant's continued residence in the United States, (4) the duration of the defendant's presence outside the United States, (5) the nature and extent of the defendant's familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States, (6) the seriousness of the defendant's criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.

USSG § 3E1.1

Acceptance of Responsibility

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.~

Application Notes:

1. In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:

   (A) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. A defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility, but the fact that a defendant's challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous;

(B) voluntary termination or withdrawal from criminal conduct or associations;

(C) voluntary payment of restitution prior to adjudication of guilt;

(D) voluntary surrender to authorities promptly after commission of the offense;

(E) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;

(F) voluntary resignation from the office or position held during the commission of the offense;

(G) post-offense rehabilitative efforts (e.g., counseling or drug treatment); and

(H) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

2. This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.

3. Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (see Application Note 1(A)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.

4. Conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be

extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply.

5. The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.

6. Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease in offense level for a defendant at offense level 16 or greater prior to the operation of subsection (a) who both qualifies for a decrease under subsection (a) and who has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps set forth in subsection (b). The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under subsection (b) will occur particularly early in the case. For example, to qualify under subsection (b), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.

   Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing. See section 401(g)(2)(B) of Public Law 108–21. The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal.

   If the government files such a motion, and the court in deciding whether to grant the motion also determines that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, the court should grant the motion.

USSG § 4A1.1

Criminal History Category

The total points from subsections (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this subsection.

(d) Add 1 point for each prior sentence resulting from a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was treated as a single sentence, up to a total of 3 points for this subsection.

(e) Add 1 point if the defendant (1) receives 7 or more points under subsections (a) through (d), and (2) committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

Application Notes:

1. §4A1.1(a). Three points are added for each prior sentence of imprisonment exceeding one year and one month. There is no limit to the number of points that may be counted under this subsection. The term "prior sentence" is defined at §4A1.2(a). The term "sentence of imprisonment" is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, see §4A1.2(k).

   Certain prior sentences are not counted or are counted only under certain conditions:

   A sentence imposed more than fifteen years prior to the defendant's commencement of the instant offense is not counted unless the defendant's incarceration extended into this fifteen-year period. See §4A1.2(e).

   A sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted under this subsection only if it resulted from an adult conviction. See §4A1.2(d).

A sentence for a foreign conviction, a conviction that has been expunged, or an invalid conviction is not counted. See §4A1.2(h) and (j) and the Commentary to §4A1.2.

2. §4A1.1(b). Two points are added for each prior sentence of imprisonment of at least sixty days not counted in §4A1.1(a). There is no limit to the number of points that may be counted under this subsection. The term "prior sentence" is defined at §4A1.2(a). The term "sentence of imprisonment" is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, see §4A1.2(k).

   Certain prior sentences are not counted or are counted only under certain conditions:

   A sentence imposed more than ten years prior to the defendant's commencement of the instant offense is not counted. See §4A1.2(e).

   An adult or juvenile sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted only if confinement resulting from such sentence extended into the five-year period preceding the defendant's commencement of the instant offense. See §4A1.2(d).

   Sentences for certain specified non-felony offenses are never counted. See §4A1.2(c)(2).

   A sentence for a foreign conviction or a tribal court conviction, an expunged conviction, or an invalid conviction is not counted. See §4A1.2(h), (i), (j), and the Commentary to §4A1.2.

   A military sentence is counted only if imposed by a general or special court-martial. See §4A1.2(g).

3. §4A1.1(c). One point is added for each prior sentence not counted under §4A1.1(a) or (b). A maximum of four points may be counted under this subsection. The term "prior sentence" is defined at §4A1.2(a).

   Certain prior sentences are not counted or are counted only under certain conditions:

   A sentence imposed more than ten years prior to the defendant's commencement of the instant offense is not counted. See §4A1.2(e).

   An adult or juvenile sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted only if imposed within five years of the defendant's commencement of the current offense. See §4A1.2(d).

Sentences for certain specified non-felony offenses are counted only if they meet certain requirements. See §4A1.2(c)(1).

Sentences for certain specified non-felony offenses are never counted. See §4A1.2(c)(2).

A diversionary disposition is counted only where there is a finding or admission of guilt in a judicial proceeding. See §4A1.2(f).

A sentence for a foreign conviction, a tribal court conviction, an expunged conviction, or an invalid conviction, is not counted. See §4A1.2(h), (i), (j), and the Commentary to §4A1.2.

A military sentence is counted only if imposed by a general or special court-martial. See §4A1.2(g).

4. §4A1.1(d). In a case in which the defendant received two or more prior sentences as a result of convictions for crimes of violence that are treated as a single sentence (see §4A1.2(a)(2)), one point is added under §4A1.1(e) for each such sentence that did not result in any additional points under §4A1.1(a), (b), or (c). A total of up to 3 points may be added under §4A1.1(e). For purposes of this guideline, "crime of violence" has the meaning given that term in §4B1.2(a). See §4A1.2(p).

   For example, a defendant's criminal history includes two robbery convictions for offenses committed on different occasions. The sentences for these offenses were imposed on the same day and are treated as a single prior sentence. See §4A1.2(a)(2). If the defendant received a five-year sentence of imprisonment for one robbery and a four-year sentence of imprisonment for the other robbery (consecutively or concurrently), a total of 3 points is added under §4A1.1(a). An additional point is added under §4A1.1(e) because the second sentence did not result in any additional point(s) (under §4A1.1(a), (b), or (c)). In contrast, if the defendant received a one-year sentence of imprisonment for one robbery and a nine-month consecutive sentence of imprisonment for the other robbery, a total of 3 points also is added under §4A1.1(a) (a one-year sentence of imprisonment and a consecutive nine-month sentence of imprisonment are treated as a combined one-year-nine-month sentence of imprisonment). But no additional point is added under §4A1.1(e) because the sentence for the second robbery already resulted in an additional point under §4A1.1(a). Without the second sentence, the defendant would only have received two points under §4A1.1(b) for the one-year sentence of imprisonment.

5. §4A1.1(e). One point is added if the defendant (1) receives 7 or more points under §4A1.1(a) through (d), and (2) committed any part of the instant offense (i.e., any relevant conduct) while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. See §4A1.2(n). For the purposes of this subsection, a "criminal justice sentence" means a sentence countable under §4A1.2 (Definitions and Instructions for Computing Criminal History) having a custodial or supervisory component, although active supervision is not required for this subsection to apply. For example, a term of unsupervised probation would be included; but a sentence to pay a fine, by itself, would not be included. A defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (e.g., a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence for the purposes of this provision if that sentence is otherwise countable, even if that sentence would have expired absent such warrant. See §4A1.2(m).˜

USSG, Ch.5, Pt.A

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0–6	0–6	0–6	0–6	0–6	0–6
	2	0–6	0–6	0–6	0–6	0–6	1–7
	3	0–6	0–6	0–6	0–6	2–8	3–9
Zone A	4	0–6	0–6	0–6	2–8	4–10	6–12
	5	0–6	0–6	1–7	4–10	6–12	9–15
	6	0–6	1–7	2–8	6–12	9–15	12–18
	7	0–6	2–8	4–10	8–14	12–18	15–21
	8	0–6	4–10	6–12	10–16	15–21	18–24
	9	4–10	6–12	8–14	12–18	18–24	21–27
Zone B	10	6–12	8–14	10–16	15–21	21–27	24–30
	11	8–14	10–16	12–18	18–24	24–30	27–33
Zone C	12	10–16	12–18	15–21	21–27	27–33	30–37
	13	12–18	15–21	18–24	24–30	30–37	33–41
	14	15–21	18–24	21–27	27–33	33–41	37–46
	15	18–24	21–27	24–30	30–37	37–46	41–51
	16	21–27	24–30	27–33	33–41	41–51	46–57
	17	24–30	27–33	30–37	37–46	46–57	51–63
	18	27–33	30–37	33–41	41–51	51–63	57–71
	19	30–37	33–41	37–46	46–57	57–71	63–78
	20	33–41	37–46	41–51	51–63	63–78	70–87
	21	37–46	41–51	46–57	57–71	70–87	77–96
	22	41–51	46–57	51–63	63–78	77–96	84–105
	23	46–57	51–63	57–71	70–87	84–105	92–115
	24	51–63	57–71	63–78	77–96	92–115	100–125
	25	57–71	63–78	70–87	84–105	100–125	110–137
	26	63–78	70–87	78–97	92–115	110–137	120–150
	27	70–87	78–97	87–108	100–125	120–150	130–162
Zone D	28	78–97	87–108	97–121	110–137	130–162	140–175
	29	87–108	97–121	108–135	121–151	140–175	151–188
	30	97–121	108–135	121–151	135–168	151–188	168–210
	31	108–135	121–151	135–168	151–188	168–210	188–235
	32	121–151	135–168	151–188	168–210	188–235	210–262
	33	135–168	151–188	168–210	188–235	210–262	235–293
	34	151–188	168–210	188–235	210–262	235–293	262–327
	35	168–210	188–235	210–262	235–293	262–327	292–365
	36	188–235	210–262	235–293	262–327	292–365	324–405
	37	210–262	235–293	262–327	292–365	324–405	360–life
	38	235–293	262–327	292–365	324–405	360–life	360–life
	39	262–327	292–365	324–405	360–life	360–life	360–life
	40	292–365	324–405	360–life	360–life	360–life	360–life
	41	324–405	360–life	360–life	360–life	360–life	360–life
	42	360–life	360–life	360–life	360–life	360–life	360–life
	43	life	life	life	life	life	life

6.16 Test Your Knowledge

Problem 6.1

Lino López is an undocumented migrant living in San Diego, California. He has been separated from his wife and 10-year-old son, both Mexican citizens, for more than five years. Lino is determined to reunite with them.

Lino's wife and son surreptitiously cross the U.S.-Mexico border through the desert east of San Diego. Lino meets them on the U.S. side and attempts to drive them home.

Lino and his family are intercepted by Border Patrol Agent Alicia Armstrong. In the course of taking the three into custody, Agent Armstrong discovers a handgun in the glove compartment of Lino's car. Lino explains that he keeps the weapon there for his safety since he lives in a bad neighborhood, and it is often unsafe for him to drive home late at night when he's finished his work as a dishwasher in a high-end restaurant.

Agent Armstrong also discovers that Lino has a criminal record. In 2010, he pled guilty to driving without a license pursuant to California Vehicle Code § 12500 and served 70 days in jail. In 2011 and 2013, Lino pled guilty to 8 U.S.C. § 1325, was sentenced to time served (seven and 14 days respectively) and removed from the country.

If criminally prosecuted under 8 U.S.C. § 1324 for transporting unauthorized migrants, what sentence is Lino facing and why? What if, instead, he pleads guilty to 8 U.S.C. § 1326 – what sentence would Lino be facing and why?

Problem 6.2

Greg is a U.S. citizen. He's also a gambling addict. He's been fueling his gambling habit by borrowing money from a loan shark. Unable to pay even the vig on the amounts borrowed, Greg strikes a different deal. He agrees to transport a group of undocumented migrants from the border to the loan shark.

When Border Patrol stops Greg, they find three undocumented immigrants in the back seat, an undocumented child (10) in the front seat (apparently unrelated to anyone else in the car), and two additional undocumented individuals in the trunk of Greg's car.

In addition, Border Patrol finds an unregistered Colt 45 underneath the driver's seat of the car.

Greg was apprehended in Arizona. He was taking these migrants to the loan shark in Nevada.

Greg is charged under § 1324.

What sentence is Greg facing if he has no prior criminal history?

What sentence is Greg facing if he has a prior conviction for possession of marijuana for which he served a suspended sentence of six months as well as a prior conviction for mail fraud for which he was sentenced to 14 months?

Chapter Seven: States & Immigration

Many lawmakers, frustrated with what they believe to be a failure of the federal government to police the nation's borders, have sought to leverage state and local laws to get tough on undocumented migrants. The primary stumbling block for these attempts has been federal preemption.

This chapter begins with a brief history of state immigration laws (section 7.1). Next, it offers examples of modern state immigration laws (section 7.2) and explores the contours of federal preemption (section 7.3). Finally, it brings these two issues together, exploring the preemption of state immigration laws (sections 7.4-7.6).

7.1 A Brief History of State Immigration Laws

As explored in section 3.1, the first federal immigration law was passed in 1875, nearly 100 years after American independence. From 1776-1875, states led the way in immigration regulation. See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993).

One focus of state immigration law during the period from 1776 to 1875 was noncitizen criminality, as discussed in section 3.1. Various states prohibited the migration of convicts both from abroad and from sister states, often coupled with sanctions against those transporting convicts across state lines.

States also passed laws directed at "foreign paupers" during this period. Some states issued warnings to perceived paupers that they should leave the state within a set period and settle elsewhere. Others imposed sanctions against those transporting the indigent or required shipmasters to pay taxes on or supply bonds for impoverished migrants.

Public health was another focus of early state immigration laws. States imposed quarantines on travelers suspected of carrying contagious diseases such as cholera, smallpox, typhus, and yellow fever.

Finally, states took different approaches to the migration of "free blacks" during the antebellum period. Legislation was aimed at migration between states as well as from the West Indies.

State involvement in immigration changed dramatically in 1875. As already noted, that was the year Congress passed the Page Act, the first federal immigration law. It is also the year that the U.S. Supreme Court decided Chy Lung v. Freeman, 92 U.S. 275. This case challenged California law that required incoming vessels to post bond for any passenger identified by a list of undesirable characteristics including, among others, criminality and pauperism. The Supreme Court held the California law to be "in conflict with the Constitution of the United States," writing: "The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States." The Court reasoned that Congress "has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations."

7.2 Modern State Immigration Laws

The following examples highlight some of the myriad ways in which states have enacted laws aimed at noncitizens and immigration.

DRIVING

La. Rev. Stat. 14:100.13

A. No alien student or nonresident alien shall operate a motor vehicle in the state without documentation demonstrating that the person is lawfully present in the United States.˜

C. Whoever commits the crime of driving without lawful presence in the United States shall be fined not more than one thousand dollars, imprisoned for not more than one year, with or without hard labor, or both.

Fla. Stat. § 322.033

(1) If a driver license is of a class of licenses issued by another state exclusively to undocumented immigrants who are unable to prove lawful presence in the United

States when the licenses are issued, the driver license, or other permit purporting to authorize the holder to operate a motor vehicle on public roadways, is invalid in this state and does not authorize the holder to operate a motor vehicle in this state.˜

EDUCATION

S.C. Stat. § 59-101-430˜

(A) An alien unlawfully present in the United States is not eligible to attend a public institution of higher learning in this State˜.

(B) An alien unlawfully present in the United States is not eligible on the basis of residence for a public higher education benefit including, but not limited to, scholarships, financial aid, grants, or resident tuition.

ENTRY

Okla. Stat. § 21-1795˜

(B) A person commits an impermissible occupation if the person is an alien and willfully and without permission enters and remains in the State of Oklahoma without having first obtained legal authorization to enter the United States.

FALSE IDENTIFICATION

Wy. Stat. § 6-3-615

(a) Any person who intentionally uses false documents to conceal his true identity, citizenship or resident alien status to obtain access to public resources or services is guilty of a misdemeanor punishable by imprisonment for not more than six (6) months, a fine of not more than one thousand dollars ($1,000.00), or both.

FIREARMS

S.C. Code Ann. § 16-23-530

(A) It is unlawful for an alien unlawfully present in the United States to possess, purchase, offer to purchase, sell, lease, rent, barter, exchange, or transport into this State a firearm.˜

(C) A person violating the provisions of subsection (A) of this section is guilty of a felony and, upon conviction, must be fined not more than ten thousand dollars or imprisoned not more than ten years, or both.

FORGERY

Iowa Stat. § 715A.2

2. a. Forgery is a class "D" felony if the writing is or purports to be˜

(4) A document prescribed by statute, rule, or regulation for entry into or as evidence of authorized stay or employment in the United States.

HEALTHCARE

Fla. Stat. § 395.3027

(1) Each hospital that accepts Medicaid must include a provision on its patient admission or registration forms for the patient or the patient's representative to state or indicate whether the patient is a United States citizen or lawfully present in the United States or is not lawfully present in the United States.˜

(2) Each hospital must submit a quarterly report˜ which reports the number of hospital admissions or emergency department visits within the previous quarter which were made by a patient who indicated that he or she was˜ not lawfully present in the United States˜.

REGISTRATION

S.C. Stat. § 16-17-750

(A) It is unlawful for a person eighteen years of age or older to fail to carry in the person's personal possession any certificate of alien registration or alien registration receipt card issued to the person pursuant to 8 U.S.C. Section 1304 while the person is in this State.

REMOVABILITY

Ariz. Rev. Stat. § 13-3883

A. A peace officer, without a warrant, may arrest a person if the officer has probable cause to believe:˜

5. The person to be arrested has committed any public offense that makes the person removable from the United States.

RENTING

City of Farmers Branch, Texas, Ordinance 2952

It shall be an offense for a person to be an occupant of a leased or rented single family residence without first obtaining a valid occupancy license permitting the person to occupy that single family residence.˜

It shall be an offense for a lessor to lease or rent a single family residence without obtaining and retaining a copy of the residential occupancy license of any and all known occupants.˜

[T]he building inspector shall˜ verify with the federal government whether the occupant is an alien lawfully present in the United States.˜

If the federal government reports the status of the occupant as an alien not lawfully present in the United States, the building inspector shall send the occupant, at the address of the single family residence shown on the application for residential occupancy license, a deficiency notice.

SMUGGLING

Ariz. Rev. Stat. § 13-2319

A. It is unlawful for a person to intentionally engage in the smuggling of human beings for profit or commercial purpose.

B. A violation of this section is a class 4 felony.˜

F. For the purposes of this section:˜ 3. "Smuggling of human beings" means the transportation, procurement of transportation or use of property or real property by a person or an entity that knows or has reason to know that the person or persons transported or to be transported are not United States citizens, permanent resident aliens or persons otherwise lawfully in this state or have attempted to enter, entered or remained in the United States in violation of law.

TRANSPORTING

Ga. Code § 16-11-200

(b) A person who, while committing another criminal offense, knowingly and intentionally transports or moves an illegal alien in a motor vehicle for the purpose of furthering the illegal presence of the alien in the United States shall be guilty of the offense of transporting or moving an illegal alien.˜

UNAUTHORIZED EMPLOYMENT

Fla. Stat. § 448.09

(1) It is unlawful for any person to knowingly employ, hire, recruit, or refer, either for herself or himself or on behalf of another, for private or public employment within this state, an alien who is not duly authorized to work by the immigration laws of the United States, the Attorney General of the United States, or the United States Secretary of the Department of Homeland Security.

UNAUTHORIZED WORK

Ala. Code § 31-13-11

(a) It is unlawful for a person who is an unauthorized alien to knowingly apply for work, solicit work in a public or private place, or perform work as an employee or independent contractor in this state.

7.3 An Introduction to Federal Preemption

As mentioned, the biggest stumbling block to state and local efforts to criminalize immigration related conduct has been the issue of federal preemption. The following reading summarizes the law of preemption.

CRS, Federal Preemption: A Legal Primer (2023)

The Constitution's Supremacy Clause provides that "the Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."˜ This language is the foundation for the doctrine of federal preemption, according to which federal law supersedes conflicting state laws.˜

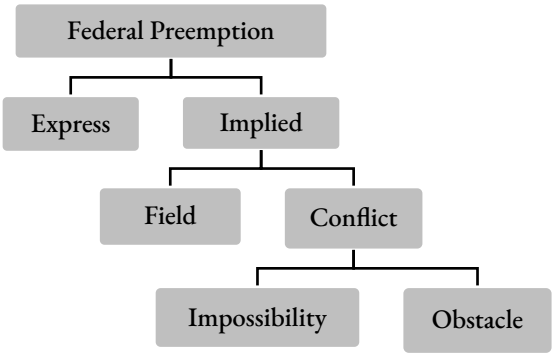
Federal preemption of state law is a ubiquitous feature of the modern regulatory state and "almost certainly the most frequently used doctrine of constitutional law in practice."˜ Indeed, preemptive federal statutes shape the regulatory environment for most major industries˜. As a result, "[d]ebates over the federal government's preemption power rage in the courts, in Congress, before agencies, and in the world of scholarship."˜ These debates over federal preemption implicate many of the themes that recur throughout the federalism literature. Proponents of broad federal preemption often cite the benefits of uniform national regulations˜ and the concentration of expertise in federal agencies.˜ In contrast, opponents of broad preemption often appeal to the importance of policy experimentation,˜ the greater democratic accountability that they

believe accompanies state and local regulation,˜ and the "gap-filling" role of state common law in deterring harmful conduct and compensating injured plaintiffs.˜

These broad normative disputes occur throughout the Supreme Court's preemption case law. However, the Court has also identified different ways in which federal law can preempt state law, each of which raises a unique set of narrower interpretive issues. As Figure 1 illustrates, the Court has identified two general ways in which federal law can preempt state law. First, federal law can *expressly* preempt state law when a federal statute or regulation contains explicit preemptive language. Second, federal law can *impliedly* preempt state law when its structure and purpose implicitly reflect Congress's preemptive intent.˜

The Court has also identified two subcategories of implied preemption: "field preemption" and "conflict preemption." Field preemption occurs when a pervasive scheme of federal regulation implicitly precludes supplementary state regulation, or when states attempt to regulate a field where there is clearly a dominant federal interest.˜ In contrast, conflict preemption occurs when compliance with both federal and state regulations is a physical impossibility ("impossibility preemption"),˜ or when state law poses an "obstacle" to the accomplishment of the "full purposes and objectives" of Congress ("obstacle preemption").

Figure 1: Preemption Taxonomy



7.4 Supreme Court Jurisprudence Regarding State Employment Laws

Many U.S. Supreme Court cases that deal with state immigration laws and preemption focus on the area of employment. The following reading summarizes the Court's holdings in this area.

CRS, Federal Regulation of Alien Employment and Preemption over State Laws (2020)

The Supreme Court has repeatedly recognized that federal law preempts many state or local activities addressing immigration-related matters, though not every state enactment "which in any way deals with aliens is a regulation of immigration and thus *per se* preempted." Before enactment of IRCA [in 1986], for example, the Court in De Canas v. Bica held that federal immigration laws did not preempt a California law barring employers from hiring unlawfully present aliens because states have traditionally broad police powers over employment to protect workers in those states. Moreover, the Court reasoned, the "central concern" of then-existing federal immigration laws was to regulate the admission of aliens, not the employment of unlawfully present aliens. As noted, IRCA ultimately established a comprehensive federal scheme for regulating the employment of aliens in the United States, and state laws like the one considered in De Canas are now preempted. Still, the Court's recognition in De Canas that states have broad authority to regulate employment of persons in their jurisdictions may inform judicial analysis of IRCA's preemptive effect. The Supreme Court generally begins its preemption analysis with the assumption that Congress did not intend to displace state laws. In the case of IRCA, the High Court has tended to disfavor field preemption arguments against state or local measures, which assert that IRCA left no room for states to adopt measures that incidentally relate to the employment of aliens in their jurisdictions. Instead, the Court's analysis has turned on whether a challenged state or local measure is either expressly preempted by IRCA or conflicts with the federal law's objectives and purposes.

CHAMBER OF COMMERCE V. WHITING

In 2011, the Supreme Court in Chamber of Commerce v. Whiting considered whether IRCA restricted states from regulating alien employment through business licensing laws, and whether IIRIRA barred states from requiring employers to participate in the E-Verify program. The Court held that IRCA did not preempt an Arizona law allowing the suspension and revocation of business licenses belonging to employers who hire unauthorized aliens. In a 5-3 opinion, the Court determined that the state law's licensing provisions were permissible because, although IRCA expressly preempted state laws that imposed sanctions on employers of unauthorized aliens, it included a proviso that expressly allowed states to impose sanctions "through licensing and similar laws." [See INA 274A(h)(2), 8 USC 1324a(h)(2).] The Court also ruled that federal law did not impliedly preempt Arizona's requirement that employers within the state use E-Verify. The Court reasoned that, while IIRIRA limits the federal government's ability to mandate E-Verify for nonfederal entities, it does not restrict

states from requiring E-Verify. Further, in the Court's view, Arizona's use of E-Verify was compatible with IIRIRA's objectives of ensuring reliability in employment authorization verification and preventing fraud.

ARIZONA V. UNITED STATES

A year after Whiting, the Supreme Court again considered IRCA's preemptive effect on state regulation of alien employment. In Arizona v. United States, the Court in 2012 considered an Arizona measure that aimed to deter unlawfully present aliens from working or residing in the state. One component of the measure made it a criminal offense for "unauthorized aliens" to work in that state. The Court recognized in a 5-3 vote that IRCA preempted this criminal sanction. The Court observed that while IRCA expressly barred states from imposing criminal penalties on employers of unauthorized aliens, it was silent on whether those penalties may be imposed on the employees themselves. Still, the Court held that IRCA impliedly preempted state laws that criminalized such conduct. In the Court's view, Congress had made a "deliberate choice" not to impose criminal sanctions on aliens who unlawfully work in the United States, and the Arizona statute frustrated the "full purposes and objectives" of Congress.

KANSAS V. GARCIA

More recently, in 2020, the Supreme Court in Kansas v. Garcia considered whether IRCA barred states from criminally prosecuting unauthorized aliens who obtained employment through fraud. In that case, aliens who had presented stolen Social Security numbers on their tax withholding forms argued that IRCA prevented the state of Kansas from prosecuting them because the Social Security numbers were also included within their I-9s, and IRCA bars the "use" of any information "contained in" an I-9 except to enforce federal law. The Court disagreed in a 5-4 opinion, ruling that IRCA's restriction on the "use" of information found within an I-9 does not bar any use of that information outside federal law enforcement. To interpret IRCA so broadly, the Court declared, "is flatly contrary to standard English usage" because a person can "use" information "'contained in' many different places." The Court concluded that IRCA's restriction on the use of I-9-related information does not prevent states from regulating "things that an employee must or may do to satisfy requirements unrelated to work authorization," such as the completion of tax forms.

The Court also held that IRCA did not impliedly preempt application of Kansas law to prosecute aliens who fraudulently gain employment. The Court reasoned that state regulation of the use of tax withholding forms—used to enforce tax laws—is "fundamentally unrelated" to work authorization, and therefore does not intrude upon

a field implicitly reserved to Congress. Further, the Court held, Kansas's prosecution of aliens who use stolen Social Security numbers creates no obstacle to IRCA's objective of regulating the employment of aliens. The Court distinguished Arizona, which held that IRCA impliedly preempted a state law making it a crime for unauthorized aliens to work because Congress, through IRCA, had made a "considered decision" not to criminalize that conduct. Here, Congress made no similar determination that aliens who use false identities on tax withholding forms should not face criminal prosecution. Finally, the Court concluded that the possibility that the state prosecutions might impact federal enforcement priorities does not provide a basis for preemption because the Supremacy Clause prioritizes federal law, not simply "the criminal law enforcement priorities or preferences of federal officers."

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7.5 Case: United States v. Texas

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

PRISCILLA RICHMAN, CHIEF JUDGE:

In an effort to stem the tide of illegal immigration into Texas, the state legislature passed a bill known as S.B.4 that amended various statutes. The new laws prohibit noncitizens from illegally entering or reentering the state and set forth removal procedures. The United States, two nonprofit organizations, and the county of El Paso sued to enjoin enforcement of S.B.4, arguing it is preempted by federal law. The district court granted a preliminary injunction.˜ [W]e deny Texas's motion to stay that injunction pending appeal.˜

I

In November 2023, the Texas legislature passed Senate Bill 4 (S.B.4).˜ Its preamble reflects that its purpose is to prohibit the illegal entry into or illegal presence in the state of a noncitizen, to "authoriz[e] or requir[e] under certain circumstances the removal of persons who violate those prohibitions," and to create criminal offenses.˜ S.B.4 amended the Texas Penal Code to include new sections entitled: "Illegal Entry from Foreign Nation" and "Illegal Reentry by Certain Aliens."˜ Those and other implementing laws are the primary focus of our analysis.

The crime of "Illegal Entry from Foreign Nation" is codified at Texas Penal Code § 51.02, and provides: "A person who is an alien commits an offense if the person enters

or attempts to enter this state directly from a foreign nation at any location other than a lawful port of entry."˜ That section also enumerates affirmative defenses, including: (1) the federal government has granted the defendant "lawful presence in the United States"; (2) the federal government has granted the defendant asylum under 8 U.S.C. § 1158; (3) the defendant's conduct does not constitute a violation of 8 U.S.C. § 1325(a), which prohibits illegal entry into the United States; and (4) the defendant was approved for benefits under the federal Deferred Action for Childhood Arrival program (DACA) between certain dates.˜

The crime of "Illegal Reentry by Certain Aliens" is codified at Texas Penal Code § 51.03, and provides: "A person who is an alien commits an offense if the person enters, attempts to enter, or is at any time found in this state after the person: (1) has been denied admission to or excluded, deported, or removed from the United States; or (2) has departed from the United States while an order of exclusion, deportation, or removal is outstanding."˜

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

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

In December 2023, Las Americas Immigrant Advocacy Center and American Gateways (collectively, "Nonprofit Plaintiffs"), and El Paso County, sued the Director of the Texas Department of Public Safety, Steven McCraw, and the District Attorney for the 34th Judicial District of Texas, Bill Hicks.˜ In January 2024, the United States sued Texas, Governor Greg Abbott, the Texas Department of Public Safety, and Director McGraw.˜ The plaintiffs sought to enjoin Texas from enforcing S.B.4.˜

The district court consolidated the cases. In February 2024, days before S.B.4's effective date, the district court granted a preliminary injunction.˜ In the interlocutory appeal now before us, the defendants moved for ... a stay pending appeal.˜ For the reasons explained below, we conclude that Texas's motion for stay pending appeal should be denied.

II

We consider four factors in ruling on a motion for a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure other parties interested in the proceeding; and (4) where the public interest lies."˜ "The first two factors˜ are the most critical."˜

III

We begin with likelihood of success on the merits.˜

B

Texas asserts that it is likely to prevail on the merits of its argument that S.B.4 is not preempted under the Supremacy Clause.˜ We first consider field preemption.

1

Field preemption occurs when "States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance."˜ The Supreme Court has indicated that courts should hesitate to infer field preemption unless "the nature of the regulated subject matter permits no other conclusion" or "Congress has unmistakably so ordained."˜ When Congress has not expressly preempted state law, field preemption may still "be inferred from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."˜ Field preemption may also be inferred "where an Act of Congress touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."˜ When analyzing field preemption, "the relevant field should be defined narrowly."˜ The operative question, therefore, is whether Congress intended to "occupy the field"˜ of immigration policies concerning entry into and removal from the United States.

Here, the district court concluded that "the federal government has both a dominant interest and a pervasive regulatory framework" to control immigration into the United States, "preclud[ing] state regulation in the area."˜

For nearly 150 years, the Supreme Court has held that the power to control immigration—the entry, admission, and removal of noncitizens—is exclusively a federal power.˜ Despite this fundamental axiom, S.B.4 creates separate, distinct state criminal offenses and related procedures regarding unauthorized entry of noncitizens into Texas from outside the country and their removal.

The Supreme Court's decision in Arizona v. United States provides considerable guidance as to whether Texas is likely to succeed on the merits of the preemption issue. There, the relevant state-law provision—Section 3 of S.B.1070, an Arizona bill—punished a noncitizen's "willful failure to complete or carry an alien registration document."˜ The state provision adopted the same substantive standards as the federal law that required noncitizens to carry proof of registration.˜ After analyzing the federal regulations in the "field of alien registration," the Court observed "[t]he framework enacted by Congress leads to the conclusion ... that the Federal Government has occupied the field of alien registration."˜ The Court noted "[t]he federal statutory directives provide a full set of standards governing alien registration, including the punishment for noncompliance."˜ The Court explained this national registration scheme "was designed as a 'harmonious whole.'" ˜

Texas correctly observes the statutes at issue in Arizona did not regulate unlawful entry and removal of noncitizens. But the Court's holding in Arizona provides guiding principles. The Court held: "Where Congress occupies an entire field, as it has in the field of alien registration, even complementary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards."˜

In 1952, Congress enacted the Immigration and Nationality Act (INA) to establish a "comprehensive federal statutory scheme for regulation of immigration and naturalization" and to set "the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country."˜ The Act's "central concern" is the "entry and stay of aliens" in the United States.˜ The Act makes it unlawful for any noncitizen to enter the United States other than through a port of entry,˜ and punishes any noncitizen who unlawfully reenters or remains in the United States.˜ These provisions—§§ 1325(a) and 1326(a)—closely resemble Sections 51.02 and 51.03 of S.B.4. In fact, an affirmative defense under Section 51.02 is that "the defendant's conduct does not constitute a violation of 8 U.S.C. Section 1325(a)."˜ Moreover, the language in Section 51.03 is similar to that of § 1326(a). These features make the Court's analysis in Arizona particularly salient. In the same way Arizona S.B.1070 "add[ed] a state-law penalty for conduct proscribed by federal law,"˜ S.B.4 criminalizes behavior already prohibited by the INA. Particularly applicable in the present case, the Supreme Court held in Arizona that "[p]ermitting the State to impose its own penalties for the federal offenses here would conflict with the careful framework Congress adopted."˜ That is just as true regarding the Texas laws regarding entry and removal.

It is also important to understand that as part of its field-preemption analysis in Arizona, the Supreme Court pointed to the fact that the Arizona law regarding noncitizen registration "rules out probation as a possible sentence (and also eliminates the possibility of a pardon)," while federal law did not.˜ In the present case, a defendant may be removed before federal proceedings that would permit her to remain in the United States lawfully have been initiated or concluded. Sources of such relief include asylum, relief based on a Convention Against Torture (CAT) claim, or dispensation from the United States Attorney General.˜

Equally importantly, in concluding there was field preemption, the Supreme Court in Arizona relied on the fact that "[w]ere § 3 to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine[d] that prosecution would frustrate federal policies."˜ The same is true of the Texas laws at issue here.

The Supreme Court in Arizona spent considerable time and ink in explaining how the removal procedures work under federal law. "Removal is a civil, not criminal, matter."˜ The Texas and federal laws are not congruent on this score. The Supreme Court also explained that "[a] principal feature of the [federal] removal system is the broad discretion exercised by immigration officials."˜ "Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all."˜ "If removal proceedings commence, aliens may seek asylum and other discretionary relief allowing them to remain in the country or at least to leave without formal removal."˜

Under federal law, a noncitizen who does not enter through a designated port of arrival may nevertheless seek asylum.˜ A claim for asylum can be pursued before, during, or after the conclusion of prosecution under federal law for illegal entry.˜ In contrast, the Texas laws do not permit abatement of prosecution and removal proceedings,˜ and as a result, a noncitizen may be removed under Article 5B.002(d) before asylum proceedings are concluded.

Similarly, the Texas laws preclude a noncitizen from pursuing a CAT claim once proceedings are commenced. Federal law markedly differs. A noncitizen in removal proceedings with a reasonable fear of persecution or torture in his home country may request relief from removal based on the CAT.˜ "[T]he Attorney General has no discretion to deny relief to a noncitizen who establishes his eligibility. [Even a] conviction of an aggravated felony has no effect on CAT eligibility ..."˜

It is evident that the Texas entry and removal laws also significantly impair the exercise of discretion by federal immigration officials. Though the Texas laws carve out

some room for instances in which the federal government has exercised such discretion,˜ they limit others. For example, Congress has given the Attorney General authority to waive various requirements that would otherwise stand in the way of admission.˜ Noncitizens cannot pursue these avenues once Texas proceedings are instituted against them. The dissenting opinion's assertion that S.B.4 "has no impact whatsoever on which aliens Congress chooses to admit"˜ is simply incorrect.

The broadest exercise of federal discretion is the Executive's decision not to pursue either civilly or criminally the very noncitizens whom Texas has drawn a bead upon in enacting new state laws. The discretion to pursue these same noncitizens likely lies exclusively with the Executive.

In United States v. Texas, 599 U.S. 670 (2023),Texas and Louisiana challenged the Biden Administration's guidelines that "prioritize the arrest and removal from the United States of noncitizens who are suspected terrorists or dangerous criminals, or who have unlawfully entered the country only recently."˜ Texas and Louisiana also "contend[ed] that for certain noncitizens, such as those who are removable due to a state criminal conviction, § 1226(c) of Title 8 says that the Department 'shall' arrest those noncitizens and take them into custody when they are released from state prison."˜ Though the Supreme Court resolved the case based on standing, the reasoning supporting the Supreme Court's holding appears to be equally applicable in assessing whether Texas's enactment of laws aimed at increasing arrests and prosecutions of illegally present noncitizens impinges on discretion granted by the Constitution to the Executive. The Supreme Court held: "Article II of the Constitution assigns the 'executive Power' to the President and provides that the President 'shall take Care that the Laws be faithfully executed.'"˜ The Court said: "Under Article II, the Executive Branch possesses authority to decide 'how to prioritize and how aggressively to pursue legal actions against defendants who violate the law.'"˜ "[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."˜ The Supreme Court held that this exclusive authority extended to enforcement of the immigrations laws at issue: "That principle of enforcement discretion over arrests and prosecutions extends to the immigration context, where the Court has stressed that the Executive's enforcement discretion implicates not only 'normal domestic law enforcement priorities' but also 'foreign-policy objectives.'"˜ The exclusive authority over removal was expressly set forth: "In line with those principles, this Court has declared that the Executive Branch also retains discretion over whether to remove a noncitizen from the United States."˜ This is likely quintessential field preemption.

There is more. Congress has given the Executive statutory authority to request help from the states in arresting and detaining, at least for short periods of time, noncitizens

who are illegally present. When states cooperate in this way, their actions and officers are generally supervised by the Executive Branch pursuant to federal law.˜ If it chose to do so, the Executive could rely upon statutory authority to request Texas to assist, under the supervision of federal officers, in arresting the very noncitizens whom Texas now says it has the authority to arrest under state law, unsupervised by any federal officer or agency. The Executive Branch has in fact sought Texas's assistance under various statutes, but the federal government has not utilized Texas's resources to the extent desired by Texas. Regardless of the wisdom of the Executive's actions and inactions, it is for the Executive to decide whether, and if so, how to pursue noncitizens illegally present in the United States.

It is worth noting that one root cause for the lack of action by the Executive could well be the failure of Congress to spend the funds necessary to address the massive increases in the numbers of noncitizens illegally entering the United States. The Supreme Court's decision in United States v. Texas recited that "[f]or the last 27 years since § 1226(c) and § 1231(a)(2) were enacted in their current form, all five Presidential administrations have determined that resource constraints necessitated prioritization in making immigration arrests."˜ The results of the lack of funding coupled with the lack of political will are apparent. Texas, nobly and admirably some would say, seeks to fill at least partially the gaping void. But it is unlikely that Texas can step into the shoes of the national sovereign under our Constitution and laws.

The Court observed in Arizona that "[r]eturning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission."˜ "The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities."˜

When analyzing Section 3 of S.B.1070, the Arizona Court explained that "[f]ederal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders."˜ Texas fails to explain why this logic does not apply to the equally—if not more—sensitive topic of noncitizens entering the country. Congress established a comprehensive framework to identify who may enter,˜ how they may enter,˜ where they may enter,˜ and what penalties apply for those who enter unlawfully.˜

Field preemption of the entry and removal of noncitizens is indicated by the breadth of the United States' power "to control and conduct relations with foreign nations," and the reasons for the existence of that power.˜ The Supreme Court said in Arizona:

- "Decisions [regarding removal] touch on foreign relations and must be made with one voice."˜
- "Removal decisions, including the selection of a removed alien's destination, may implicate [the Nation's] relations with foreign powers and require consideration of changing political and economic circumstances."˜
- "The federal power to determine immigration policy is well settled. Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws."˜
- "Perceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad."˜
- "It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States."˜
- "This Court has reaffirmed that '[o]ne of the most important and delicate of all international relationships ... has to do with the protection of the just rights of a country's own nationals when those nationals are in another country.'"˜

These considerations certainly auger in favor of concluding that Congress intended to occupy the field regarding removal of noncitizens. The Texas removal provisions bestow powers upon itself that are likely reserved to the United States.

We outline in detail additional provisions of federal immigration law that are relevant to noncitizen removal. If a noncitizen enters the United States "at any time or place other than as designated by the Attorney General" they are "inadmissible" and "removable" under 8 U.S.C. §§ 1182(a)(6)(A)(i) and 1229a(e)(2).˜ The "usual removal process involves an evidentiary hearing before an immigration judge."˜ At that hearing, the noncitizen may be represented by counsel, present evidence on their behalf, and attempt to show why he or she should not be admitted.˜ Among other things, the noncitizen may claim asylum by expressing fear of persecution or harm upon return to his or her home country.˜ If their claim is rejected and the noncitizen is ordered removed, they can appeal the removal order to the Board of Immigration Appeals.˜ If that appeal is unsuccessful, the noncitizen is generally entitled to review in a federal court of appeals.˜ There is also a more expedited procedure for removal. If an immigration officer determines that a noncitizen who is arriving in the United States is inadmissible because they misrepresented their admission status or lack valid admission documentation, the

officer must order the noncitizen removed from the United States without further hearing or review.˜ Other noncitizens who are already present in the United States are subject to the same expedited removal if they "(1) [are] inadmissible because he or she lacks a valid entry document; (2) [have] not 'been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility'; and (3) [are] among those whom the Secretary of Homeland Security has designated for expedited removal."˜ All noncitizens subject to this expedited removal procedure can avoid removal by claiming asylum or a fear of persecution, at which point they are referred to an asylum officer.˜ If the asylum officer finds the applicant does not have a credible fear, a supervisor will review the asylum officer's determination.˜ The supervisor's review can be appealed to an immigration judge.˜

This system is comprehensive, complex, and national in scope. It provides multiple procedural channels to determine whether a noncitizen should be removed and establishes a detailed process for reviewing those determinations. S.B.4's removal provision intrudes on this system by giving state judges and magistrate judges the power to order a noncitizen removed without an opportunity to avail himself of rights he has under federal law.

Although state officers may "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States,"˜ federal law does not authorize or contemplate "cooperation" on removal decisions. By creating a complex, national system for determining whether a noncitizen should be removed, there is strong evidence Congress intended to occupy the field for any decision related to noncitizen removal.

In De Canas v. Bica, 424 U.S. 351 (1976), the Supreme Court observed that the "comprehensiveness" of this scheme "was to be expected in light of the nature and complexity of the subject."˜ If every state could regulate the unlawful entry and reentry of noncitizens, "[e]ach additional statute [would] incrementally diminish[ ] the [federal government]'s control over enforcement" and "detract[ ] from the 'integrated scheme of regulation' created by Congress."˜

Supreme Court authorities and the detailed statutory scheme governing who will be permitted to remain in the United States and removal procedures strongly indicate that Congress "occupies [the] entire field" of unlawful entry and reentry of noncitizens as well as removal.˜

Texas makes three counterarguments. First, Texas argues that "[s]tate laws that 'mirror[ ] federal objectives' are more—not less—likely to be upheld."˜ The Supreme Court, however, rejected this exact argument in Arizona, stating it "ignores the basic

premise of field preemption—that States may not enter, in any respect, an area the Federal Government has reserved for itself."~

Second, Texas cites several federal statutes that it contends reflect that federal immigration law "regularly encourages States to aid federal entry and removal."~ It cites 18 U.S.C. § 758 for the proposition that it is a crime for a noncitizen to "flee" from "State[ ] or local law enforcement" around immigration checkpoints.~ But that federal statute makes it a federal crime when someone "flees Federal, State, or local enforcement agents in excess of the legal speed limit."~ This statute would not prohibit Texas from arresting or prosecuting a person for violating state-established speed limits under state law. Indeed, a federal statute provides that state law extends over immigration stations and that officers in charge of immigration stations shall admit "State and local officers charged with law enforcement ... in order that such State and local officers may preserve the peace and make arrests for crimes under the laws of the States and Territories."~ But it does not authorize Texas to (1) enact a statute making it a state crime to flee a checkpoint, or (2) arrest or prosecute anyone under § 758. Most importantly, this statute does not pertain to whether someone should be allowed to enter or remain in the United States or whether they should be deported or removed if they enter illegally.

Texas points to 8 U.S.C. § 1324(c), arguing "States have authority to make arrests for violations of alien smuggling prohibition[s]."~ But, here again, this statute has nothing to do with whether a noncitizen should be prosecuted or deported for being in the United States illegally. Rather, this statute makes it a crime for anyone, whether they are a noncitizen, a United States citizen, or a person lawfully in the United States, to engage in smuggling noncitizens into the United States or harboring or transporting them.

Texas argues that 22 U.S.C. § 7105(c)(3)(C)(i), 8 U.S.C. § 1101(a)(15)(T)(i), and 8 U.S.C. § 1101(a)(15)(U), contemplate state prosecution or investigation of illegal trafficking.~ But, here again, these statutes do not authorize Texas to determine whether a person is illegally present in the United States in order to take action to remove or deport that person.

Texas fails to explain how these laws are relevant to the entry or removal provisions. While Texas undoubtedly can assist the federal government in arresting noncitizens who violate federal law when federal law permits it to do so,~ the question is not whether Congress intended to occupy the entire field of immigration.~ The laws cited by Texas do not facilitate the inquiry pertinent in the present case, which is whether Congress intended to "occupy the field" of immigration policies concerning entry into or removal from the United States or both.~

In its merits briefing, Texas maintains the federal government has "abandoned" the field because the Executive Branch has failed to enforce immigration policy in dereliction of its statutory duties.˜ Regardless of whether these claims are accurate, our task is to determine whether Congress "'legislated so comprehensively' in a particular field that it 'left no room for supplementary state legislation.'"˜ "Evidence of pre-emptive purpose is sought in the text and structure of the statute at issue," not enforcement decisions by the Executive.˜ Here, there is strong support for the conclusion that Congress has "legislated so comprehensively" in the field of noncitizen entry, reentry, and removal that it "left no room for supplementary state legislation."˜ Texas has not demonstrated it is likely to prevail on its argument that the district court erred by holding that S.B.4 is likely field preempted.

2

Even if there is likely no field preemption, Texas has not demonstrated that it is likely to succeed on the merits regarding conflict preemption. Generally speaking, the Supreme Court has recognized that a state statute may be preempted by federal law when (1) it is impossible for a person to comply with both the state law and federal law, or (2) when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."˜ The Supreme Court has described these concepts in this way:

This Court, when describing conflict pre-emption, has spoken of pre-empting state law that "under the circumstances of th[e] particular case ... stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"—whether that "obstacle" goes by the name of "conflicting; contrary to; ... repugnance; difference; irreconcilability; inconsistency; violation; curtailment; ... interference," or the like. The Court has not previously driven a legal wedge—only a terminological one—between "conflicts" that prevent or frustrate the accomplishment of a federal objective and "conflicts" that make it "impossible" for private parties to comply with both state and federal law. Rather, it has said that both forms of conflicting state law are "nullified" by the Supremacy Clause.˜

Two seminal cases that considered whether state laws addressing immigration-related issues were preempted employed an "obstacle" analysis, Arizona˜ and Hines.˜ Neither has been overruled or abrogated in that regard.

The Texas entry provisions make it unlawful for a noncitizen to enter or reenter the state from outside the country.˜ Texas contends that these provisions mirror federal-law standards, arguing "there can by definition be no conflict" between federal and state law because they comport with one another.˜ The mere fact that state laws "overlap" with

federal criminal provisions does not, by itself, make a case for conflict preemption.˜ But, as the Supreme Court has cautioned, "conflict is imminent" when "two separate remedies are brought to bear on the same activity."˜ The Texas entry provisions are not congruent.˜

First and foremost, Texas law punishes unlawful entry˜ while under federal law, there are various avenues by which a noncitizen may ultimately be admitted or receive absolution even though he or she initially entered illegally. Second, relatedly, it does not appear there is any discretion given to state officials to decline to prosecute those who commit the offense set forth in Section 51.02. But even if state law afforded discretion, it would vest that discretion in a state official, not the United States Attorney General or another federal officer. That is in conflict with federal law.

The INA provides the federal government discretion to decide whether to initiate criminal proceedings or civil immigration proceedings once a noncitizen is apprehended. The Texas scheme blocks this exercise of discretion. A noncitizen apprehended illegally entering or remaining in Texas is charged with a crime, and the federal government has no voice in further proceedings. An arrest or conviction would interfere with federal law because the Texas process for arrests and convictions suppresses or subverts federal authority over a noncitizen's status in the United States.

S.B.4 affects noncitizens whom Congress has assigned a federal immigration status—that of a "applicant for admission"˜—and interferes with federal immigration officials' ability to determine the applicant's admissibility. The relevant statute provides: "An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival ...) shall be deemed for purposes of this chapter an applicant for admission."˜ Congress directed that all applicants for admission "shall" be inspected by a federal immigration officer.˜ We described this process in more detail above and we summarize it again here. First, the immigration officer must determine whether the noncitizen falls into a category defined in part by statute and in part by a designation by the Secretary of Homeland Security.˜ Second, if the immigration officer determines that the noncitizen falls into that category (or if the noncitizen is arriving in the United States), the officer must then decide whether the noncitizen is inadmissible under two specified statutory provisions.˜ Those noncitizens are generally subject to expedited removal, unless they indicate an intention to apply for asylum.˜ Noncitizens who are not subject to expedited removal (and who are not "clearly and beyond a doubt entitled to be admitted") are detained for further proceedings before an immigration judge.˜ The immigration judge "shall" determine whether the noncitizen is inadmissible.˜

In light of this process, it is problematic that state courts will determine if a noncitizen has entered illegally. In Villas at Parkside Partners v. City of Farmers Branch,˜ a majority of our en banc court concluded that state courts may not assess the legality of a noncitizen's presence.˜ There, the ordinance at issue allowed for state judicial review as to whether an individual was lawfully present in the country.˜ The lead opinion concluded that because of "the discretion and variability inherent in a determination of whether an alien is 'lawfully present in the United States' ... the judicial review section of the Ordinance [ ] is preempted by federal law."˜

The Texas law regarding entry grants Texas judges significantly more power than the ordinance at issue in Farmers Branch.˜ It allows Texas courts to impose criminal sanctions, including significant terms of imprisonment, and order removal if a noncitizen is found to have entered or remained in Texas illegally.˜ As some jurists have recognized, "the structure of the [federal] immigration statutes makes it impossible for [a] State to determine which [noncitizens] are entitled to residence, and which eventually will be deported."˜

The Texas unlawful entry and removal statutes also conflict with federal law because they prohibit abatement of prosecutions under Chapter 51 of the Penal Code on the grounds that federal proceedings have been or will be commenced regarding the immigration status of a noncitizen. S.B.4 amended the Texas Code of Criminal Procedure to add Article 5B.003. It provides: "Art. 5B.003. Abatement of Prosecution on Basis of Immigration Status Determination Prohibited[.] A court may not abate the prosecution of an offense under Chapter 51, Penal Code, on the basis that a federal determination regarding the immigration status of the defendant is pending or will be initiated."˜

Federal law provides that a noncitizen may be permitted to remain in the United States lawfully even if he has been convicted of illegal entry. Removing a noncitizen before the federal government has made a decision as to whether (1) that noncitizen is permitted to remain in the United States because asylum should be granted, (2) a CAT claim is valid, or (3) the United States Attorney General would exercise discretion to waive obstacles to removal and admit a noncitizen would conflict with federal law.

The removal provision also appears to conflict with federal law because, again, the provision authorizes Texas state judges and magistrate judges to remove noncitizens from the United States without notice to or consent from the federal government.˜ This appears to run headlong into federal law. Congress has identified the grounds for removal, the requirements for commencing and administering removal proceedings, the protections afforded to noncitizens throughout the removal proceedings, and the process for selecting the country to which noncitizens may be removed.˜ A "principal

feature" of this complex removal system is the "broad discretion" exercised by federal immigration officials.˜ Contrast the removal provision's grant to Texas judges the unilateral power to make removal decisions. The removal provision sidesteps the sensitive issues that federal immigration officers are to consider.˜

The Texas removal provisions will significantly conflict with the United States' authority to select the country to which noncitizens will be removed. A large number of noncitizens who crossed into Texas from Mexico are not citizen or residents of Mexico. Nevertheless, under Texas law they would be removed to Mexico. The United States would have no voice in the matter.

It is evident that the Texas entry and removal laws significantly eliminate the exercise of discretion by federal immigration officials, including the United States Attorney General.˜ Though the Texas laws carve out some room for instances in which the federal government has exercised such discretion,˜ the Texas laws by no means afford a noncitizen the opportunity to benefit fully from the broad discretion available under federal law.

The State asserted at oral argument that at the very least, state law allowing the arrest of noncitizens who are illegally present should not be enjoined. First, the state laws at issue provide that state officers may apprehend and detain noncitizens for unlawful entry and reentry for a violation of state, not federal, law. If the entry and removal provisions are preempted, nothing is left for state officers to enforce by arresting noncitizens. S.B.4 does not purport to authorize state law enforcement officials to make arrests or detentions for violations of federal law.

Second, allowing state law enforcement officers to arrest noncitizens based on a preempted state offense, as the dissenting opinion suggests we should,˜ "would allow the State to achieve its own immigration policy. The result could be unnecessary harassment of some aliens (for instance, a veteran, college student, or someone assisting with a criminal investigation) who federal officials determine should not be removed."˜ The dissenting opinion recognizes that "[t]he principal concern motivating the Hines Court was that a State might use registration requirements to harass admitted aliens."˜ Allowing state law enforcement officials to arrest noncitizens who have not been admitted but who may be eligible for various status determinations that would allow them to remain in the United States raises the same concerns expressed in Hines.

In any event, "[f]ederal law specifies [the] limited circumstances in which state officers may perform the functions of an immigration officer."˜ At all times, those circumstances require federal supervision or authorization. Under 8 U.S.C. § 1357(g), the Secretary of Homeland Security "may enter into a written agreement with a State"

or any of its "political subdivision[s]," allowing state or local officers "to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of [noncitizens] in the United States."˜ In performing those functions, the officers must "be subject to the direction and supervision of the [Secretary]."˜ That federal law expressly provides that an agreement is not required for any state or political subdivision of a state to communicate with the Attorney General about the immigration status of an individual, including "reporting knowledge that a particular alien is not lawfully present in the United States."˜ That same provision, § 1357(g)(10), further provides that an agreement is not necessary for a state or local government "otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States."˜ This is not a grant of authority to a state to enact a statute making it a state crime to be unlawfully present. Nor is it a grant of authority to a state to enact a statute that gives authority under state law to state officials to arrest or remove someone illegally present. This provision does not even grant a state the authority to arrest or remove under federal law. Similarly, other statutes expressly authorize state officers' arrest authority—but only in narrow circumstances.˜ The Texas laws at issue permit state authorities to prosecute an individual for being unlawfully present and remove individuals who are unlawfully present or removable, without any consultation or cooperation with the Attorney General of the United States.

S.B.4 also appears to permit an end-run around 8 U.S.C. § 1252c. Section 1252c authorizes "State and local law enforcement officials" to "arrest and detain" noncitizens "illegally present in the United States" only if the noncitizen "has previously been convicted of a felony in the United States and deported or left the United States after such conviction."˜ S.B.4, however, permits Texas law enforcement to arrest and detain noncitizens illegally present in Texas regardless of whether the noncitizen has left the United States or been deported after being convicted of a felony.˜ Compounding the problem, § 1252c contains another condition on state officers' arrest authority: the officer may arrest the noncitizen "only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States."˜ S.B.4 clearly conflicts with this statute.

Texas contends that S.B.4 regulates entry and reentry coterminously with federal law, citing § 1357(g). But the Supreme Court addressed a similar argument in Arizona when analyzing Section 6 of S.B.1070, which authorized state officers to arrest a person if the officer had probable cause to believe that person was removable.˜ The Supreme

Court explained that "no coherent understanding of the term [cooperation] would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government."˜ Texas has not demonstrated why the same logic does not apply to S.B.4's entry provisions. Allowing Texas to detain noncitizens "without any input from the Federal Government about whether an arrest is warranted in a particular case ... would allow the State to achieve its own immigration policy."˜

Texas argues that "S.B.4 also provides for return orders and, in lieu of prosecution, permits an alien to depart voluntarily—something that no federal law prohibits, and which aliens are free to do themselves."˜ Relatedly, it asserts "[a]nd like federal law, S.B.4 makes failure to comply with a return order a crime."˜ These laws are not preempted, Texas maintains, because "[a]n alien can comply with both the federal immigration code and S.B.4 by entering this country legally at a port of entry, not reentering illegally, and complying with a valid return or removal order."˜ But as discussed above, state courts would determine whether the defendant is illegally present. The defendant would be prosecuted for a crime under state law if he does not return to the country from which he illegally entered, without the ability to avail himself of federal laws that might permit him to remain in the United States. That conflicts with federal law.

In sum, there are "significant complexities" in determining a noncitizen's immigration status.˜ Texas has failed to persuade us that it is likely to show that the entry, removal, and arrest provisions do not "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."˜

D

The remaining Nken factors are "(2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure other parties interested in the proceeding; and (4) where the public interest lies."˜ They weigh against a stay.˜

Texas's motion for a stay pending appeal is DENIED.

7.6 Revisiting Modern State Immigration Laws

Having considered the contours of federal preemption in sections 7.3-7.5, revisit the laws identified in section 7.2. Do you think any could (or did) survive a preemption challenge?

7.7 Test Your Knowledge

PROBLEM 7.1

Oklahoma law, 21 Okla. Stat. § 446(A), states that "It shall be unlawful for any person to transport, move, or attempt to transport in the State of Oklahoma any alien knowing or in reckless disregard of the fact that the alien has come to, entered, or remained in the United States in violation of law, in furtherance of the illegal presence of the alien in the United States." There is no case law regarding this statute.

Cassie Cobard was driving her half-brother, Hiam Haban, to his job when she was stopped by Officer Ortegon for failing to come to a complete stop at a stop sign. When Officer Ortegon asked for identification from both Cobard and Haban, only Cobard was able to provide identification as Haban was undocumented and did not have identification.

The traffic charge against Cobard was dismissed. But she was prosecuted under 21 Okla. Stat. § 446(A) for knowingly transporting Haban, an undocumented migrant.

You represent Cobard. What are your options?

Chapter Eight: Border Enforcement

The United States expends significant effort to prevent and deter unauthorized crossings of the U.S.-Mexico border. This chapter begins with a brief history of border enforcement (section 8.1) and an introduction to the federal agencies responsible for border enforcement today (section 8.2). The remainder of the chapter is devoted to the question of whether and how the Fourth Amendment of the U.S. Constitution limits border policing (sections 8.3-8.6).

8.1 A Brief History of Border Enforcement

Federal immigration enforcement began in 1891 when Congress created the Office of the Superintendent of Immigration within the U.S. Treasury Department. This agency became known as the "Immigration Service," and its immigration inspectors, stationed at major ports of entry, questioned arriving noncitizens about their admissibility and made decisions regarding whether to admit or refuse entry.

In 1895, Congress renamed the Immigration Service and its head: The Office of Immigration became the Bureau of Immigration, and its head was retitled from Superintendent of Immigration to Commissioner-general of Immigration. In 1903, the Bureau was removed from the aegis of the Treasury Department and relocated under the Department of Commerce and Labor, precursor to the Department of Labor. Ten years later, in 1913, the Bureau split into two agencies: the Bureau of Immigration and the Bureau of Naturalization.

In 1924, Congress created the U.S. Border Patrol and housed it under the Bureau of Immigration. Prior to 1924, horse-mounted immigration inspectors, operating out of El Paso, Texas, engaged in "sporadic" efforts to thwart unauthorized migration along

the Southern border. At the time, "unauthorized migration" primarily meant Chinese nationals looking to evade the Chinese Exclusion Act.

In 1933, the Bureau of Immigration (with Border Patrol as a sub-agency) and the Bureau of Naturalization recombined to become the Immigration and Naturalization Service (INS). In 1940, the INS was rehomed from the Department of Labor to the Justice Department. There it remained until disbanded by the Homeland Security Act of 2002, which created the modern agencies discussed below in section 8.2.

8.2 An Introduction to Border Enforcement Today

Kit Johnson, Women of Color in Immigration Enforcement, 21 NEV. L. J. 997 (2021)

The Department of Homeland Security (DHS) is the federal agency in charge of immigration enforcement in the United States.˜ The work is principally delegated to two agencies under DHS's aegis: U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE).˜ The work of CBP and ICE are further subdivided into specialized enforcement branches. CBP includes the Office of Field Operations (OFO), U.S. Border Patrol (USBP), and Air and Marine Operations (AMO). ICE includes Enforcement & Removal Operations (ERO) as well as Homeland Security Investigations (HSI).˜ Figure 1 shows the hierarchical relationship among these entities.

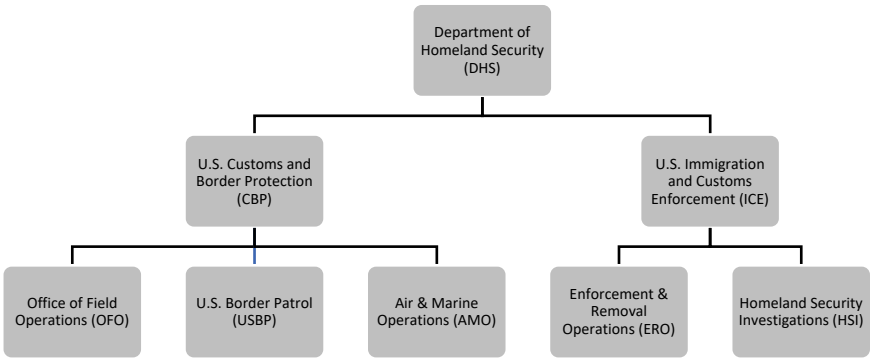

Figure 1: Federal Immigration Enforcement Agencies˜

Of these myriad agencies, [two are most significant in terms of border enforcement: OFO and USBP.]˜ AMO˜ and HSI,˜ while also engaged in immigration enforcement,˜ are largely focused on other law enforcement concerns—particularly narcotics˜—and do not deal with the same volume of immigration enforcement work as the other three

agencies.˜ [ERO is focused more on interior enforcement and will be addressed in Chapter 9.]

OFFICE OF FIELD OPERATIONS

Officers with the OFO, clad in their signature navy blue, work at the 328 ports of entry around the United States.˜ Ports of entry are the locations where individuals and goods can lawfully enter the United States by land, sea, or air.

The focus of the OFO is border security and trade.˜ The agency is responsible for the traditional customs functions of screening cargo and goods: making sure that duties have been paid, inspecting incoming animals and plants, and prohibiting the smuggling of drugs and counterfeit materials.˜ In addition, the OFO is responsible for the traditional immigration functions involved with the screening of individuals entering the United States: verifying identification documents, checking authorization to enter the country, and confirming intent to comply with U.S. immigration laws.˜

In terms of their immigration functions, officers with the OFO interact with persons seeking entry into the United States. Such persons might be pedestrians—walking across the border on foot, arriving at the border on busses or cruise ships, or landing in the United States at international airports—or they may be drivers and passengers of cars, trucks, and trains. In addition to individuals declaring their intent to enter the United States, officers encounter those who seek to enter surreptitiously by concealing themselves in vehicle compartments in an effort to evade inspection and enter the United States without authorization.˜

Those who declare their intention to enter the United States present paperwork indicating their identity and their permission to enter the country.˜ Officers with the OFO inspect these documents. They make sure that the identification materials match the person presenting them.˜ They assess the authenticity of the documents.˜ And they evaluate whether the individual is or is not allowed to enter the United States.˜

All of this may happen in a matter of seconds. An officer might scan the passport of a potential border crosser, ask one or two questions, and waive the individual through to the United States.˜ Quick action of this kind is considered "primary" screening.˜ Sometimes, however, an officer or an inspection dog will flag a potential border crosser as needing more investigation.˜ Such individuals will then proceed to "secondary" screening where they face more intense scrutiny and likely a search of their belongings and/or vehicle.˜ If the inspecting officer determines that a noncitizen individual is engaged in misrepresentation or does not have the proper documents required to enter,

the OFO has the power to expel the traveler and bar them from reentering the United States for five years.˜

U.S. Border Patrol

Like the OFO, USBP agents focus on border security.˜ Agents of the USBP operate between ports of entry, along the nearly 2,000 miles of the border between the U.S. and Mexico, the more than 5,500 miles of the border between the U.S. and Canada, and the thousands of miles of U.S. coastal borders.˜ USBP operates not just at the border itself, but within 100 air miles of those borders.˜ They are identified by their distinctive olive green uniforms.˜

The work of USBP agents is varied and changes with the landscape and geography of each border station. Some agents work in command centers, not interacting with migrants directly but instead reading information gleaned from technology such as motion detectors and feeding that data to agents in the field.˜ As for those in the field, some agents hold a fixed and visible position, serving as a deterrent to unauthorized border crossings in potentially high traffic areas such as the tops of hills south of San Diego, California.˜ Others man permanent checkpoints on highways near the U.S. border, questioning individuals in cars and trucks about their right to remain in the United States as well as searching for drugs.˜ USBP agents also erect temporary checkpoints to check traffic along other border routes˜ and conduct roving patrols on roads and highways near the border.˜ Agents work in border cities, checking train traffic,˜ looking for signs of illegal tunneling,˜ and identifying unauthorized migrants.˜ They also patrol the thousands of miles of rural U.S. borderlands on boat, horse, ATV, jeep, snowmobile, and on foot, searching for clues about recent unlawful travel and tracking migrants.˜

The many USBP agents working in isolated parts of the Southern border face a job that can be both boring and scary.˜ These agents find themselves searching for signs of border crossings for hours, perhaps finding none during an entire shift. When they do encounter migrants, the agent's job is to apprehend them despite the fact that agents often work alone, with backup many miles away, and may be working to apprehend a group of migrants traveling together, none of whom want to be caught.˜ In addition to often being outnumbered, agents frequently do not know before the encounter whether the individuals they seek to apprehend are families with young children or drug mules—differences that significantly affect the safety of the agent during apprehension.˜

8.3 Border Enforcement and The Fourth Amendment

Border enforcement involves asking people questions (e.g. Are you a citizen? Do you have authorization to be in the United States?) and searching their possessions (e.g. cars, backpacks, cellphones). What are the statutory rules that authorize such questions and searches? How are these statutes informed or limited by constitutional restraints? The following cases answer these questions. The first, United States v. Flores Montano (section 8.4), addresses searches at the border and border equivalents. The second, Almeida-Sanchez v. United States (section 8.5), addresses searches near but not at the border or its functional equivalents. The final case, United States v. Brignoni-Ponce (section 8.6), concerns questioning near but not at the border or its functional equivalents.

8.4 Case: United States v. Flores Montano

United States v. Flores-Montano
541 U.S. 149 (2004)

CHIEF JUSTICE REHNQUIST DELIVERED THE OPINION OF THE COURT.

Customs officials seized 37 kilograms-a little more than 81 pounds-of marijuana from respondent Manuel Flores-Montano's gas tank at the international border. The Court of Appeals for the Ninth Circuit˜ held that the Fourth Amendment forbade the fuel tank search absent reasonable suspicion.˜ We hold that the search in question did not require reasonable suspicion.

Respondent, driving a 1987 Ford Taurus station wagon, attempted to enter the United States at the Otay Mesa Port of Entry in southern California. A customs inspector conducted an inspection of the station wagon, and requested respondent to leave the vehicle. The vehicle was then taken to a secondary inspection station.

At the secondary station, a second customs inspector inspected the gas tank by tapping it, and noted that the tank sounded solid. Subsequently, the inspector requested a mechanic under contract with Customs to come to the border station to remove the tank. Within 20 to 30 minutes, the mechanic arrived. He raised the car on a hydraulic lift, loosened the straps and unscrewed the bolts holding the gas tank to the undercarriage of the vehicle, and then disconnected some hoses and electrical connections. After the gas tank was removed, the inspector hammered off bondo (a putty-like hardening substance that is used to seal openings) from the top of the gas tank. The inspector opened an access plate underneath the bondo and found 37 kilograms of marijuana bricks. The process took 15 to 25 minutes.

A grand jury for the Southern District of California indicted respondent on one count of unlawfully importing marijuana, in violation of 21 U.S.C. § 952, and one count of possession of marijuana with intent to distribute, in violation of § 841(a)(1).˜ [R]espondent filed a motion to suppress the marijuana recovered from the gas tank˜ [arguing] that removal of a gas tank requires reasonable suspicion in order to be consistent with the Fourth Amendment.˜

The District Court˜ held that reasonable suspicion was required to justify the search and, accordingly, granted respondent's motion to suppress. The Court of Appeals˜ summarily affirmed the District Court's judgment.˜ We granted certiorari,˜ and now reverse.˜

The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border. Time and again, we have stated that "searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border."˜ Congress, since the beginning of our Government, "has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country."˜ The modern statute that authorized the search in this case, 46 Stat. 747, 19 U.S.C. § 1581(a),˜ derived from a statute passed by the First Congress, the Act of Aug. 4, 1790, ch. 35, § 31, 1 Stat. 164,˜ and reflects the "impressive historical pedigree" of the Government's power and interest˜. It is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity.

That interest in protecting the borders is illustrated in this case by the evidence that smugglers frequently attempt to penetrate our borders with contraband secreted in their automobiles' fuel tank. Over the past 5 ½ fiscal years, there have been 18,788 vehicle drug seizures at the southern California ports of entry.˜ Of those 18,788, gas tank drug seizures have accounted for 4,619 of the vehicle drug seizures, or approximately 25%.˜ In addition, instances of persons smuggled in and around gas tank compartments are discovered at the ports of entry of San Ysidro and Otay Mesa at a rate averaging 1 approximately every 10 days.˜

Respondent asserts two main arguments with respect to his Fourth Amendment interests. First, he urges that he has a privacy interest in his fuel tank, and that the suspicionless disassembly of his tank is an invasion of his privacy. But on many occasions, we have noted that the expectation of privacy is less at the border than it is in the interior.˜ We have long recognized that automobiles seeking entry into this country

may be searched.˜ It is difficult to imagine how the search of a gas tank, which should be solely a repository for fuel, could be more of an invasion of privacy than the search of the automobile's passenger compartment.

Second, respondent argues that the Fourth Amendment "protects property as well as privacy,"˜ and that the disassembly and reassembly of his gas tank is a significant deprivation of his property interest because it may damage the vehicle. He does not, and on the record cannot, truly contend that the procedure of removal, disassembly, and reassembly of the fuel tank in this case or any other has resulted in serious damage to, or destruction of, the property.˜ According to the Government, for example, in fiscal year 2003, 348 gas tank searches conducted along the southern border were negative (i.e., no contraband was found), the gas tanks were reassembled, and the vehicles continued their entry into the United States without incident.˜

Respondent cites not a single accident involving the vehicle or motorist in the many thousands of gas tank disassemblies that have occurred at the border. A gas tank search involves a brief procedure that can be reversed without damaging the safety or operation of the vehicle. If damage to a vehicle were to occur, the motorist might be entitled to recovery. See, e.g., 31 U.S.C. § 3723; 19 U.S.C. § 1630. While the interference with a motorist's possessory interest is not insignificant when the Government removes, disassembles, and reassembles his gas tank, it nevertheless is justified by the Government's paramount interest in protecting the border. ˜Respondent also argued that he has some sort of Fourth Amendment right not to be subject to delay at the international border and that the need for the use of specialized labor, as well as the hour actual delay here and the potential for even greater delay for reassembly are an invasion of that right. Respondent points to no cases indicating the Fourth Amendment shields entrants from inconvenience or delay at the international border. The procedure in this case took about an hour (including the wait for the mechanic). At oral argument, the Government advised us that, depending on the type of car, a search involving the disassembly and reassembly of a gas tank may take one to two hours.˜ We think it clear that delays of one to two hours at international borders are to be expected.˜

For the reasons stated, we conclude that the Government's authority to conduct suspicionless inspections at the border includes the authority to remove, disassemble, and reassemble a vehicle's fuel tank. While it may be true that some searches of property are so destructive as to require a different result, this was not one of them. The judgment of the United States Court of Appeals for the Ninth Circuit is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER, CONCURRING.

I join the Court's opinion in full. I also note that Customs keeps track of the border searches its agents conduct, including the reasons for the searches˜. This administrative process should help minimize concerns that gas tank searches might be undertaken in an abusive manner.

8.5 Case: Almeida-Sanchez v. United States

Almeida-Sanchez v. United States
413 U.S. 266 (1973)

MR. JUSTICE STEWART DELIVERED THE OPINION OF THE COURT.

The petitioner in this case, a Mexican citizen holding a valid United States work permit, was convicted of having knowingly received, concealed and facilitated the transportation of a large quantity of illegally imported marihuana˜. His sole contention on appeal was that the search of his automobile that uncovered the marihuana was unconstitutional under the Fourth Amendment and that˜ the marihuana should not have been admitted as evidence against him.

The basic facts in the case are neither complicated nor disputed. The petitioner was stopped by the United States Border Patrol on State Highway 78 in California, and his car was thoroughly searched. The road is essentially an east-west highway that runs for part of its course through an undeveloped region. At about the point where the petitioner was stopped the road meanders north as well as east—but nowhere does the road reach the Mexican border, and at all points it lies north of U.S. 80, a major east-west highway entirely within the United States that connects the Southwest with the west coast. The petitioner was some 25 air miles north of the border when he was stopped. It is undenied that the Border Patrol had no search warrant, and that there was no probable cause of any kind for the stop or the subsequent search—not even˜ 'reasonable suspicion'˜.

The Border Patrol conducts three types of surveillance along inland roadways, all in the asserted interest of detecting the illegal importation of aliens. Permanent checkpoints are maintained at certain nodal intersections; temporary checkpoints are established from time to time at various places; and finally, there are roving patrols such as the one that stopped and searched the petitioner's car. In all of these operations, it is argued, the agents are acting within the Constitution when they stop and search automobiles without a warrant, without probable cause to believe the cars contain aliens, and even without probable cause to believe the cars have made a border crossing.

The only asserted justification for this extravagant license to search is s 287(a) (3) of the Immigration and Nationality Act˜, which simply provides for warrantless searches of automobiles and other conveyances 'within a reasonable distance from any external boundary of the United States,' as authorized by regulations to be promulgated by the Attorney General. The Attorney General's regulation, 8 CFR § 287.1, defines 'reasonable distance' is 'within 100 air miles from any external boundary of the United States.'

The Court of Appeals for the Ninth Circuit recognized that the search of petitioner's automobile was not a 'border search,' but upheld its validity on the basis of the above-mentioned portion of the Immigration and Nationality Act and the accompanying regulation.˜ We granted certiorari˜ to consider the constitutionality of the search.

I

No claim is made, nor could one be, that the search of the petitioner's car was constitutional under any previous decision of this Court involving the search of an automobile. It is settled, of course, that a stop and search of a moving automobile can be made without a warrant. That narrow exception to the warrant requirement was first established in Carroll v. United States, 267 U.S. 132,˜ providing for warrantless searches of automobiles when there was probable cause˜ for the search.˜

II˜

[W]e are left simply with the statute that purports to authorize automobiles to be stopped and searched, without a warrant and 'within a reasonable distance from any external boundary of the United States.' It is clear, of course, that no Act of Congress can authorize a violation of the Constitution. But under familiar principles of constitutional adjudication, our duty is to construe the statute, if possible, in a manner consistent with the Fourth Amendment.˜

It is undoubtedly within the power of the Federal Government to exclude aliens from the country.˜ It is also without doubt that this power can be effectuated by routine inspections and searches of individuals or conveyances seeking to cross our borders. As the Court stated in Carroll v. United States: 'Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.'˜

Whatever the permissible scope of intrusiveness of a routine border search might be, searches of this kind may in certain circumstances take place not only at the border

itself, but at its functional equivalents as well. For example, searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches. For another example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search.˜

But the search of the petitioner's automobile by a roving patrol, on a California road that lies at all points at least 20 miles north of the Mexican border,˜ was of a wholly different sort. In the absence of probable cause or consent, that search violated the petitioner's Fourth Amendment right to be free of 'unreasonable searches and seizures.'

It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards. It is well to recall the words of Mr. Justice Jackson, soon after his return from the Nuremberg Trials: 'These (Fourth Amendment rights), I protest, are not mere second-class rights but belong in the catalog of indipensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.'˜

The Court that decided Carroll v. United States, supra, sat during a period in our history when the Nation was confronted with a law enforcement problem of no small magnitude—the enforcement of the Prohibition laws. But that Court resisted the pressure of official expedience against the guarantee of the Fourth Amendment. Mr. Chief Justice Taft's opinion for the Court distinguished between searches at the border and in the interior, and clearly controls the case at bar: 'It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.'˜

Accordingly, the judgment of the Court of Appeals is reversed.

Reversed.

8.6 Case: United States v. Brignoni-Ponce

United States v. Brignoni-Ponce
422 U.S. 873 (1975)

MR. JUSTICE POWELL DELIVERED THE OPINION OF THE COURT.

This case raises questions as to the United States Border Patrol's authority to stop automobiles in areas near the Mexican border. It differs from our decision in Almeida-Sanchez v. United States˜, in that the Border Patrol does not claim authority to search cars, but only to question the occupants about their citizenship and immigration status.

I

As a part of its regular traffic-checking operations in southern California, the Border Patrol operates a fixed checkpoint on Interstate Highway 5 south of San Clemente. On the evening of March 11, 1973, the checkpoint was closed because of inclement weather, but two officers were observing northbound traffic from a patrol car parked at the side of the highway. The road was dark, and they were using the patrol car's headlights to illuminate passing cars. They pursued respondent's car and stopped it, saying later that their only reason for doing so was that its three occupants appeared to be of Mexican descent. The officers questioned respondent and his two passengers about their citizenship and learned that the passengers were aliens who had entered the country illegally. All three were then arrested, and respondent was charged with two counts of knowingly transporting illegal immigrants, a violation of § 274(a)(2) of the Immigration and Nationality Act˜. At trial respondent moved to suppress the testimony of and about the two passengers, claiming that this evidence was the fruit of an illegal seizure. The trial court denied the motion, the aliens testified at trial, and respondent was convicted on both counts.

Respondent's appeal was pending in the Court of Appeals for the Ninth Circuit when we announced our decision in Almeida-Sanchez v. United States,˜ holding that the Fourth Amendment prohibits the use of roving patrols to search vehicles, without a warrant or probable cause, at points removed from the border and its functional equivalents. The Court of Appeals, sitting en banc, held that the stop in this case more closely resembled a roving-patrol stop than a stop at a traffic checkpoint, and applied the principles of Almeida-Sanchez.˜ The court held that the Fourth Amendment, as interpreted in Almeida-Sanchez, forbids stopping a vehicle, even for the limited purpose of questioning its occupants, unless the officers have a "founded suspicion" that the

occupants are aliens illegally in the country. The court refused to find that Mexican ancestry alone supported such a "founded suspicion" and held that respondent's motion to suppress should have been granted.˜ We granted certiorari˜.

The Government does not challenge the Court of Appeals' factual conclusion that the stop of respondent's car was a roving-patrol stop rather than a checkpoint stop.˜ Nor does it challenge the retroactive application of Almeida-Sanchez,˜ or contend that the San Clemente checkpoint is the functional equivalent of the border. The only issue presented for decision is whether a roving patrol may stop a vehicle in an area near the border and question its occupants when the only ground for suspicion is that the occupants appear to be of Mexican ancestry. For the reasons that follow, we affirm the decision of the Court of Appeals.

II

The Government claims two sources of statutory authority for stopping cars without warrants in the border areas. Section 287(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1357(a)(1), authorizes any officer or employee of the Immigration and Naturalization Service (INS) without a warrant, "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." There is no geographical limitation on this authority. The Government contends that, at least in the areas adjacent to the Mexican border, a person's apparent Mexican ancestry alone justifies belief that he or she is an alien and satisfies the requirement of this statute. Section 287(a)(3) of the Act, 8 U.S.C. § 1357(a)(3), authorizes agents, without a warrant, "within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle . . .."

Under current regulations, this authority may be exercised anywhere within 100 miles of the border. 8 CFR § 287.1(a) (1975). The Border Patrol interprets the statute as granting authority to stop moving vehicles and question the occupants about their citizenship, even when its officers have no reason to believe that the occupants are aliens or that other aliens may be concealed in the vehicle.˜ But 'no Act of Congress can authorize a violation of the Constitution,'˜ and we must decide whether the Fourth Amendment allows such random vehicle stops in the border areas.

III

The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest.˜ "(W)henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that

person,'˜ and the Fourth Amendment requires that the seizure be "reasonable." As with other categories of police action subject to Fourth Amendment constraints, the reasonableness of such seizures depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.˜

The Government makes a convincing demonstration that the public interest demands effective measures to prevent the illegal entry of aliens at the Mexican border. Estimates of the number of illegal immigrants in the United States vary widely. A conservative estimate in 1972 produced a figure of about one million, but the INS now suggests there may be as many as 10 or 12 million aliens illegally in the country.˜ Whatever the number, these aliens create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services. The aliens themselves are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation.˜

The Government has estimated that 85% of the aliens illegally in the country are from Mexico.˜ The Mexican border is almost 2,000 miles long, and even a vastly reinforced Border Patrol would find it impossible to prevent illegal border crossings. Many aliens cross the Mexican border on foot, miles away from patrolled areas, and then purchase transportation from the border area to inland cities, where they find jobs and elude the immigration authorities. Others gain entry on valid temporary border-crossing permits, but then violate the conditions of their entry. Most of these aliens leave the border area in private vehicles, often assisted by professional 'alien smugglers.' The Border Patrol's traffic-checking operations are designed to prevent this inland movement. They succeed in apprehending some illegal entrants and smugglers, and they deter the movement of others by threatening apprehension and increasing the cost of illegal transportation.

Against this valid public interest we must weigh the interference with individual liberty that results when an officer stops an automobile and questions its occupants. The intrusion is modest. The Government tells us that a stop by a roving patrol "usually consumes no more than a minute."˜ There is no search of the vehicle or its occupants, and the visual inspection is limited to those parts of the vehicle that can be seen by anyone standing alongside.˜ According to the Government, "(a)ll that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States."˜.

Because of the limited nature of the intrusion, stops of this sort may be justified on facts that do not amount to the probable cause required for an arrest. In Terry v. Ohio, supra, the Court declined expressly to decide whether facts not amounting to probable

cause could justify an "investigative 'seizure" short of an arrest,˜ but it approved a limited search—a pat-down for weapons—for the protection of an officer investigating suspicious behavior of persons he reasonably believed to be armed and dangerous. The Court approved such a search on facts that did not constitute probable cause to believe the suspects guilty of a crime, requiring only that "the police officer ... be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" a belief that his safety or that of others is in danger.˜

We elaborated on Terry in Adams v. Williams, 407 U.S. 143˜ (1972), holding that a policeman was justified in approaching the respondent to investigate a tip that he was carrying narcotics and a gun. "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, Terry recognizes that it may be the essence of good police work to adopt an intermediate response. ... A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."˜

These cases together establish that in appropriate circumstances the Fourth Amendment allows a properly limited 'search' or 'seizure' on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime. In both Terry and Adams v. Williams the investigating officers had reasonable grounds to believe that the suspects were armed and that they might be dangerous. The limited searches and seizures in those cases were a valid method of protecting the public and preventing crime. In this case as well, because of the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border, we hold that when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion. As in Terry, the stop and inquiry must be 'reasonably related in scope to the justification for their initiation.'˜ The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.

We are unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops.˜ In the context of border area stops, the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the

Government. Roads near the border carry not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well. San Diego, with a metropolitan population of 1.4 million, is located on the border. Texas has two fairly large metropolitan areas directly on the border: El Paso, with a population of 360,000, and the Brownsville-McAllen area, with a combined population of 320,000. We are confident that substantially all of the traffic in these cities is lawful and that relatively few of their residents have any connection with the illegal entry and transportation of aliens. To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers. The only formal limitation on that discretion appears to be the administrative regulation defining the term 'reasonable distance' in s 287(a)(3) to mean within 100 air miles from the border. 8 CFR § 287.1(a) (1975). Thus, if we approved the Government's position in this case, Border Patrol officers could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road, without any reason to suspect that they have violated any law.

We are not convinced that the legitimate needs of law enforcement require this degree of interference with lawful traffic. As we discuss in Part IV, infra, the nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators. Consequently, a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference. Under the circumstances, and even though the intrusion incident to a stop is modest, we conclude that it is not 'reasonable' under the Fourth Amendment to make such stops on a random basis.˜

The Government also contends that the public interest in enforcing conditions on legal alien entry justifies stopping persons who may be aliens for questioning about their citizenship and immigration status. Although we may assume for purposes of this case that the broad congressional power over immigration,˜ authorizes Congress to admit aliens on condition that they will submit to reasonable questioning about their right to be and remain in the country, this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens. For the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens.

IV

The effect of our decision is to limit exercise of the authority granted by both § 287(a)(1) and § 287(a)(3). Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.˜

Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area. Officers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic are all relevant.˜ They also may consider information about recent illegal border crossings in the area. The driver's behavior may be relevant, as erratic driving or obvious attempts to evade officers can support a reasonable suspicion.˜ Aspects of the vehicle itself may justify suspicion. For instance, officers say that certain station wagons, with large compartments for fold-down seats or spare tires, are frequently used for transporting concealed aliens.˜ The vehicle may appear to be heavily loaded, it may have an extraordinary number of passengers, or the officers may observe persons trying to hide.˜ The Government also points out that trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut.˜ In all situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling.˜

In this case the officers relied on a single factor to justify stopping respondent's car: the apparent Mexican ancestry of the occupants.˜ We cannot conclude that this furnished reasonable grounds to believe that the three occupants were aliens. At best the officers had only a fleeting glimpse of the persons in the moving car, illuminated by headlights. Even if they saw enough to think that the occupants were of Mexican descent, this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country. Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens.˜ The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.

The judgment of the Court of Appeals is affirmed.

Affirmed.

8.7 Test Your Knowledge

PROBLEM 8.1

Agent Arvin Axel has been a Border Patrol agent at the Freer, Texas immigration checkpoint for over eight years. His duties at the checkpoint consist of working the inspection lanes and conducting immigration inspections on vehicles that approach the checkpoint.

The Freer checkpoint is about 50 miles from the border of the United States and Mexico and approximately 43 miles from Laredo, Texas. It sits on U.S. Highway 59, just north of where highway FM 2050 dead-ends into Highway 59. If a motorist traveling north on Highway 59 turned right (south) onto FM 2050, he would avoid the Freer checkpoint. Turning right onto FM 2050 from Highway 59 will add about an hour onto a trip from Laredo to Houston. It is undisputed that FM 2050 is known for alien and contraband smuggling.

Nevertheless, there are legitimate reasons to be on FM 2050. There are a dozen homes, a wind farm, oil and gas sites, ranches, and other businesses along FM 2050. While Agent Axel is familiar with some of the vehicles belonging to homeowners and people who work at places on the road, he is not familiar with all the vehicles. Over the eight years that he has worked at the Freer checkpoint, Agent Axel has driven on FM 2050 numerous times.

It is the practice of Border Patrol to not stop vehicles prior to turning down FM 2050, but once a vehicle makes the turn, Border Patrol will attempt to chase down the vehicle and conduct a roving stop to see if there are any immigration violations occurring. Indeed, Border Patrol's practice is to stop 100% of vehicles that turn down FM 2050. The process works as follows: an agent on the primary inspection lane, upon seeing a vehicle turn south on FM 2050, alerts an agent inside the checkpoint who comes out and attempts to chase down the vehicle. Once the pursuing agent finds the vehicle matching the description of the vehicle the primary agent called out, he attempts to run a registration check to determine where the vehicle is from, as it is uncommon for vehicles from out of the area to be traveling down FM 2050. While following the vehicle, the agent will observe the vehicle's speed, the driving of the vehicle, and how the driver is reacting to being pursued.

The Border Patrol makes approximately 10 to 20 roving stops per week on FM 2050. Agent Axel himself has conducted approximately 20 to 30 stops throughout his eight years there, and only two or three of those stops resulted in seizures.

On February 13, 2017, Agent Axel was working inside the Freer checkpoint rather than on the inspection lanes. Around 4:10 p.m., an agent called out that a white Chevy pickup truck turned onto FM 2050 and Agent Axel got into the pursuit vehicle and attempted to chase down the truck. Agent Axel estimates it took him about 20 seconds to walk to the vehicle, and another 10 seconds to turn onto FM 2050. Agent Axel thinks it took him five minutes to catch up to the truck and that he traveled about 100 miles an hour to reach it, although he knows he slowed down significantly when he caught up to the truck. Agent Axel describes the road as windy and hilly, and he believes the truck he was pursuing was swaying side to side within the lane, creating dust clouds from driving on the soft shoulder of the road. Agent Axel acknowledges that the road was under construction.

Prior to conducting the stop, Agent Axel contacted radio dispatch to run a check on the truck's paper license plate. According to Agent Axel, paper license plates are often used by smugglers to avoid suspicion or inspection. Dispatch told Agent Axel that the vehicle was registered to an individual (Felipe Freeman, who turned out to be the driver of the truck) out of Houston, Texas. Agent Axel noted it is uncommon to see vehicles based out of Houston on FM 2050 because it is not a direct route to Houston. Houston is about 250 miles Northeast from Freer, and the truck was heading south on FM 2050. However, nothing else stood out to Agent Axel about the truck; in fact, it was the type of vehicle commonly used by oil and gas companies on FM 2050.

While in pursuit of Freeman, Agent Axel could not see into the back of the truck but was able to see Freeman's face in the side view mirror. He thought Freeman appeared to be nervous because he seemed to be glancing into the side mirror several times. Agent Axel activated his emergency lights and conducted a patrol stop about 7.6 miles from the checkpoint and approximately nine and a half minutes after Freeman's truck was spotted turning on to FM 2050.

After Agent Axel stopped Freeman, Agent Axel discovered there was a passenger in Freeman's truck, Ms. Miriam Manolo. Ms. Manolo did not have legal status to be in the United States.

According to Ms. Manolo, Freeman appeared to be driving at a normal rate of speed on FM 2050, and he only veered off the road when he was stopped by the agents. She also believed his behavior to be normal and that everything seemed to be fine prior to the car being stopped and Agent Axel coming up to the truck.

If criminally prosecuted under 8 U.S.C. § 1324 for transporting an unauthorized migrant, would Felipe Freeman have any basis for challenging Agent Axel's conduct? Why or why not?

Chapter Nine: Interior Immigration Enforcement

Immigration and Customs Enforcement (ICE) is in charge of the enforcement of immigration laws in the interior of the United States. It is the ICE division of Enforcement and Removal Operations (ERO) that takes the lead on this enforcement (section 9.1). ICE agents have authority to arrest and detain noncitizens in connection with their immigration enforcement efforts, question noncitizens, and inspect worksites for immigration violations (section 9.2-9.3). ICE also partners with state and local law enforcement through agreements made under INA § 287(g) (section 9.4), the Criminal Apprehension Program (CAP) (section 9.5), and the use of immigration detainers (section 9.6). Not all states and localities want to partner with ICE on immigration enforcement. Those polities that look to dissociate themselves from federal immigration enforcement efforts are often called sanctuary jurisdictions (section 9.7). Some states, however, mandate cooperation with federal immigration enforcement (section 9.8). This chapter concludes with a look at ICE's use of Big Data to enforce immigration law (section 9.9).

9.1 ICE's Enforcement and Removal Operations (ERO)

Kit Johnson, Women of Color in Immigration Enforcement, 21 Nev. L. J. 997 (2021)

ENFORCEMENT AND REMOVAL OPERATIONS

Unlike the OFO and USBP, which are divisions of Customs and Border Protection, ERO falls under the supervision of Immigration and Customs Enforcement. While OFO operates at ports of entry, and USBP operates along the U.S. border, ERO operates

throughout the United States.˜ As its name suggests, ERO focuses on the enforcement of immigration laws through the arrest and removal of immigration law violators.˜

The day-to-day work of ERO agents ranges widely.˜ Some ERO agents work at office desks where they track migrants who are waiting to hear about their petitions for immigration benefits, identify migrants who have been ordered removed from the United States or failed to abide by voluntary departure orders, or send detainer requests to jails and prisons holding potentially-removable migrants.˜ ERO agents also meet with noncitizens, serving as something akin to probation officers, checking in with individuals as their removal cases proceed through the courts, verifying any necessary immigration bond is in place, or monitoring ankle bracelets.˜ Some ERO agents work in the field, looking to apprehend migrants identified for removal—whether in custodial settings or at large.˜ Others serve in immigration detention facilities, managing and overseeing both privately- and publicly-run detention centers.˜ Additionally, ERO agents facilitate the transportation of noncitizens both within the United States—if transferred between detention centers˜ or visiting a hospital˜—and leaving the United States—by working to secure travel documents from consulates˜ and accompanying repatriated deportees on flights to their countries of origin.˜

Unlike the members of the OFO and USBP, ERO agents do not have a uniform.˜ They typically work in plain clothes but can also be seen dressed in khaki tactical pants and a dark polo shirt with an ICE logo on the left breast.˜

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9.2 Rules Regarding Interior Immigration Enforcement

CRS, Immigration Arrests in the Interior of the United States: A Primer (2021)

U.S. Immigration and Customs Enforcement (ICE)˜ is primarily responsible for immigration enforcement in the interior of the United States. ICE has substantial authority to arrest and detain non-U.S. nationals (aliens) identified for removal because of immigration violations.˜ This Legal Sidebar provides an overview of ICE's authority to conduct arrests and other enforcement actions.

ICE'S GENERAL AUTHORITY TO ARREST AND DETAIN˜

ICE officers' authority to arrest aliens believed to have committed immigration violations derives primarily from two federal statutes: Sections 236 and 287 of the Immigration and Nationality Act (INA).

INA § 236(a) provides that an immigration officer may arrest and detain an alien who is subject to removal upon issuance of a "Warrant for Arrest of Alien." This administrative arrest warrant (ICE Warrant) may be issued with a Notice to Appear (NTA), the charging document that initiates formal removal proceedings, or "at any time thereafter and up to the time removal proceedings are completed." DHS regulations provide that the ICE warrant may be issued only by certain designated immigration officials (e.g., a supervisory officer). In addition, an ICE warrant is issued exclusively for use by immigration officers. Reviewing courts have recognized that this administrative warrant may not serve as the basis for state or local law enforcement officials to arrest and detain an alien, except when done under the terms of a cooperative agreement with federal authorities under INA § 287(g). [See section 16.3.]

While an immigration-related arrest generally requires an ICE warrant, INA § 287(a)(2) lists two circumstances when an ICE warrant is not required for an immigration officer to arrest an alien for a suspected immigration violation:

1. the alien, in the presence or view of the immigration officer, is entering or attempting to enter the United States unlawfully; or
2. the immigration officer has "reason to believe" that the alien is in the United States in violation of law and is likely to escape before a warrant can be obtained.

The immigration officer must also have completed immigration law enforcement training and be one of the designated immigration officers who have the warrantless arrest authority under DHS regulations.˜

LIMITATIONS TO ICE'S ARREST AUTHORITY FOR CIVIL IMMIGRATION VIOLATIONS

Generally, upon issuance of an ICE warrant, or "reason to believe" that an alien is removable and likely to escape, an authorized immigration officer may arrest and detain an alien. There are constitutional restrictions on this arrest authority. The Fourth Amendment's protections against unreasonable searches and seizures apply to immigration-related arrests and detentions. Thus, reviewing courts have interpreted the "reason to believe" standard for warrantless immigration arrests to be the equivalent of probable cause. Under this standard, the immigration officer must have sufficient facts that would lead a reasonable person to believe, based on the circumstances, that the alien has violated federal immigration laws and is likely to escape before an ICE warrant can be obtained.

The Supreme Court also has held that the Fourth Amendment's prohibition against unreasonable seizures precludes the use of excessive force during an arrest. Thus,

DHS regulations provide that "non-deadly force" may be used only when the immigration officer reasonably believes that such force is warranted, and that a "minimum" level of non-deadly force should be employed unless circumstances warrant a greater degree of force. And the regulations instruct that "deadly force"—defined as "any use of force that is likely to cause death or serious physical injury"—may be used only when the officer reasonably believes that such force is necessary to protect the officer or others from death or serious harm. The regulations also prohibit the use of threats or physical abuse to compel an individual to make a statement or waive his or her legal rights.

The Supreme Court has also long held that the Fourth Amendment prohibits the government's nonconsensual entry into a person's home without a judicial warrant. This restriction may also extend to other areas where there is a reasonable expectation of privacy, such as the non-public part of a workplace or business. Unlike judicial warrants, ICE warrants are purely administrative, as they are neither reviewed nor issued by a judge or magistrate, and therefore do not confer the same authority as judicially approved arrest warrants. Applying these principles, some courts have ruled that ICE agents violated the Fourth Amendment by forcibly entering homes without a judicial warrant, when no exigent circumstances or other exceptions to general Fourth Amendment requirements existed. Thus, immigration authorities would generally be unable to enter homes and non-public parts of a business absent exigent circumstances (e.g., risk of harm to the public, potential destruction of evidence) or the owner's consent.

ICE also has a long-standing policy of not taking enforcement actions (i.e., arrests, interviews, searches, and surveillance) at certain "sensitive locations." These sensitive locations currently include schools (including postsecondary institutions); hospitals and other health care facilities; Coronavirus Disease 2019 (COVID-19) vaccination sites; places of worship; courthouses (including the close vicinity of a courthouse); public demonstrations; and the sites of funerals, weddings, or other public religious ceremonies. ICE officers may engage in an enforcement action at a sensitive location only with prior approval from a supervisory official, unless (1) the enforcement action involves a national security or terrorism matter; (2) there is an imminent risk of death, violence, or physical harm to any person; (3) the enforcement action involves the hot pursuit of a person who presents a danger to public safety; or (4) there is an imminent risk of destruction of evidence material to a criminal case. For courthouses, an immigration enforcement action may be taken against a person who poses a threat to public safety only if a safe alternative location for such action does not exist or would be too difficult to achieve, and the action has been approved by a supervisory official.

IMMIGRATION-RELATED ARREST AND DETENTION PROCESS

DHS regulations provide that, upon an arrest (with or without an ICE warrant), the immigration officer must promptly identify himself if it is practical and safe to do so, and inform the alien of the reason for the arrest. If the arrested individual claims to be a U.S. citizen, ICE guidelines require the immigration officer to assess any evidence of citizenship before taking that individual into custody. Before transporting the alien to an ICE facility, the officer may search the alien "as thoroughly as circumstances permit." The alien must be transported "in a manner that ensures the safety of the persons being transported," and the alien "shall not be handcuffed to the frame or any part of the moving vehicle or an object in the moving vehicle," or left unattended during transport.

Typically, an alien arrested under an ICE warrant is taken into custody pending removal proceedings. At any time during those proceedings, ICE may decide to release the alien (but in some cases, such as when aliens have committed specified crimes, detention is mandatory). If an alien is arrested without an ICE warrant, DHS regulations require the alien to first be "examined by an officer other than the arresting officer," unless no other qualified immigration officer is "readily available." If the examining officer determines there is sufficient evidence that the alien has committed an immigration violation, the alien is to be issued an NTA and placed in removal proceedings. ICE must decide within 48 hours of a warrantless arrest whether to issue an NTA and whether to keep the alien detained. In "an emergency or other extraordinary circumstance," the regulations permit ICE to exceed the 48-hour time limitation and make its charging and custody determinations "within an additional reasonable period of time."

If an alien is placed in formal removal proceedings and then issued a final order of removal, the alien is generally subject to detention pending efforts to secure removal (though aliens usually must be released from custody if removal is not effectuated within a certain period). If the alien is not in ICE's physical custody, the agency will typically issue a "Bag and Baggage" letter directing the alien to report to ICE so removal may be effectuated. If the alien fails to surrender, ICE may arrest the alien under an administrative Warrant of Removal. As noted above, an administrative warrant does not confer authority to enter a home or private area. The immigration officer's ability to arrest the alien may also be restricted by ICE's "sensitive locations" policy.

ROUTINE QUESTIONING AND BRIEF INVESTIGATIVE DETENTIONS

ICE also has authority to conduct interrogations and brief detentions as part of an investigation into possible immigration violations. INA § 287(a)(1) states that an

immigration officer may, without a warrant, "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." The exercise of this authority is subject to constraint under the Fourth Amendment. The Supreme Court has declared that law enforcement officers do not violate the Fourth Amendment by merely questioning individuals in public places. Therefore, in INS v. Delgado, the Court held that immigration officers did not violate the Fourth Amendment by entering factory buildings (which the Court treated as "public places" because the officers had acted on either a warrant or the employer's consent) and questioning employees about their citizenship, even if there were armed officers stationed near the exit doors. The Court reasoned that the questioning was "nothing more than a brief encounter" that did not prevent the employees from going about their business.

The Supreme Court, however, has long held that certain, more intrusive encounters that do not rise to the level of an arrest, such as a brief detention or "stop and frisk," may be justified only if there is reasonable suspicion that a crime is afoot. This standard, lower than the probable cause threshold for an arrest, requires specific, articulable facts—rather than a mere hunch—that reasonably warrant suspicion of unlawful activity. The Supreme Court has applied this standard to immigration-related detentions.˜

The Supreme Court has not decided, more generally, whether immigration authorities may briefly detain individuals solely on a reasonable suspicion that they are aliens, absent reasonable suspicion of their unlawful presence. Some lower courts, however, have ruled that an immigration officer may not detain an alien to investigate his or her immigration status (e.g., stopping a pedestrian on the street) absent reasonable suspicion of the alien's unlawful presence. Some courts have held that the officer may not rely solely on "generalizations," such as an individual's appearance, ethnicity, or inability to speak English, to establish reasonable suspicion.

Reflecting some of these Fourth Amendment constraints, DHS regulations provide that an immigration officer may question an individual so long as the officer "does not restrain the freedom of an individual, not under arrest, to walk away." An immigration officer may "briefly detain" an individual for questioning only if there is reasonable suspicion that the person is "engaged in an offense against the United States or is an alien illegally in the United States." The information obtained from the immigration officer's questioning "may provide the basis for a subsequent arrest" (e.g., if the immigration officer forms probable cause that the alien is unlawfully present in the United States).

WORKSITE INSPECTIONS

ICE also has statutory authority to conduct worksite inspections to enforce federal immigration laws on the employment of aliens. Under INA § 274A, it is unlawful for "a person or other entity" knowingly to employ an "unauthorized alien," defined as an alien who is not lawfully admitted for permanent residence or otherwise authorized to be employed in the United States. The statute requires an employer to complete a Form I-9 attesting that a person hired for employment is not an unauthorized alien. The employer must also retain the I-9 form for inspection for three years after the hiring. DHS regulations allow ICE to conduct the inspection at the employer's place of business with at least three business days' notice. I-9 site inspections do not require an administrative or judicial warrant, or probable cause of an immigration violation. Under DHS regulations, ICE may conduct a worksite inspection so long as there is reasonable suspicion that there are aliens at the site who are "illegally in the United States" or "engaged in unauthorized employment."

Mirroring the Fourth Amendment's restrictions, DHS regulations provide that an immigration officer conducting an inspection may not enter the non-public areas of a business, a residence, a farm, or other outdoor agricultural operation (excluding private lands near the border) to question the occupants or employees about their immigration status in the absence of a judicial warrant or the property owner's consent. The immigration officer may enter publicly accessible parts of a business without any warrant, consent, or reasonable suspicion of the unlawful presence of aliens. As noted above, the Supreme Court in INS v. Delgado held that immigration officers who had legally entered worksites could briefly question employees about their citizenship as long as the employees were not restrained. Some lower courts have ruled that detaining employees during such questioning, without permitting them to leave, is unconstitutional absent reasonable suspicion.

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EOUSA, OLE, Immigration Law (2005)

POST-ARREST INTERROGATION- IMMIGRATION VERSUS CRIMINAL RULES˜

Immigration proceedings are regarded as civil in nature; therefore, many of the constitutional protections accorded to criminal defendants do not apply to routine immigration proceedings in which illegal aliens are arrested for removal from the United States. For example, aliens arrested for removal are not entitled to Miranda warnings prior to custodial interrogation, and there is no right to the presence of counsel during an immigration interrogation.˜ Similarly, even assuming an illegal search or seizure, the

Fourth Amendment exclusionary rule does not preclude an alien's removal absent egregious conduct by government officials.˜ While the Fifth Amendment precludes removal based upon forced or involuntary statements, an alien in removal proceedings before the Immigration Court does not have the right to remain silent; rather, the alien has an affirmative duty to answer non-incriminating questions or suffer the consequences of an adverse inference being drawn from the alien's silence or refusal to testify.˜ Also, there is no presumption of innocence or citizenship in removal proceedings.˜

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9.3 Case: Kidd v. Mayorkas

Kidd v. Mayorkas
__ F.Supp.3d __, 2024 WL 2190981 (C.D. Cal. 2024)

OTIS D. WRIGHT, II, U.S. DISTRICT JUDGE

I. INTRODUCTION

While "knock and talks"—as defined by the United States Supreme Court—are considered constitutional, "knock and talks"—as defined and executed by U.S. Immigration and Customs Enforcement ("ICE")—are not. Considering the policies and practices governing how ICE conducts its "knock and talks," the more accurate title for certain law enforcement operations would be "knock and arrests." This Order serves to vacate those unlawful policies and practices.

In this action, Plaintiffs Osny Sorto-Vasquez Kidd, the Inland Coalition for Immigrant Justice ("ICIJ"), and the Coalition for Humane Immigrant Rights Los Angeles ("CHIRLA") seek class-wide declaratory relief that various actions, policies, and practices by which ICE officers allegedly enter residences or curtilage to arrest occupants violate the Fourth Amendment˜. Plaintiffs also seek class-wide injunctive relief to enjoin Defendants from engaging in certain actions, policies, and practices in the future.˜ Plaintiffs and Official Capacity Defendant˜ now both move for summary judgment.˜ For the reasons below, the Court GRANTS Plaintiffs' Motion and DENIES Defendants' Motion, as described in more detail below.˜

II. BACKGROUND˜

Plaintiffs challenge how ICE conducts law enforcement in its Los Angeles Area of Responsibility ("AOR"), which includes the counties of Los Angeles, Orange, San Bernardino, Riverside, Ventura, Santa Barbara, and San Luis Obispo.˜ Specifically,

Plaintiffs allege˜ ICE officers in this district "routinely conduct arrests in or near the home that violate the Constitution" [by]˜ enter[ing] the constitutionally protected private areas around individuals' homes to arrest occupants without consent or a judicial warrant (the "Knock and Talk" claims).˜

A. "Knock and Talks"

ICE—a part of the U.S. Department of Homeland Security ("DHS")—generally defines a "knock-and-talk" as simply walking up to the door of a residence to speak with an occupant.˜ As part of carrying out a "knock and talk," field officers enter onto curtilage without first obtaining residents' express consent and, upon initiating contact with the resident, generally state that they are "conducting an investigation."˜ Field officers are trained that they may enter the curtilage of a home with "an implied license," meaning that they are instructed to walk across curtilage to speak to the occupants if the general public (e.g., a mailman, a political canvasser, or a delivery person) could do so as well.˜

1. "Knock and Talks" and Civil Immigration Arrests

In addition to "walking up to the door of a residence to speak with an occupant,"˜ ICE officers use "knock and talks" to carry out civil immigration arrests.˜ Despite often stating a different purpose for their visit, the true "intent" and "actual purpose" behind a "knock and talk" is to make an immigration arrest.˜ When executing a "knock and talk," field officers typically do not have a judicial warrant (i.e., a warrant issued by a judge or other neutral magistrate),˜ but are instead often armed with an administrative arrest warrant.˜ Plaintiffs' expert witness, Dr. Bret M. Dickey, states that according to available ICE data, "knock and talks" accounted for at least 27% of residential arrests for the period during which data was available and at least 8% of all arrests in 2022.˜

2. "Knock and Talks" in ICE Policy and Training

ICE policies and trainings authorize and encourage officers to use "knock and talks" to carry out civil immigration arrests.˜ Field officers take Fourth Amendment training on a bi-annual basis, and the materials and content presented in such trainings are generated by ICE headquarters in Washington, DC.˜ During a "Fourth Amendment Refresher Training," dated June 2021, field officers were instructed that they "[m]ay walk across curtilage to speak to the occupants if the general public could do so as well."˜

ICE's "At-Large Best Practices" Handbook lists a "knock and talk" as one of the "[f]our primary methods of apprehension."˜ The Handbook defines a "knock and talk" as the "[a]rrest [of] an individual by knocking on the door of the residence and either making an entry or calling the subject outside."˜

Furthermore, to become a full-fledged field officer, a prospective ICE officer must complete a 16-to-20-week Basic Immigration Enforcement Training Program ("BIETP") at the Federal Law Enforcement Training Center, also known as "the academy."˜ The BIETP Lesson Plan, which includes a Performance Objective titled "Explain how to lawfully approach a dwelling for a knock and talk," lays out factors informing prospective ICE officers of best practices when using walkways/paths to access the property's door.˜ The BIETP Lesson Plan lists different approaches to "justify" encroaching on such walkways "for a stated purpose such as knocking on a door in an attempt to speak with an occupant."˜

The Fugitive Operations Handbook, also created by ICE headquarters, is the main guide for ICE field operations for the Los Angeles Field Office.˜ In a section titled "Consent," the Fugitive Operations Handbook states: "Neither a Warrant for Arrest of Alien (I-200) nor a Warrant of Removal (I-205) authorizes officers to enter the target's residence or anywhere else where the target has a reasonable expectation of privacy. A government intrusion into an area where a person has a reasonable expectation of privacy for the purpose of gathering information will trigger Fourth Amendment protections, including a physical intrusion into a constitutionally protected area ... Therefore, without a criminal warrant, officers must obtain voluntary consent before entering a residence or area where there is a reasonable expectation of privacy. ˜ The Fugitive Operations Handbook does not specifically reference "knock and talks."˜

3. Examples of "Knock and Talks" in Practice

Plaintiffs provide numerous examples involving members of the "Knock and Talk Class" of ICE field officers executing a "knock and talk" with the purpose of arresting the occupant.˜ The Court highlights a few here.

On February 17, 2017, at approximately 8:30 am, ICE officers conducted a "knock and talk" at the home of Diana Rodriguez˜ in Santa Ana.˜ The officers approached the back entrance of Rodriguez's home, which is only accessible by entering the back yard.˜ After Rodriguez's girlfriend answered the door, an officer asked Rodriguez to step outside, answer some questions, and provide the officers with identification.˜ After Rodriguez stepped outside, the officers took her into custody.˜

On April 23, 2017, at approximately 7:30 am, ICE officers approached the residence of Linda Urbano Vasquez in Pomona by entering through a fence surrounding her property.˜ The officers entered onto a covered porch to reach the front door.˜ When Urbano Vasquez answered the door, officers indicated that they were probation and looking for her brother, Jose.˜ After Jose approached the front door, the officers took him into custody.˜

On October 13, 2019, ICE officers conducted a "knock and talk" at the residence of Sigifredo Zendejas Lopez in Anaheim.˜ To access the front door, the officers had to enter a small patio outside the door that was covered by a tarp and enclosed by a gate.˜ When Mr. Zendejas Lopez's approached the door, the officers told him that they needed to speak with him outside, where the officers took him into custody.˜

On April 23, 2020, at approximately 6:00 am, ICE officers came to home of Javier Gomez Rodriguez in Santa Maria to execute a "knock and talk."˜ Upon opening the door, two officers asked Gomez Rodriguez to step outside to answer a couple of questions.˜ As soon as he stepped outside, the officers arrested him.˜

In each of these instances, consistent with the training policies and procedures described above, ICE officers entered the curtilage of the home for the purpose of arresting the resident without a judicial warrant or the express consent of the resident.

B. This Lawsuit

On April 16, 2020, Plaintiffs initiated this lawsuit against various officials for ICE and DHS in their official capacities, the United States of America, and individual officers˜.

On February 7, 2023, the Court granted ICIJ and CHIRLA's (together, the "Coalition Plaintiffs") motion to certify [a] class[] of individuals who have been or will be affected by Defendants' alleged unconstitutional˜ "Knock and Talk" ˜[practice].˜ The ["Knock and Talk" Class]˜ includes "[a]ll individuals residing at a home in the [Los Angeles Area of Responsibility] where ICE has conducted or will conduct a warrantless civil immigration enforcement operation using a 'knock and talk.'"˜

The parties now each move for summary judgment regarding the "Knock and Talk" Class claims.˜ The Coalition Plaintiffs, on behalf of themselves and the certified "Knock and Talk" Class, seek summary judgment on their claims challenging Defendants' policy and practice of entering the curtilage of homes to arrest class members for alleged civil immigration violations.˜ Defendants seek summary judgment in their favor on the same "Knock and Talk" Class claims.˜

III. LEGAL STANDARD

A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A disputed fact is "material" where it might affect the outcome of the suit under the governing law, and the dispute is "genuine" where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."˜

IV. DISCUSSION˜

Plaintiffs argue that the Court should "issue injunctive and declaratory relief to put an end to Defendants' blatant disregard of the Fourth Amendment and sanctity of the home" and "'set aside' Defendants' unlawful policy and practice under the APA."˜ Conversely, Defendants ask that the Court grant summary judgment in their favor on the same issue.˜

A. "Knock and Talks" and the Fourth Amendment

The narrow issue here is whether Defendants' policy and practice of entering the curtilage of homes and knocking on the door, not merely to talk to residents but to arrest them, violates the protections of the Fourth Amendment.

1. The Protections of the Fourth Amendment

At the core of the Fourth Amendment stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."˜ "It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable."˜ The general rule states: "[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave."˜ This protection extends to curtilage—the area "immediately surrounding [the] house"—which "enjoys protection as part of the home itself."˜ Therefore, "[b]ecause the curtilage is part of the home, searches and seizures in the curtilage without a warrant are also presumptively unreasonable."˜

Here, it is undisputed that ICE officers physically encroach on and occupy the curtilage of an individual's home when conducting a "knock and talk." Lacking a judicial warrant, express consent, or some other exception to the warrant requirement, Defendants argue that ICE officers are armed with implied consistent and an administrative warrant when executing a "knock and talk."

2. Administrative Warrants˜

[T]he question here is whether an administrative warrant serves a sufficient basis upon which an ICE officer may enter the constitutionally protected areas of a home.

A judicial "arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within,"˜ and "consistent with the Fourth Amendment, immigration authorities may arrest individuals for civil immigration removal purposes pursuant to an administrative arrest warrant issued by an executive official, rather than by a judge,"˜. However, as the Court has previously noted,˜ the Supreme Court has

expressly declined to consider whether an administrative warrant satisfied the requirements for "warrants" under the Fourth Amendment.˜

Rather, case law supports the need for independent judgment in issuing warrants.˜

Here, not all case administrative warrants are reviewed by an independent officer. There are fifty-two immigration officer categories expressly authorized to issue arrest warrants for immigration violations, as well as "[o]ther duly authorized officers or employees of [DHS] or the United States who are delegated the authority." 8 C.F.R. § 287.5(e)(2). For example, a Form I-205 (Warrant of Removal) is reviewed by an ICE supervisor who signs on behalf of the Field Office Director and not by any judge (immigration or otherwise).˜ Because the administrative warrants at issue here lack the independent assurance guaranteed by the Fourth Amendment, they do not immunize Defendants' conduct. This is also consistent with ICE training materials, which affirm "that administrative warrants do not authorize entry into a dwelling without consent."˜

Having determined that an administrative warrant is insufficient to enter the constitutionally protected areas of a home, the Court turns next to whether ICE officers have implied consent to conduct a "knock and talk"—as defined by ICE—to carry out a civil immigration arrest.

3. Implied Consent

Defendants argue that ICE officers have an implied license to enter the curtilage of an individual's residence to "[a]rrest an individual by knocking on the door of the residence and either making entry or calling the subject outside."˜

A person can give leave (even implicitly) for another to enter the constitutionally protected extensions of one's home. "A license may be implied from the habits of the country,"˜ and "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers for all kinds of salable articles,"˜. "This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."˜ Thus, applying this standard to law enforcement, "a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'"˜

Applying the Supreme Court's holding in Jardines, the Ninth Circuit has found that "the scope of a license is often limited to a specific purpose, and the customary license to approach a home and knock is generally limited to the 'purpose of asking questions of the occupants.'" United States v. Lundin, 817 F.3d 1151, 1159 (9th Cir. 2016)˜. Accordingly, a law enforcement officer who knocks on the door of a home for a

purpose other than "asking questions of the occupants ... generally exceed[s] the scope of the customary license and therefore do[es] not qualify for the 'knock and talk' exception."˜ This is because although the "reasonableness" inquiry under the Fourth Amendment "is predominantly an objective inquiry,"˜ the determination of "whether the officer's conduct was an objectively reasonable search ... depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered,"˜. Therefore, because an implied license to enter the curtilage of a home is limited "to a specific purpose,"˜ "[t]he 'knock and talk' exception to the warrant requirement does not apply when officers encroach upon the curtilage of a home with the intent to arrest the occupant,"˜.

Defendants argue that the Ninth Circuit's holding in Lundin does not apply because it "arose in the criminal context, involved a warrantless arrest, and took place at 4:00 a.m."˜ In doing so, Defendants rely on Matias Rauda v. Wilkinson, 844 F. App'x 945, 948 (9th Cir. 2021) (unpublished),˜ where the Ninth Circuit "decline[d] ... to extend [the court's] holding in [Lundin]" and upheld the denial of a motion to suppress evidence in an immigration proceeding. However, Matias Rauda is materially distinguishable from this case. As expressly noted in the court's opinion, "[b]ecause the exclusionary rule is generally inapplicable to immigration proceedings," a petitioner must show an "egregious violation" of his or her Fourth Amendment rights to obtain a suppression remedy.˜ In other words, the panel in Matias Rauda was considering whether the alleged Fourth Amendment violation warranted the suppression of evidence in Matias Rauda's immigration proceeding, which required an "egregious violation." This case arises under a different posture and legal standard, which seeks to affirmatively prevent future Fourth Amendment violations, including violations that may not qualify as "egregious." Although it is true that ICE is conducting arrests for the purpose of immigration enforcement, affirmative prospective relief against Fourth Amendment violations remains available and triggers constitutional concerns distinct from the "exclusionary rule" at issue in Matias Rauda.˜ Defendants second argument on why Lundin is inapplicable—ICE officers mostly possess administrative warrants—is equally fruitless. As discussed previously, the Court does not find that administrative warrants alone permit law enforcement entry into the protected areas of a home, and therefore do not grant ICE officers, who are armed with the intent to arrest the occupant, the authority to enter the protected areas of a residence to speak with the occupant or further "solicit consent to entry."˜ And finally, ICE's guidance here that "knock and talks" can be conducted as early as 6:00 a.m. is not materially distinguishable from the "knock and talk" conducted at 4:00 a.m. in Lundin. Therefore, the Court heeds the Ninth Circuit's guidance in Lundin, which stands for the clear proposition

that "[t]he 'knock and talk' exception to the warrant requirement does not apply when officers encroach upon the curtilage of a home with the intent to arrest the occupant."˜

Here, ICE officers are trained "that they may enter the curtilage of a residence to conduct a knock and talk under the theory of an implied license."˜ However, in contravention of the rule for implied licenses detailed above, ICE's policy and practice does not limit that encroachment to the purpose of "asking questions of the occupant."˜ For example, although certain training materials state that ICE officers can merely "walk across curtilage to speak to the occupants if the general public could do so as well,"˜ or that field officers can knock on a person's door "for a stated purpose such as knocking on a door in an attempt to speak with an occupant,"˜ ICE's training materials take that guidance too far when it encourages field officers to use "knock and talks" as one of the "[f]our primary methods of apprehension,"˜. To be consistent with the Fourth Amendment, it is not sufficient that "[f]ield officers are instructed that the license is granted for the purpose of making contact with the occupant."˜ This is because the implied license of approaching the front door of a residence does not cover all instances "of making contact with the occupant," but is more narrowly tailored to "the purpose of asking questions of the occupants."˜ The intent and purpose of arresting the occupant does not fall within the scope of the implied license.

However, that is precisely how "knock and talks" are employed by ICE field officers. ICE's Supervisory Detention and Deportation Officer (SDDO) C.S. states that "knock and talks" constitute "an arrest operation."˜ ICE Deportation Officer H.P. states that H.P.'s understanding of ICE's policy and practice regarding implied consent allows him to "knock on the door" to arrest someone "if [H.P.'s] intention is to make the arrest."˜ In fact, according to ICE Deportation Officer D.G., the only time D.G. performs a "knock and talk" is when D.G. is executing an administrative arrest warrant.˜ These sentiments are confirmed by ICE Deportation Officer F.G., who states that, after confirming that the suspect was home during a "knock and talk," F.G. would "do the arrest."˜

The narratives of "knock and talks" executed upon class members only further elucidate the consequences that ICE's training and policy have in practice. In each of the examples reviewed by the Court,˜ ICE officers routinely entered the curtilage of a home and, immediately upon identifying the suspect, took him or her into custody. In their briefing, Defendants agree that "[a]ll knock and talks require an administrative warrant ... because [they are] considered ... targeted arrest[s]."˜

To summarize, although it is true that the specific facts surrounding each "knock and talk" can vary, it is consistently true across ICE's policies and practice that field officers are trained to enter constitutionally protected areas of a home for the purpose

of arresting the occupant. Such policies and practices are materially distinguishable from lawfully "approaching a home ... and knocking on the front door with the intent merely to ask the resident questions,"˜ and exceed the scope of implied consent. It is therefore clear to the Court that "knock and talks"—which, as defined and executed by ICE, can be more accurately termed "knock and arrests"—violate the Fourth Amendment insofar that they are conducted with the purpose of arresting the resident.˜

V. CONCLUSION

For the reasons discussed above, the Court GRANTS Plaintiffs' Motion for Partial Summary Judgment pursuant to Federal Rule of Civil Procedure 56(c) as to the Knock and Talk Class's First, Second, and Third Cause of Action.˜ The Court DENIES Defendants' Motion for Summary Judgment.˜

Accordingly, the Court DECLARES that the challenged system-wide policies and practices of entering the curtilage of homes for the purpose of arresting the occupant violate the Fourth Amendment to the United States Constitution˜. The Court VACATES any policies and practices that allow officers in the Los Angeles Field Office of ICE or Enforcement and Removal Operations ("ERO"), and any agents with Homeland Security Investigations ("HSI") participating with such ERO officers on civil immigration enforcement operations in the Los Angeles AOR to enter the curtilage of a home for the purpose of arresting an occupant, absent a judicial warrant, valid express consent by a resident of the home, or other legal authority by which the officer may enter the curtilage of the occupant's home. This Order specifically applies to the portions of Defendants' policies and trainings pertaining to the entry onto curtilage for the purpose of carrying out an arrest, without judicial warrant or express consent, through the use of "knock and talks." The Court will issue a final judgment to this effect at the resolution of this case.

IT IS SO ORDERED.

9.4 INA § 287(g) agreements

CRS, Sanctuary Jurisdictions and Criminal Aliens: In Brief (2017)

Section 287(g) of the Immigration and Nationality Act (INA) permits the Secretary of Homeland Security˜ to delegate certain immigration enforcement functions to state and local law enforcement agencies. This authority was enacted into law in 1996˜ but was given new urgency following the terrorist attacks in September 2001. In 2002, the Attorney General proposed an initiative to enter into Section 287(g) agreements with a number of jurisdictions in an effort to carry out the country's anti-terrorism mission. Under these agreements, commonly referred to as Section 287(g) programs, state and local law enforcement officers could be trained to assist ICE with enforcing certain aspects of immigration law.˜

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CRS, Interior Immigration Enforcement: Criminal Alien Programs (2016)

Agreements entered pursuant to INA § 287(g) (or "§ 287(g) agreements") enable specially trained state or local officers to perform specific functions related to the investigation, apprehension, or detention of aliens, over a specified period (renewable at ICE's discretion) and under federal supervision.˜ [S]tate and local law enforcement officers˜ [who] complete˜ ICE's four-week § 287(g) training program˜ [can be] certified to conduct certain immigration enforcement duties.

Prior to 2013, the § 287(g) program˜ encompassed "task force" agreements that allowed deputized local law enforcement officers to question and arrest alleged noncitizens encountered in the field who were suspected of violating immigration laws. ICE allowed all such § 287(g) task force agreements to expire by the end of 2012.˜ In 2013, responding to a report by DHS's Office of the Inspector General,˜ ICE revised the § 287(g) Memorandum of Agreement to foster clarity and consistency with current ICE policies among state and local law enforcement agencies. Under the current remaining "jail enforcement" agreements, specially trained officers within state and local corrections facilities are authorized to identify criminal aliens by interviewing them and screening their biographic information against the same DHS databases used by CAP agents and officers. [See section 9.5 regarding CAP.] Section 287(g) officers also use ICE's database and Enforcement Case Tracking System (ENFORCE) to enter information about aliens in their custody and to generate the paperwork for an

immigration detainer and a notice to appear (NTA, initiating the formal removal process). State and local corrections officers are supervised by CAP officers.

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ICE, Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act (2021)

The 287(g) Program continues to receive overwhelmingly positive feedback from its partners. The mutually beneficial agreements allow state and local officers to act as a force multiplier in the identification, arrest, and service of warrants and detainers of incarcerated foreign-born individuals with criminal charges or convictions. Those deemed amenable to removal are identified while still secure in state or local custody, potentially reducing the time the alien spends in ICE custody. The state and local partners benefit by reducing the number of criminal offenders that are released back into the community without being screened for immigration violations. Gang members, sex offenders, and murderers are often identified and taken into ICE custody after serving their criminal sentences, thus being removed from the community. The efficiency and safety of the program allows ICE to actively engage criminal alien offenders while incarcerated in a secure and controlled environment as opposed to the alternative of conducting at-large arrests which can pose safety concerns for the officers and the community and may result in collateral arrests. Federal, state and local officers working together provide a tremendous benefit to public safety through increased law enforcement communication and overall community policing effectiveness.

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9.5 Criminal Apprehension Program (CAP)

Some version of the Criminal Apprehension Program (CAP)—currently run by the Enforcement and Removal Operations (ERO) division of ICE—has been in place for nearly 40 years.

The first iteration was a 1986 pilot program called the Alien Criminal Apprehension Program (ACAP). ACAP was initially operational in just four cities: Chicago, Miami, Los Angeles, and New York. The idea, as conveyed in congressional testimony, was to create a "more proactive approach to identifying and removing criminal aliens from the streets and country and developing closer working relationships with federal, state, and local law enforcement agencies." The Immigration and Naturalization Service (INS)—then in charge of immigration enforcement (see section 8.1)—formalized the program in 1988.

Between 2005 and 2007, ACAP became the Criminal Alien Program (CAP).

CRS, Interior Immigration Enforcement: Criminal Alien Programs (2016)

The Criminal Alien Program (CAP) is an umbrella program that includes systems for identifying and initiating removal proceedings for priority criminal aliens who are incarcerated within federal, state, and local prisons and jails, as well as at-large criminal aliens who have avoided identification. CAP is intended to prevent the release of criminal aliens from jails and prisons into U.S. communities by securing final orders of removal either prior to the termination of aliens' criminal sentences or subsequently whenever possible, and by taking custody of and removing priority aliens who complete their criminal sentences.˜ Identifying and processing incarcerated criminal aliens before their release from jails and prisons is intended to reduce or eliminate time spent in ICE custody and reduce related overall costs to the federal government.

CAP jail enforcement officers screen people to identify and prioritize potentially removable aliens as they are being booked into jails and prisons and while they are serving their sentences. Such screening covers almost all persons booked into federal and state prisons and local jails.˜ CAP officers search biometric and biographic databases to identify matches in DHS databases and interview arrestees and prisoners to identify potentially removable aliens without DHS records.˜

When CAP officers identify a removable alien, they may issue a request for notification to state or local law enforcement agencies formally asking to be contacted prior to an alien's release from custody. Issuance of a request for notification depends on whether removal of the flagged individual accords with CAP priorities.˜ CAP officers may issue an immigration detainer [See section 9.6] if an individual is subject to a final order of removal.˜

As of April 2016, approximately 1,300 CAP officers were monitoring 100% of federal and state prisons, a total of over 4,300 facilities.˜ This total also includes some local jails but, because of their larger numbers, CAP does not have personnel in local facilities to the extent that it does in the federal and state prisons. In addition to onsite deployment of some ICE officers and agents, CAP uses video teleconference (VTC) equipment that connects jails and prisons to ICE's Detention Enforcement and Processing Offenders by Remote Technology (DEPORT) Center in Chicago, IL. CAP also works with state and local correctional departments that provide inmate roster data which ICE then compares to its immigration databases. CAP manages the Law Enforcement Support Center (LESC), a 24/7 call-center that conducts database checks

on the identity and immigration status of arrestees for ICE officers and law enforcement agencies.

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Today, CAP refers to the ERO's Criminal Apprehension Program. As with the earlier versions of the program, CAP continues to focus on the "the identification, arrest, and removal of Incarcerated [sic.] noncitizens at federal, state, and local levels, as well as at-large criminal noncitizens."

9.6 Detainers

CRS, Immigration Detention: A Legal Overview (2019)

Generally, upon issuing an administrative warrant, ICE may arrest and detain an alien pending a determination about whether the alien should be removed from the United States.˜ But if an alien is in criminal custody by state or local law enforcement officers (LEOs) (e.g., if an alien is arrested by local police), ICE may take custody of the alien through the use of an "immigration detainer."˜ An immigration detainer is a document by which ICE advises the LEOs of its interest in individual aliens whom the LEOs are detaining, and requests the LEOs to take certain actions that could facilitate removal (e.g., holding the alien temporarily, notifying ICE before releasing the alien).˜

The detainer regulation, [8 C.F.R. § 287.7],˜ provides the following: "Any authorized immigration officer may at any time issue a Form I-247, Immigration Detainer-Notice of Action, to any other Federal, State, or local law enforcement agency. A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible."˜

The regulation further instructs that, upon issuance of a detainer, the LEO "shall maintain custody of the alien for a period not to exceed 48 hours" beyond the time when the alien would have otherwise been released (excluding Saturdays, Sundays, and holidays) to facilitate transfer of custody to ICE.˜

Although the detainer regulation instructs that LEOs "shall maintain custody" of an alien, reviewing courts have construed the regulation as being permissive rather than mandatory.˜ Third Circuit has˜ ruled that construing immigration detainers as mandatory would run afoul of the "anti-commandeering" principles of the Tenth

Amendment, which prohibits the federal government from compelling state and local officials to enforce a federal regulatory scheme.˜

As a result of judicial construction of the detainer regulation, LEOs may (but need not) notify ICE about an alien's release date and hold the alien pending transfer to ICE.˜

While DHS regulations authorize immigration detainers for removable aliens in criminal custody, courts have addressed legal challenges to the continued detention of aliens who would have otherwise been released from criminal custody (e.g., on bail, upon completion of sentence), but who remain detained pending their transfer to ICE.˜

In response˜, ICE in 2017 created new immigration detainer guidelines.˜ Among other things, ICE officers "must establish probable cause to believe that the subject is an alien who is removable from the United States before issuing a detainer."˜ And the detainer must come with either an administrative arrest warrant or a warrant of removal (if the alien has been ordered removed) signed by an authorized ICE officer.˜

Despite ICE's revised detainer policy, some courts have held that, under the Fourth Amendment, immigration detainers supported by probable cause that an alien is removable still do not justify the alien's continued detention by state or local LEOs unless there is probable cause that the alien has committed a criminal offense giving those LEOs a basis to detain the alien for criminal prosecution.˜ These rulings are largely informed by the Supreme Court's 2012 decision in Arizona v. United States, which held that a state statute authorizing police officers unilaterally to arrest an alien suspected of being removable was preempted by federal law, which exclusively gave the authority to enforce civil immigration laws to federal immigration officers.˜ So these courts reason, because state and local LEOs generally lack the authority to enforce civil immigration laws, they may not hold an alien under an immigration detainer unless there is an independent basis—such as probable cause of a crime—to justify the continued detention.˜

In City of El Cenizo v. Texas, however, the Fifth Circuit held that state and local LEOs do not need probable cause of a crime to hold an alien pursuant to an immigration detainer.˜ [O]fficers may detain aliens for the additional 48 hours."˜

Courts are thus divided˜.

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9.7 Sanctuary Jurisdictions

States and localities take differing approaches to ICE's interior immigration enforcement efforts. Some states look to support federal immigration authorities in

their enforcement efforts (see section 9.8). Others seek to distance themselves from immigration enforcement. The latter category includes so-called "sanctuary" jurisdictions.

CRS, "Sanctuary" Jurisdictions: Federal, State, and Local Policies and Related Litigation (2019)

State or local measures limiting police participation in immigration enforcement are not a recent phenomenon.˜ Indeed, many of the recent "sanctuary"-type initiatives can be traced back to church activities designed to provide refuge—or "sanctuary"—to unauthorized Central American aliens fleeing civil unrest in the 1980s.˜ A number of states and municipalities issued declarations in support of these churches' actions.˜ Others went further and enacted more substantive measures intended to limit police involvement in federal immigration enforcement activities.˜

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Kit Johnson, The Mythology of Sanctuary Cities, 28 S. CAL. INTERDISC. L.J. 589 (2019)

One myth about sanctuary cities is that they represent a coherent, singular concept. They are frequently discussed as a homogeneous whole˜ and so painted with the same brush.˜

Take for example, this official White House statement: "Sanctuary cities ... block their jails from turning over criminal aliens to Federal authorities for deportation ...."˜ Conservative news outlet Breitbart has used a similar definition, characterizing sanctuary cities as "the counties and cities that refuse to hand over criminal illegal aliens to ICE to be detained and deported from the U.S. Instead, these illegal aliens are released back into American communities."˜

The truth, however, is that there is no uniform definition for "sanctuary."˜ The description can aptly apply to cities as well as local and state jurisdictions that employ one or more of the following devices: "(1) barring investigation of civil and criminal immigration violations by local law enforcement, (2) limiting compliance with immigration detainers and immigration warrants, (3) refusing U.S. Immigration and Customs Enforcement ("ICE") access to local jails, (4) limiting local law enforcement's disclosure of sensitive information, and (5) precluding local participation in joint operations with federal immigration enforcement."˜

Interestingly, a jurisdiction might utilize one or more of these devices without self-identifying as a "sanctuary."˜

Device one—barring investigation of civil and criminal immigration violations by local law enforcement: Some sanctuary jurisdictions bar local law enforcement˜ from investigating civil immigration violations. Others also bar local law enforcement from investigating some criminal immigration violations. The idea is that state and local law enforcement ought to focus on the violation of state and local criminal law. Determining whether an individual should be permitted to stay in or be deported from the United States is a civil matter,˜ thus it is seen to be outside the mandate of state and local law enforcement. To be sure, there are immigration crimes, but those are exclusively federal in nature˜ and so they fall outside the mandate of state and local law enforcement to enforce state and local criminal laws.˜

Device two—limiting compliance with immigration detainers and immigration warrants: Some sanctuary jurisdictions bar local law enforcement from complying with federal immigration detainers or immigration warrants. This issue arises when local law enforcement makes an arrest. When an individual is arrested by local law enforcement, they are taken to a local jail. At the jail, they are fingerprinted. Those fingerprints are routinely sent to the Federal Bureau of Investigation ("FBI") to determine the arrestee's identity and criminal history.˜ At this stage, the search might reveal an administrative arrest warrant—a warrant issued by an immigration officer based on probable cause for civil removal from the United States.˜ This administrative warrant can show up as a "hit" in the criminal database, indicating that local law enforcement should follow up with ICE about the individual.˜ Some sanctuary jurisdictions bar local law enforcement from following up on or honoring these civil warrants.˜ Immigration warrants aside, even if the arrestee's prints trigger no criminal hits (or various non-criminal ICE hits posing as criminal hits), the FBI shares the fingerprints it receives with the Department of Homeland Security ("DHS"). DHS agents then determine whether the arrestee is a noncitizen. If the arrestee is a noncitizen, ICE will typically issue a "detainer." A detainer asks the jail to provide information to ICE about when the individual will be released from detention and requests that the jail continues to detain the individual until they can be picked up by ICE.˜ The detainer, if honored, applies not only to individuals that are arrested and prosecuted but also to individuals that are arrested and never charged with a crime or prosecuted.˜ Some sanctuary jurisdictions will not honor detainers.

Device three—denying ICE access to local jails: Local jails are run by local law enforcement. Federal authorities occasionally attempt to enter local jails in order to conduct their own evaluation of the incarcerated population to determine if any individuals present are noncitizens subject to civil deportation or prosecution for federal immigration crimes.˜ Denying this request for access is one sort of sanctuary-city device.˜

Device four—limiting local law enforcement's disclosure of sensitive information: Some sanctuary communities restrict local officials from sharing a wide swath of sensitive information—from immigration status to tax history— with federal law enforcement. The goal is "to encourage residents to feel safer when accessing local services or interacting with local government authorities."˜ Other sanctuary communities specifically narrow the information-sharing restriction to immigration enforcement by preventing local law enforcement from notifying federal immigration authorities about any noncitizen's release from custody.˜

Device five—precluding local participation in joint operations with federal immigration enforcement: The final tactic utilized by sanctuary jurisdictions is to prevent local law enforcement from participating in joint operations with federal immigration authorities. For example, if federal authorities are planning to conduct a series of immigration arrests in a particular community, they might seek out local law enforcement to supplement those efforts.˜ One sanctuary policy is to prohibit that sort of cooperation.

All of these devices seek to inhibit local criminal law enforcement from participating in federal enforcement of civil immigration laws.˜ That is, the devices are mechanisms by which localities declare that they will not "be an arm of federal immigration authorities."˜

Sanctuary jurisdictions elect to separate themselves from federal immigration enforcement for various reasons. Common rationales include: "(1) the conviction that localities (and not the federal government) should control their own criminal justice priorities and resources; (2) a desire to avoid unlawful arrests and detentions; (3) the concern that entangling police with immigration enforcement erodes trust among minority community members; (4) a commitment to preventing improper discrimination in policing based on race, ethnicity or national origin; (5) a desire to further diversity and inclusion; and (6) a wish to express disagreement with federal immigration policy."˜

The heterogeneity of sanctuary jurisdictions becomes even more clear when we compare two very different sanctuary cities. First, consider Wichita, Kansas. In 2006, the city's Police Department instituted a policy which stated that "[o]fficers shall not seek or stop a person suspected of being an alien just because he/she is suspected of being in this country illegally."˜ Yet the Wichita Police Department policy also directed officers to advise ICE of noncitizens in custody˜ and to determine whether ICE would like the individual held on their behalf.˜ This policy was not accompanied by any policy statement explaining its origin.

Now, consider San Francisco, California. In contrast to Wichita, San Francisco currently prohibits its departments, agencies, commissions, officers, and employees from using city funds or resources to "assist in the enforcement of Federal immigration law or to gather or disseminate information regarding the release status of individual or any other such personal information," except in limited circumstances.˜ The city's administrative code provides numerous reasons for this prohibition, including, among others: "protect[ion of] limited local resources," concerns about the constitutionality of detainers, equal protection and equal treatment for all of its residents, "open communication between City employees and City residents," "the City's core mission of ... serving the needs of everyone in the community," and "respect and trust between law enforcement and residents."˜

In sum, the devices used by sanctuary jurisdictions vary, as do the rationales.˜

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CA Govt Code § 7283.1 (2022)
[Transparent Review of Unjust Transfers and Holds (TRUTH) Act]

(a) In advance of any interview between ICE and an individual in local law enforcement custody regarding civil immigration violations, the local law enforcement entity shall provide the individual with a written consent form that explains the purpose of the interview, that the interview is voluntary, and that the individual may decline to be interviewed or may choose to be interviewed only with the individual's attorney present. The written consent form shall be available in English, Spanish, Chinese, Tagalog, Vietnamese, and Korean. The written consent form shall also be available in any additional languages that meet the county threshold as defined in subdivision (d) of Section 128552 of the Health and Safety Code if certified translations in those languages are made available to the local law enforcement agency at no cost.

(b) Upon receiving any ICE hold, notification, or transfer request, the local law enforcement agency shall provide a copy of the request to the individual and inform the individual whether the law enforcement agency intends to comply with the request. If a local law enforcement agency provides ICE with notification that an individual is being, or will be, released on a certain date, the local law enforcement agency shall promptly provide the same notification in writing to the individual and to the individual's attorney or to one additional person who the individual shall be permitted to designate.

(c) All records relating to ICE access provided by local law enforcement agencies, including all communication with ICE, shall be public records for purposes of the California Public Records Act (Division 10 (commencing with Section 7920.000)),

including the exemptions provided by that act and, as permitted under that act, personal identifying information may be redacted prior to public disclosure. Records relating to ICE access include, but are not limited to, data maintained by the local law enforcement agency regarding the number and demographic characteristics of individuals to whom the agency has provided ICE access, the date ICE access was provided, and whether the ICE access was provided through a hold, transfer, or notification request or through other means.

(d) Beginning January 1, 2018, the local governing body of any county, city, or city and county in which a local law enforcement agency has provided ICE access to an individual during the last year shall hold at least one community forum during the following year, that is open to the public, in an accessible location, and with at least 30 days' notice to provide information to the public about ICE's access to individuals and to receive and consider public comment. As part of this forum, the local law enforcement agency may provide the governing body with data it maintains regarding the number and demographic characteristics of individuals to whom the agency has provided ICE access, the date ICE access was provided, and whether the ICE access was provided through a hold, transfer, or notification request or through other means. Data may be provided in the form of statistics or, if statistics are not maintained, individual records, provided that personally identifiable information shall be redacted.

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9.8 State Laws Regarding Interior Immigration Enforcement

In contrast to sanctuary jurisdictions, some states and localities aim to support ICE's interior immigration enforcement efforts. Consider the following examples:

PROHIBITING SANCTUARY JURISDICTIONS

Iowa Code 2024, Chapter 27A.4

Restriction on enforcement of immigration law prohibited.

1. A local entity shall not adopt or enforce a policy or take any other action under which the local entity prohibits or discourages the enforcement of immigration laws.
2. A local entity shall not prohibit or discourage a person who is a law enforcement officer, corrections officer, county attorney, city attorney, or other official who is employed by or otherwise under the direction or control of the local entity from doing any of the following:

a. Inquiring about the immigration status of a person under a lawful detention or under arrest.

b. Doing any of the following with respect to information relating to the immigration status, lawful or unlawful, of any person under a lawful detention or under arrest, including information regarding the person's place of birth:

(1) Sending the information to or requesting or receiving the information from United States citizenship and immigration services, United States immigration and customs enforcement, or another relevant federal agency.

(2) Maintaining the information.

(3) Exchanging the information with another local entity or a federal or state governmental entity.

c. Assisting or cooperating with a federal immigration officer as reasonable or necessary, including providing enforcement assistance.

d. Permitting a federal immigration officer to enter and conduct enforcement activities at a jail or other detention facility to enforce a federal immigration law.

TX Govt Code § 752.053

(a) A local entity or campus police department may not:

(1) adopt, enforce, or endorse a policy under which the entity or department prohibits or materially limits the enforcement of immigration laws;

(2) as demonstrated by pattern or practice, prohibit or materially limit the enforcement of immigration laws; or

(3) for an entity that is a law enforcement agency or for a department, as demonstrated by pattern or practice, intentionally violate Article 2.251, Code of Criminal Procedure.

(b) In compliance with Subsection (a), a local entity or campus police department may not prohibit or materially limit a person who is a commissioned peace officer described by Article 2.12, Code of Criminal Procedure, a corrections officer, a booking clerk, a magistrate, or a district attorney, criminal district attorney, or other prosecuting attorney and who is employed by or otherwise under the direction or control of the entity or department from doing any of the following:

(1) inquiring into the immigration status of a person under a lawful detention or under arrest;

(2) with respect to information relating to the immigration status, lawful or unlawful, of any person under a lawful detention or under arrest, including information regarding the person's place of birth:

(A) sending the information to or requesting or receiving the information from United States Citizenship and Immigration Services, United States Immigration and Customs Enforcement, or another relevant federal agency;

(B) maintaining the information; or

(C) exchanging the information with another local entity or campus police department or a federal or state governmental entity;

(3) assisting or cooperating with a federal immigration officer as reasonable or necessary, including providing enforcement assistance; or

(4) permitting a federal immigration officer to enter and conduct enforcement activities at a jail to enforce federal immigration laws.

(c) Notwithstanding Subsection (b)(3), a local entity or campus police department may prohibit persons who are employed by or otherwise under the direction or control of the entity or department from assisting or cooperating with a federal immigration officer if the assistance or cooperation occurs at a place of worship.

ENFORCING ICE DETAINERS

Iowa Code 2024, Chapter 27A.2

Law enforcement agency duties — immigration detainer requests.

A law enforcement agency in this state that has custody of a person subject to an immigration detainer request issued by United States immigration and customs enforcement shall fully comply with any instruction made in the detainer request and in any other legal document provided by a federal agency.

TX Code Crim Pro § 2.251

(a) A law enforcement agency that has custody of a person subject to an immigration detainer request issued by United States Immigration and Customs Enforcement shall:

(1) comply with, honor, and fulfill any request made in the detainer request provided by the federal government; and

(2) inform the person that the person is being held pursuant to an immigration detainer request issued by United States Immigration and Customs Enforcement.

9.9 The Future of Interior Immigration Enforcement: Big Data

Whether states restrict or mandate cooperation with immigration agents is fast becoming irrelevant. That is because immigration enforcement agencies are increasingly relying upon Big Data in their enforcement efforts.

DHS contracts with LexisNexis to gain access to that company's vast Law Enforcement Investigative Database for both ICE and CBP. The Lexis database includes, among many other sources, car registrations, drivers' licenses, property records, cell phone records, credit reports, utility bills, work affiliations, cell phone geolocation data, and "[c]omprehensive jail booking data with real-time alerts of incarcerations from all states and DC." The drivers' license data alone enables ICE to employ facial recognition technology. Note that LexisNexis is able to acquire data even from sanctuary jurisdictions where states or localities are prohibited from sharing that same data directly with ICE.

DHS also accumulates information itself that it then contributes to federal law enforcement databases. Since 2020, DHS has taken DNA samples from 1.5 million noncitizen detainees. The collected samples are sent to the FBI for inclusion in the federal government's DNA database. See Stevie Glaberson et al., *Raiding the Genome: How the United States Government Is Abusing Its Immigration Powers to Amass DNA for Future Policing*, Center on Privacy & Technology at Georgetown Law (2024).

DHS has also been working to improve its access to and rapid comprehension of law enforcement data. Enter Palantir, a technology company that "build[s] platforms for integrating, managing, and securing data." ICE utilizes Palantir software called FALCON which facilitates data mining. DHS describes FALCON as enabling "homeland security personnel to store, search, analyze, and visualize volumes of existing information in support of ICE's mission to enforce and investigate violations of U.S. criminal, civil, and administrative laws."

ICE also employs specialized agents to work on data screening. These individuals operate within the Targeting Operations Division (TOD) of ICE's Enforcement and Removal Operations. The TOD has three important units. The Law Enforcement Support Center (LESC) is a 24-7 operation that "conducts person-centric data analysis and provides timely assistance to law enforcement agencies by identifying noncitizens suspected, arrested, or convicted of criminal activity." The LESC processes more than

1.5 million queries annually. The Pacific Enforcement Response Center (PERC) "uses biometric information and in-depth analysis to verify subjects' identity, immigration status, criminal record, custody status, and removability." PERC reviewed over 190,000 queries in fiscal year 2021, resulting in over 98,000 "fugitive operations" referrals And, finally, the National Criminal Analysis and Targeting Center (NCATC) "analyzes data in numerous law enforcement and immigration databases to develop leads on removable noncitizens that are provided to ERO's 25 field offices." The NCATC vetted 7.7 million individuals in fiscal year 2021.

ICE's use of Big Data does not come cheap. Between 2008 and 2021, ICE spent a little over $1.3 billion on geolocation providers, $96 million on biometrics, $97 million on data brokers, $252 million on access to government databases, $389 million on telecom interception, and $569 million on data analysis. See *American Dragnet: Data-Driven Deportation in the 21st Century* (2022), https://americandragnet.org.

Appendices

A.1 Glossary of Key Immigration Terms

Note: *Many of the following definitions use text from or adapted from the publication* Immigration Law *published in 2005 by the Executive Office for United States Attorneys, Office of Legal Education, and from the Department of Homeland Security's "Definition of Terms" webpage. Other material is original to this casebook.*

accredited representative. A representative is "accredited" when DOJ/EOIR authorizes a specially qualified non-lawyer, who works or volunteers with a recognized organization, to represent individuals in immigration legal matters.

acquired citizenship. Citizenship conferred at birth on children born abroad to U.S. citizen parent(s).

adjustment of status. A procedure allowing certain noncitizens in the United States to apply for lawful permanent resident status without having to depart the United States and appear at an American consulate in a foreign country. INA § 245(a), 8 U.S.C. § 1255.

administrative removal. A summary procedure allowing for the removal of a noncitizens, other than lawful permanent residents, convicted of an aggravated felony pursuant to an administrative decision by ICE. INA § 238(b), 8 U.S.C. § 1128(b).

admission. The "lawful entry of the alien into the United States after inspection and authorization by an immigration officer." INA § 101(a)(13), 8 U.S.C. § 1101(a)(13)

A-File. Alien file. Contains the noncitizen's biographical information, family history, passports, records of each apprehension by or encounter with INS/DHS, prior applications for immigration benefits, `prior proceedings, conviction records, photographs, and fingerprints.

aggravated felony. Refers to a select group of crimes for which special immigration consequences follow. The INA bars noncitizens convicted of aggravated felonies from obtaining certain forms of discretionary relief such as asylum, cancellation of removal, and voluntary departure. Such noncitizens also are precluded from obtaining judicial review to the greatest extent permitted under the Constitution. INA § 242, 8 U.S.C. § 1252. The definition of "aggravated felony" was first added to the INA by section 7342 of the Anti-Drug Abuse Act of 1988, and it is found at section 101(a)(43) of the INA, 8 U.S.C. § 1101(a)(43). Four subsequent amendments to the INA enlarged the class of aggravated felonies for immigration purposes.

Air and Marine Operations (AMO). A division of CBP. The agency focuses on border security through the use of aircraft and boats.

alien. "The term 'alien' means any person not a citizen or national of the United States." INA § 101(a)(3), 8 U.S.C. § 1101(a)(3). The term has been criticized as dehumanizing. See, e.g., Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1996-97). Nevertheless, it persists in statute.

alternatives to detention (ATD). Alternatives to the physical detention of migrants during their removal proceedings include parole/release on own recognizance, bond, check-ins at ICE offices, home visits and check-ins, telephonic monitoring, and ankle monitors.

American Immigration Lawyers Association (AILA). The national association of immigration lawyers established 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.

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Pub. L. 104-132, 110 Stat. 1214 (Apr. 24, 1996). An amendment to the INA that, among other things, mandated detention of noncitizens convicted of a wide range of crimes.

A-Number. Alien Registration Number. Alien Number. A#. The number associated with the noncitizen's A-File. The number begins with the letter "A" and is followed by seven, eight, or nine digits.

asylee. A noncitizen within the United States who has been granted the protection of the United States asylum laws because of persecution or a well-founded fear of persecution in their home country.

asylum. The process by which a nation grants protection to a migrant fleeing from persecution; also the protection itself.

beneficiary. A noncitizen who receives an immigration benefit from the government after a request has been made by a U.S. citizen, lawful permanent resident, or employer, any of whom is known as the petitioner. A "principal beneficiary" is a noncitizen who is named on an immigrant or nonimmigrant petition or application. A "derivative beneficiary" is an immediate family member of the principal beneficiary who may be

eligible to receive the same immigration status as the principal beneficiary based on their family relationship.

biometrics. Processes used to identify people based on their physical traits, including fingerprints, photograph, and signature.

Board of Alien Labor Certification Appeals (BALCA). The appellate body that hears administrative appeals brought by employers whose applications to certify noncitizens to work in the United States have been denied.

Board of Immigration Appeals (Board or BIA). The appellate body that hears administrative appeals from decisions of immigration judges.

cancellation of removal. A form of relief created by IIRIRA, potentially available for permanent residents and nonpermanent residents. INA § 240A(b), 8 U.S.C. § 1229b.

child. The term "child" for immigration purposes is comprehensively defined by INA § 101(b), 8 U.S.C. 1101(b), and refers to an unmarried person under 20 years of age.

citizen. The legally recognized subject or national of a nation.

conditional permanent resident. Any noncitizen granted permanent resident status on a conditional basis (for example, a spouse of a U.S. citizen or an immigrant investor) who must petition to remove the conditions of their status before the second anniversary of the approval date of their conditional status.

conviction. The term "conviction" for immigration purposes is comprehensively defined by INA § (a)(48)(A), 8 U.S.C. § 1101(a)(48)(A), and it includes both a formal judgment of guilt as well as an admission of guilt combined with punishment.

crime involving moral turpitude (CIMT). A ground of deportability or inadmissibility under the INA. INA §§ 237(a)(2)(A), 212(a)(2)(A), 8 U.S.C. §§ 1227(a)(2)(A), 1182(a)(2)(A).

deferred action. A discretionary determination to defer a removal action against an individual as an act of prosecutorial discretion. An individual who has received deferred action is authorized by DHS to be present in the United States and is therefore considered by DHS to be lawfully present during the period deferred action is in effect. An individual whose case has been deferred is eligible to receive employment authorization for the period of deferred action, provided he or she can demonstrate "an economic necessity for employment." DHS can terminate or renew deferred action at any time, at the agency's discretion.

Department of Homeland Security (DHS). The federal agency principally responsible for immigration law. DHS was created in 2002 as part of a package of reforms in the wake of the September 11, 2001 attacks.

deportable. A noncitizen lawfully admitted to the United States subject to any of the 27 grounds for deportation specified in the INA. INA § 237, 8 U.S.C. § 1227.

deportation. The formal removal of a previously admitted noncitizen from the United States. INA § 237, 8 U.S.C. § 1227. It also refers to the type of immigration

proceedings commenced prior to April 1, 1997, to remove noncitizens who entered the United States without inspection. Note: Regarding relation to the term "removal," see *removal*.

derivative citizenship. Citizenship conferred on foreign-born children when a parent achieves U.S. citizenship by naturalization or when the child is adopted by a U.S. citizen.

detainer. A written notice that DHS issues to a federal, state, or local law enforcement agency requesting that the agency hold a noncitizen in their custody pending pick-up by ICE for removal proceedings.

detention. The physical holding of a migrant by the government during the pendency of their civil immigration proceedings. INA § 235(b)(1)(B)(iii)(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV); INA § 235(b)(2), 8 U.S.C. § 1225(b)(2); INA § 236(a), 8 U.S.C. § 1226(a); INA § 236(c), 8 U.S.C. § 1226(c).

employer sanctions. The employer sanctions provisions of the Immigration Reform and Control Act of 1986 (IRCA) prohibit employers from hiring noncitizens who are unauthorized to work in the United States and impose a duty on the employers to verify the employment eligibility of their workers. INA § 274A, 8 U.S.C. § 1324a.

employment authorization document (EAD). Proof of authorization to work in the United States for a specific time period.

Enforcement and Removal Operations (ERO). A division of ICE. The agency focuses on the enforcement of immigration laws through the arrest and removal of immigration law violators.

entry without inspection (EWI). Prior to 1996, noncitizens who entered without inspection by an immigration officer were considered deportable. Under the amended INA, they are now considered inadmissible. INA § 212(a)(6)(A), 8 U.S.C. § 1182(a)(6)(A). Noncitizens who enter without inspection may be criminally prosecuted. INA § 275, 8 U.S.C. § 1325. See *exclusion, inadmissibility, removal*.

exclusion. Prior to 1996, exclusion was the formal term for denial of a noncitizen's entry into the United States. This was distinguished from deportation, which then applied to all noncitizens present in the United States. Today, exclusion refers to both the process of adjudicating the inadmissibility of noncitizens seeking entry into the United States and the removal of noncitizens who entered the United States without formal admission. INA § 212, 8 U.S.C. § 1182. See *inadmissible*.

Executive Office for Immigration Review (EOIR). The Agency within the Department of Justice that oversees the activities of the Office of the Chief Immigration Judge (OCIJ), the Office of the Chief Administrative Hearing Officer (OCAHO) and the Board of Immigration Appeals (BIA).

expedited removal. IIRIRA authorized the DHS to quickly remove certain inadmissible noncitizens from the United States. The authority covers noncitizens who are inadmissible because they have no entry documents or because they have used counterfeit, altered, or otherwise fraudulent or improper documents. The authority

covers noncitizens who arrive in, attempt to enter, or have entered the United States without having been admitted or paroled by an immigration officer at a port-of-entry. The DHS has the authority to order the removal, and the noncitizen is not referred to an immigration judge except under certain circumstances after a noncitizen makes a claim to lawful status in the United States or demonstrates a credible fear of persecution if returned to his or her home country. INA § 235(b)(1)(A), 8 U.S.C. § 1225(b)(1)(A).

fiscal year. For the federal government, the 12-month period beginning October 1 and ending September 30.

Foreign Affairs Manual (FAM). A single, comprehensive, and authoritative source for the Department of State's organization structures, policies, and operating procedures including ones applicable to the Foreign Service and, in some cases, other federal agencies.

good moral character. Establishing good moral character is a prerequisite to many immigration benefits. The term is defined in the negative, with INA § 101(f), 8 U.S.C. § 1101(f), listing reasons why an individual should not be considered to be person of good moral character based on specifically delineated conduct.

green card (alien registration card). A card issued to lawful permanent residents in lieu of a visa. The first such cards were issued in 1946 and were green in color. After 1964 the cards ceased to be green but they are still referred to as "green cards." See *lawful permanent resident*.

Homeland Security Investigations (HSI). A division of ICE. It is the principal investigative arm of DHS, and it is focused on criminal organizations that "threaten or seek to exploit the customs and immigration laws of the United States."

illegal alien. A common but linguistically inapt phrase that is used in an imprecise way to refer to a noncitizen who has entered the United States without authorization, remains in the United States without authorization, or is perceived as having done something contrary to U.S. law. The phrase is rightly condemned on the grounds that persons themselves cannot be "illegal" and on the grounds that a noncitizen's presence in the United States without authorization, while grounds for removal, does not constitute a crime or civil offense. The phrase is not commonly used by immigration lawyers.

illegal immigrant. See *illegal alien*.

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA, commonly pronounced "eye-ruh, eye-ruh"), Pub. L. No. 104-208, 110 Stat. 1570. A major amendment to the INA that, among other things, mandated individuals who accrued unlawful presence in the United States to remain abroad for a significant period of time before reentry.

immediate relative. Certain immigrants who, because of their close relationship to U.S. citizens, are exempt from the numerical limitations imposed on immigration to the

United States. Immediate relatives are: spouses, children, and parents of U.S. citizens. INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i).

immigrant. A noncitizen entering the country to settle there permanently. Under U.S. law, every noncitizen seeking to enter the U.S. is presumed to be an immigrant—intending to settle here permanently—unless they can prove that they are a nonimmigrant. INA § 214(b), 8 U.S.C. § 1184(b). See *nonimmigrant*.

Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, 104 Stat. 5005 (1990). Effective as of November 29, 1990. An amendment to the INA that, among other items, established the diversity visa program.

Immigration Marriage Fraud Amendments of 1986 (IMFA), Pub. L. No. 99-639, 100 Stat. 3537 (1986). An amendment to the INA that imposed strict conditions on any noncitizen seeking to become a lawful permanent resident through marriage to a U.S. citizen or permanent resident. Such conditions include conditional residency for a two-year period.

Immigration and Nationality Act of 1952 (INA), as amended, Pub. L. No. 104-8, 66 Stat. 163 (1952), 8 U.S.C. §§ 1101-1537. The INA, as amended, is the principal source of statutory law on immigration in the United States.

Immigration and Naturalization Service (INS). A former division of the Department of Justice (from 1940 to 2003) and the Department of Law (from 1993 to 1940), the INS ceased to exist on March 1, 2003. Its work was transferred to the newly created Department of Homeland Security (DHS).

immigration judge (IJ). An administrative hearing officer designated by the Attorney General to conduct removal proceedings. 8 C.F.R. § 1003.10.

Immigration Reform and Control Act of 1986 (IRCA, commonly pronounced "irk-uh"), Pub. L. No. 99-603, 100 Stat. 3359 (1986). An amendment to the INA that, among other things, provided for the regularization of certain noncitizens who had been in the U.S. without authorization for many years and for certain special agricultural noncitizen workers.

inadmissible. The status of a noncitizen seeking admission at a port of entry who does not meet the criteria in the INA for admission. Since 1996, the statutory grounds for inadmissibility are also applied to the removal of migrants who have entered without inspection. INA § 212, 8 U.S.C. § 1182.

institutional hearing program (IHP). Refers to removal hearings held inside correctional institutions while the noncitizen is serving a criminal sentence.

judicial recommendation against deportation (JRAD). A form of relief from deportation eliminated by the Immigration Act of 1990. It authorized sentencing judges in criminal trials to weigh in on the advisability of deporting the defendant.

jus sanguinis. Nationality determined by "blood," i.e., by the nationality of the parents. A legal concept used to support acquired and derived citizenship. See *acquired citizenship*, *derived citizenship*.

jus solis. Nationality determined by place of birth.

labor certification. The certification process administered by the Department of Labor to ensure that foreign workers do not take away jobs from American workers and do not depress wages.

lawful permanent resident (LPR). An immigrant who has been conferred permanent resident status, that is, who has authorization to live and work in the United States indefinitely. Upon meeting the statutory prerequisites for naturalization, an LPR may apply to become a naturalized citizen.

Legal Immigration Family Equity Act (LIFE), Pub. L. No. 106-553, 114 Stat. 2762 (2002). Temporarily reinstated INA § 245(i), 8 U.S.C. § 1255(i) and created the "V" nonimmigrant visa category for spouses and children of LPRs waiting for immigrant visas.

migrant. A person who leaves his/her country of origin to seek residence in another country.

naturalization. The process of conferring nationality of a state on a person after birth. INA § 101(a)(23), 8 U.S.C. § 1101(a)(23).

Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA), Pub. L. No. 105-100, 111 Stat. 2193 (1997). An amendment to the INA that pertains to certain Central American and other noncitizens who were long-term unauthorized residents in the United States when hardship relief rules were made more stringent by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Provisions: 1) allowed approximately 150,000 Nicaraguans and 5,000 Cubans adjustment to permanent resident status without having to make any hardship showing; 2) allowed approximately 200,000 Salvadorans and 50,000 Guatemalans as well as certain noncitizens from the former Soviet Union to seek hardship relief under more lenient hardship rules than existed prior to IIRIRA amendments.

noncitizen. A person who is not a citizen of the United States. This term is synonymous with the statutory definition of "alien."

nonimmigrant. A noncitizen admitted to the United States for a temporary duration, such as a student, a visitor, or a temporary worker. INA § 101(a)(15), 8 U.S.C. § 1101(a)(15).

notice to appear (NTA). The NTA (Form I-862) is the charging document used, since April 1, 1997, by DHS to place a noncitizen in removal proceedings. See *order to show cause*.

Office of the Chief Counsel (OCC). A division within USCIS. OCC attorneys provide legal advice, opinions, determinations, regulations, and any other assistance to the USCIS director as an embedded legal program of the DHS Office of the General Counsel.

Office of Field Operations (OFO). A division of CBP. It is the government agency that enforces immigration laws at ports of entry.

Office of Immigration Litigation (OIL). A division with the Department of Justice. OIL has nationwide jurisdiction over all civil immigration litigation matters and is responsible for the nationwide coordination of civil immigration litigation.

Office of the Principal Legal Advisor (OPLA). A division within ICE. OPLA attorneys represent the government in immigration removal proceedings. OPLA attorneys also counsel ICE personnel regarding their enforcement actions and work with the DOJ in ICE-built criminal prosecutions.

Office of Refugee Resettlement (ORR). A division of the U.S. Department of Health and Human Services that provides benefits and services to refugees, asylees, special immigrants, victims of trafficking, and unaccompanied minors.

order to show cause (OSC). The charging document (Form I-221) used prior to April 1, 1997 to initiate deportation proceedings against a particular noncitizen. This phrase is used more generally in court procedure outside the immigration context.

out of status. A noncitizen who violates their terms of their visa is considered out of status.

overstay. An "overstay" occurs when a nonimmigrant remains in the United States longer than permitted.

parolee. A noncitizen who appears to be inadmissible to DHS, but is allowed to come into the United States, provided the noncitizen is not a security or flight risk. 8 C.F.R. § 212.5.

per-country limit. The maximum number of family-sponsored and employment-based preference visas that can be issued to citizens of any country in a fiscal year. The limits are calculated each fiscal year depending on the total number of family-sponsored and employment-based visas available. No more than 7 percent of the visas may be issued to natives of any one independent country in a fiscal year; no more than 2 percent may be issued to any one dependency of any independent country. The per-country limit does not indicate, however, that a country is entitled to the maximum number of visas each year, just that it cannot receive more than that number. Because of the combined workings of the preference system and per-country limits, most countries do not reach per-country limits on visa issuance.

petitioner. A person who is filing an immigration form with the government in order to obtain immigration status for another person, called the beneficiary.

port of entry (POE). A location in the United States which is designated as a point of entry for noncitizens and United States citizens. The ports of entry are listed at 8 C.F.R. § 100.4.

preinspection. Immigration inspection conducted of passengers at foreign airports to determine their admissibility before their departure for the United States. This practice has been codified at INA § 235A, 8 U.S.C. § 1225a.

priority date. The date on the I-797, notice of action, marking receipt of an immigration application or petition. The priority date marks the noncitizen's place in the immigrant visa queue.

prosecutorial discretion. In the context of immigration enforcement by DHS and DOJ, the capacity and authority of the government to do any of the following: refrain from placing a potentially deportable person in deportation proceedings; suspend or even terminate a deportation proceeding; postpone a deportation; release someone from detention; or de-prioritize the enforcement of immigration laws against someone. Prosecutorial discretion is guided by policy preferences that frequently shift.

registry. Noncitizens who have continuously resided in the United States since January 1, 1972, are of good moral character, and are not inadmissible, are eligible to adjust to lawful permanent resident status under the "registry" provision. INA § 249, 8 U.S.C. § 1259.

refugee. A person, outside of the United States, who is also outside the country of his or her nationality who is unable or unwilling to return to that country because of persecution or a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group. INA§ 101(a)(42), 8 U.S.C. § 1101(a)(42).

reinstatement of removal. The removal of a previously removed noncitizen who returned to the United States without permission on the basis of the initial order of removal. INA § 241(a)(5), 8 U.S.C. § 1231(a)(5)

removal. The expulsion of a noncitizen from the United States. This expulsion may be based on grounds of inadmissibility (INA § 212) or deportability (INA § 237). Note: The usage of the terms "deportation" and "removal" shifted under U.S. law in 1996; subsequently, deportation can be thought of as a subset of removal.

respondent. An individual who is in immigration court "responding" to charges of removability laid out in the notice to appear.

Service Centers. The five offices of the U.S. Citizenship and Immigration Service established to handle the filing, data entry, and adjudication of certain applications for immigration services and benefits.

Student and Exchange Visitor Information System (SEVIS). SEVIS documents information pertaining to international foreign students and exchange visitors.

special immigrant. A general reference to eleven categories of immigrants listed at INA § 101(a)(27), 8 U.S.C. § 1101(a)(27).

special immigrant juvenile (SIJ). An immigrant "who has been declared dependent on a juvenile court located in the United States ... and whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law." INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J).

temporary protected status (TPS). A status provided by the secretary of Homeland Security to nationals of certain countries temporarily unable to handle the return of

their nationals due to armed conflict or natural disaster. TPS beneficiaries receive authorization to remain and work in the United States for the duration of the TPS period. INA § 244, 8 U.S.C. § 1254a.

unaccompanied alien child (UAC). A migrant under the age of 18 who seeks entry into or enters the United States without a parent or guardian.

undocumented. A noncitizen described as "undocumented" lacks legal authorization to be present in the United States.

U.S. Border Patrol (USBP). A division within CBP. USBP agents focus on border security between ports of entry.

U.S. citizen (USC). An individual is or becomes a U.S. citizen in various ways—generally by birth in the United States, birth to U.S. citizen parents, or naturalization.

U.S. Citizenship and Immigration Services (USCIS). A division within DHS. USCIS is the government agency that oversees lawful immigration to the United States.

U.S. Customs and Border Protection (CBP). A division within DHS that is focused on border security, including immigration enforcement.

U.S. Immigration and Customs Enforcement (ICE). A division within DHS that is focused on immigration enforcement in the interior of the United States.

unlawful presence. The time that a noncitizen is present in the United States after entering the country without inspection or after the expiration of their allotted visa stay.

Violence Against Women Act of 1994 (VAWA). Pub. L. No. 103-322, 108 Stat. 1901 (1994). VAWA amended the INA to create pathways to lawful immigration status for noncitizens battered by their U.S. citizen or LPR spouses or parents.

visa. A permit issued by a consular representative of a country, allowing the bearer entry into or transit through that country. The United States issues immigrant visas (IV) to lawful permanent residents and nonimmigrant visas (NIV) to temporary visitors.

voluntary departure. The privilege of voluntarily departing the United States in lieu of being formally removed.

voluntary return. The informal process through which an authorized immigration official or border patrol agent returns a noncitizen to Mexico or Canada with the noncitizen's consent and without a hearing.

waiver. A discretionary pardon for a specific immigration violation. See INA § 212(h).

withdrawal. An arriving noncitizen's voluntary retraction of an application for admission to the United States in lieu of a removal hearing before an immigration judge or an expedited removal.

withholding. Withholding of removal is a form of relief from deportation akin to, but less desirable than, asylum. See INA § 241(b)(3).

A.2 Table of Abbreviations

AAO	Administrative Appeals Office of the USCIS
ACWIA	American Competitiveness and Workforce Improvement Act of 1998
AEDPA	Antiterrorism and Effective Death Penalty Act of 1996
AG	Attorney General of the United States
AILA	American Immigration Lawyers Association
AOS	Adjustment of status
ATD	Alternatives to detention
AUSA	Assistant United States Attorney
BALCA	Board of Alien Labor Certification Appeals
BIA	Board of Immigration Appeals
BOP	Bureau of Prisons Burden of proof
CAT	Convention against torture
CBP	U.S. Customs and Border Protection
CFR	Code of Federal Regulations
CIMT	Crime involving moral turpitude
CIS	United States Citizenship and Immigration Services
COR	Cancellation of removal
CRS	Congressional Research Service
CSPA	Child Status Protection Act
DACA	Deferred Action for Childhood Arrivals
DED	Deferred Enforced Departure
DHHS	Department of Health and Human Services
DHS	Department of Homeland Security
DOJ	Department of Justice
DOL	Department of Labor
DOS	Department of State
DOT	Department of Occupational Titles
EAD	Employment Authorization Document
EOIR	Executive Office for Immigration Review
EOUSA	Executive Office for United States Attorneys

ESTA	Electronic System for Travel Authorization
EWI	Entry Without Inspection
FAM	Foreign Affairs Manual
FGM	Female genital mutilation
FY	Fiscal year
GMC	Good moral character
HSA	Homeland Security Act of 2002
IAC	Ineffective assistance of counsel
ICE	U.S. Immigration and Customs Enforcement
IHP	Institutional Hearing Program
IIRIRA	Illegal Immigration Reform and Immigrant Responsibility Act of 1996
IJ	Immigration judge
IMFA	Immigration Marriage Fraud Amendments of 1986
IMMACT	Immigration Act of 1990
INA	Immigration and Nationality Act of 1952
INS	Immigration and Naturalization Service
IRCA	Immigration Reform and Control Act of 1996
IV	Immigrant visa
JRAD	Judicial Recommendation Against Deportation
LC	Labor certification
LCA	Labor condition application
LESC	Law Enforcement Support Center
LIFE	Legal Immigration Family Equity Act
LPR	Lawful permanent resident
MTR	Motion to reopen
NACARA	Nicaraguan Adjustment and Central American Relief Act of 1997
NAFTA	North American Free Trade Agreement
NCATC	National Criminal Analysis and Targeting Center
NIV	Nonimmigrant visa
NIW	National interest waiver
NSEERS	National Security Entry Exit Registration System
NTA	Notice to appear

NVC	National visa center
OCAHO	Office of the Chief Administrative Hearing Officer
OCC	Office of the Chief Counsel
OCIJ	Office of the Chief Immigration Judge
OIL	Office of Immigration Litigation
OLE	Office of Legal Education (DOJ)
OPLA	Office of the Principal Legal Advisor
ORR	Office of Refugee Resettlement
OSC	Order to show cause
OTM	Other than Mexican
PCR	Post conviction relief
PERC	Pacific Enforcement Response Center
PERM	Program Electronic Review Management System
POE	Port of entry
RFE	Request for evidence
SEVIS	Student and Exchange Visitor Information System
SIJ	Special Immigrant Juvenile
TOD	Targeting Operations Division
TPS	Temporary Protected Status
UAC	Unaccompanied alien child
UNHCR	United Nations High Commissioner for Refugees
UPL	Unauthorized practice of law
USBP	United States Border Patrol
USC	United States Citizen United States Code
USCIS	United States Citizenship and Immigration Services
US-VISIT	United States Visitor and Immigrant Status Indicator Technology
VAWA	Violence Against Women Act of 1994
VD	Voluntary Departure
VR	Voluntary Return

A.3 USCIS Chart on Waivers and Relief from Inadmissibility

GROUNDS	EXCEPTIONS	WAIVERS
212(a)(1)(A)(i): Communicable Disease		NIV: 212(d)(3)(A) IV: 212(g)(1) (applicable to spouse, unmarried son or daughter, or parent of USC/LPR) danger to public health is minimal; spread of infection is minimal; no cost incurred by gov't agency w/o consent Legalization: 245A(d)(2)(B)(i)
212(a)(l)(A)(ii): Vaccinations	212(a)(l)(C) adopted child; 10 yrs old & parent's affidavit	NIV: N/A IV: 212(g)(2) Legalization: 245A(d)(2)(B)(i)
212(a)(1)(A)(iii): physical or mental disorder & behavior poses threat		NIV: 212(d)(3)(A) IV: 212(g)(3) Legalization: 245A(d)(2)(B)(i)
212(a)(l)(A)(iv): Drug abuser or addict		NIV: 212(d)(3)(A) IV: NO WAIVER Legalization: 245A(d)(2)(B)(i)
212(a)(2)(A)(i)(I): CIMT (conviction or admission)	• 212(a)(2)(A)(ii)(I): only 1 crime + committed < 18 yrs old + >5 yrs before application for visa/admission • 212(a)(2)(A)(ii)(n): only 1 crime + maximum penalty possible 1yr + alien's sentence is 6 months or less • Full pardon by President or Governor, 237(a)(2)(A)(vi) • Purely political offense	NIV: 212(d)(3)(A) IV: 212(h) (if violent or dangerous crime then exceptional or extremely unusual hardship and have supervisor or higher concurrence for approval) • 212(h)(l)(A): Offense >15 yrs ago + rehabilitated + not contrary to national welfare; • 212(h)(l)(B): Alien is spouse/parent/son/ daughter of USC/LPR + extreme hardship to USC/LPR; • 212(h) barred if (1) LPR convicted of ag felony or lacks 7 yrs cont. residence before initiation of removal; or (2) murder or crime involving torture Legalization: NO WAIVER
212(a)(2)(A)(i)(II): Controlled Substance		NIV: 212(d)(3)(A) IV: 212(h) for single offense of simple possession 30 grams MJ (See 212(h)(l)(A) or 212(h)(l)(B) above); if violent or dangerous crime then exceptional or extremely unusual hardship and have supervisor or higher concurrence for approval Legalization: 245A(d)(2)(B)(i)(II); no waiver except single possession of 30 grams of MJ

GROUNDS	EXCEPTIONS	WAIVERS
212(a)(2)(B): Multiple convictions + >5 years sentence total		NIV: 212(d)(3)(A) IV: 212(h) (if violent or dangerous crime then exceptional or extremely unusual hardship and have supervisor or higher concurrence for approval) • 212(h)(l)(A): Offense >15 yrs ago + rehabilitated + not contrary to national welfare; • 212(h)(l)(B): Alien is spouse/parent/son/ daughter of USC/LPR + extreme hardship to USC/LPR; • 212(h) barred if (1) LPR convicted of ag felony or lacks 7 yrs cont. residence before initiation of removal; or (2) murder or crime involving torture Legalization: NO WAIVER
212(a)(2)(C): Drug Traffickers (reason to believe)		NIV: 212(d)(3)(A) IV: NO WAVIER Legalization: NO WAIVER
212(a)(2)(D): (i) Engaging in prostitution within past 10 yrs (ii) Procuring prostitutes within past 10 yrs; (iii) Coming to engage in Commercialized vice		NIV: 212(d)(3)(A) IV: 212(h) (if violent or dangerous crime then exceptional or extremely unusual hardship and have supervisor or higher concurrence for approval) • For (i) & (ii) 212(h)(l)(A): Admission is not contrary to national welfare, safety or security and alien has been rehabilitated • For (iii) 212(h)(1)(A) Offense >15 yrs ago rehabilitated + not contrary to national welfare • For (i), (ii), (iii), 212(h)(l)(B): Alien is spouse/parent/son/ daughter of USC/LPR + extreme hardship to USC/LPR.
212(a)(2)(E) Alien asserts immunity from prosecution		NIV: 212(d)(3)(A) IV: 212(h) if violent or dangerous crime then exceptional or extremely unusual hardship and have supervisor or higher concurrence for approval • 212(h)(l)(A): Offense >15 yrs ago + rehabilitated + not contrary to national welfare; • 212(h)(l)(B): Alien is spouse/parent/son/ daughter of USC/LPR + extreme hardship to USC/LPR; Legalization: NO WAIVER

GROUNDS	EXCEPTIONS	WAIVERS
212(a)(2)(G) Foreign gov't officials who violated religious freedom		NIV: 212(d)(3)(A) IV: NO WAIVER Legalization: 245A(d)(2)(B)(i)
212(a)(2)(H) Human traffickers & sp/son/dau who knew & benefitted $$	212(a)(2)(H)(iii) Received benefits only while a minor child	NIV: 212(d)(3)(A) IV: NO WAIVER Legalization: 245A(d)(2)(B)(i)
212(a)(2)(I) Money Laundering		NIV: 212(d)(3)(A) IV: NO WAIVER Legalization: 245A(d)(2)(B)(i)
212(a)(3)(A)(i)(I) Espionage, sabotage		NIV or IV: NO WAIVER Legalization: NO WAIVER
212(a)(3)(A)(i)(II) Illegal export of technology or sensitive information		NIV: 212(d)(3)(A) IV: NO WAIVER
212(a)(3)(A)(ii) Other unlawful activity		NIV or IV: NO WAIVER Legalization: NO WAIVER
212(a)(3)(A)(iii) Actively engage in overthrow of US		NIV or IV: NO WAIVER Legalization: NO WAIVER
212(a)(3)(B)(i)(I) Engaged in terrorist activity, defined at 212(a)(3)(B)(iv) to include providing material support	212(a)(3)(B)(iv)(VI)(dd) Providing material support to an undesignated org. if clear & convincing evidence didn't reasonably know it was terrorist org.	NIV:212(d)(3)(A) IV or NIV: 212(d)(3)(B) Sec of DHS or Sec of State may grant waiver in sole unreviewable discretion for material support Legalization: NO WAIVER
212(a)(3)(B)(i)(II) Reasonable belief likely to engage in terrorist activity		NIV: 212(d)(3)(A} IV: NO WAIVER Legalization: NO WAIVER
212(a)(3)(B)(i)(m) Incited terrorism		NIV: 212(d)(3)(A) IV: NO WAIVER Legalization: NO WAIVER
212(a)(3)(B)(i)(IV) Representative of a terrorist org. or an org. that endorse terrorist activity. 212(a)(3)(B)(vi) defines terrorist org as (I) §219 designation, (II) Sec of State designation, or (iii) 2 or more individuals engaged in terrorist activity.		NIV: 212(d)(3)(A) NIV/IV: 212(d)(3)(B) Sec of DHS or Sec of State may grant in sole unreviewable discretion for representatives of organizations that endorse terrorist activity.
212(a)(3)(B)(i)(V) Member of terrorist org.	Member of undesignated org. + clear & convincing evidence	NIV: 212(d)(3)(A) IV: NO WAIVER

GROUNDS	EXCEPTIONS	WAIVERS
described in subcl. (I), (II), or cl. (vi)	didn't reasonable know it was terrorist org.	Legalization: NO WAIVER
212(a)(3)(B)(i)(VI) Member of terrorist org. described in (vi)(III)		NIV: 212(d)(3)(A) IV: NO WAIVER Legalization: NO WAIVER
212(a)(3)(B)(i)(VII) Endorses or espouses terrorist activity (defined at §212(a)(3)(8)(iii))		NIV: 212(d)(3)(A) IV: 212(d)(3)(B) Sec of DHS/ Sec of State may grant in sole unreviewable discretion
212(a)(3)(B)(i)(VIII) Received military type training from terrorist org.		NIV: 212(d)(3)(A)
212(a)(3)(B)(i)(IX) Spouse or child of an alien inadmissible under 212(a)(3)(B) if activity occurred within last 5 years	212(a)(3)(B)(ii): Spouse or child did not reasonably know of activity or spouse or child renounced the activity	NIV: 212(d)(3)(A) IV: NO WAIVER Legalization: NO WAIVER
212(a)(3)(C) Entry has potentially serious adverse foreign policy consequences	212(a)(3)(C)(ii) foreign officials 212(a)(3){C}{iii) Beliefs, statements or associations would be lawful in US	NIV: NO WAIVER IV: NO WAIVER Legalization: NO WAIVER
212(a)(3)(D) Communist Party Membership	212(a)(3)(D)(ii) Involuntary membership 212(a)(3)(D)(iii) Past membership terminated	NIV: 212(d)(3)(A) IV: 212(a)(3)(D)(iv) close family member Legalization: NO WAIVER
212(a)(3)(E) Nazi persecution or genocide		NIV or IV: NO WAIVER Legalization: NO WAIVER
212(a)(4) Public Charge	NACARA 202(d)(l)(D) Special Rules for Legalization Applicants 245A(d)(2)(B)(ii)(4) and 245A(d)(2)(B)(iii)	NIV: 212(d)(3)(A) IV: 213 (bond), 213A (affidavit of support), 221(g) (bond)
212(a)(5)(A) Lack of Labor Certification & seeking employment; immigrants seeking admission or adjustment under 203(b)(2), (3)	• Labor Certification • Proof applicant will not work • 8 CFR 212.8(a), (b) lists various exemptions e.g. US Military, fiancé, etc. • 207(c)(3) refugees • 209 (c) asylees adjusting status • Family based immigrants • NACAR • Legalization applicants	NIV: 212(d)(3)(A) IV: 212(k) (alien in possession of an immigrant visa if inadmissibility was not known before departure)
212(A)(5)(B) unqualified physician		NIV: 212(d)(3)(A) IV: NO WAIVER
212(a)(5)(C) uncertified health care worker		NIV: 212(d)(3)(A) IV: NO WAIVER

GROUNDS	EXCEPTIONS	WAIVERS
212(a)(6)(A) Alien present w/o admission or parole	• (6)(a)(ii) battered woman & child • NACARA 202(d)(1)(D) • Legalization applicants	NIV: 212(d)(3)(A)
212(a)(6)(B) Failure to attend removal proceedings	• Reasonable cause for failure to attend • Proceedings initiated prior to 4/1/1997	NIV: 212(d)(3)(A) IV: NO WAIVER but it is no longer an inadmissibility if 5 years has passed
212(a)(6)(C)(i) Misrepresentation or fraud seeking to procure a visa admission, or other benefit under the INA	• Timely retraction • Immaterial misrepresentation • 22 CFR 40.63(a)	NIV: 212(d)(3)(A) IV: 212(i) discretion + alien is the spouse/son/daughter of USC/LPR + extreme hardship to USC/LPR Legalization: 245A(d)(2)(B)(i)
212(a)(6)(C)(ii) False claim to USC	• False claims before 9/30/96 (but could fall under (6)(c)(i) • 212(a)(6)(C)(ii)(II) Reasonable mistaken belief by alien who was LPR by age 16+ child of USC parents	NIV: 212(d)(3)(A) IV: NO WAIVER Legalization: 245A(d)(2)(B)(i)
212(a)(6)(D) Stoaways (present)	Applies only to current entry as stowaway	NIV & IV: NO WAIVER Legalization: 245A(d)(2)(B)(i)
212(a)(6)(E) Alien Smugglers	212(a)(6)(E(ii)	NIV: 212(d)(3)(A) IV: 212(d)(11) Intending LPR/LPR who aided own spouse, parent, son or daughter (not 4th preference) Legalization: 245A(d)(2)(B)(i)
212(a)(6)(F) 274C civil penalty		NIV: 212(d)(3)(A) IV: 212(d)(11) LPR + committed to aid own spouse or child Legalization: 245A(d)(2)(B)(i)
212(a)(6)(G) Student visa Abusers	Remain outside US 5 years after violation	NIV: 212(d)(3)(A) IV: NO WAIVER Legalization: 245A(d)(2)(B)(i)
212(a)(7)(A) Immigrant document requirement	• 211(b) returning LPRS • 211(c) refugees • NACARA 202(d)(1)(D) • 289, American Indians born in Canada • Legalization Applicant: 245A(d)(2)(A)	NIV: 212(d)(3)(A) IV: 212(k)
212(a)(7)(B) Non-immigrant document requirement (c/o valid passport, visa, border crossing card)	• NATO Military personnel • 212(d)(4)(B) • 212(d)(7), Alien entering from Guam, PR, VI • US military under official orders • 289, American Indians born in Canada	NIV: 212(d)(3), (4) 217 VWP IV: N/A

GROUNDS	EXCEPTIONS	WAIVERS
	• Legalization Applicant: 245A(d)(2)(A)	
212(a)(8)(A) Permanently ineligible for citizenship- relieved of military service in the US on the ground of alienage. Of Matter of Kanga, 22 I&N Dec. 1206 (BIA 2000)		NIV: 212(d)(3)(A) IV: NO WAIVER Legalization: 245A(d)(2)(B)(i)
212(a)(8)(B) Left US or remained abroad to avoid or evade military training or service during war or national emergency	Nonimmigrant at time of departure & seeking reentry as a nonimmigrant	NIV: 212(d)(3)(A) IV: NO WAIVER. Vietnam era draft evaders may benefit from Presidential pardon; 42 Fed. Reg. 59,562 (Nov. 15, 1977) Legalization: 245A(d)(2)(B)(i)
212(a)(9)(A) Previously removed (5 , 10-, 20- year bars & permanent bars)	212(a)(9)(A)(iii) AG's consent to reapplying for admission by filing I-212	NIV: 212(d)(3)(A) IV: NO WAIVER Legalization: 245A(d)(2)(B)(i)
212(a)(9)(B) Aliens Unlawfully Present (3- & 10- year bars)	• 212(a)(9)(B)(iii) exception to accrual of ULP for minors, asylee applicant + no unlawful employment, Family Unity, Battered Women & Children • 212(a)(9)(B)(iv) Tolled period for good cause • Lawfully present (1) E/S or C/S pending (3/3/2000 Person Memo); (2) NACARA §202(d)(1)(D); (3) HRIFA; (4) 249 registry applicant; (5) VD period; (6) refugee; (7) asylee; (8) granted withholding; (9) granted cancellation; (10) DED; (11) TPS; (12) §202(b) Cuban-Haitian; (13) §245 applicant • Immediate relatives §201(b) • Special Immigrants	NIV: 212(d)(3) IV: 212(a)(9)(B)(v) Alien is spouse/son/daughter of USC/LPR + extreme hardship to USC/LPR Legalization: 245A(d)(2)(B)(i)
212(a)(9)(C) Aliens Unlawfully Present after Previous Immigration Violations	212(a)(9)(C)(ii)10 years since last departure + AG's consent to reapplying for admission by filing I-212	NIV: 212(d)(3) IV: NO WAIVER Legalization: 245A(d)(2)(B)(i)
212(a)(10)A) Practicing polygamists		NIV: n/a IV: NO WAIVER Legalization: 245A(d)(2)(B)(i)

GROUNDS	EXCEPTIONS	WAIVERS
212(a)(10)(B) Guardian to accompany helpful alien		IV: NO WAIVER Legalization: 245A(d)(2)(B)(i)
212(a)(10)(C) International Child Abduction	212(a)(10)(B)(ii) Child located in a foreign state that is party to the Hague Convention	NIV: 212(d)(3) IV: NO WAIVER Legalization: 245A(d)(2)(B)(i)
212(a)(10)(D) Unlawful voters	212(a)(10(D)(ii) Reasonable mistaken belief at time of violation that he was USC + parent are USC + LPR before	NIV: 212(d)(3) IV: NO WAIVER Legalization: 245A(d)(2)(B)(i)
212(a)(10)(E) Former USC who renounces to avoid taxation		NIV: 212(d)(3)(A) IV: NO WAIVER
212(f) Present can use executive proclamation to suspend the admission of persons into US		

NOTE: INA § 212(c) may be available to LPRs who pled guilty to criminal offense prior to April 1, 1997, if the LPR would have been eligible for § 212(c) at the time of the plea. Consequently, key dates for determining eligibility for §212(c) are when various laws went into effect amending § 212(c), i.e. November 29, 1990 (IMMACT '90), April 24, 1996 (AEDPA) and April 1, 1997 (IIRIRA).

A.4 Common Immigration Forms

Form	Name
AR-11	Alien's Change of Address Card
EOIR-26	Notice of Appeal from a Decision of an Immigration Judge
EOIR-28	Notice of Entry of Appearance as Attorney of Representative Before the Immigration Court
EOIR-40	Application for Suspension of Deportation
EOIR-42A	Application for Cancellation of Removal for Certain Permanent Residents
EOIR-42B	Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents
G-28	Notice of Entry of Appearance as Attorney or Accredited Representative (DHS)
G-325A	Biographic Information (for Deferred Action)
G-639	Freedom of Information/Privacy Act Request (DHS)
G-1145	e-Notification of Application/Petition Acceptance (DHS)
I-9	Employment Eligibility Verification
I-90	Application to Replace Permanent Resident Card (Green Card)
I-129	Petition for a Nonimmigrant Worker
I-130	Petition for Alien Relative
I-134	Affidavit of Support
I-140	Immigrant Petition for Alien Workers
I-212	Application for Permission to Reapply for Admission into the United States After Deportation or Removal
I-221	Order to Show Cause and Notice of Hearing
I-485	Application to Register Permanent Residence or Adjust Status
I-539	Application To Extend/Change Nonimmigrant Status
I-589	Application for Asylum and for Withholding of Removal
I-601	Application for Waiver of Grounds of Inadmissibility
I-601A	Application for Provisional Unlawful Presence Waiver
I-751	Petition to Remove Conditions on Residence
I-765	Application for Employment Authorization
I-797	Notice of Action
I-821	Application for Temporary Protected Status
I-821D	Consideration of Deferred Action for Childhood Arrivals
I-862	Notice to Appear
I-864	Affidavit of Support Under section 213A of the INA
I-907	Request for Premium Processing Service
I-912	Request for Fee Waiver
I-914	Application for T Nonimmigrant Status
I-918	Petition for U Nonimmigrant Status
N-400	Application for Naturalization
N-600	Application for Certificate of Citizenship

A.5 Immigration and Nationality Act to United States Code Conversion Table

INA	U.S.C.	Title
Title I: General Provisions		
INA § 101	8 U.S.C. § 1101	Definitions
INA § 102	8 U.S.C. § 1102	Diplomatic and semidiplomatic immunities
INA § 103	8 U.S.C. § 1103	Powers and duties of the Secretary, the Under Secretary, and the Attorney General
INA § 104	8 U.S.C. § 1104	Powers and duties of Secretary of State
INA § 105	8 U.S.C. § 1105	Liaison with internal security officers; data exchange
INA § 106	8 U.S.C. § 1105a	Employment authorization for battered spouses of certain nonimmigrants
Title II: Immigration		
INA § 201	8 U.S.C. § 1151	Worldwide level of immigration
INA § 202	8 U.S.C. § 1152	Numerical limitations on individual foreign states
INA § 203	8 U.S.C. § 1153	Allocation of immigrant visas
INA § 204	8 U.S.C. § 1154	Procedure for granting immigrant status
INA § 205	8 U.S.C. § 1155	Revocation of approval of petitions; effective date
INA § 206	8 U.S.C. § 1156	Unused immigrant visas
INA § 207	8 U.S.C. § 1157	Annual admission of refugees and admission of emergency situation refugees
INA § 208	8 U.S.C. § 1158	Asylum
INA § 209	8 U.S.C. § 1159	Adjustment of status of refugees
INA § 210	8 U.S.C. § 1160	Special agricultural workers
INA § 211	8 U.S.C. § 1181	Admission of immigrants into the United States
INA § 212	8 U.S.C. § 1182	Inadmissible aliens
INA § 213	8 U.S.C. § 1183	Admission of aliens on giving bond or undertaking; return upon permanent departure
INA § 213A	8 U.S.C. § 1183a	Requirements for sponsor's affidavit of support
INA § 214	8 U.S.C. § 1184	Admission of nonimmigrants
INA § 215	8 U.S.C. § 1185	Travel control of citizens and aliens
INA § 216	8 U.S.C. § 1186a	Conditional permanent resident status for certain alien spouses and sons and daughters
INA § 216A	8 U.S.C. § 1186b	Conditional permanent resident status for certain alien entrepreneurs, spouses, and children
INA § 217	8 U.S.C. § 1187	Visa waiver program for certain visitors
INA § 218	8 U.S.C. § 1188	Admission of temporary H-2A workers
INA § 219	8 U.S.C. § 1189	Designation of foreign terrorist organizations
INA § 221	8 U.S.C. § 1201	Issuance of visas
INA § 222	8 U.S.C. § 1202	Application for visas
INA § 223	8 U.S.C. § 1203	Reentry permit
INA § 224	8 U.S.C. § 1204	Immediate relative and special immigrant visas
INA § 231	8 U.S.C. § 1221	Lists of alien and citizen passengers arriving and departing

INA § 232	8 U.S.C. § 1222	Detention of aliens for physical and mental examination
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INA § 235A	8 U.S.C. § 1225a	Preinspection at foreign airports
INA § 236	8 U.S.C. § 1226	Apprehension and detention of aliens
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INA § 250	8 U.S.C. § 1260	Removal of aliens falling into distress
INA § 251	8 U.S.C. § 1281	Alien crewmen
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INA § 274C	8 U.S.C. § 1324c	Penalties for document fraud
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Further Editing Notes

Idiosyncratic unmarked edits were made as follows:

Section 5.2: In the *Padilla* opinion, the Court's erroneous "if she chooses to discusses these matters" has been substituted with "if she chooses to discuss these matters" without notation.

Section 7.5: In the *Texas* opinion, "S. B. 4" has been changed to "S.B.4" throughout. Similarly, "S. B. 1070" has been changed to "S.B.1070" throughout. Quotation marks were added when eliminating block quotes. The citation for United States v. Texas, 599 U.S. 670 (2023), included in the original opinion as a footnote, was added without editing marks. The citation for De Canas v. Bica, 424 U.S. 351 (1976), included in the original opinion as a footnote, was added without editing marks.

Section 9.3: In *Kidd v. Mayorkas*, Quotation marks were added when eliminating block quotes.