IMMIGRATION LAW
AN OPEN CASEBOOK

KIT JOHNSON

VERSION 2.0

Immigration Law: An Open Casebook

Author Edition

Version 2.0

Kit Johnson

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First printing.

For Joe and Zane, and the many immigrants who led them to their lives in the United States

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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*.

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Kit Johnson is 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

Please let me know if you adopt this casebook! Because it's free and open-licensed, I will not know who uses it unless you contact me directly. (And you will make my day!) You can reach me at kit.johnson@ou.edu or kitjohnson.net.

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

I teach immigration law as a three-credit podium course. In that class, I cover all of the chapters in sequence, with the exception of sections 6.9, 6.16, 8.7-8.8, 8.13-8.16, 9.6, and chapters 12-16. For my three-credit crimmigration course, I assign 1.1, 1.3-1.4, 6.7-6.12, 6.16, 7.7-7.8, 8.5-8.17, 9.1-9.3, 9.4-9.8, and chapters 12-16.

I am proud to offer this book to students and adopters for free. Not only is the material free, but you are welcome and encouraged to remix and reuse any portions of the book as you see fit under the terms of the Creative Commons license. (See Notices, *supra.*)

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 immigration 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.

Acknowledgments

I take this moment to acknowledge the invaluable assistance of my husband, Eric E. Johnson, who has provided help at every stage of this project. I also thank my wonderful proofreaders: Leslee Roybal, Janice Marcin, and Parker Lawter.

Chapter One: Introduction

This chapter provides introductory material that will help situate the rest of your studies regarding immigration law.

We begin with a brief history of U.S. immigration law (section 1.1). While section 1.1 introduces *how* the United States has approached immigration law, section 1.2 considers *why* the United States has passed its immigration laws. Next, you'll find a nuts-and-bolts introduction to the sources of immigration law (section 1.3). After that is an introduction to the federal agencies relevant to immigration law (section 1.4). Finally, this chapter offers an introduction to key immigration terms (section 1.5) that are worth reviewing at the outset of studying immigration law. Indeed, the field of immigration law is filled with specialized legal terms and acronyms. As you read this book, you can make reference to Appendix A.1, which is a comprehensive glossary, and Appendix A.2, which is a list of common acronyms.

1.1 A Brief History of U.S. Immigration Law

As you read the following material, you might make note of the different techniques the United States has utilized to manage immigration: Are they quantitative? Qualitative? Something else entirely?

Lozano v. City of Hazelton
496 F. Supp. 2d 477 (M.D. Pa. 2007) (Appendix)

The history of federal regulation of immigration is one of a transformation from a largely open system to one where federal rules govern nearly every aspect of the

immigrant experience, from the conditions under which new residents may enter to the terms under which they may labor.

Prior to the end of the nineteenth century, immigration restriction was minimal: the government "counted the number of immigrants for statistical purposes, and it decreed certain minimum living conditions aboard ship." [B]asic restrictions [were] first instituted by the federal government in 1875, when Congress excluded from entry "persons convicted of 'crimes involving moral turpitude' and prostitutes." In 1882, Congress denied entry to "convicts, lunatics, idiots, and persons likely to become a public charge."

Though these federal laws restricted who could enter the United States, they did not place any numerical quotas or absolute restrictions on any class of persons. Reflecting a society dominated by the proposition that racial identity determined one's capacity to participate in society, however, late nineteenth-century immigration law enacted much more robust restrictions on immigration from countries identified by contemporary ideology as populated by "inferior" races. Congress often aimed such legislation at Asians. Examples include: the 1882 Chinese Exclusion Act; the "Gentlemen's Agreement of 1907," which prevented the immigration of Japanese men; and the 1924 Immigration Act's exclusion of "aliens ineligible for citizenship," which included "peoples of all the nations of East and South Asia." Years of agitation led to new restrictions on who could enter the United States in the years during and after the First World War. In 1917, Congress restricted immigration by political radicals and imposed a literacy test on those seeking entry.

The 1921 Immigration Act tightened restrictions on immigration, establishing "the first sharp and absolute numerical restrictions on European immigration" in United States history and implementing "a nationality quota system based on the pre-existing composition of the American population." These attempts at restricting immigration culminated in the Immigration Act of 1924, which capped yearly entries into the United States at 150,000, with quotas assigned to each country based on two percent of the foreign-born individuals of each nationality in the United States in 1890. The Act also excluded "aliens ineligible for citizenship" from entry, adding Japanese people to the list of those who were excluded from immigrating altogether. The Act did not, however, restrict immigration from Mexico or other countries in the Western Hemisphere, though it did establish regulations for entry.

Historian Mae Ngai has noted that passage of the 1924 act meant "that numerical restriction created a new class of persons within the national body—illegal aliens—whose inclusion in the nation was at once a social reality and a legal impossibility." Much of federal immigration law in subsequent decades would be aimed at identifying

and controlling these illegal residents, provisions not previously present in American law.˜

Before the changes brought by the immigration regulation of the 1910s and 1920s, [changes consistent with the effort to identify and control,] the process of entering the United States as an immigrant was fairly simple, if invasive: an immigrant need only present herself at the border for inspection. ↳Historian Mae Ngai˜ describes this process as it occurred for Mexicans seeking to enter the United States in a later period: "inspection at the Mexican border involved a degrading procedure of bathing, delousing, medical-line inspection, and interrogation. The baths were new and unique to Mexican immigrants, requiring them to be inspected while naked, have their hair shorn, and have their clothing and baggage fumigated. Line inspection, modeled after the practice formerly used at Ellis Island, required immigrants to walk in single file past a medical officer."˜↵ Once immigrants cleared this initial hurdle (represented to many by Ellis Island), they were free to enter the country, and did not need to carry any documents or do anything to prove particular status.˜ The passage of quotas and other restrictions on immigration, however, meant that the status of many aliens in the United States had become far from clear.˜ Much of the subsequent history of American immigration law is the history of an attempt to determine the status of aliens living in the United States.˜ Only in 1929 did the United States first provide penalties for unlawful entry, making the first such entry a misdemeanor punishable by up to a year in jail or a $1,000 fine and the second offense a felony, punishable by two years imprisonment or a $2,000 fine.˜

[After the 1920s,] Congress made occasional changes to this immigration system over the next forty years,˜ but the use of quotas and the principal of national exclusion remained central to the federal scheme. The most fundamental change in federal regulation of immigration came with the passage of the Immigration Act of 1965. This act abolished the national-origins quotas established in the 1924 act and allowed an annual admission of 170,000 Immigrants from the Eastern Hemisphere and 120,000 from the Western.˜ The restrictions on immigration for the Western Hemisphere represented a radical change in restrictions on immigration from that part of the world.˜ The law still provided for national quotas, but distributed them equally, not on the basis of previous immigration in particular years.˜ The law also exempted from the quota spouses, minor children and parents of United States citizens.˜ Immigrants would be admitted according to certain preference categories for adult family members, professionals, workers for unfilled positions and refugees.˜ These changes led to an even more active role for the federal government in investigating and determining the status of immigrants, since "strict positive certification was required to ensure that they would

not compete with Americans."˜ Still, the 1965 Act represented a major change in the focus of immigration policy from a race-based policy to one that: "clearly institutionalized family reunion as the leading principle governing general immigration."˜

Congress extended its reach over the lives of aliens in the United States with the 1986 Immigration Reform and Control Act ("IRCA" [pronounced "irk-uh"]). The Act established sanctions for employers who hired illegal aliens, providing a civil penalty of $250 to $2,000 for each worker hired and criminal penalties for a "pattern and practice" of illegal hiring, including a fine of up to $3,000 and six month prison sentences.˜ Such employers also had to verify the immigration status of all job applicants.˜ The Act also provided a means for illegal aliens to obtain amnesty by "apply[ing] for legal status within an eighteenth-month period starting six months after the bill became law."˜

During the 1990s Congress implemented procedures to limit the rights of aliens to court review of administrative determinations of their status. The Anti-terrorism and Effective Death Penalty Act ("AEDPA" [pronounced "uh-dep-uh"]) of 1996 "eliminated judicial review of deportation and exclusion orders for noncitizens convicted of 'aggravated felonies.'"˜ The act also removed a long-established waiver of deportability for long-term lawful United States residents.˜ That same year, Congress placed new restrictions on immigration and review of agency removal decisions in the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRAIRA") [(pronounced "eye-ruh-eye-ruh")].˜ That legislation increased resources for enforcement of the immigration laws, made more aliens eligible for deportation or exclusion, limited agency discretion to change immigrants' status and increased the penalties for violating immigration laws.˜ That act also limited review of deportation orders in certain circumstances, particularly those who had been convicted of certain crimes or based their petition on certain "disfavored claims."˜

The history of federal regulation of immigration, then, is one of the creation of an intricate and complex bureaucracy that restricted who could immigrate to the United States and under what terms. Those immigration regulations have also come to define the conditions under which aliens can find employment in the country. The creation of this complex federal bureaucracy not only altered the role of the federal government in relation to immigration; it also transformed the status of immigrants in American society. A foreign-born person in the United States in 1870 had a presumptively legal status; no careful legal inquiry was required to determine whether that person had a right to reside in the country. By 1990, however, determining whether a foreign-born person enjoyed a legal right to remain in the United States demanded a detailed legal

examination that involved numerous federal statutes, several adjudicatory bodies, and a number of appeals and exceptions. More than one hundred years of federal regulation have made the federal supremacy over immigration an intricate affair.

—-—

1.2 Theories of Immigration Law

The following excerpt from a law review article presents one way to categorize arguments in favor of various aspects of immigration law.

Kit Johnson, Theories of Immigration Law,
6 ARIZ. ST. L.J. 1211 (2014)

Former U.S. Secretary of State Madeline Albright immigrated to the United States from Czechoslovakia in 1948 and became a U.S. citizen eleven years later. In a 2008 interview with Time magazine, Albright described herself as a "beneficiary of the American people's generosity."˜

Albright's statement highlights a significant question: Why is it that any given law singles out certain individuals to be the beneficiaries of American immigration policy—or to deny them admission altogether?˜

Immigration law is fundamentally about membership in a political state.˜ It attempts to identify and circumscribe the present and future populations of our country.˜ For one thing, many more people would like to live in the United States than the country as a whole is comfortable allowing. A 2012 Gallup poll found that some 150 million adults worldwide would like to move to the United States.˜ If every one of those individuals were allowed into the United States, our population would increase by fifty percent.˜ In the absence of a desire for such a radical population shift, who gets to join our membership roster and why?˜

[Put another way, how have U.S. legislators, activists, pundits, lobbyists, and other legal reform influencers justified their choices to grant or deny membership to certain prospective migrants?]˜ It is through canvassing all possible responses to this question that four theories of immigration law emerge: (1) individual rights, (2) domestic interest, (3) national values, and (4) global welfare. In brief, the four theories can be understood as follows:

- The individual rights theory of immigration law focuses on the rights of the prospective migrant and that migrant's right of entry into the United States.

- The domestic interest theory of immigration law examines whether and to what degree allowing migrants into the United States will benefit the country as a whole.
- The national values theory of immigration law considers whether the admission of migrants promotes the fundamental values of the country as a whole.˜
- The global welfare theory of immigration law considers the welfare of humanity as a whole, and thus views the United States as one member of an interconnected global community, such that immigration decisions at the U.S. level affect the political, social, and economic makeup of the global community.˜

—-—

1.3 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 1980 Refugee Act, the 1986 Immigration Reform and Control Act (IRCA), the 1990 Immigration Act, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 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.

In addition to the INA itself, implementing regulations promulgated by immigration agencies are important sources of immigration law. *See* 8 C.F.R. §§ 1-392 (Department of Homeland Security); 8 C.F.R. §§ 1000-1337 (Executive Office of Immigration Review); 20 C.F.R. §§ 655-656 (Department of Labor); 22 C.F.R. §§ 40-62 (Department of State).

The most significant judicial interpretations of the INA and its implementing regulations come from the Board of Immigration Appeals (BIA), as well as appeals from BIA decisions brought to the U.S. Courts of Appeals and the U.S. Supreme Court.

1.4 Federal Agencies Responsible for Immigration Law

EOUSA, OLE, Immigration Law (2005)

Since the enactment of federal immigration legislation, the administration and enforcement of our immigration laws has resided within various departments.~

THE DEPARTMENT OF JUSTICE (DOJ)

In 1940, when the enforcement of immigration laws became a priority, immigration functions were transferred to the Department of Justice. The INA of 1952, 8 U.S.C. §§ 1101-1537, delegated broad authority to the Attorney General to administer immigration laws. Most of that authority was re-delegated to the [Immigration and Naturalization Service (INS), an agency that existed within the DOJ from 1940 to 2003]. However, the Attorney General reserved the ultimate authority to decide questions of law by creating the Board of Immigration Appeals (BIA) and delegating to it the authority to hear administrative appeals and to issue binding opinions.~

The Board of Immigration Appeals (BIA) is composed of~ [23 Appellate Immigration Judges.] The BIA does not conduct courtroom proceedings—it decides appeals by conducting a "paper review" of cases. The BIA has nationwide jurisdiction to hear appeals from certain decisions rendered by [Immigration Judges (IJs)] and [the Department of Homeland Security (DHS)] in a wide variety of proceedings in which one party is the Government of the United States and the other party is either an alien, a citizen, or a business firm. The BIA's precedent decisions are binding on all immigration officers within DHS and IJs unless modified or overruled by the Attorney General or a federal court. BIA decisions designated for publication are printed in bound volumes entitled Administrative Decisions Under Immigration and Nationality Laws of the United States.~

The Executive Office for Immigration Review (EOIR) is a quasi-judicial agency within the Department [of Justice]. It was created on January 9, 1983, through an internal Department reorganization which brought together the Board of Immigration Appeals (BIA) with the Immigration Judge (IJ) function previously performed by INS. The reorganization also separated the Immigration Courts from the INS. EOIR is headed by a Director who reports directly to the Deputy Attorney General.~

The Office of the Chief Immigration Judge (OCIJ) is located at EOIR's headquarters. It provides overall program direction, articulates policies and procedures, and establishes priorities for more than [600] IJs located in [68] immigration courts throughout the nation. IJs conduct removal proceedings and have the authority to

decide various forms of relief. Their decisions are administratively final unless appealed or certified to the BIA.˜

The Office of Immigration Litigation (OIL) [another agency within the DOJ, located in the Civil Division] was established in 1983. It has nationwide jurisdiction over all civil immigration litigation matters and is responsible for the nationwide coordination of civil immigration litigation. OIL has both affirmative and defensive litigation responsibilities. OIL attorneys litigate in both federal district courts and circuit courts of appeals throughout the United States.

[Finally, Assistant United States Attorneys (AUSAs), within the DOJ's Criminal Division, prosecute violations of immigration-related crimes across the country.]

THE DEPARTMENT OF HOMELAND SECURITY (DHS)

The events of September 11, 2001 precipitated the enactment of the [Homeland Security Act of 2002] HSA, which abolished the INS as an agency and transferred its functions to the newly created DHS.˜ The service and citizenship functions [of INS] were transferred to a newly created entity, now known as U.S. Citizenship and Immigration Services (USCIS).˜ The immigration enforcement functions˜ [of INS] were˜ split between˜ U.S. Customs and Border Protection (CBP) and˜ Immigration and Customs Enforcement (ICE).˜

U.S. Citizenship and Immigration Services (USCIS) [often referred to as "CIS" by immigration counsel]˜ is the "immigration service" agency within DHS. It is responsible for the administration of immigration and naturalization adjudication functions and establishing immigration services policies and priorities. USCIS adjudicates, among other things, immigrant visa petitions, nonimmigrant benefits, naturalization petitions, and asylum and refugee applications.˜

U.S. Customs and Border Protection (CBP)˜ exercises immigration enforcement authority.˜ CBP immigration authority lies principally in enforcing the immigration laws at sea ports and land ports-of-entry.˜ CBP Officers˜ guard our nations borders, not only to enforce immigration laws, but also trade and customs laws, and drug laws. They also perform other enforcement functions that prior to the HSA were conducted by multiple agencies.

The U.S. Border Patrol [(USBP)] is the mobile, uniformed law enforcement arm of DHS.˜ The Border Patrol has twenty˜ sectors responsible for detecting, interdicting, and apprehending those who attempt to enter illegally or smuggle people, including terrorists, or contraband, including weapons of mass destruction across U.S. borders between official ports of entry.˜

U.S. Immigration and Customs Enforcement (ICE)˜ is responsible for apprehending, detaining and deporting aliens who have managed to enter the country illegally.˜ ICE special agents also work closely with the U.S. Attorneys' offices (USAOs) in the investigation and prosecution of immigration-related crimes, such as reentry after deportation, document fraud and alien smuggling.

THE DEPARTMENT OF STATE (DOS)

The United States Department of State˜ [sometimes referred to as the DOS or, more frequently, the State Department,] is responsible for the issuance of passports to United States citizens and travel documents to authorized aliens. Its overseas consular offices process visa applications by persons seeking to visit, work in or immigrate to the United States. The DOS also may serve as the investigating law enforcement authority for visa and passport fraud.˜

THE DEPARTMENT OF LABOR (DOL)

The United States Department of Labor (DOL) is generally charged with determining whether American workers are available to perform specific employment and if not, whether the employment of foreign workers will adversely affect the wages and working conditions of American workers similarly employed. 20 C.F.R. § 655. This determination, known as the labor certification process, permits adversely affected petitioning employers to file administrative appeals to the Board of Alien Labor Certification Appeals (BALCA). 20 C.F.R. § 656.26. Final decisions from the BALCA are subject to judicial review.

[THE DEPARTMENT OF HEALTH AND HUMAN SERVICES (DHHS)

Within the U.S. Department of Health and Human Services (DHHS) lies the Office of Refugee Resettlement (ORR). The ORR is tasked with helping "new populations maximize their potential in the United States by linking them to critical resources that assist them in becoming integrated members of American society." In addition, ORR is responsible for unaccompanied minors who come to the United States, also known as unaccompanied alien children (UACs).]

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1.5 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. (For the sources of language used in this section, see Appendix A.1.).

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—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*.

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. As will be discussed in Chapters 3 and 4, the United States issues immigrant visas (IV) to lawful permanent residents and nonimmigrant visas (NIV) to temporary visitors.

Chapter Two: The Plenary Power Doctrine

The plenary power doctrine is a cornerstone of immigration law. It stands for the proposition that Congress enjoys broad authority to create immigration laws and that those laws will not be second-guessed by the federal judiciary.

The Supreme Court first established the plenary power doctrine in Chae Chan Ping v. United States, 130 U.S. 581 (1889), often called "The Chinese Exclusion Case." As you read this decision in section 2.1, note that the phrase "plenary power doctrine" does not actually appear in the decision. Nevertheless, the decision lays out the case for Congress' ability to create immigration laws as well as for judicial deference to Congress' immigration choices.

There is substantial debate about the continuing strength of the plenary power doctrine. The readings in section 2.2 introduce that debate.

2.1 Case: Chae Chan Ping v. United States

Chae Chan Ping v. United States
130 U.S. 581 (1889)

MR. JUSTICE FIELD DELIVERED THE OPINION FOR A UNANIMOUS COURT

This case comes before us on appeal from an order of the circuit court of the United States for the Northern district of California, refusing to release the appellant, on a writ of habeas corpus, from his alleged unlawful detention˜. The appellant is a subject of the

emperor of China, and a laborer by occupation. He resided at San Francisco, Cal. following his occupation, from some time in 1875 until June 2, 1887, when he left for China on the steam-ship Gaelic, having in his possession a certificate in terms entitling him to return to the United States˜. On the 7th of September, 1888, the appellant, on his return to California, sailed from Hong Kong in the steam-ship Belgic, which arrived within the port of San Francisco on the 8th of October following. On his arrival he presented to the proper custom-house officers his certificate, and demanded permission to land. The collector of the port refused the permit, solely on the ground that under the act of congress approved October 1, 1888,˜ the certificate had been annulled, and his right to land abrogated, and he had been thereby forbidden again to enter the United States. The captain of the steam-ship, therefore, detained the appellant on board the steamer. Thereupon a petition on his behalf was presented to the circuit court of the United States for the Northern district of California, alleging that he was unlawfully restrained of his liberty, and praying that a writ of habeas corpus might be issued˜. [T]he court˜ held˜ that the appellant was not entitled to enter the United States˜. From this order an appeal was taken to this court.

The appeal involves a consideration of the validity of the act of congress of October 1, 1888, prohibiting Chinese laborers from entering the United States who had departed before its passage, having a certificate issued under the act of 1882˜ granting them permission to return. The validity of the act is assailed as being in effect an expulsion from the country of Chinese laborers, in violation of existing treaties between the United States and the government of China, and of rights vested in them under the laws of congress.˜

It will serve to present with greater clearness the nature and force of the objections to the act if a brief statement be made of the general character of the treaties between the two countries, and of the legislation of congress to carry them into execution.˜

[In 1868, the United States and China executed the Burlingame-Seward Treaty, which included the following provisions]:˜ 'Art. 5. The United States of America and the emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other for purposes of curiosity, of trade, or as permanent residents.˜ Art. 6.˜ Chinese subjects visiting or residing in the United [States] shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation.˜'

Whatever modifications have since been made to these general provisions have been caused by a well-founded apprehension—from the experience of years—that a

limitation to the immigration of certain classes from China was essential to the peace of the community on the Pacific coast, and possibly to the preservation of our civilization there. A few words on this point may not be deemed inappropriate here, they being confined to matters of public notoriety, which have frequently been brought to the attention of congress.˜

The discovery of gold in California in 1848, as is well known, was followed by a large immigration thither from all parts of the world, attracted not only by the hope of gain from the mines, but from the great prices paid for all kinds of labor. The news of the discovery penetrated China, and laborers came from there in great numbers, a few with their own means, but by far the greater number under contract with employers, for whose benefit they worked. These laborers readily secured employment, and, as domestic servants, and in various kinds of outdoor work, proved to be exceedingly useful. For some years little opposition was made to them, except when they sought to work in the mines, but, as their numbers increased, they began to engage in various mechanical pursuits and trades, and thus came in competition with our artisans and mechanics, as well as our laborers in the field. The competition steadily increased as the laborers came in crowds˜. They were generally industrious and frugal. Not being accompanied by families, except in rare instances, their expenses were small; and they were content with the simplest fare, such as would not suffice for our laborers and artisans. The competition between them and our people was for this reason altogether in their favor, and the consequent irritation, proportionately deep and bitter, was followed, in many cases, by open conflicts, to the great disturbance of the public peace. The differences of race added greatly to the difficulties of the situation.˜ [T]hey remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people, or to make any change in their habits or modes of living. As they grew in numbers each year the people of the coast saw, or believed they saw, in the facility of immigration, and in the crowded millions of China, where population presses upon the means of subsistence, great danger that at no distant day that portion of our country would be overrun by them, unless prompt action was taken to restrict their immigration. The people there accordingly petitioned earnestly for protective legislation.

On the 6th of May, 1882, an act of congress was approved˜ entitled 'An act to execute certain treaty stipulations relating to Chinese.' It˜ declares that after 90 days from the passage of the act, and for the period of 10 years from its date, the coming of Chinese laborers to the United States is suspended, and that it shall be unlawful for any such laborer to come, or, having come, to remain within the United States. [It] provides

that˜ [the Act] shall not apply to Chinese laborers who were in the United States November 17, 1880, or who shall come within 90 days after the passage of the act.˜ [S]uch Chinese laborer shall˜ be entitled to receive˜ a certificate˜ to identify him˜ [that] 'shall entitle the Chinese laborer to whom the same is issued to return to and reenter the United States upon producing and delivering the same to the collector of customs of the district at which such Chinese laborer shall seek to re-enter.'

[T]he act of October 1, 1888, the validity of which is the subject of consideration in this case,˜ is entitled 'An act a supplement [the Chinese Exclusion Act of 1882].˜ It is as follows: '˜from and after the passage of this act it shall be unlawful for an[y] Chinese laborer who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed, or shall depart, therefrom, and shall not have returned before the passage of this act, to return to or remain [in] the United States.˜ [E]very certificate heretofore issued in pursuance thereof is hereby declared void and of no effect, and the Chinese laborer claiming admission by virtue thereof shall not be permitted to enter the United States.˜'

It must be conceded that the act of 1888 is in contravention of express stipulations of the treaty of 1868˜ but it is not on that account invalid, or to be restricted in its enforcement. The treaties were of no greater legal obligation than the act of congress.˜ In either case the last expression of the sovereign will must control.˜

This court is not a censor of the morals of other departments of the government; it is not invested with any authority to pass judgment upon the motives of their conduct. When once it is established that congress possesses the power to pass an act, our province ends with its construction and its application to cases as they are presented for determination.˜

There being nothing in the treaties between China and the United States to impair the validity of the act of congress of October 1, 1888, was it on any other ground beyond the competency of congress to pass it? If so, it must be because it was not within the power of congress to prohibit Chinese laborers who had at the time departed from the United States, or should subsequently depart, from returning to the United States. Those laborers are not citizens of the United States; they are aliens. That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power. As said by this court in the case of [The Schooner Exchange v. McFaddon & Others],˜ 'The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not

imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.'

While under our constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the states, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations.˜

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determinations, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers. If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases its determination is conclusive upon the judiciary. If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action, it can make complaint to the executive head of our government, or resort to any other measure which, in its judgment, its interests or dignity may demand; and there lies its only remedy.

The power of the government to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments.˜

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract. Whatever license, therefore, Chinese laborers may have obtained, previous to the act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time, at its pleasure. Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition, and made it applicable only to persons departing from the country after the passage of the act, are not questions for judicial determination. If there be any just ground of complaint on the part of China, it must be made to the political department of our government, which is alone competent to act upon the subject.˜

Order affirmed.

2.2 Development of the Plenary Power Doctrine

Kit Johnson, Chae Chan Ping at 125: An Introduction, 68 Okla. L. Rev. 3 (2015)

As for what happened to Chae Chan Ping after his final deportation and return to China, nothing is known. As for what to make of his Supreme Court case, the debate continues. [A symposium volume on the occasion of the 125th anniversary of the case] contains an array of contributions to thinking about the plenary power doctrine and the legacy of Chae Chan Ping on American immigration law.˜

Professor David A. Martin [in his contribution, Why Immigration's Plenary Power Doctrine Endures, 68 Okla. L. Rev. 29 (2015),] argues that the importance of Chae Chan Ping lies in its reasons for deferring to the political branch on immigration issues.˜ He emphasizes the Court's conclusion that the federal government's power to exercise immigration control was necessary for the nation to speak "with one voice on the world stage"˜ in "realms touching upon foreign relations and potential national self-

preservation."˜ This was, Martin notes, a federalism issue. For, if the federal government did not control immigration, foreign affairs would be in the hands of what were then thirty-eight different states. Thus, the lesson of Chae Chan Ping, Martin argues, is about the nation speaking as one given that immigration laws "might need to be in the mix to respond to, or to help shape, actions that others are taking abroad."˜ Martin also points out that this deference does not give the political branches a blank check for immigration law. For one, he notes that courts frequently employ sub-constitutional means - such as statutory interpretation - in ways that "adhere more closely to constitutional values" than lawmakers may have even intended.˜ And even more importantly, political bodies are responsive to political pressures. In the end, Martin concludes that Chae Chan Ping is a "call to roll up our sleeves and get to work in the political arena rather than the courts."˜

Professor Kevin R. Johnson [in his contribution, Immigration in the Supreme Court 2009-2013: A New Era of Immigration Unexceptionalism, 68 Okla. L. Rev. 57 (2015),] takes a different tack.˜ [H]e examines [plenary power's] doctrinal durability in the modern Supreme Court.˜ He closely examines each of the Court's most recent immigration decisions - including important denials of certiorari - from the 2009 through the 2013 terms. Johnson concludes that the plenary power doctrine espoused in Chae Chan Ping is "heading toward its ultimate demise."˜ He sees the Court moving away from a reliance on "immigration exceptionalism," which is the idea that because of Chae Chan Ping immigration cases are just different.˜ Instead, he finds that the Court has handled numerous immigration cases in "ordinary, standard, and unremarkable" ways. For instance, the contemporary Court has often resolved immigration cases through statutory interpretation˜ and administrative deference, instead of relying on the constitutional approach of Chae Chan Ping. The result, Johnson notes, has been a trend to bring "immigration law more in line with conventional norms of judicial review."˜ Johnson's comprehensive review of the period points to a new era of immigration unexceptionalism.

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Castro v. DHS
835 F.3d 422 (3d Cir. 2016)

The Supreme Court has "long recognized [that] the power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." Fiallo v. Bell, 430 U.S. 787, 792˜ (1977)˜. "[T]he Court's general reaffirmations of this principle have been legion." Kleindienst v. Mandel, 408 U.S. 753, 765–766 & n.6˜ (1972) (collecting cases).˜

The case that first recognized the political branches' plenary authority to exclude aliens, Chae Chan Ping v. United States˜, involved a Chinese lawful permanent resident who, prior to departing the United States for a trip abroad, had obtained a certificate entitling him to reenter the country upon his return.˜ While he was away, however, Congress passed an amendment to the Chinese Exclusion Act that rendered such certificates null and void.˜ Thus, after immigration authorities refused him entrance upon his return, the alien brought a habeas petition to challenge the lawfulness of his exclusion, arguing that the amendment nullifying his reentry certificate was invalid.˜ The Court upheld the validity of the amendment, reasoning that "[t]he power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution," and therefore that "the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one." Id.˜ (concluding that questions regarding the political soundness of the amendment "are not questions for judicial determination").

In subsequent decisions from the same period, the Court upheld and even extended its reasoning in Chae Chan Ping. For instance, in Nishimura Ekiu v. United States, 142 U.S. 651˜ (1892), another exclusion (as opposed to deportation) case, a Japanese immigrant was denied entry to the United States because immigration authorities determined that she was "likely to become a public charge."˜ The Court concluded that the statute authorizing exclusion on such grounds was valid under the sovereign authority of Congress and the Executive to control immigration. Id. at 659˜ (stating that the power over admission and exclusion "belongs to the political department[s] of the government"). In a statement that perfectly encapsulates the meaning of the plenary power doctrine, the Court declared: ["]It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law.["]˜

The following year, in Fong Yue Ting v. United States, 149 U.S. 698˜ (1893), the Court extended the plenary power doctrine to deportation cases as well. Fong Yue Ting involved several Chinese immigrants who were ordered deported pursuant to the Chinese Exclusion Act because they lacked certificates of residence and could not show by the testimony of "at least one credible white witness" that they were lawful residents.˜

The aliens sought to challenge their deportation orders, claiming, inter alia, that the Exclusion Act violated the equal protection clause of the Fourteenth Amendment.˜ As it had done in Chae Chan Ping and Nishimura Ekiu, the Court declined to intervene or review the validity of the immigration legislation: [“]The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy, or the justice of the measures enacted by congress in the exercise of the powers confided to it by the constitution over this subject.[”] Id. at 731˜; see also id. at 707˜ (“The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.”).

Thus, the Court’s earliest plenary power decisions established a rule leaving essentially no room for judicial intervention in immigration matters, a rule that applied equally in exclusion as well as deportation cases.

Yet not long after these initial decisions, the Court began to walk back the plenary power doctrine in significant ways. In Yamataya v. Fisher, 189 U.S. 86˜ (1903), a Japanese immigrant was initially allowed to enter the country after presenting herself for inspection at a port of entry.˜ Nevertheless, just a few days later, an immigration officer sought her deportation because he had concluded, after some investigation, that she “was a pauper and a person likely to become a public charge.”˜ About a week later, the Secretary of the Treasury ordered her deported without notice or hearing.˜ Yamataya then filed a habeas petition in federal district court to challenge her deportation, claiming that the failure to provide her notice and a hearing violated due process.˜ The Court acknowledged its plenary power precedents, including Nishimura Ekiu and Fong Yue Ting˜, but clarified that these precedents did not recognize the authority of immigration officials to “disregard the fundamental principles that inhere in ‘due process of law’ as understood at the time of the adoption of the Constitution.”˜ According to these “fundamental principles,” the Court held, no immigration official has the power [“]arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States.[”]˜

Thus, Yamataya proved to be a “turning point” in the Court’s plenary power jurisprudence.˜ [I]t was at this point that the Court “began to see that the premise [of

the plenary power doctrine] needed to be qualified—that a power to lay down general rules, even if it were plenary, did not necessarily include a power to be arbitrary or to authorize administrative officials to be arbitrary."˜

Nevertheless, Yamataya did not mark the only "turning point" in the development of the plenary power doctrine. Nearly fifty years after Yamataya, the Court issued two opinions—United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537˜ (1950) and Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206˜ (1953)—that essentially undid the effects of Yamataya, at least for aliens "on the threshold of initial entry," as well as for those "assimilated to that status for constitutional purposes." Mezei, 345 U.S. at 212, 214˜.

In Knauff, the German wife of a United States citizen sought admission to the country pursuant to the War Brides Act.˜ She was detained immediately upon her arrival at Ellis Island, and the Attorney General eventually ordered her excluded, without a hearing, because "her admission would be prejudicial to the interests of the United States."˜ The Court upheld the Attorney General's decision largely on the basis of pre-Yamataya plenary power principles and precedents: ["][T]he decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General. The action of the executive officer under such authority is final and conclusive. Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.... Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.["]˜ Thus, with its holding in Knauff, the Court effectively "reinvigorated the judicial deference prong of the plenary power doctrine."˜

Similar to Knauff, Mezei involved an alien detained on Ellis Island who was denied entry for undisclosed national security reasons. Unlike Knauff, however, Mezei had previously lived in the United States for many years before leaving the country for a period of approximately nineteen months, "apparently to visit his dying mother in Rumania [sic]."˜ And unlike Knauff, Mezei had no choice but to remain in custody indefinitely on Ellis Island, as no other country would admit him either.˜ In these conditions, Mezei brought a habeas petition to challenge his exclusion (and attendant indefinite detention).˜ Nevertheless, the Court again upheld the Executive's decision, essentially for the same reasons articulated in Knauff. "It is true," the Court explained, "that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due

process of law." Id. at 212 (citing, inter alia, Yamataya, 189 U.S. at 100-01). In contrast, aliens "on the threshold of initial entry stan[d] on different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'"

Thus, Knauff and Mezei essentially restored the political branches' plenary power over aliens at the border seeking initial admission. And since these decisions, the Court has continued to signal its commitment to the full breadth of the plenary power doctrine, at least as to aliens at the border seeking initial admission to the country. See Fiallo, 430 U.S. at 792 ("This Court has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens. Our cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." (internal quotation marks and citations omitted)); Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.").

2.3 Test Your Knowledge

H.R. 2415 has passed the U.S. House and Senate and is just waiting for the president's signature. If signed, it will become law. The bill would amend INA § 202(a)(1)(A) to add the following clause to the end of that paragraph: "except that no immigrant visas shall be extended to citizens of Tanzania." The House and Senate have argued that H.R. 2415 is an essential tool in the global war on terror given the recent upsurge in Tanzanian jihadists joining ISIS.

If challenged as beyond Congress's constitutional authority, how might a federal court evaluate the substantive change H.R. 2415 makes to INA § 202(a)(1)(A)?

Chapter Three: Immigrants

This chapter concerns immigrants, a legal term of art referring to noncitizens who are admitted to the United States on a permanent basis. "Immigrant" is synonymous with "lawful permanent resident" (LPR) and "green card holder."

There are three main categories of immigrants: those with specific family relationships to United States citizens and lawful permanent residents (see sections 3.4-3.10), those with employment-based ties to the United States (see sections 3.11-3.17), and "diversity" immigrants who participate in an annual lottery of immigrant visas (see section 3.18). In total, 740,002 noncitizens obtained lawful permanent resident status in the United States during fiscal year 2021.

Immigrants stand in contrast to nonimmigrants, who are admitted to the United States on a temporary basis. Nonimmigrants will be discussed in Chapter 4.

3.1 The Big Picture

EOUSA, OLE, Immigration Law (2005)

The INA presumes that all aliens who seek to enter the United States are entering with the intent to remain here permanently, i.e., as immigrants. INA § 214(b), 8 U.S.C. § 1184(b). Aliens who are not immigrants must prove that they fit within a category of nonimmigrants, i.e., those who seek to enter the United States on a temporary basis. INA § 101(a)(15), 8 U.S.C. § 1101(a)(15). [See Chapter 4.]

Generally, to immigrate to the United States or to obtain a "green-card" an applicant must have either a qualifying relative, a job, or luck in the annual visa lottery. INA § 201, 8 U.S.C. § 1151, identifies which relatives and jobs qualify for this special

treatment. Immigrants to the United States are divided into two categories: those whose ability to obtain permanent residence status is without numerical limitation, and those whose ability to obtain permanent residence is subject to an annual limitation.

The category of people whose ability to immigrate is not subject to numerical limitation includes immediate relatives of United States citizens, namely spouses, widows(ers) and˜ unmarried children [who are less than twenty-one years old]. Also included are the parents of U.S. citizens who are twenty-one or older. INA § 201(b), 8 U.S.C. § 1151(b). [The United States granted LPR status to 505,765 noncitizens as immediate relatives of USCs in fiscal year 2019.]˜

Immigrants subject to limitations are restricted to a total annual allocation of 675,000 visas per year. This category is sub-divided into those who seek permanent residence based on (A) family sponsorship, (B) employment and (C) diversity. The INA sets up an elaborate plan for the allocation of family and employment based visas. INA § 201(c)(d), 8 U.S.C. § 1151(c)(d). The statute also imposes numerical limitations on the visas allotted to nationals of individual foreign states [such that no single country can receive more than 7% of the total number of family- and employment-based immigrant visas. This is called the "per-country cap."]. INA § 202, 8 U.S.C. § 1152. [In fiscal year 2021, 385,396 noncitizens were granted LPR status as "immediate relatives."]

Family-based visas (separate from immediate relative visas, which are without numerical limitation) are distributed to four preferred groups (with minimum limits in parentheses). The first preferred group (23,400) includes unmarried sons and daughters (at least twenty-one years of age) of United States citizens, and their [unmarried, under twenty-one] children. The second preferred group (114,200) includes the spouses and unmarried sons and daughters [both under and over the age of twenty-one] of legal permanent residents (LPRs). The third preferred group (23,400) includes the married sons and daughters of United States citizens and their spouses and [unmarried, under twenty-one] children. The final preferred group (65,000) includes the brothers and sisters of United States citizens (at least twenty-one years of age) and their spouses and [unmarried, under twenty-one] children. [In fiscal year 2021, 65,690 noncitizens were granted LPR status on the basis of these family relationships.]

A total minimum of 140,000 immigrant visas are made available annually to employment-based immigrants. This category is divided into five preference groups. The number of visas allocated to each of the preferred groups is shown as a percentage of the yearly limit of the visas allocated to the employment-based category. The first preference (28.6%) is for priority workers, persons of extraordinary ability in the sciences, arts, education, business or athletics, outstanding professors and researchers, and certain multinational executives and managers. The second preference (28.6%) is

for professionals holding advanced degrees, and persons of exceptional ability in the sciences, arts, and business. The third preference (28.6%) is for professionals holding baccalaureate degrees, skilled workers with at least two years experience and other workers whose skills are in short supply in the United States. The fourth preference (7.1%) is for special immigrants, certain religious workers, ministers of religion, certain international organization employees and their immediate family members and qualified, recommended current and former U.S. Government employees. The fifth preference (7.1%) is for investors, persons who create employment for at least ten unrelated persons by investing capital in a new commercial enterprise in the United States. The minimum capital required is between $[9]00,000 and $1,[8]00,000, depending on the employment rate in the geographic area. [In fiscal year 2021, 193,338 noncitizens received LPR status on the basis of employment.]

The INA also allocates a maximum of 55,000 diversity immigrant visas. INA § 201(e), 8 U.S.C. § 1151(e). The persons eligible for these visas are selected at random from countries with low rates of immigration to the United States, hence the common name of "lottery visas." The Department of State administers this program and announces the registration information each year. [In fiscal year 2021, 15,145 visas were issued to diversity lottery winners.]

Aliens who enter the United States as immigrants or who obtain lawful permanent resident status in the United States are eligible to apply for naturalization when they have met certain eligibility requirements [including, among others, holding LPR status for five years (three for spouses of U.S. citizens)]. See INA §§ 311 et seq., 8 U.S.C. § 1422. [See Chapter 12.]

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3.2 Wait Times

As discussed in section 3.1, some noncitizens are classified as "immediate relatives" and are not subject to the numerical limitations on immigrant visas: these include the spouses, parents, and the unmarried/under-21 children of U.S. citizens. INA § 201(b), 8 U.S.C. § 1151(b). These immigrants may come to the United States as soon as their visa applications are processed and approved. (Chapter 7 provides information about the mechanics of admission.)

For noncitizens who are subject to the numerical limitations on immigrant visas, a visa may not be immediately available. The visa may not be available because of the limited number of visas allotted. Remember from section 3.1 that there are, for example, only 23,400 visas available annually for the married sons and daughters of United States

citizens and their spouses and children. Alternatively, the visa may not be immediately available because of the 7% per-country cap on family- and employment-based visas.

When a visa is not immediately available, the filing date of the visa petition, also called a "priority date," marks the noncitizen's place in the immigrant visa queue. The State Department maintains information about the queues for family-based and employment-based immigrant visas. Each month, the State Department publishes visa bulletins, which provide information to noncitizens about: (1) when visas are actually available for each immigrant visa category by country of birth—the "final action dates" for visas; and (2) when visa applications can be processed by the State Department for each immigrant visa category by country of birth—"dates for filing" visa applications.

Here is the State Department bulletin listing final action dates for family-based immigrants dated June 2023:

Family-Sponsored	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILLIPINES
F1	15DEC14	15DEC14	15DEC14	01APR01	01MAR12
F2A	08SEP20	08SEP20	08SEP20	01NOV18	08SEP20
F2B	22SEP15	22SEP15	22SEP15	01JUN01	22OCT11
F3	22DEC08	08DEC08	08DEC08	01NOV97	08JUN02
F4	08APR07	08APR07	15SEP05	01AUG00	22AUG02

The first column of the above chart refers to the family-based visa categories. F1 refers to the unmarried and over-21 sons and daughters of U.S. citizens. INA 203(a)(1), 8 U.S.C. § 1153(a)(1). F2A refers to the spouses and the unmarried, under-21 children of LPRs. INA 203(a)(2)(A), 8 U.S.C. § 1153(a)(2)(A). F2B refers to the unmarried, over-21 sons or daughters of LPRs. INA 203(a)(2)(B), 8 U.S.C. § 1153(a)(2)(B). F3 refers to the married sons and daughters of U.S. citizens. INA 203(a)(3), 8 U.S.C. § 1153(a)(3). Finally, F4 refers to the brothers and sisters of U.S. citizens. INA 203(a)(4), 8 U.S.C. § 1153(a)(4). Note that there is no preference category for the parents, married children, or siblings of LPRs.

The remainder of the chart provides information about when visas are available. Dates are listed in an abbreviated format indicating the day of the month, month, and year that is being processed. That is, 15DEC14 refers to December 15, 2014.

The chart indicates that in June 2023, the spouses and children of LPRs eligible for an F2A visa had the shortest wait times; a visa application filed on their behalf would typically be processed within three years. On the other hand, the chart indicates that the State Department was, in June 2023, processing the F3 visa application filed on behalf of Mexican citizens who were the married and over-21-years-of-age sons and daughters of U.S. citizens that had been filed by their parents more than 25 years earlier in November of 1997. This lag-time indicates that a F3 application filed on behalf of a Mexican citizen in June 2023 would likely not be processed until 2048.

Here is a portion of the State Department bulletin listing final action dates for employment-based immigrants dated June 2023:

Employment based	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
1st	C	01JUN22	01JUN22	C	C
2nd	01DEC22	01JUL19	01MAY12	01DEC22	01DEC22
3rd	01MAY23	01JUN19	01AUG12	01MAY23	01MAY23
Other Workers	01FEB20	01JAN16	01AUG12	01FEB20	01FEB20
4th	01OCT18	01OCT18	01OCT18	01OCT18	01OCT18
Certain Religious Workers	01OCT18	01OCT18	01OCT18	01OCT18	01OCT18

As with the family-based bulletin, the first column on this employment-based bulletin refers to the visa category. 1st refers to priority workers. INA 203(b)(1), 8 USC § 1153(b)(1). 2nd refers to members of the professions holding advanced degrees or aliens of exceptional ability. INA 203(b)(2), 8 USC § 1153(b)(2). 3rd refers to skilled workers and professionals. INA 203(b)(3)(A)(i)-(ii), 8 USC § 1153(b)(3)(A)(i)-(ii). Other Workers refers to INA 203(b)(3)(A)(iii), 8 USC § 1153(b)(3)(A)(iii). 4th refers to certain special immigrants. INA 203(b)(4), 8 USC § 1153(b)(4). Certain Religious Workers refers to a subset of special immigrants. INA § 101(a)(27)(C), 8 U.S.C. § 1101(a)(27)(C).

In addition to dates, this chart includes the letter "C," which indicates that the category is current and there is no wait beyond administrative processing for a visa. More

employment-based immigrant categories than family-based immigrant categories are current. However, the bulletin indicates that that immigrants from India have significant wait times for several visa categories. Frequently, noncitizens in these categories work in the United States as nonimmigrants (see Chapter 4) while their immigrant visa applications are pending.

3.3 Rights and Responsibilities

USCIS, Welcome to the United States: A Guide for New Immigrants (2015)

As a permanent resident, you have the right to:

- Live permanently anywhere in the United States.
- Work in the United States.
- Own property in the United States.
- Attend public school.
- Apply for a driver's license in your state or territory.
- Join certain branches of the U.S. armed forces.
- Receive Social Security, Supplemental Security Income, and Medicare benefits, if you are eligible.
- Apply to become a U.S. citizen once you are eligible.
- Request visas for your spouse and unmarried children to live in the United States.
- Leave and return to the United States under certain conditions.

As a permanent resident, you must:

- Obey all federal, state, and local laws.
- Pay federal, state, and local income taxes.
- Register with the Selective Service (U.S. armed forces), if you are a male between the ages of 18 and 26.
- Maintain your immigration status.
- Carry proof of your permanent resident status at all times.

- Change your address online or provide it in writing to USCIS within 10 days of each time you move.

3.4 Family-Based Immigrants: An Introduction

Kit Johnson, Theories of Immigration Law,
6 ARIZ. ST. L.J. 1211 (2014)

The United States has a long-standing tradition of favoring family-based migration. As research by Kerry Abrams suggests, early considerations of family migration were grounded in the individual rights theory.˜ "In the late nineteenth and early twentieth centuries, the ability to relocate one's family was thought of as a male head of household's right. Under coverture, a man had the right to determine the domicile of his wife and children; the right to bring his wife and child with him when he immigrated was analogous. Most immigration was unrestricted, but even when Congress did restrict immigration—such as through the various Chinese exclusion acts—these acts were notably enforced in ways that still allowed a woman to enter if she was married to a man who was eligible for admission. In one case, for example, a court explained, "[A] Chinese merchant who is entitled to come into and dwell in the United States is thereby entitled to bring with him, and have with him, his wife and children. The company of the one, and the care and custody of the other, are his by natural right; and he ought not to be deprived of either."˜

While the nineteenth-century law of coverture and its concomitant focus on male heads of households is antiquated, its doctrinal descendant, family-based migration, has had a continued vitality through today. The Emergency Quota Act of 1921 was the first immigration law to "specifically privilege certain family members over other immigrants."˜ The privileged status of family members continues today with nearly 81% of those who obtained lawful permanent residence status in 2011 doing so on the basis of family relationships.˜

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3.5 Family-Based Immigrants: Spouses

Spouses can receive many categories of immigrant visas. As discussed in section 3.1, spouses of U.S. citizens are classified as "immediate relatives" and can receive family-based immigrant visas. As discussed in section 3.2, spouses of lawful permanent residents can receive F2A immigrant visas. Finally, as will be discussed in more detail in section 3.20, every other noncitizen awarded an immigrant visa (whether family-based, employment-based, or diversity) is entitled to travel to the United States with their

spouse; that spouse will be considered a "derivative beneficiary." INA § 203(d), 8 U.S.C. § 1153(d).

What Qualifies as a Marriage? 9 FAM 102.8-1(A)

The term "marriage" is not specifically defined in the INA; however, the meaning of "marriage" can be inferred from INA 101(a)(35), which defines the term "spouse" [in the negative as not including "a spouse, wife, or husband by reason a of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated."] Relationships entered into for purposes of evading immigration laws of the United States are not valid for visa adjudication purposes.

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Validity of Marriage 9 FAM 102.8-1(B)

a. Law of Place of Celebration Controls: The underlying principle in determining the validity of the marriage is that the law of the place of marriage celebration controls (except as otherwise noted below). If the marriage was properly and legally performed in the place of celebration and legally recognized, then the marriage is deemed to be valid for visa adjudication purposes. Any prior marriage, of either party, must be legally terminated before the later marriage.

b. Void for Public Policy: Certain marriages that are legal in the place of celebration, but are void under state law as contrary to public policy, are not valid for visa adjudication purposes.

1. Polygamous Marriages: Polygamous marriages are not recognized as a matter of federal public policy. See Matter of H, 9 I&N Dec. 640 (BIA 1962). Any prior marriage, of either party, must be legally terminated before the later marriage.
2. Marriage Between Relatives: Certain marriages between relatives may be void because of public policy concerns even if the place of celebration recognizes the marriage.˜
3. Minor Marriage: Certain underage marriages involving an individual under the age of 18 may be void because of public policy concerns even if the place of celebration recognizes the marriage as valid.˜

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3.6 Case: Adams v. Howerton

Adams v. Howerton
673 F.2d 1036 (9th Cir. 1982)

CIRCUIT JUDGE JOHN CLIFFORD WALLACE:

Adams, a male American citizen, and Sullivan, a male alien, appeal from the district court's entry of summary judgment for Howerton, Acting District Director of the Immigration and Naturalization Service (INS). The district court held that their homosexual marriage did not qualify Sullivan as Adams's spouse pursuant to section 201(b) of the Immigration and Nationality Act of 1952, as amended (the Act), 8 U.S.C. § 1151(b). We affirm.

I

Following the expiration of Sullivan's visitor's visa, Adams and Sullivan obtained a marriage license from the county clerk in Boulder, Colorado, and were "married" by a minister. Adams then petitioned the INS for classification of Sullivan as an immediate relative of an American citizen, based upon Sullivan's alleged status as Adams's spouse. The petition was denied, and the denial was affirmed on appeal by the Board of Immigration Appeals. Adams and Sullivan then filed an action in district court challenging this final administrative decision on both statutory and constitutional grounds. The parties agreed that there was no genuine issue as to any material fact and that the only issues presented were issues of law. On cross-motions for summary judgment, the district court entered judgment for the INS.˜ This appeal followed.

II

Two questions are presented in this appeal: first, whether a citizen's spouse within the meaning of section 201(b) of the Act must be an individual of the opposite sex; and second, whether the statute, if so interpreted, is constitutional.

Section 201(a) of the Act establishes immigration quotas and a system of preferential admissions based upon the existence of close family relationships. The section excludes immediate relatives of United States citizens from the quota limitations, which have been periodically revised by Congress. 8 U.S.C. § 1151(a). Section 201(b) defines "immediate relatives" to include the spouses of United States citizens. 8 U.S.C. § 1151(b).˜ Section 201(b) was added to the Act in its present form by the Immigration and Nationality Act Amendments of 1965˜. Neither that section nor any subsequent amendments further define the term "spouse" directly.

Cases interpreting the Act indicate that a two-step analysis is necessary to determine whether a marriage will be recognized for immigration purposes. The first is whether the marriage is valid under state law. The second is whether that state-approved marriage qualifies under the Act. Both steps are required.˜ We first consider the validity of the marriage under state law.

In visa petition proceedings addressing this question, the Board of Immigration Appeals has held that the validity of a marriage is governed by the law of the place of celebration.˜ Because a valid marriage is necessary for spouse status under the immigration laws,˜ we look to Colorado law to determine whether the Adams-Sullivan marriage is valid.˜

It is not clear, however, whether Colorado would recognize a homosexual marriage.˜

While we might well make an educated guess as to how the Colorado courts would decide this issue, it is unnecessary for us to do so.˜ ↳Because we do not reach the question of whether Colorado law permits homosexual marriages, we need not examine the constitutionality of the statute.↵ We decide this case solely upon construction of section 201(b), the second step in our two-step analysis.

III

Even if the Adams-Sullivan marriage were valid under Colorado law, the marriage might still be insufficient to confer spouse status for purposes of federal immigration law. So long as Congress acts within constitutional constraints, it may determine the conditions under which immigration visas are issued. Therefore, the intent of Congress governs the conferral of spouse status under section 201(b), and a valid marriage is determinative only if Congress so intends.

It is clear to us that Congress did not intend the mere validity of a marriage under state law to be controlling. Although the 1965 amendments do not define the term "spouse," the Act itself limits the persons who may be deemed spouses. Section 101(a)(35) of the Act specifically provides that the term "spouse" does not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated. 8 U.S.C. § 1101(a)(35). Furthermore, valid marriages entered into by parties not intending to live together as husband and wife are not recognized for immigration purposes.˜ Therefore, even though two persons contract a marriage valid under state law and are recognized as spouses by that state, they are not necessarily spouses for purposes of section 201(b).

We thus turn to the question of whether Congress intended that homosexual marriages confer spouse status under section 201(b). Where a statute has been interpreted by the agency charged with its enforcement, we are ordinarily required to accord substantial deference to that construction, and should follow it "unless there are compelling indications that it is wrong."˜ Thus, we must be mindful that the INS, in carrying out its broad responsibilities, has interpreted the term "spouse" to exclude a person entering a homosexual marriage.

While we do accord this construction proper weight, we base our decision primarily on the Act itself.˜ Nothing in the Act, the 1965 amendments or the legislative history suggests that the reference to "spouse" in section 201(b) was intended to include a person of the same sex as the citizen in question. It is "a fundamental canon of statutory construction" that, "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."˜ The term "marriage" ordinarily contemplates a relationship between a man and a woman.˜ The term "spouse" commonly refers to one of the parties in a marital relationship so defined. Congress has not indicated an intent to enlarge the ordinary meaning of those words. In the absence of such a congressional directive, it would be inappropriate for us to expand the meaning of the term "spouse" for immigration purposes.˜

Our conclusion is supported by a further review of the 1965 amendments to the Act. These amendments˜ clearly express an intent to exclude homosexuals.˜ As our duty is to ascertain and apply the intent of Congress, we strive to interpret language in one section of a statute consistently with the language of other sections and with the purposes of the entire statute considered as a whole.˜ We think it unlikely that Congress intended to give homosexual spouses preferential admission treatment under section 201(b) of the Act when, in the very same amendments adding that section, it mandated their exclusion. Reading these provisions together, we can only conclude that Congress intended that only partners in heterosexual marriages be considered spouses under section 201(b).

IV

We next consider the constitutionality of the section 201(b) so interpreted. Adams and Sullivan contend that the law violates the equal protection clause˜ because it discriminates against them on the bases of sex and homosexuality.˜ We need not and do not reach the question of the nature of the claimed right˜ or whether such a right is implicated in this case.˜ Congress has almost plenary power to admit or exclude aliens,˜ and the decisions of Congress are subject only to limited judicial review.˜

We hold that section 201(b) of the Act is not unconstitutional because it denies spouses of homosexual marriages the preferences accorded to spouses of heterosexual marriages.

AFFIRMED.

3.7 Same-Sex Marriage

Same-Sex Marriages, 9 FAM 102.8-1(E)

Same-sex marriage is valid for visa adjudication purposes, as long as the marriage is recognized in the "place of celebration," whether entered into in the United States or a foreign country. The same-sex marriage is valid even if the applicant is applying in a country in which same-sex marriage is illegal.

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3.8 Marriage Fraud

EOUSA, OLE, Immigration Law (2005)

Marriage fraud for immigration purposes is the participation by an alien in a marriage with a United States citizen˜ so that the alien can obtain immigration status.˜

Marriage fraud cases typically involve one of two factual scenarios. The first type involves a United States citizen who is paid some consideration to enter into a marriage with an alien, knowing that the purpose of the marriage is to enable the alien to petition for immigration benefits, with neither the alien nor the citizen having any intention of thereafter residing as a married couple. The second type of marriage fraud involves an alien spouse who misleads a United States citizen with feigned love and matrimonial intent, only to abandon or separate from the citizen after obtaining immigration benefits as a result of the marriage.˜

Predictably, the INA's spousal preference was an easy target for abuse by aliens who wished to immigrate to the United States. An alien who did not qualify for immigration, or who was qualified but unwilling to wait until an immigrant visa became available, could participate in a fraudulent marriage in order to circumvent the immigration law and swiftly obtain permanent-resident status. The INS recognized the problem, estimating in 1985 that 30 percent of all marriage-based immigration petitions filed between 1978 and 1984 involved some type of fraud. See S. Rep. No. 99-49I, at 2 (1986) (Immigration and Marriage Fraud Amendments of 1986, Report to the Senate Committee on the Judiciary).˜

Faced with the INS statistics on the growing marriage fraud problem, and recognizing the lack of an effective prosecutorial tool to combat the problem, Congress passed the˜ [Immigration and Marriage Fraud Amendments of 1986 (IMFA)], expressly codifying marriage fraud as a federal crime, and enabling immigration authorities to better identify spurious marriages during the administrative process.˜

THE FEDERAL CRIME OF MARRIAGE FRAUD

In order to prove a charge of marriage fraud under 8 U.S.C. § 1325(c), the government must prove the following elements:

1. The defendant knowingly.
2. Entered into a marriage.
3. For the purpose of evading any provision of the immigration laws of the United States.

[CONDITIONAL PERMANENT RESIDENCY FOR CERTAIN NONCITIZEN SPOUSES

The IMFA created new rules for any U.S. citizens seeking an "immediate relative" immigrant visa for their spouse when the two have been married for less than two years. INA § 216, 8 U.S.C. § 1186a. In these circumstances, the noncitizen spouse will receive "conditional" permanent resident status for two years.]

At any time during the conditional two-year period, both the alien and the citizen-spouse are subject to inspection by immigration examiners. Typically, examiners interview the couple together and then each person separately, to test whether the couple is indeed living as husband and wife in a viable marriage. Interviewers may question each person regarding the lay-out of the marital home, the other's habits and preferences, the names of in-laws and any other information a married couple would reasonably be expected to know about each other. In addition, examiners look for documentary proof that the couple is living as husband and wife. Couples typically present copies of household bills and other correspondence, listing both the alien and citizen-spouse as addressees. Copies of joint tax returns often are submitted by the couple, as are copies of the alien's driver's license and other personal identification cards, showing his residence as that of his citizen-spouse.

Within ninety days before the expiration of the conditional two-year period, the alien and spouse must file a Form I-751, Joint Petition to Remove Conditional Basis of Alien's Permanent Residency Status, with [US]CIS. The petition must verify that the marriage is legitimate, that it remains intact, and that it was not entered into for payment. A final interview is conducted prior to the conclusion of the conditional

period, and if satisfied, immigration officials approve the petition and lift the alien's conditional status, thus making him a permanent resident of the United States. If the couple fails to file the Form 1-751 before the expiration of the two-year conditional period, the alien's status expires and the alien is subject to deportation.

[OTHER STATUTORY RED FLAGS

In addition to establishing conditional permanent residence for certain noncitizen spouses, the IMFA established new rules for other forms of marriage deemed potentially indicative of fraud, namely: new marriage-based petitions by LPRs who themselves obtained immigration status on the basis of a former marriage, and marriages entered into during removal proceedings.

A lawful permanent resident who obtained their LPR status on the basis of marriage (LPR1) cannot thereafter petition for LPR status for a noncitizen spouse (potential LPR2) unless either: (a) five years has passed since LPR1 obtained permanent residence or (b) LPR1 establishes by "clear and convincing evidence" that their first marriage, the marriage that gave them LPR status, was not fraudulent. INA § 204(a)(2)(A), 8 U.S.C. § 1154(a)(2)(A). Consider Luna from Mexico, who marries Oscar, a U.S. citizen, and gets LPR status on the basis of that marriage. If the two later divorce, and Luna thereafter marries Mateo, a Mexican citizen, she will have to prove that her original marriage to Oscar was not entered into "for the purpose of evading any provision of the immigration laws"—if she petitions for Mateo to receive LPR status within five years of having obtained LPR status herself.

Marriages entered into during removal proceedings are also subject to heightened scrutiny. Noncitizens in removal proceedings are not entitled to an immediate relative visa unless either: (a) they spend two years, after the date of marriage, outside of the United States or (b) they establish by "clear and convincing evidence" that the marriage was entered into "in good faith." INA §§ 204(g), 245(e), 8 U.S.C. §§ 1154(g), 1255(e). The "good faith" exception was not originally included in the IMFA but was added by statute later.]

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USCIS Adjudicator's Field Manual § 21.3(a)(2)(I)

Some indications that a marriage may have been contracted solely for immigration benefits include:

- Large disparity of age;
- Inability of petitioner and beneficiary to speak each other's language;

- Vast difference in cultural and ethnic background;
- Family and/or friends unaware of the marriage;
- Marriage arranged by a third party;
- Marriage contracted immediately following the beneficiary's apprehension or receipt of notice to depart the United States;
- Discrepancies in statements on questions for which a husband and wife should have common knowledge;
- No cohabitation since marriage;
- Beneficiary is a friend of the family;
- Petitioner has filed previous petitions on behalf of aliens, especially prior alien spouses.

3.9 The Problem of Family Violence

Noncitizens face significant hurdles if the sponsor of their family-based visa is abusive. For example, an abusive spouse might refuse to cooperate with the IMFA process described in section 3.8 to remove conditions on their battered spouse's residency petition, leaving them open to removal. An abusive spouse might exploit this situation by threatening to report their partner to DHS, should they ever try to leave the abuse.

In 1990, Congress created a battered spouse waiver to the IMFA process that applies if a noncitizen can establish that removal would result in "extreme hardship," that the underlying marriage was "entered into in good faith," and that during the marriage the spouse or child "was battered by or was the subject of extreme cruelty" by their U.S. citizen or LPR spouse or parent. INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4).

In 1994, Congress created a broader form a relief that did not require a spouse to initiate, then abandon, the visa petition process. This new process allowed battered spouses to affirmatively self-petition for residency status if they entered a legal marriage with a U.S. citizen or LPR in good faith but "was battered by or was the subject or extreme cruelty." INA §§ 204(a)(1)(A)(iii) (U.S. citizens) & 204(a)(1)(B)(ii) (LPRs), 8 U.S.C. §§ 1154(a)(1)(A)(iii) & 1154(a)(1)(B)(ii).

3.10 Family-Based Immigrants: Children

The term "child" is defined by INA § 101(b), 8 U.S.C. 1101(b), and refers to an unmarried person under 21 years of age. Many categories of children can receive immigrant visas. As discussed in section 3.1, children of U.S. citizens are classified as "immediate relatives" and can receive family-based immigrant visas. As discussed in section 3.2, children of lawful permanent residents can receive F2A immigrant visas. Finally, as will be discussed in more detail in section 3.20, every other noncitizen awarded an immigrant visa (whether family-based, employment-based, or diversity) is entitled to travel to the United States with their children; those children will be considered "derivative beneficiaries." INA § 203(d), 8 U.S.C. § 1153(d).

What happens if a sponsor files an application for an immigrant visa when the beneficiary meets this definition of a child but the beneficiary "ages out" before the visa becomes available? That is, what happens if the visa beneficiary is under the age of 21 when the application is filed by their sponsor but is over the age of 21 when the visa becomes available?

Congress passed the Child Status Protection Act (CSPA) to address this scenario. For the children of U.S. citizens, who are classified as immediate relatives, CSPA essentially freezes their age at the time the visa application was filed on their behalf. So as long as an application is filed on behalf of such a child on the day before they turn 21, and so long as they remain unmarried, they will continue to be considered a child.

For those who are not children of U.S. citizens, the CSPA allows them to subtract the time their petition was being reviewed at U.S. Citizenship and Immigration Services (USCIS) from their age on the day a visa becomes available. If the beneficiary's age after this calculation is less than 21 years, he or she can continue as a "child" in their original visa category. The CSPA only adjusts age; the beneficiary must remain unmarried.

How might the above provision come into play?

Children (and spouses) of incoming LPRs (whether family-based, employment-based, or diversity recipients) may enter the United States if "accompanying or following to join" their parent. INA § 203(d), 8 U.S.C. § 1153(d). Consider Ana, who is the sister of Hector and the mother of Roberto. Hector is a U.S. citizen. Hector has petitioned for Ana to receive an F4 visa. Ana's son Roberto can get an F4 visa at the same time as his mom if he is unmarried and under 21 when Ana's F4 visa becomes available. Roberto can also get an F4 visa at the same time as his mom if he is unmarried and no older than 21 plus the visa processing time. If Roberto is over the age of 21 due to the wait times outlined in section 3.2, the CSPA will not help. He will have "aged out" and

cannot follow his mom to the United States under the category of "accompanying or following to join."

Two notes on terminology. First, when the INA refers to the "sons and daughters" of U.S. citizens and LPRs—as it does for F1, F2B, and F3 visas, as discussed in section 3.2—it means progeny over the age of 21 in contradistinction to "children." Second, the term "unaccompanied alien child" (UAC) is a unique statutory term referencing a noncitizen without immigration status, who is under 18, and does not have a parent or guardian in the United States or a parent or guardian in the United States who can "provide care and physical custody." 6 U.S.C. § 279(g).

3.11 Employment-Based Immigrants: Priority Workers (EB-1)

There are three categories of workers who qualify as "priority workers." INA § 203(b)(1), U.S.C. § 1153(b)(1).

The first category includes noncitizens with "extraordinary ability" in "sciences, arts, education, business, or athletics … demonstrated by sustained national or international acclaim." Proof of extraordinary ability can be shown with evidence of a one-time achievement such as a Pulitzer prize, an Oscar, or an Olympic medal. Alternatively, an individual can establish their extraordinary ability by showing at least three of the following 10 items:

- Evidence of receipt of a lesser nationally or internationally recognized prize or award for excellence in the field of endeavor;
- Evidence of membership in associations which require outstanding achievements of their members, as judged by recognized experts;
- Published material in professional or major trade publications or major media about the alien's work;
- Evidence of participation on a panel, or individually, as a judge of the work of others in the field;
- Evidence of original scientific, scholarly, artistic, or business-related contributions of major significance;
- Evidence of authorship of scholarly articles in professional journals or other major media;
- Evidence of the display of the alien's work in exhibitions or showcases;
- Evidence that the alien has performed in a leading or critical role for organizations or establishments having a distinguished reputation;

- Evidence of high salary or high remuneration in relation to others in the field; or
- Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disc, or video sales.

An individual of "extraordinary ability" need not have an offer of employment.

The second category includes noncitizens who are "outstanding professors and researchers." This category requires proof of international recognition for outstanding achievements in a particular academic field, a minimum of three years' experience in teaching or research in that academic area, and evidence of a job offer whether in academic or the private sector. This category requires proof of two of the following:

- Evidence of receipt of major prizes or awards for outstanding achievement;
- Evidence of membership in associations that require their members to demonstrate outstanding achievement;
- Evidence of published material in professional publications written by others about the alien's work in the academic field;
- Evidence of participation, either on a panel or individually, as a judge of the work of others in the same or allied academic field;
- Evidence of original scientific or scholarly research contributions in the field; or
- Evidence of authorship of scholarly books or articles (in scholarly journals with international circulation) in the field.

Finally, the EB-1 category includes certain multinational executives and managers.

3.12 Employment-Based Immigrants: Members of the Professions Holding Advanced Degrees and Those of Exceptional Ability (EB-2)

One way for a noncitizen to qualify for an EB-2 visa is to hold an advanced degree: a baccalaureate or foreign equivalent degree plus five years of post-baccalaureate, progressive work experience in the field. The job they are coming to fill must require that advanced degree.

Alternatively, a noncitizen can qualify for an EB-2 visa by showing exceptional (in contrast to the EB-1's "extraordinary") ability in the "sciences, arts, or business." Exceptional ability "means a degree of expertise significantly above that ordinarily

encountered in the sciences, arts, or business." This category requires proof of three of the following six types of evidence:

- An official academic record showing that the beneficiary has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
- Evidence in the form of letter(s) from current or former employer(s) showing that the beneficiary has at least 10 years of full-time experience in the occupation in which he or she is being sought;
- A license to practice the profession or certification for a particular profession or occupation;
- Evidence that the beneficiary has commanded a salary or other remuneration for services that demonstrates exceptional ability. (To satisfy this criterion, the evidence must show that the beneficiary has commanded a salary or remuneration for services that is indicative of his or her claimed exceptional ability relative to others working in the field);
- Evidence of membership in professional associations; or
- Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

Both types of EB-2 workers need to go through the labor certification process, discussed in section 3.14 below.

3.13 Employment-Based Immigrants: Skilled Workers, Professionals, and Other Workers (EB-3)

The third preference group for employment-based visas includes:

- "Skilled workers": Persons whose jobs require a minimum of two years training or experience, not of a temporary or seasonal nature. The skilled worker must meet the educational, training, or experience requirements of the job opportunity. Relevant post-secondary education may be considered as training.
- "Professionals": Persons whose job requires at least a U.S. baccalaureate or foreign equivalent degree and are a member of the professions.
- "Other workers": Persons performing unskilled labor requiring less than two years training, education, or experience, not of a temporary or seasonal nature.

All three types of EB-3 workers need to go through the labor certification process, discussed in section 3.14 below.

3.14 Labor Certification for EB-2 and EB-3 Workers

Before an employer can file a visa application with USCIS on behalf of a prospective EB-2 or EB-3 worker, that employer must first seek labor certification from another federal agency: the Department of Labor's Employment and Training Administration (ETA). This process is currently electronic, conducted through the Program Electronic Review Management (PERM) system.

The purpose of labor certification is twofold. First, it aims to ask whether there are "able, willing, and qualified" U.S. workers available to fill the position that the employer seeks to fill with a noncitizen worker. That is, labor certification asks: did the employer advertise the position and attempt to recruit U.S. workers to fill it? Did the published job description accurately describe the minimum qualifications for the job? Were there any minimally qualified U.S. workers willing to take the position, even if the proposed EB-2 or EB-3 worker was more qualified? Second, labor certification aims to verify that the employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers. To meet this latter requirement, the employer must show that they are paying the "prevailing wage" for the job, a number that can be requested from the National Prevailing Wage Center (NPWC) or determined from another legitimate source of wage information.

The labor certification process, in looking to concerns of recruitment and wages, involves the submission of attestations by the employer on these topics. Applications are generally granted on the basis of employer attestations alone. However, applications are subject to both random and targeted audits to ensure that the process is not being abused by employers.

The DOL has predetermined that there are certain jobs in the United States where there is such a shortage of workers that the labor certification process can be bypassed. The DOL's "Schedule A" identifies these jobs. Beyond Schedule A, certain noncitizens can bypass the labor certification process by obtaining a national interest waiver (NIW).

Schedule A
9 FAM 302.1-5(B)(3)

In General: The Department of Labor attempts to minimize the operational impact of its statutory responsibilities with "Schedules" for types of cases in which either a

definite approval˜ will result, without having to undertake the individual analysis required in the great majority of cases.

Schedule A Certifications:

(1) The Department of Labor's Schedule A (see 20 CFR § 656.5) sets forth occupational and professional groups in which there is a nationwide shortage of workers willing, able, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts), and available and in which the employment of aliens will not, presumably, affect adversely the wages and working conditions of workers in the United States similarly employed.

(2) An employer for an alien in an occupation that qualifies for Schedule A may file an application for certification with the appropriate DHS office. Schedule A, as amended by the Immigration Act of 1990, lists two such occupational groups as follows:

(a) Group I - Physical Therapists and Nurses; and

(b) Group II - Aliens of Exceptional Ability in Sciences or Arts.

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National Interest Waivers of Labor Certification,
9 FAM 504.4-3(E)(b)(a)

Although a labor certification is generally required for the second preference category, USCIS may waive the labor certification requirement if it determines that such waiver is in the national interest. A waiver is considered to be in the national interest if the petitioner can establish, based on Matter of In Re: New York State Department of Transportation, 22 I&N Dec. 215 (Comm. 1998) that:

a) The alien must seek employment in an area that has substantial intrinsic merit;
b) The waiver request is not based solely on local labor shortage, but rather the proposed benefit to be provided will be national in scope; and
c) It must be demonstrated that the national interest would be adversely affected if the employer is required to proceed with the labor certification process.

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3.15 Case: In Re Marion Graham

Matter of Marion Graham

Board of Alien Labor Certification Appeals, Feb. 2, 1990 No. 88-INA-102 (en banc)

DECISION AND ORDER

This appeal arises from an application for labor certification pursuant to Section 212(a)(14) of the Immigration and Nationality Act˜. The Certifying Officer (CO) of the United States Department of Labor denied the application, and Employer requested administrative-judicial review pursuant to 20 C.F.R. §656.26.˜

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

Employers desiring to employ aliens on a permanent basis must apply for labor certification pursuant to 20 C.F.R. Part 656. These regulations require an employer to document that the job opportunity has been and is being described without unduly restrictive requirements. If the job requirements which an employer is requiring of U.S. workers are: (1) other than those normally required for the job in the United States; (2) exceed the requirements listed in the Dictionary of Occupational Titles (D.O.T.); (3) include a foreign language; (4) involve a combination of duties or (5) require the worker to live on employer's premises, they are presumptively unduly restrictive, and the employer must demonstrate by documentation that its requirements arise from a business necessity. §656.21(b)(2)(i), (ii), and (iii).˜

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Background

On December 26, 1986, an application for labor certification pursuant to § 212(a)(14) of the Act was submitted by Marion Graham (Employer) on behalf of Gladys Yolanda Ulloa (Alien) for the position of "HOUSEWORKER GENERAL/CHILD MONITOR (Live-In)."˜ The duties of the position were listed˜ as follows: "Responsible for cleaning 2 story house of 3,000 square feet. Cleans 3

bedrooms, 4 bathrooms, 2 living rooms, 1 dining room, 1 bar area, 1 kitchen area, also cleans garage area. Irons clothes. Polishes furniture and silverware and glassware. Waters plants. Changes linens. Answers phone and bell door. Feed 2 dogs. Cleans 8 glass windows, 9 glass doors and 3 big mirros [sic]. Full supervision and responsibility on absence of parent of 1 infant girl of 1 (one) years of age. Cooks meals and prepare formulas for her. Bathe, dress her. Supervise and participate in her play activities."˜

Employer submitted that 50-percent of the duties required for the position were household related and 50-percent related to child monitoring.˜ As a condition of employment, Employer required that the person hired live in her home, have 3-months experience and be willing to work Monday through Friday, Saturdays and Sundays when requested, and 3 to 4 hours overtime daily. Employer also required that the employee not smoke or drink [alcoholic beverages] at the work site and that he or she have a legal right to work in the United States.˜ No U.S. workers responded to Employer's advertisement.˜

On April 30, 1987, the CO issued a Notice of Findings (NOF) which proposed to deny certification on the basis of §656.21(b)(2), which requires that the job opportunity be described without unduly restrictive requirements. In the NOF the CO challenged the requirement that the employee hired live in the employer's home as being unduly restrictive.˜ The CO stated, however, that Employer could delete the live-in requirement and readvertise the position, or she could provide documentation that the live-in requirement arises from a business necessity.˜

In its letter of rebuttal, dated May 23, 1987, Employer attempted to demonstrate that the live-in requirement arises from a business necessity.˜ Employer asserted that the work shift is divided so that 50-percent of the working hours pertain to the household cleaning and 50-percent child monitoring; the household is very busy; because Employer's husband is a Hospital President, on call 24 hours a day a live-in employee is needed to screen calls at night; Employer personally accompanies her husband at times on his business trips, and therefore a live-in is required to take full responsibility for the child and household; the cost of paying a housekeeper and a night care child monitor is very expensive; Employer has to run different types of personal errands every day, including helping to care for her sick mother. Employer also asserted that because the Alien has cared for the child since birth, she has confidence in her.˜

On July 15, 1987, the CO issued a Final Determination (FD) denying certification finding that Employer had failed to document the live-in requirement as arising from a business necessity.˜ On July 22, 1987, Employer timely submitted a request for administrative-judicial review.˜

II. Applicability of §656.21(b)(2)(iii)

Under the basic labor certification process as set forth in §656.21, an employer must document that the job opportunity has been described without unduly restrictive job requirements.˜ In instances where the worker is required to live on the employer's premises, the requirement will be deemed unduly restrictive unless the employer adequately documents that the requirement arises from a business necessity.˜

Although the word "business" is generally used in the context of a commercial enterprise, the use of the term "business necessity" in §656.21(b)(2)(iii) was not intended by the drafters of the regulation˜ to limit application of the subsection to commercial enterprises.˜

This regulatory history establishes that the drafters of §656.21(b)(2)(iii) did not intend to exclude noncommercial employers, and that noncommercial enterprises must also show a business necessity for a live-on-the-premises requirement.

III. "Business" to which §656.21(b)(2)(iii) applies

Although the regulatory history of §656.21(b)(2)(iii) establishes that the requirement of showing a business necessity is applicable to employers seeking to obtain labor certification for a domestic live-in worker, it does not resolve the question whether the relevant "business" in "business necessity" involves only an employer's outside business activities, or whether it involves the "business" of operating a household or managing one's personal affairs.

The regulations contained in Part 656 offer no guidance˜. Nor is guidance found in the Immigration and Nationality Act˜. In fact the Act does not include any reference to the term "business necessity." Rather, it simply provides that in order for labor certification to be granted, an employer, on behalf of an alien, must establish to the Secretary's satisfaction that there are no willing, qualified, and available U.S. workers to perform the job, and that employment of the alien will not adversely affect the wages and working conditions of U.S. workers.˜

Although no federal district or circuit court has squarely addressed the issue, those which have touched on the question of "business necessity" in the context of live-in domestic workers˜ have indicated that Employer's out-of-home business activities, the circumstances of the household, and other extenuating circumstances or hardships may be taken into account in the consideration process.˜

As the term "business" as it is used in §656.21(b)(2)(iii) is not defined by the Act, the regulations, or the caselaw, it is necessary that we determine its meaning.˜ Where a term is not defined in a statute, a court is compelled to start with the assumption that

the legislative purpose is expressed by the ordinary meaning of the words used.˜ The rule that the ordinary and commonly understood meaning shall be attributed to terms employed in statutes, unless a contrary meaning is clearly intended, is applicable to the interpretation of administrative regulations.˜

[W]hile dictionary definitions of "business" indicate that "business" usually has a commercial meaning attached to it, those definitions also indicate that "business" can, in some contexts, have a meaning that includes other purposeful activities.

It is also a tenet of statutory construction that words in statutes "should take color from their surroundings ... And derive meaning from the context of the statute, which must be read in light of the mischief to be corrected and the end to be obtained."˜ When engaged in statutory or regulatory interpretation, the court should look to the common sense of a statute or regulation, to its purpose, and to the practical consequences of the suggested interpretations.˜ A fortiori, immigration laws and their implementing regulations must be read so as to be a useful and effective part of the whole statute.˜

In setting the context for construction of the term "business necessity" under §656.21(b)(2)(iii), we must be mindful that the subsection was promulgated to aid in implementation of the Secretary's responsibility under the Act to determine and certify that (1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of the application for a visa and admission into the United States and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. Workers similarly employed. We must be equally mindful that the Act provides for no more and no less; it expresses no intent to distinguish between employers on the basis of whether that employer is a commercial enterprise or a noncommercial enterprise such as a private household.

Considering the absence of guidance from the Act or the regulations as to the meaning of the term "business necessity" under §656.21(b)(2)(iii), the fact that the federal district and circuit courts which have touched on the subject imply that many factors are relevant when determining business necessity in a live-in domestic situation, the fact that dictionary definitions of "business" do not exclude use of the term in non-commercial contexts, and the context of labor certification which does not direct the Secretary to make any sort of judgment on the value of the employment opportunity offered but only on availability of and impact on U.S. Workers, we conclude that the relevant "business" is the "business" of running a household or managing one's personal affairs. To construe "business necessity" so as require consideration to be limited to the employer's outside business interests in the context of labor certification of a domestic worker would infuse the Secretary with the discretion to decide what business needs and

personal social and economic preferences are best for the country—a discretion that goes well beyond the responsibility imposed on the Secretary under the Act.

IV. Application of business necessity test in live-in domestic context

To establish the business necessity for a live-on-the-premises requirement for a domestic worker, the employer must demonstrate that the requirement is essential to perform, in a reasonable manner, the job duties as described by the employer. In the context of a domestic live-in worker, pertinent factors in determining whether the live-on-the-premises requirement is essential for the performance of the job duties include the Employer's occupation or commercial activities outside the home, the circumstances of the household itself, and any other extenuating circumstances. Those factors must be weighed on a case-by-case basis. The presence or absence of any one concern in a particular case may not be determinative.↳The fact that a particular Employer does not have an occupation outside the home, for example, would not preclude that Employer from obtaining labor certification for a domestic live-in worker if some other factor showing business necessity is documented for the live-in requirement, such as the Employer being an invalid. On the other hand, the mere fact that an Employer is an invalid may not itself establish the business necessity for a live on the premises requirement. Hence, if several United States workers could perform the work required, the fact that the Employer is an invalid who needs constant care may not justify the live-in requirement. It is noted, however, that employment of an around-the-clock service may prove to be exorbitantly expensive and therefore inappropriate.↵

Although a judgment on the merits of the job opportunity as it relates to a private employer's lifestyle choice is not a relevant consideration, ↳For example, a Certifying Officer may not conclude that business necessity has not been shown simply because that Officer believes that live-in domestic service is a luxury reserved for the rich.↵ a mere personal preference to have an employee live on the premises does not establish business necessity.

V. Application of the test to Marion Graham, Employer

To meet the business necessity test of §656.21(b)(2)(iii), Ms. Graham's evidence must establish that the live-on-the-premises requirement is essential for the Alien to perform, in a reasonable manner, the job duties of general household worker/child monitor.

Written assertions which are reasonably specific and indicate their sources or bases are to be considered documentation which must be given the weight it rationally deserves.˜ When applying the business necessity test in a live-in domestic situation, a requisite degree of specificity for a written assertion generally should, at the very least,

enable the Certifying Officer to determine whether there are cost-effective alternatives to a live-in requirement and whether the needs of the household for a live-in worker are genuine. For example, if one of the reasons proffered for the live-in requirement is absence of Employer from the home, the assertions should specify the length (e.g. overnight, days at a time, 18-hours per day, etc.) and frequency (e.g., three or four days a week, weekends, etc.) of the absences. The Board also notes that, as a general matter, documentation to bolster assertions of a need for a live-in requirement will go a long way in establishing the credibility of those assertions (e.g., travel vouchers; written estimates of the costs of alternatives such as a phone answering service or babysitters).

The relevant evidence in this case consists entirely of written assertions made by Employer in her December 13, 1986 letter to the California Employment Development Office˜ and her May 23, 1987 letter of rebuttal.˜ The assertions show four factors purportedly making the live-on-the-premises requirement essential for the Alien to perform, in a reasonable manner, the job duties of general household worker/child monitor: (1) the need for a person to screen telephone calls since Employer's husband is a hospital president who is on call 24-hours per day; (2) the need for someone to attend the house and to monitor Employer's child while employer is away on business trips with her husband, running errands, or attending her sick mother; (3) the need for someone to be present when the Grahams return home in the evening; and (4) the lessened expense of hiring a live-in domestic as opposed to hiring both a housekeeper and a night child care monitor.

We conclude that Employer's statements herein do not constitute documentation: they are neither reasonably specific nor do they adequately indicate their sources or bases. The record fails to show the frequency of late-night telephone calls, or why a professional answering service could not perform the screening function Employer asserts is necessary. Neither does the record show the number of days per month Ms. Graham has been away from home overnight, or the likelihood of her future absences from home on business with her husband, performing errands, or caring for her sick mother. Further, the record does not show how much extra cost, if any, would be involved in hiring a child monitor and housekeeper for the particular nights that the Grahams anticipate being away from home. In short, the record established by Employer in this case consists solely of unsupported allegations which are insufficient to document business necessity for the live-on-the-premises requirement. Hence, the Certifying Officer's denial of labor certification must be affirmed.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

[DISSENT:]

We agree with the business necessity test for live-in domestic workers set forth by the majority in this case. However, we do not agree that the denial of labor certification should be affirmed. The Certifying Officer never requested in his Notice of Findings any of the specific documentation that the majority finds lacking.˜ All he noted was that "[t]here is no evidence employer's jobs are so erratic as to preclude hiring a day worker." Consequently, we would Remand this case to the Certifying Officer in order to give the Employer the opportunity to submit the documentation which the majority deems necessary to establish business necessity in light of the test for live-in domestic workers first enunciated here.

3.16 Employment-Based Immigrants: Special Immigrants (EB-4)

The fourth preference of employment-based immigrants is reserved for "special immigrants." The term "special immigrants" is defined at INA 101(a)(27), 8 U.S.C. § 1101(a)(27). It includes such diverse categories as religious workers, translators who worked with the U.S. armed forces in Iraq or Afghanistan, and children who a U.S. court has determined cannot be reunified with one or more parents due to abuse, neglect, or abandonment.

3.17 Employment-Based Immigrants: Investors (EB-5)

CRS, EB-5 Immigrant Investor Visa (2021)

The EB-5 immigrant investor visa, the fifth employment preference immigrant visa category, was created in 1990 to benefit the U.S. economy through job creation and foreign capital investment. It provides lawful permanent residence (LPR status) to foreign nationals who invest $1,800,000 or more, or $900,000 or more in a rural area or an area with high unemployment (referred to as targeted employment areas [TEAs]), in a new commercial enterprise (NCE) in the United States and create or preserve at least 10 jobs.˜

The EB-5 visa grants foreign national investors conditional residence status. After approximately two years, the foreign national must apply to remove the conditionality (i.e., adjust to full-LPR status). If the foreign national has met the visa requirements (i.e., invested the required money and created the required jobs), he/she will receive full LPR status. If the foreign national has not met the requirements or does not apply to have the conditional LPR status removed, his or her conditional status is terminated, and,

generally, the foreign national is required to leave the United States, or will be placed in removal proceedings.

In 1992, Congress established the Regional Center (Pilot) Program, which created an additional pathway in the EB-5 visa category. Regional centers are "any economic unit, public or private, which [are] involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment." The program allows investors to pool their investment in a regional center to fund a project in a specific geographic area. The Regional Center Program now accounts for nearly all EB-5 visas (96% in FY2019).˜

Compared with other immigrant visas, the EB-5 visa presents additional risks of fraud. Such risks are associated with difficulty verifying that investors' funds are obtained lawfully and with the visa's potential for large monetary gains, which could motivate individuals to take advantage of investors and make the visa susceptible to the appearance of favoritism. U.S. Citizenship and Immigration Services (USCIS) has reported improvements in fraud detection but also states it is restricted by statutory limitations. EB-5 stakeholders have voiced concerns over the delays in processing EB-5 applications and possible effects on investors and time sensitive projects as well as uncertainty generated by the short-term reauthorizations of the Regional Center Program, the most common pathway for EB-5 visas.

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3.18 Diversity Immigrants

CRS, The Diversity Immigrant Visa (2019)

The purpose of the diversity immigrant visa program (DV program, sometimes called "the green card lottery" or "the visa lottery") is, as the name suggests, to foster legal immigration from countries other than the major sending countries of current immigrants to the United States. Current law weights the allocation of immigrant visas primarily toward individuals with close family in the United States and, to a lesser extent, toward those who meet particular employment needs. The diversity immigrant category was added to the Immigration and Nationality Act (INA) by the Immigration Act of 1990 (P.L. 101-649) to stimulate "new seed" immigration (i.e., to foster new, more varied migration from other parts of the world).

The DV program currently makes 50,000 visas available annually to natives of countries from which immigrant admissions were less than 50,000 over the preceding five years combined. The formula for allocating these visas is specified in statute: visas

are divided among six global geographic regions, and each region and country is identified as either high-admission or low-admission based on how many immigrant visas were given to foreign nationals from each region and country over the previous five-year period. Higher proportions of diversity visas are allocated to low-admission regions and countries. The INA limits each country to 7% (3,500, currently) of the total and provides that Northern Ireland be treated as a separate foreign state.

Because demand for diversity visas greatly exceeds supply, a lottery system is used to select individuals who may apply for them. Those selected˜, like all other foreign nationals wishing to come to the United States, must undergo reviews performed by Department of State consular officers abroad and Department of Homeland Security immigration officers upon entry to the United States. These reviews are intended to ensure that the foreign nationals are not ineligible for visas or admission to the United States under the grounds for inadmissibility spelled out in the INA. To be eligible for a diversity visa, the INA requires that a foreign national have at least a high school education or the equivalent, or two years' experience in an occupation that requires at least two years of training or experience. The foreign national or the foreign national's spouse must be a native of one of the countries listed as a foreign state qualified for the diversity visa program.

The distribution of diversity visas by global region of origin has shifted over time, with higher shares coming from Africa and Asia in recent years compared to earlier years when Europe accounted for a higher proportion. Of all those admitted through the program from FY1995 (the first year it was in full effect) through FY2017 (the most recent year for which data are available), individuals from Africa accounted for 40% of diversity immigrants, while Europeans accounted for 31% and Asians for 25%.

Some argue that the DV program should be eliminated and its visas re-allocated for employment-based visas or backlog reduction in various visa categories. Critics of the DV program warn that it is vulnerable to fraud and misuse and is potentially an avenue for terrorists to enter the United States, citing the difficulties of performing background checks in many of the countries whose citizens are eligible for a diversity visa. Critics also argue that admitting immigrants on the basis of their nationality is discriminatory and that the reasons for establishing the DV program are no longer germane. Supporters of the program argue that it provides "new seed" immigrants for a system weighted disproportionately to family-based immigrants from a handful of countries. Supporters contend that fraud and abuse have declined following measures put in place by the State Department, and that the system relies on background checks for criminal and national security matters that are performed on all prospective immigrants seeking to come to the United States, including those applying for diversity visas. Supporters also contend

that the DV program promotes equity of opportunity and serves important foreign policy goals.

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3.19 Other Immigrant Categories

There are other pathways to becoming an LPR. As discussed in Chapter 4, two nonimmigrant visa categories offer a path to LPR status: the T visa for noncitizen victims of severe forms of human trafficking and the U visa for noncitizen crime victims who help law enforcement agencies. As discussed in Chapter 9, noncitizens who are granted a special kind of relief from removal called cancellation of removal are granted LPR status. Finally, as discussed in Chapter 11, refugees and asylees have a path to LPR status.

3.20 Derivative Beneficiaries

Every immigrant (whether family-based, employment-based, or diversity) is entitled to travel to the United States with their spouse and children. 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 receive the same visa as the principal beneficiary. Recall Ana and Roberto from section 3.10. Ana, as the sibling of a U.S. citizen, qualified for an F4 visa. She was the principal beneficiary. Ana's unmarried and under-21 son, Roberto, was also entitled to an F4 visa as a child "accompanying or following to join" his mother Ana. INA § 203(d), 8 U.S.C. § 1153(d).

In terms of the wait times discussed in section 3.2, primary and derivative beneficiaries share the same priority date based upon the principal beneficiary's visa application. For example, let's continue to think about Ana and Roberto from section 3.10 with the following extra information: Ana and Roberto are from Spain and Hector (Ana's U.S. citizen brother) filed the paperwork for Ana's F4 visa on April 1, 2007. Looking at the visa bulletin in section 3.2, the State Department was ready to process Ana's visa application in June 2023. Roberto's eligibility for a visa would be judged by his age and marital status in June 2023.

Finally, the visas issued to derivative beneficiaries count toward the total number of visas available in any given year. As discussed in section 3.1, the United States makes 65,000 F4 visas available annually. If Ana and Roberto each get an F4 visa, the total

number of available F4 visas is reduced by two. If Ana's family were larger—if she were married and had three unmarried and under-21 children—Ana, her spouse, and her three kids would get five of the available F4 visas. That is to say, the United States does not award 65,000 visas to siblings of U.S. citizens a year. It awards a certain number of visas to siblings and to those siblings' spouses and children. This is true for all family-based, employment-based, and diversity visa categories.

3.21 Test Your Knowledge

PROBLEM 3.1

Diego Del Durando is a recently naturalized citizen from the Philippines. Diego is in the process of seeking family-based immigrant visas for his sister, his brother-in-law, and his two nieces (ages one and three). Using the chart in section 3.2, when would you estimate that Diego's sister, brother-in-law, and nieces would be able to come to the United States as LPRs?

PROBLEM 3.2

Tim Tarkinol got the surprise of his life when his commercial DNA results showed that he was the father of 20-year-old Olga Ostøyan, the result of a one-night tryst when he was studying abroad in Norway. Tim and Olga have connected (as have Tim and Olga's mom). Olga is not a U.S. citizen, but she is interested in moving permanently to the United States. Olga's soon-to-be-wife, Persa Persgard, has just been accepted to medical school in New York. And Olga is interesting in getting to know Tim, Tim's wife, their kids, as well as Tim's parents, sister, brother-in-law, and nephews. What are Olga's options in terms of an immigrant visa? Are there any pitfalls or concerns that Olga and Tim should be considering?

Chapter Four: Nonimmigrants

This chapter concerns nonimmigrants, a legal term of art referring to temporary visitors to the United States. There are many categories of nonimmigrants including those coming to the United States to work (see sections 4.3-4.7), to reunite with family (see section 4.8), to study (see section 4.9), and to travel (see section 4.11). There are even nonimmigrant visas available for noncitizens who have been the victim of crimes in the United States (see section 4.10).

The United States admits significantly more nonimmigrants each year than immigrants. As discussed in Chapter 3, just over 740,000 million noncitizens became LPRs in fiscal year 2021. In contrast, the United States recorded more than 35 million nonimmigrant admissions in fiscal year 2021. What explains this monumental difference? Immigrants, as you'll recall from Chapter 3, are entitled to remain in the United States indefinitely and have the opportunity to become U.S. citizens. The United States is, therefore, motivated to restrict the numbers of new LPRs each year. In contrast, nonimmigrants come to the United States for a limited time (such as a few months or a few years) and for a limited purpose (to work, attend school, or travel around the country). 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.

4.1 The Big Picture

EOUSA, OLE, Immigration Law (2005)

Unlike the immigrant visas, a person who seeks to enter as a nonimmigrant is coming to the United States for a temporary period of time and for a specific purpose.

Section 101(a)(15) of the INA, 8 U.S.C. § 1101 provides a lengthy list of categories of nonimmigrant visas. The visas are commonly referred to by the letters and numbers of the applicable subsections under INA § 101(a)(15), 8 U.S.C. § 1101(a)(15). [Thus, an A visa is found at INA § 101(a)(15)(A), 8 U.S.C. § 1101(a)(15)(A).]

A nonimmigrant may apply for an extension of his authorized period of stay in the United States, may change status from one nonimmigrant category to another [see section 4.12], and may in certain limited circumstances adjust status to that of a lawful permanent resident [see sections 4.10 (discussing T and U visas) and 7.8 (discussing adjustment of status)].

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4.2 Nonimmigrant Intent

Many nonimmigrant categories specify that the beneficiary must have "residence in a foreign country which he has no intention of abandoning." See, e.g., INA § 101(a)(15)(F), 8 U.S.C. § 1101(a)(15)(F). What evidence would you think a bona fide nonimmigrant should submit to prove up this required intent?

Nonimmigrants in certain visa categories are entitled to hold "dual intent." That is, some noncitizens are entitled to receive a nonimmigrant visa even though they are simultaneously applying for an immigrant visa. See INA § 214(h), 8 U.S.C. § 1184. Recall the visa bulletin from section 3.2. Some aspiring beneficiaries of employment-based immigrant visas must wait years for their visa to become available. In such cases, the employer-sponsor does not hold a job open while the prospective employee waits abroad. Rather, that employee is typically present in the United States on an employment-based nonimmigrant visa (see section 4.3) while their green-card application is processed. This type of applicant can have "dual intent," meaning (1) the intent to abide by all of the restrictions accompanying their nonimmigrant visa including returning to their country of origin after their nonimmigrant visa expires, and (2) the intent to pursue an immigrant visa that would allow the noncitizen to remain in the United States indefinitely. As the Board of Immigration Appeals has stated: "a desire to remain in this country permanently in accordance with the law, should the opportunity to do so present itself, is not necessarily inconsistent with nonimmigrant status." Matter of Hosseinpour, 15 I&N Dec. 191, 192 (BIA 1975).

4.3 Employment-Based Nonimmigrants

Much of the work of an immigration lawyer can involve finding useful visa opportunities for their clients. Here is a sampling of employment-based nonimmigrant categories:

Diplomats. The A visa is for heads of state, ambassadors, public ministers, career diplomats, consular officers, and their families and staff, traveling to the U.S. solely to engage in official duties or activities on behalf of their national government.

Business Visitors. The B-1 visa is for temporary business visitors who are not "performing skilled or unskilled labor." The Bricklayers case, included in section 4.6, explores some of the boundaries of this visa program. Examples of authorized activity include attending a scientific, educational, professional or business conference; settling an estate; and negotiating a contract. The B-1 visa is also available to professional athletes competing in the United States, so long as the athletes are not earning a salary—with competing for prize money being permissible. Examples of unauthorized activity for the holder of a B-1 visa includes engaging in the active management of an enterprise.

Crewmembers. The C-1 visa (sometimes issued as a C-1/D visa) is for crewmen in continuous transit through the United States. It would be appropriate for a crewmember flying into the United States to immediately join a ship in port before it leaves the United States—for example, a noncitizen worker who flies into Miami, Florida to start their job on a Royal Caribbean cruise ship temporarily docked in Miami.

Treaty Traders. The E-1 visa is for noncitizens from treaty countries (countries with which the United States maintains a treaty of commerce and navigation, or with which the United States maintains a qualifying international agreement, or which has been deemed a qualifying country by legislation) coming to the United States solely to engage in substantial international trade (between the U.S. and the treaty country) on behalf of an already-existing enterprise.

Professional Workers. The H-1B visa is for noncitizens engaged in a specialty occupation. A "specialty occupation" is one that requires both "theoretical and practical application of a body of highly specialized knowledge and … a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation." INA § 214(i), 8 U.S.C. § 1184(i). H-1B visas require going through the labor condition application, outlined in section 4.4 below. Only 65,000 H-1B visas are available each year, though an additional 20,000 visa slots are available every year for those with master's or doctoral degrees from U.S. institutions. The program is routinely over-subscribed, and the USCIS must frequently allocate visas using a lottery system based on applications filed by April 1. Some employers are "cap-exempt" and can hire

H-1B employees outside these limited numbers; among these are institutions of higher education and research hospitals. The H-1B visa allows recipients to have "dual intent." (See section 4.2). There are two additional programs for specialty-occupation workers of note. The H-1B1 visa provides 1,400 visas to specialty workers from Chile and another 5,400 visas for specialty workers from Singapore. Finally, the E-3 visa can be issued to 10,500 Australian workers in specialty occupations.

Foreign Fashion Models. The H-1B3 visa is for foreign fashion models of distinguished merit and ability.

Agricultural Workers. The H-2A visa is for those "coming temporarily to the United States to perform agricultural labor or services … of a temporary or seasonal nature." Examples would include workers harvesting grapes at a winery or helping with calving season on a ranch. This category has no annual quota. H-2A visas require going through the labor certification process, outlined in section 4.5 below.

Temporary Nonagricultural Workers. The H-2B visa applies to "other temporary service or labor." The employer's temporary need for the worker must be either a one-time occurrence, seasonal, peakload, or intermittent. The boundaries of this visa category are discussed in the *Bricklayers* case, included in section 4.6. Only 66,000 H-2B visas can be issued annually, with 33,000 available during each half of the fiscal year. H-2B visas require going through the labor certification process, outlined in section 4.5 below.

Trainee. The H-3 visa can be used by individuals: (i) to obtain training unavailable in their home country, in any field except graduate medical education, or training that will help the recipient to pursue their career outside the U.S. or (ii) to obtain special education training for children with disabilities.

Journalists. The I visa is for members of the foreign press.

Transnational Employees. The L visa is for noncitizens working in a managerial or executive capacity (L-1A), and others working in positions of specialized knowledge (L-1B), who have been working for at least a year overseas and now seek to work for that same employer in the United States. L visa holders, like H-1B recipients, are entitled to hold "dual intent." (See section 4.2).

Extraordinary Workers. The O-1 visa is available to noncitizens with "extraordinary ability" in "sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim." The benefits to being in the O category include the lack of any numerical limits on the number of O admissions

per year and the absence of a need to file a labor-condition application, which will be discussed in greater detail in section 4.4 below.

Athletes and Entertainers. Athletes and entertainers who do not qualify for the "extraordinary" O visa may qualify for the P visa, so long as they can establish that they are internationally recognized as "outstanding" in their field.

Cultural Workers. The Q visa is for employees whose work involves the sharing of the history, culture, and traditions of their home country. It is informally called the "Disney visa" and was enacted in 1990 after lobbying by Disney, motivated to staff its Epcot Center at Walt Disney World.

Religious Workers. The R visa is for religious workers. Visas are available for both ministers—those authorized and trained to conduct religious worship—and religious workers with a non-ministerial vocation or profession.

NAFTA Professionals. The TN visa is for noncitizens from Canada or Mexico working in one of more than 60 professional occupational categories enumerated in the North American Free Trade Agreement. While NAFTA was replaced by the United States-Mexico-Canada Agreement (USMCA) in 2020, TN beneficiaries are still known as NAFTA professionals.

4.4 Labor Condition Application

Employers seeking to sponsor a temporary worker in a specialty occupation under the H-1B, H-1B1, or E-3 visas must file a "labor condition application" (LCA) with the U.S. Department of Labor Employment and Training Administration's (DOLETA) Office of Foreign Labor Certification (OFLC) as a first step in the visa petition process. The LCA requires that employers looking to sponsor workers attest that: (1) the foreign worker's wages will be the greater of either actual wages at the place of employment or prevailing wages in the area for the position; (2) the working conditions of the worker will not adversely affect the working conditions of workers similarly employed; (3) the employer is not experiencing a strike or lock-out; (4) the employer provided notice to employees and unions about the labor certification; and (5) the agency displayed publicly the specific number of the foreign hires, their wages, and working conditions.

Notably, the LCA does not require an employer to first look for "able, willing, qualified" U.S. workers, the standard we first discussed in connection with LPR visas in section 3.14.

With the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Congress added requirements for employers who are "H-1B dependent."

Whether a company is deemed H-1B dependent turns on the percentage of H-1B employees in the company's workforce: An H-1B dependent employer has 25 or fewer full-time employees and at least eight H-1B workers, 26-50 full-time employees and at least 13 H-1B workers, or 51 or more full-time employees of whom 15% or more are H-1B workers. If a company is deemed H-1B dependent, then it is prohibited from displacing U.S. workers within a 180-day window. Depending on the situation, the window can be triggered by either the filing of the H-1B petition or the placement of the H-1B worker. Displacement includes both direct displacement (a company firing its own U.S. workers and replacing them with H-1B workers) and secondary displacement (a company using its H-1B workers to displace the U.S. workers of a second employer). H-1B-dependent employers are also under an obligation to take "good faith steps to recruit U.S. workers" for the positions to be filled by H-1B workers.

4.5 Labor Certification

The labor condition application, discussed in section 4.4, does not apply to all employment-based nonimmigrants. Employers seeking to sponsor a temporary worker under an H-2A (agricultural) or H-2B (other temporary workers) visa must seek labor certification. These applications are processed through the Department of Labor's Foreign Labor Application Gateway (FLAG). The certification inquiry aims to establish that: (1) There are not sufficient able, willing, and qualified U.S. workers available to perform the temporary employment for which nonimmigrant foreign workers are being requested; and (2) Employment of H-2A/H-2B workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. These standards parallel those required for EB-2 and EB-3 LPRs, discussed in section 3.14. While the DOL is the gatekeeper for both certifications, different online systems are utilized.

4.6 Case: International Union of Bricklayers and Allied Craftsmen v. Meese

International Union of Bricklayers and Allied Craftsmen v. Meese
616 F. Supp. 1387 (N.D. Cal. 1985)

DISTRICT JUDGE CHARLES A. LEGGE

Plaintiff International Union of Bricklayers and Allied Craftsmen ("International Union") represents approximately 100,000 masonry craftsmen working in the construction industry in the United States. Plaintiff Local No. 7, California, International Union of Bricklayers and Allied Craftsmen ("Local 7") is affiliated with

plaintiff International Union in Northern California, and represents masonry craftsmen working in Lake County, California.

Defendants Edwin Meese III ("Attorney General"), George P. Schultz ("Secretary of State"), and the Immigration and Naturalization Service ("INS") are charged with the administration and enforcement of the immigration laws in the United States.˜ Defendant-intervenor Homestake Mining Company of California ("Homestake") is a California corporation, and the owner of the McLaughlin Gold Project in Lake County, California.

Plaintiffs commenced this case on behalf of themselves and their members to challenge the federal defendants' practice of issuing visas to foreign laborers under the authority of INS Operations Instruction 214.2(b)(5), an INS internal agency guideline. Pursuant to that practice, visas are issued to foreign laborers coming to the United States temporarily to work. In this case, visas were issued to foreign laborers who came temporarily to work on the project owned by Homestake. Plaintiffs contend that the practice violates the Immigration and Nationality Act˜ and seek declaratory and injunctive relief to remedy the alleged violations.˜

For the reasons set forth below, the court concludes that summary judgment should be entered in favor of plaintiffs.

I. Statutory and Regulatory Overview

The Act generally charges the Attorney General and the Secretary of State with the administration and enforcement of the immigration laws of the United States. See 8 U.S.C. §§ 1103(a), 1104(a). Primary responsibility, however, rests with the Attorney General,˜ and his "determination and ruling ... with respect to all questions of [immigration] law [is] controlling." 8 U.S.C. § 1103(a).˜

The dispute in the present case centers on the Act's provisions regarding nonimmigrant aliens. Section 101(a)(15) of the Act, 8 U.S.C. § 1101(a)(15), sets forth thirteen classes of aliens entitled to nonimmigrant status. The parties have stipulated, however, that only two of those classes are germane to this case.

A. Temporary Visitors for Business

The first class of nonimmigrant aliens relevant here is the "temporary visitor for business" class. Section 101(a)(15)(B) of the Act defines a "temporary visitor for business" as: "an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United

States temporarily for business… .” 8 U.S.C. § 1101(a)(15)(B). An alien qualifying for this nonimmigrant status is entitled to receive a “B-1” visa.˜

Pursuant to his authority under the Act, see 8 U.S.C. § 1104(a), the Secretary of State has promulgated a regulation defining the term “business” for purposes of the B-1 “temporary visitor for business” class: “The term ‘business’, as used in section 101(a)(15)(B) of the Act, refers to legitimate activities of a commercial or professional character. It does not include purely local employment or labor for hire. An alien seeking to enter as a nonimmigrant for employment or labor pursuant to a contract or other prearrangement shall be required to qualify under the provisions of [22 C.F.R.] § 41.55.3.” 22 C.F.R. § 41.25(b) (1985).˜

Among the criteria utilized to determine an alien’s eligibility for B-1 “temporary visitor for business” status is INS Operations Instruction 214.2(b)(5), an INS internal agency guideline that is the subject of this dispute. The Operations Instruction provides: “Each of the following may also be classified as a B-1 nonimmigrant if he/she is to receive no salary or other remuneration from a United States source (other than an expense allowance or other reimbursement for expenses incidental to the temporary stay): (5) An alien coming to install, service, or repair commercial or industrial equipment or machinery purchased from a company outside the U.S. or to train U.S. workers to perform such service, provided: the contract of sale specifically requires the seller to perform such services or training, the alien possesses specialized knowledge essential to the seller’s contractual obligation to provide services or training, the alien will receive no remuneration from a U.S. source, and the trip is to take place within the first year following the purchase.” INS Operations Instruction 214.2(b)(5)˜.

Pursuant to the Operations Instruction, B-1 visas have been issued to the foreign laborers who came to the United States to work on the project owned by Homestake, and to foreign laborers to do other work throughout the United States.˜ The central issue in this case is whether the Operations Instruction violates the Act and the regulations promulgated under the Act.

B. Temporary Workers

The second class of nonimmigrant aliens involved here is the “temporary worker” class. Section 101(a)(15)(H)(ii) of the Act defines a “temporary worker” as: “an alien having a residence in a foreign country which he has no intention of abandoning … [and] who is coming temporarily to the United States to perform temporary services of labor, if unemployed persons capable of performing such service or labor cannot be found in this country….” 8 U.S.C. § 1101(a)(15)(H)(ii). An alien qualifying for this nonimmigrant status is entitled to receive an “H-2” visa.˜

The Attorney General is authorized to make the determination concerning the admissibility of an H-2 "temporary worker" applicant after consulting with other government agencies. In this regard, the Act provides that "[t]he question of importing any alien as a nonimmigrant under section 101(a)(15)(H) … shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer." 8 U.S.C. § 1184(c).

Pursuant to his authority under the Act, the Attorney General has promulgated a regulation which requires the petitioning employer for an H-2 "temporary worker" applicant to seek labor certification from the Secretary of Labor prior to approval of the applicant's petition. That regulation provides in pertinent part: "Every petitioner must attach to every nonimmigrant visa petition to classify an alien under section 101(a)(15)(H)(ii) of the Act … either: (A) A certification from the Secretary of Labor … stating that qualified persons in the United States are not available and that the employment of the beneficiary will not adversely affect wages and working conditions of workers in the United States similarly employed; or (B) A notice that such certification cannot be made. If there is attached to the petition a notice from the Secretary of Labor … that certification cannot be made, the petitioner shall be permitted to present countervailing evidence.… All such evidence submitted will be considered in the adjudication of the petition." 8 C.F.R. § 214.2(h)(3) (1985).

II. The Present Case

A. Factual Background

Homestake began construction in early 1984 on its McLaughlin Gold Project in order to open a new gold mine. Due to metallurgical problems in the Lake County region, Homestake concluded that it was necessary to employ technology not used previously in the gold mining industry. Davy McKee Corporation ("Davy McKee"), Homestake's construction manager, therefore conducted a search to locate the appropriate technology.

On behalf of Homestake, Davy McKee agreed to purchase a newly-designed gold ore processing system from Didier-Werke ("Didier"), a West German manufacturing company. Although the purchase agreement required Didier to supply an integrated processing system, it was not possible to premanufacture the entire system in West Germany. The purchase agreement was therefore made contingent upon Didier's West German employees completing the work on the system at the project site in Lake County.

In September 1984, Didier submitted B-1 "temporary visitor for business" visa petitions on behalf of ten of its West German employees to United States consular

officers in Bonn, West Germany. Relying upon INS Operations Instruction 214.2(b)(5), consular officers approved the petitions and issued B-1 visas to the West Germans. Neither the West Germans nor their employer was required to seek labor certification from the Secretary of Labor, because the certification procedures only govern the issuance of H-2 "temporary worker" visas. In January 1985, the West Germans entered the United States to work on the processing system. The work involves the installation of the interior linings of the system's autoclaves, and requires certain technical bricklaying skills.

B. Procedural Background

On January 29, 1985, plaintiffs filed this lawsuit against the federal defendants.

Plaintiffs allege that the federal defendants' practice of issuing B-1 "temporary visitor for business" visas under the authority of INS Operations Instruction 214.2(b)(5) violates two provisions of the Act. First, plaintiffs allege that the practice violates section 101(a)(15)(B) of the Act, because the issuance of B-1 visas to aliens coming to the United States to perform skilled or unskilled labor is expressly prohibited by section 101(a)(15)(B). Second, plaintiffs allege that the practice violates section 101(a)(15)(H)(ii) of the Act, because aliens have been permitted to bypass the labor certification requirements contained in the regulations under section 101(a)(15)(H)(ii).

Plaintiffs therefore ask this court to declare that INS Operations Instruction 214.2(b)(5) violates the Act; to permanently enjoin the federal defendants from issuing B-1 visas under the authority of the Operations Instruction; and to order the federal defendants to reclassify the visa status of all B-1 "temporary visitor for business" alien nonimmigrants who are currently performing skilled or unskilled labor in the United States.

IV. The Validity of the Operations Instruction Under the Act

Plaintiffs contend that INS Operations Instruction 214.2(b)(5) violates the Act, because the Operations Instruction is inconsistent with specific provisions of the Act, and with the legislative intent underlying those provisions.

In testing the Operations Instruction against the Act, the court's task is to interpret the Act in light of the purposes Congress sought to achieve in enacting it. The starting point must be the language employed by Congress. Absent a clearly expressed legislative intention to the contrary, the statutory language is to be regarded as conclusive.

A. The Language of the Act and the Operations Instruction

The court must begin its analysis by comparing the language of the Act with the language of the Operations Instruction. In particular, the court must focus on the

nonimmigrant visa provisions in sections 101(a)(15)(B) and 101(a)(15)(H)(ii) of the Act.˜

A comparison of the language of section 101(a)(15)(B) of the Act with the language of INS Operations Instruction 214.2(b)(5) demonstrates that the Operations Instruction contravenes that section of the Act. Section 101(a)(15)(B) unequivocally excludes from the B-1 "temporary visitor for business" classification an alien who is "coming for the purpose of … performing skilled or unskilled labor." 8 U.S.C. § 1101(a)(15)(B). That exclusion is reinforced by the federal defendants' own regulations. In this regard, the Secretary of State has promulgated a regulation defining "business" for purposes of section 101(a)(15)(B): "The term 'business' … refers to legitimate activities of a commercial or professional character. *It does not include purely local employment or labor for hire*." 22 C.F.R. § 41.25(b) (1985) (emphasis added).˜

INS Operations Instruction 214.2(b)(5), however, does not contain an exclusion for an alien seeking to enter the United States to perform skilled or unskilled labor. The Operations Instruction provides that an alien may be classified as a "temporary visitor for business" if the alien is "coming to install, service, or repair commercial or industrial equipment or machinery." The effect of this language is to authorize the issuance of a B-1 visa to an alien coming to this country to perform skilled or unskilled labor. In the present case, for example, the West Germans undeniably are performing labor—whether it be deemed skilled or unskilled—in connection with the installation of the gold ore processing system at the McLaughlin Gold Project.

Similarly, a comparison of the language of section 101(a)(15)(H)(ii) of the Act with the language of INS Operations Instruction 214.2(b)(5) shows that the Operations Instruction also contravenes that section of the Act. Section 101(a)(15)(H)(ii) classifies an H-2 "temporary worker" as an alien "coming … to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. § 1101(a)(15)(H)(ii). Because the Act requires the Attorney General to consult other agencies of the government concerning "temporary worker" visas,˜ the Attorney General has established H-2 labor certification procedures. Thus, an H-2 visa petition cannot be approved unless the alien's employer obtains either "*[a] certification from the Secretary of Labor* … stating *that qualified persons in the United States are not available and that the employment* of the beneficiary *will not adversely affect wages and working conditions of workers in the United States* similarly employed … [*or*] notice that such certification *cannot* be made." 8 C.F.R. § 214.2(h)(3) (1985) (emphasis added).

In contrast, INS Operations Instruction 214.2(b)(5) does not require an alien to seek labor certification prior to obtaining a nonimmigrant visa. More importantly, the

Operations Instruction authorizes the issuance of a nonimmigrant visa to a person performing skilled or unskilled labor, though qualified Americans may be available to perform the work involved. The Operations Instruction therefore lacks the safeguards contained in section 101(a)(15)(H)(ii) of the Act and the regulation promulgated under that section. Again, the present case illustrates this point, because the parties have stipulated that neither the West Germans nor their employer was required to seek labor certification from the Secretary of Labor prior to the issuance of the visas to the West Germans.

In summary, it is apparent that the language of INS Operations Instruction 214.2(b)(5) is inconsistent with the language of sections 101(a)(15)(B) and 101(a)(15)(H)(ii) of the Act. First, the Operations Instruction ignores the provision in section 101(a)(15)(B) excluding skilled or unskilled labor. Second, the Operations Instruction ignores the provision in section 101(a)(15)(H)(ii) concerning the availability of qualified American workers.

B. The Intent of Congress

Having determined that INS Operations Instruction 214.2(b)(5) is expressly inconsistent with the relevant sections of the Act, the court will also examine the congressional intent underlying those sections. As noted above, however, the scope of the court's inquiry is quite limited. Absent a clearly expressed legislative intention to the contrary, the language of the Act is to be regarded as conclusive.˜

The current substantive versions of sections 101(a)(15)(B) and 101(a)(15)(H)(ii) of the Act were enacted in 1952.˜ Congress, however, demonstrated its concern for the protection of American workers as early as 1885 [when]˜ Congress enacted legislation prohibiting the entry of contract laborers. Contract laborers generally were unskilled aliens who received minimal wages in return for passage to the United States. The importation of those laborers was intended "to oversupply the demand for labor so that the domestic laborers would be forced to work at reduced wages."˜ In the 1885 Act, Congress therefore sought to "protect American labor from an influx of cheaper foreign competition."˜

In the Immigration Act of 1924,˜ Congress enacted a "temporary visitor for business" nonimmigrant provision in section 3(2) that was very similar to section 101(a)(15)(B) of the current Act.˜

In taking these actions, Congress evidenced a continuing concern for the protection of American workers from unnecessary foreign competition.˜

The legislative history also demonstrates that sections 101(a)(15)(B) and 101(a)(15)(H)(ii) of the Act were intended to restrict the influx of aliens seeking to perform skilled or unskilled labor in the United States. Thus, to the extent that INS Operations Instruction 214.2(b)(5) permits aliens to circumvent the restrictions enacted by Congress in those sections, the Operations Instruction is inconsistent with both the language and the legislative intent of the Act.

C. Defendants' Arguments

Defendants contend that INS Operations Instruction 214.2(b)(5) should be upheld because it embodies a reasonable administrative interpretation of the Act.

Defendants' argument centers on the purposes Congress sought to achieve in sections 101(a)(15)(B) and 101(a)(15)(H)(ii) of the Act. Defendants contend that those sections evidence Congress' intent to foster multiple purposes. Although defendants acknowledge that one such purpose was the protection of American labor, they argue that another was the promotion of international commerce. Further, defendants assert that the language in sections 101(a)(15)(B) and 101(a)(15)(H)(ii) reveals a tension between American labor interests and international commerce interests; that the Operations Instruction seeks to minimize the tension; and that the Operations Instruction is therefore consistent with the multiple purposes in the Act.

Defendants rely primarily upon the decision of the Board of Immigration Appeals in *Matter of Hira*, 11 I. & N. Dec. 824 (BIA 1966). In *Hira*, an alien employed by a Hong Kong custom-made clothing manufacturer had entered the United States under the authority of a B-1 "temporary visitor for business" visa. While in this country, the alien took orders on behalf of his employer from prospective customers, and took the measurements of those customers. Prior to the expiration of the alien's visa, the INS commenced deportation proceedings against him. The INS concluded that the alien's activities involved the performance of skilled labor, and ordered that the alien be deported for failure to maintain his B-1 "temporary visitor for business" status. On appeal, the Board of Immigration Appeals focused its analysis on the term "business" within section 101(a)(15)(B) of the Act. Adopting the Supreme Court's definition from an earlier version of the Act, the Board held that "business," for purposes of section 101(a)(15)(B) of the Act, "contemplate [s] only 'intercourse of a commercial character.'" Id. at 827. In support of that definition, the Board alluded to prior administrative cases in which aliens were found eligible for "temporary visitor for business" status because "there was involved international trade or commerce and the employment was a necessary incident thereto." Id. at 830. The Board also elaborated upon the underlying requirements for eligibility as a "temporary visitor for business" nonimmigrant: "The significant considerations to be stressed are that there is a clear

intent on the part of the alien to continue the foreign residence and not to abandon the existing domicile; the principal place of business and the actual place of eventual accrual of profits, at least predominantly, remains in the foreign country; the business activity itself need not be temporary, and indeed may long continue; the various entries into the United States made in the course thereof must be individually or separately of a plainly temporary nature in keeping with the existence of the two preceding considerations." Id. at 827˜.

Applying those principles the Board in *Hira* concluded that the alien's business was intercourse of a commercial character, even though he took prospective customers' measurements in connection with the business. Thus, the Board held that the alien was entitled to B-1 "temporary visitor for business" status. The Attorney General subsequently affirmed the Board's decision, and certified it as controlling. See 8 U.S.C. § 1103(a).

Defendants argue that *Hira* controls the result in this case, since the principles underlying INS Operations Instruction 214.2(b)(5) and *Hira* are nearly identical. Defendants focus on the portion of *Hira* that permits the issuance of B-1 "temporary visitor for business" visas to an alien coming to the United States to engage in "intercourse of a commercial character," or coming to work as a "necessary incident" to international trade or commerce. *Hira*, supra, 11 I. & N. Dec. at 827, 830. Defendants argue that here the West Germans came to this country only as a necessary incident to the purchase and sale of the gold-ore processing system, rather than as individuals hired expressly as laborers. Further, defendants contend that it must be presumed that Congress has acquiesced in the policies underlying the Operations Instruction, because Congress has been aware of those policies for many years but has failed to take action.

Defendants' arguments are answered primarily by the language of the Act. It is important to reemphasize that in matters of statutory interpretation, a court must interpret the statute in light of the purposes Congress sought to achieve in enacting it.˜ And absent a clearly expressed legislative intention to the contrary, the statutory language is regarded as conclusive.˜ Under those principles, the language of section 101(a)(15)(B) of the Act which excludes an alien "coming for the purpose of ... performing skilled or unskilled labor," 8 U.S.C. § 1101(a)(15)(B), precludes defendants' purported distinction between business and labor in this case; so does the expressed congressional intent of protecting American labor.

Similarly, there is no indication that Congress has acquiesced in the policies underlying INS Operations Instruction 214.2(b)(5). The current substantive versions of sections 101(a)(15)(B) and 101(a)(15)(H)(ii) were enacted in 1952. The Operations Instruction was not promulgated until 1972. And there is no suggestion from legislative

history that Congress considered either the specific holding of the Board of Immigration Appeals in *Hira* in 1966, or *Hira* 's impact on other types of foreign labor performed in the United States.

The interpretation of a federal statute by the officials responsible for its administration is entitled to deference.˜ A court, however, must reject an administrative interpretation "that [is] inconsistent with the statutory mandate or that frustrate[s] the policy that Congress sought to implement."˜

The court concludes from both the language and legislative intent of the Act that the federal defendants' interpretation embodied in the Operations Instruction contravenes the Act. The court therefore decides that INS Operations Instruction 214.2(b)(5) violates sections 101(a)(15)(B) and 101(a)(15)(H)(ii) of the Act.˜

VI. Order˜

IT IS THEREFORE ORDERED AS FOLLOWS:

1. Plaintiffs' motion for summary judgment is granted, and defendants' motion for summary judgment is denied.

2. INS Operations Instruction 214.2(b)(5) is declared unlawful and in violation of sections 101(a)(15)(B) and 101(a)(15)(H)(ii) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(B), 1101(a)(15)(H)(ii).

3. Defendants Edwin Meese III, George P. Schultz, and the Immigration and Naturalization Service, and their agents, successors and assigns, and all persons acting with or in concert with them, are permanently enjoined from issuing B-1 "temporary visitor for business" visas under the authority of INS Operations Instruction 214.2(b)(5).˜

4.7 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 to establish a separate nonimmigrant classification for fashion models.

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

SECTION 1. ESTABLISHMENT OF NEW FASHION MODEL NONIMMIGRANT CLASSIFICATION.

(a) In General-

(1) NEW CLASSIFICATION- Section 101(a)(15)(P) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(P)) is amended

(A) in clause (iii), by striking 'or' at the end;

(B) in clause (iv), by striking 'clause (i), (ii), or (iii)' and inserting 'clause (i), (ii), (iii), or (iv)';

(C) by redesignating clause (iv) as clause (v); and

(D) by inserting after clause (iii) the following:

(iv) is a fashion model who is of distinguished merit and ability and who is seeking to enter the United States temporarily to perform fashion modeling services that involve events or productions which have a distinguished reputation or that are performed for an organization or establishment that has a distinguished reputation for, or a record of, utilizing prominent modeling talent; or.

(2) AUTHORIZED PERIOD OF STAY- Section 214(a)(2)(B) of the Immigration and Nationality Act (8 U.S.C. 1184(a)(2)(B)) is amended in the second sentence—

(A) by inserting 'or fashion models' after 'athletes'; and

(B) by inserting 'or fashion model' after 'athlete'.

(3) NUMERICAL LIMITATION- Section 214(c)(4) of the Immigration and Nationality Act (8 U.S.C. 1184(c)(4)) is amended by adding at the end the following:

(I)(i) The total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year under section 101(a)(15)(P)(iv) may not exceed 1,000.

(ii) The numerical limitation established by clause (i) shall only apply to principal aliens and not to the spouses or children of such aliens.

(iii) An alien who has already been counted toward the limitation established by clause (i) shall not be counted again during the same period of stay or authorized extension under subsection (a)(2)(B), irrespective of whether there is a change in petitioner under subparagraph (C).

(4) CONSULTATION-

(A) IN GENERAL- Section 214(c)(4)(D) of the Immigration and Nationality Act (8 U.S.C. 1184(c)(4)(D)) is amended by striking 'clause (i) or (iii)' and inserting 'clause (i), (iii), or (iv)'.

(B) ADVISORY OPINION- Section 214(c)(6)(A)(iii) of the Immigration and Nationality Act (8 U.S.C. 1184(c)(6)(A)(iii)) is amended—

(i) by striking 'section 101(a)(15)(P)(i) or 101(a)(15)(P)(iii),' and inserting 'clause (i), (iii), or (iv) of section 101(a)(15)(P),'; and

(ii) by striking 'of athletics or entertainment'.

(C) EXPEDITED PROCEDURES- Section 214(c)(6)(E)(i) of the Immigration and Nationality Act (8 U.S.C. 1184(c)(6)(E)(i)) is amended by striking 'artists or entertainers' and inserting 'artists, entertainers, or fashion models'.

(b) Elimination of H-1B Classification for Fashion Models- Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(i)(b)) is amended—

(1) by striking 'or as a fashion model'; and

(2) by striking 'or, in the case of a fashion model, is of distinguished merit and ability'.

(c) Effective Date and Implementation-

(1) IN GENERAL- The amendments made by this section shall take effect on the date of the enactment of this Act.

(2) REGULATIONS, GUIDELINES, AND PRECEDENTS- The regulations, guidelines and precedents in effect on the date of the enactment of this Act for the adjudication of petitions for fashion models under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(i)(b)), shall be applied to petitions for fashion models under section 101(a)(15)(P)(iv) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(P)(iv)), as added by this Act, except to the extent modified by the Secretary of Homeland Security through final regulations (not through interim

regulations) promulgated in accordance with subchapter II of chapter 5, and chapter 7, of title 5, United States Code (commonly known as the 'Administrative Procedure Act').

(3) CONSTRUCTION- Nothing in this section shall be construed as preventing an alien who is a fashion model from obtaining nonimmigrant status under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(O)(i)) if such alien is otherwise qualified for such status.

(4) TREATMENT OF PENDING PETITIONS- Petitions filed on behalf of fashion models under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(i)(b)) that are pending on the date of the enactment of this Act shall be treated as if they had been filed under section 101(a)(15)(P)(iv) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(P)(iv)), as added by this Act.

4.8 Family-Based Nonimmigrants

There are two important family-based nonimmigrant categories:

Fiancée/Fiancé. The K visa is for the betrothed of a U.S. citizen who will marry within 90 days of coming to the United States.

Spouses and Children of LPRs. The V visa was created to give certain spouses and children of LPRs a means to come to the United States during the processing of their immigrant visa applications. At present, spouses and children of LPRs are eligible to receive immigrant visas under the F2A category, which is "current," meaning there is no wait time for the issuance of the visa (see section 3.2). However, in the past, spouses and children of LPRs had faced lengthy delays in getting visas. Thus, Congress created the V visa to help alleviate family separation due to those delays.

4.9 Students

There are three important categories for nonimmigrants pursing educational opportunities in the United States:

Degree-seeking students. The F visa is available to degree-seeking international students who are enrolled in an academic program. The F visa applies whether the student is pursuing undergraduate or graduate education in the United States. F-visa students can engage in on-campus work and, in the case of economic hardship, off-campus work. They are also eligible for curricular practical training (CPT) during their program of study, which is employment that is an integral part of an established

curriculum and that directly relates to the student's major area of study. F-visa students are also eligible for optional practical training (OPT) during or following their program of study, which is temporary employment that directly relates to the student's program of study. F-visa students can remain in the United States for the duration of their studies.

Vocational students. The M visa is available to students who are pursuing vocational and technical studies in the United States. M-visa students have limited work opportunities in the United States. They can engage in practical training (PT) one month for every four months of their program. M visas are typically issued for just one year.

Exchange visitors. The J visa is available to exchange students who are studying in the United States on a temporary basis, such as for a single semester or academic year, and are not degree-seeking. The J visa, however, is much broader than the F or M categories. It also includes opportunities for visa holders to teach, study, conduct research, demonstrate special skills or receive on-the-job training for periods ranging from a few weeks to several years. It is a visa utilized by such diverse occupations as au pairs, camp counselors, doctors, and professors.

Kit Johnson, The Wonderful World of Disney Visas,
63 FLA. L. REV. 915 (2011)

The J visa has been in existence since 1961. It is a product of the Mutual Educational and Cultural Exchange Act of 1961, also called the Fulbright-Hays Act after Senator J. William Fulbright, who was then chairman of the Senate Foreign Relations Committee.˜ Its history, however, dates back to 1939. In August of that year, Congress enacted a law˜ relating to educational cooperation with Latin America that provided, among other things, for international student exchanges monitored by the Department of State.˜ The "[p]rimary emphasis" of the law was on "the increase of mutual understanding through personal relationships between leaders of thought and opinion in all fields."˜

The 1948 United States Information and Educational Exchange Act,˜ better known as the Smith-Mundt Act,˜ expanded the 1939 Act beyond the Western Hemisphere. Section 201 of the Smith-Mundt Act authorized the Secretary of State to "provide for interchanges on a reciprocal basis between the United States and other countries of students, trainees, teachers, guest instructors, professors, and leaders in fields of specialized knowledge or skill."˜ Visitors under this program were considered "nonimmigrant visitors for business,"˜ and later just unspecified "nonimmigrants,"˜ present in the United States for a finite period before returning to their country of origin.

The legislative reports that discussed the purpose and need for the Smith-Mundt Act echoed the 1939 call for "mutual understanding between the people of the United States and of other countries."˜ Congress argued that such "mutual understanding" was necessary to "correct misunderstandings about the United States abroad."˜ ["T]he importance of maintaining such a program cannot be gainsaid. The American people, our ideals, and our form of government are being misrepresented and distorted abroad by the propaganda of other nations. The prestige of the United States and of democracy itself are suffering as a result of this unequal battle of ideas. We must be able to tell abroad the truth about the United States. We cannot afford to let others tell that story for us.["]˜

One thing that was not spelled out in the Smith-Mundt Act was how to deal with exchange visitors who wanted to stay in the United States after the conclusion of their exchange programs. President Dwight Eisenhower strongly urged the passage of a new law to require "that exchange personnel return home and remain there for a minimum period before being eligible to reenter the United States for permanent residence."˜ He argued that this would be the only effective means for achieving the program's basic objectives: (1) promoting international understanding and (2) allowing the countries of origin to benefit from their citizens' United States training.˜

Congress obliged. In 1956, the Smith-Mundt Act was amended to require exchange participants to reside and be physically present overseas for at least two years following their departure from the United States.˜

The Fulbright-Hays Act of 1961 followed.˜ Its purpose was to "consolidate, expand, and simplify both the scope and the administration of [U.S.] international educational and cultural exchange program[s],"˜ which included, among others, the Smith-Mundt Act.˜

The Act authorized "educational exchanges" open to "students, trainees, teachers, instructors, and professors"˜ as well as "other exchanges ... promoting studies, research, instruction, and other educational activities of citizens and nationals of foreign countries in American schools, colleges, and universities located in the United States."˜ It also authorized separate "cultural exchanges" for limited categories of specialized activities such as creative performing artists and athletes.˜

The Act fixed the problem of how to define these exchange visitors for purposes of immigration law by creating a new visa category—the J visa—solely to serve the purposes of the Fulbright-Hays Act.˜ This new J visa applied, and continues to apply, to: ["]an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee ... who is coming temporarily to

the United States as a participant in a program designated by the Director of the United States Information Agency,˜ for the purpose of … studying, observing, … consulting, demonstrating special skills, or receiving training ….[”]˜

Notably, the Act also codified the requirement that J visa recipients typically must reside overseas for two years following the conclusion of their J visa program before returning to the United States.˜

Congress’ statement of purpose for the new law largely echoed language justifying the past twenty-two years of legislation: [“]The purpose of this chapter is to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchange; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations, and the contributions being made toward a peaceful and more fruitful life for people throughout the world; to promote international cooperation for educational and cultural advancement; and thus to assist in the development of friendly, sympathetic, and peaceful relations between the United States and the other countries of the world.[”]˜

The House Report regarding the Fulbright-Hays Act was more pointedly directed at the Cold War fears prevalent at the time of the Act’s passage:˜ [“]Present-day governments give a high priority to educational and cultural exchanges. While political and economic affairs are the province of a relatively few individuals, educational and cultural programs are by their very nature a people-to-people activity. A lecturer catches young minds. A student gains experiences that shape his mature years. Cultural exchanges as in music or art can reach thousands at a time. In the current struggle for the minds of men, no other instrument of foreign policy has such great potential.[”]˜

Congress saw in the Act the potential for drawing members of the international community into a pro-American, and thus anti-communist, stance by means of education and cultural exchange.˜

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4.10 Prosecution-Related Nonimmigrant Categories

The United States has three different nonimmigrant categories that relate to criminal prosecution:

Informants. Informants who have “critical reliable information” about a criminal or terrorist organization, and who work with law enforcement to prosecute such organizations, may be eligible for an S visa.

Trafficking. Victims of “severe” labor or sex trafficking, who are present in the United States because of that trafficking, who cooperate (or are unable to cooperate) with law enforcement, and who would suffer “extreme hardship involving unusual and severe harm upon removal” may be eligible for a T visa. Trafficking involves (i) the recruitment, harboring, transporting, provision or obtaining of a person, (ii) through force, fraud, or coercion, (iii) for the purpose of a commercial sex act or subjection to involuntary servitude, peonage, debt bondage, or slavery. Only 5,000 T visas are available annually, but this cap has never been met. A T visa holder can adjust to LPR status after three years of physical presence in the United States, assuming other requirements are met. INA § 245(*l*), 8 U.S.C. § 1255(*l*).

Crime Victims. A person who has “suffered substantial physical or mental abuse” because of certain specified crimes and who “has been helpful, is being helpful, or is likely to be helpful” to law enforcement may be eligible for a U visa. Specified crimes include: abduction, abusive sexual contact, blackmail, domestic violence, extortion, false imprisonment, female genital mutilation, felonious assault, fraud in foreign labor contracting, hostage, incest, involuntary servitude, kidnapping, manslaughter, murder, obstruction of justice, peonage, perjury, prostitution, rape, sexual assault, sexual exploitation, slave trade, stalking, torture, trafficking, witness tampering, and unlawful criminal restraint. Only 10,000 U visas are available each year, and there is a significant backlog for this visa category. A U visa holder can adjust to LPR status after three years of physical presence in the United States, assuming other requirements are met. INA § 245(m), 8 U.S.C. § 1255(m).

4.11 Tourists

The B-2 visa is available to noncitizens traveling to the United States “temporarily for ... pleasure.” The term “pleasure” has been understood quite broadly. It includes travel for purposes of medical treatment, seeing friends and family, as well as travel for purposes of engaging in a “short course of study” that is “recreational or avocational.” It’s also available to uncompensated amateur competitors in musical, sports, and similar contests. Before the United States recognized same-sex marriages, the B-2 visa offered a means for same-sex noncitizens to join their partners in the United States for a limited time.

4.12 Change of Nonimmigrant Classification

Many, though not all, nonimmigrants can change from one nonimmigrant status to another without leaving the United States. INA § 248, 8 U.S.C. § 1258. So, for example, a university student who came to the United States on an F visa could, following graduation, be hired by a company who would sponsor them for an H-1B visa. Notably, that same individual could ultimately change from an H-1B visa to an employment-based immigrant visa following a process called "adjustment of status," discussed in section 7.9.

4.13 Test Your Knowledge

PROBLEM 4.1

Kurt Köhler, has a good job in the states. He was brought to the U.S. on a B-1/B-2 visa by the German manufacturing company Seimation Systems in order to build new a manufacturing plant that will eventually produce power-plant turbines for worldwide distribution. Kurt works as an electrical technician in Germany and was brought to the U.S. by Seimation to install wiring in the new U.S. plant. He works with four other electricians and is nominally the supervisor for the group, though he's doing as much on-the-ground wiring as his cohort.

Is everything on the up-and-up with Kurt Köhler? Explain.

PROBLEM 4.2

Bastien Bacques works for Disneyland Paris. He is a sales manager within the Disney Business Solutions division. As such, he works with corporate clients to plan business events at Disneyland Paris. He manages everything from budgets to logistics.

Bastien is interested in moving to the United States to get additional sales manager experience at Walt Disney World in Orlando, Florida. What are nonimmigrant visa options that Bastien and Walt Disney World should consider? Are there any benefits to pursuing one visa over another?

Chapter Five: Undocumented Migrants

Undocumented migrants make up the third significant group of noncitizens living in the United States, after immigrants and nonimmigrants. 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. 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 legally in the United States without being legally admitted to the country. Section 7.6 will discuss one of these statuses, parole, in more detail. And sections 9.13, 9.14, and 11.39, will discuss other important quasi-legal statuses, including temporary protected status and the Deferred Action for Childhood Arrivals (DACA) program.

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.

5.1 Characteristics of the Undocumented Population

CRS, Unauthorized Aliens in the United States: Policy Discussion (2014)

PERIOD OF ARRIVAL˜

[M]ore than half (54%) of the total unauthorized immigrant population in January 2012 entered the United States in the 10 years between 1995 and 2004, and˜ 87% of this population entered the country before 2005. As discussed below, these data are important for estimating potential numbers of beneficiaries under possible legalization programs, which typically have eligibility cut-off dates.

REGION OF BIRTH

Mexico has historically been the major source country for unauthorized migration to the United States. According to DHS, there were an estimated 6.7 million unauthorized immigrants from Mexico residing in the United States in early 2012, representing 59% of the total unauthorized resident population at the time. According to preliminary Pew estimates for 2012, there were an estimated 6.0 million unauthorized immigrants from Mexico living in the United States that year, representing 52% of the total unauthorized resident population.

In its analysis of the 2012 unauthorized population, DHS produced region of birth estimates. It estimated that there were 8.9 million unauthorized immigrants living in the United States in 2012 from North America, which includes Mexico as well as Canada, the Caribbean, and Central America (78% of the total). According to the DHS analysis, South America accounted for 0.7 million unauthorized aliens in 2012, yielding a combined North America and South America total of 9.6 million (84% of the total unauthorized resident population). Asia accounted for an additional 1.3 million unauthorized immigrants.˜

STATES OF RESIDENCE˜

California is home to more unauthorized immigrants than any other state. DHS estimates that about one-quarter of the U.S. unauthorized population in January 2012 was living in California. Pew estimates California's share of the 2012 unauthorized population at a lower 21%.˜ [U]nder the DHS analysis, the top nine states housed 70% of the total unauthorized resident alien population in 2012. This distribution represents less geographic concentration than in past years, however, when the top states were home to a greater percentage of the total unauthorized population.˜

DEMOGRAPHIC AND FAMILY CHARACTERISTICS

DHS and Pew demographers analyzed the gender and age of unauthorized immigrants living in the United States in January 2012 and March 2010, respectively.˜ According to DHS, its estimated January 2012 unauthorized population of 11.4 million consisted of 10.3 million adults and 1.1 million children under age 18. Among the adults, 5.5 million were men and 4.8 million were women.˜ According to Pew, its March 2010 estimate of 11.2 unauthorized residents˜ was composed of 10.2 million unauthorized adults and 1.0 million unauthorized children.

With respect to age, the DHS analysis found that a majority of unauthorized immigrants were between the ages of 25 and 44. About 61% of all unauthorized aliens living in the United States in January 2012 were in this age group, according to DHS. Pew estimated that the median age of an unauthorized adult in 2010 was 36.2 years old.˜ These demographic data have implications for labor force participation, which is discussed in the next section.

Children of unauthorized immigrants may be unauthorized immigrants themselves or may have legal status. Pew estimated that there were 5.5 million children in the United States in 2010 with at least one unauthorized parent. As noted, 1.0 million of these children were unauthorized aliens. According to the Pew analysis, the remaining 4.5 million children were born in the United States and, thus, were U.S. citizens. Pew also developed estimates of "mixed-status" families (i.e., families with at least one unauthorized parent and at least one U.S.-born child). It reported that there were at least 9 million people living in mixed-status families in the United States in 2010.˜

LABOR FORCE PARTICIPATION

Given the age distribution of unauthorized aliens, among other factors, it is not surprising that the labor force participation rate of unauthorized immigrants is high. Pew estimated that there were 8.0 million unauthorized aliens in the labor force in 2010, representing almost four of every five unauthorized adults in the United States that year. These unauthorized workers accounted for 5.2% of the civilian labor force.˜

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5.2 Restrictions Facing Undocumented Migrants

Life as an undocumented migrant is difficult in many ways. Chapter 6 will discuss immigration consequences for undocumented presence (see section 6.2). And section 13.1 will discuss criminal liability for undocumented entry and re-entry after

deportation. In addition to these consequences, undocumented migrants face barriers to employment and cannot access most public benefits.

EMPLOYMENT

As discussed above, many unauthorized migrants work in the United States. The government has not attempted to punish such workers with civil fines or criminal liability. However, it has established civil and criminal liability for employers of undocumented workers.

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." INA § 274A(a)(1), 8 U.S.C. § 1324a(a)(1). 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. INA § 274A(a)(2), 8 U.S.C. § 1324a(a)(2). 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. These prohibitions came into being as part of the Immigration Reform and Control Act of 1986 (IRCA) and represented an effort to eliminate the availability of U.S. jobs thought to be the "pull factor" drawing undocumented migrants to the United States.

There are three principal ways in which the employment of undocumented workers takes place, despite the above penalties. The first two ways involve categories of work that are excluded from IRCA's reach: "casual employment by individuals who provide domestic service in a private home that is sporadic, irregular or intermittent" and "independent contractors." Third, and far more commonly, employers of undocumented migrants simply ignore the IRCA out of a desire to reap the financial benefits of employing unauthorized workers. It's not particularly risky to do so. Fewer than 0.02% of U.S. employers are civilly fined for unlawful employment. Moreover, criminal convictions are rare, and prison-time is rarer still.

PUBLIC BENEFITS

CRS, Unauthorized Aliens' Access to Federal Benefits: Policy and Issues (2016)

Federal law bars aliens residing without authorization in the United States from most federal benefits˜. Except for a narrow set of specified emergency services and programs, unauthorized aliens are not eligible for federal public benefits. The law (§401(c) of [Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996] P.L. 104-193) defines federal public benefit as[: "]any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.["]

PRWORA expressly bars unauthorized aliens from most state and locally funded benefits. The restrictions on these benefits parallel the restrictions on federal benefits. Unauthorized aliens are generally barred from state and local government contracts, licenses, grants, loans, and assistance.˜

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5.3 Rights of Undocumented Migrants

Undocumented migrants have myriad rights when present in the United States. They have constitutional rights, including First Amendment rights to freedom of speech and religion, Fifth Amendment rights to due process in immigration proceedings, and Miranda rights in custodial settings. See e.g., Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("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."). They also have the right to public education and certain federal benefits.

PUBLIC K-12 EDUCATION

With Plyler v. Doe, 458 U.S. 1131 (1982), the U.S. Supreme Court held that undocumented children are entitled to a free, public, K-12 education. The Court struck down a Texas statute that withheld state funds from schools educating children not "legally admitted" to the United States and authorized schools to deny enrollment to

children not "legally admitted." These laws, the Court determined, violated the Equal Protection Clause of the Fourteenth Amendment: "If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here."

LIMITED PUBLIC BENEFITS

CRS, Unauthorized Aliens' Access to Federal Benefits: Policy and Issues, (2016)

[Undocumented migrants may access the following benefits:]

- treatment under Medicaid for emergency medical conditions (other than those related to an organ transplant);˜
- short-term, in-kind emergency disaster relief;˜
- immunizations against immunizable diseases and testing for and treatment of symptoms of communicable diseases;
- services or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelters) designated by the Attorney General as (1) delivering in-kind services at the community level, (2) providing assistance without individual determinations of each recipient's needs, and (3) being necessary for the protection of life and safety; and
- to the extent that an alien was receiving assistance on the date of enactment, programs administered by the Secretary of Housing and Urban Development, programs under title V of the Housing Act of 1949, and assistance under Section 306C of the Consolidated Farm and Rural Development Act.˜

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5.4 "Solving" the Problem of Undocumented Migration

CRS, Unauthorized Aliens in the United States: Policy Discussion (2014)

Over the years, a range of options has been offered for addressing the unauthorized resident population.˜ In most cases, the ultimate goal is to reduce the number of aliens in the United States who lack legal status. Many of these options fall under one of two broad categories: (1) reducing the unauthorized population through departure of unauthorized aliens from the United States and (2) reducing the unauthorized

population through the grant of legal (or quasi-legal) status to unauthorized immigrants.

DEPARTURE OF UNAUTHORIZED ALIENS

Current law places various restrictions on unauthorized aliens. They typically have no legal right to live or work in the United States and are subject to removal from the country. One set of options for addressing the unauthorized resident population centers on requiring or encouraging illegal aliens to leave the country. Those who support this approach argue that these individuals are in the United States in violation of the law and that their presence variously threatens social order, national security, and economic prosperity.˜

Removal

One departure strategy is for ICE, the DHS entity responsible for immigration enforcement within the United States, to locate and deport unauthorized aliens from the country.˜

The option of removing the entire unauthorized resident population was raised at the 2007 Senate Homeland Security and Governmental Affairs Committee hearing on the nomination of Julie Myers to be assistant secretary of ICE. At the hearing, Senator Susan Collins stated that "there are those who have advocated that we should somehow try to locate, detain, and deport all 12 million people [who are in the United States illegally]," and asked Myers how much such an effort would cost. Myers estimated the total cost at roughly $94 billion.˜

Attrition Through Enforcement

Because of the high cost of removing unauthorized immigrants from the United States, among other considerations, some who favor the departure of unauthorized immigrants advocate an alternative approach, known as attrition through enforcement. This strategy has received renewed attention in connection with state and local efforts to deter the presence of unauthorized aliens in their jurisdictions. Mark Krikorian of the Center for Immigration Studies (CIS), who supports this approach, describes attrition through enforcement as follows: ["]This means steady, across-the-board enforcement of our immigration laws (something we have never even tried before) so that not only would fewer illegal immigrants come here, but more who are already here would give up and deport themselves.["]

The goal would be to get the total illegal population to start shrinking from one year to the next instead of allowing it to simply keep growing. Over time, the size of the

problem would decrease, and we would then be able to decide what further steps, if any, are warranted.˜

LEGAL STATUS FOR UNAUTHORIZED ALIENS

One of the basic tenets of the departure approach is that unauthorized aliens in the United States should not be granted benefits. An opposing strategy would grant qualifying unauthorized immigrants various benefits, including an opportunity to obtain legal status. Supporters of this type of approach do not characterize unauthorized aliens in the United States as lawbreakers, but rather as contributors to the economy and society at large. Some who support granting legal status to unauthorized immigrants have argued for legalization as a way to generate increases in wages and spending and generally promote economic recovery.˜

A variety of proposals have been put forth over the years to grant some type of legal status to some portion of the unauthorized population. In some cases, the proposals are explicitly intended to benefit unauthorized immigrants; in other cases, both unauthorized aliens and legal temporary residents may benefit. Some of these options would use existing mechanisms under immigration law to grant legal status, while others would establish new mechanisms. Some would benefit a particular subset of the unauthorized population, while others would make relief available more broadly.

Some recent legalization proposals bear similarities to the general legalization program enacted as part of the Immigration Reform and Control Act (IRCA) of 1986.˜ IRCA § 201(a) authorized a two-stage legalization program, through which eligible applicants would first be granted temporary resident status and then after 18 months could apply to adjust to LPR status. To be eligible for temporary status, an alien had to establish that he or she had resided continuously in the United States in an unlawful status since January 1, 1982, and was admissible to the United States. To subsequently adjust to LPR status, a temporary resident had to file a timely application, establish continuous U.S. residence since the granting of temporary resident status, establish admissibility to the United States, and meet requirements concerning basic citizenship skills.

In the past several years, supporters of proposed programs to grant LPR status to unauthorized aliens have described these programs as providing for "earned adjustment." The concept of earned adjustment is that the unauthorized immigrant "earns" legal status through contributions to society, which typically include work (or education or military service), payment of a fine, payment of income taxes, and learning English and civics.

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Chapter Six: Inadmissibility

Not every noncitizen is welcome in the United States. INA § 212, 8 U.S.C. § 1182, delineates classes of noncitizens who are ineligible for visas or admission to the United States. These inadmissibility grounds apply to two district groups of noncitizens: (1) would-be immigrants and nonimmigrants living outside the United States who seek to enter the country through the legal process of admission that will be discussed in Chapter 7, and (2) migrants who are present in this country after entering without authorization and who are being expelled from the United States through the legal process of removal that will be discussed in Chapter 10.

The remainder of this chapter explores the varied classes of individuals marked for exclusion under INA § 212 including: those who have failed to adhere to U.S. immigration laws (sections 6.2-6.3), suspected terrorists and terrorism abettors (sections 6.4-6.6), criminals (section 6.7-6.12), the poor (section 6.13), and those posing a public health risk (section 6.14). Finally, this chapter explores waivers to these inadmissibility grounds (section 6.16, Appendix A.3).

6.1 Inadmissibility Basics

Congress has created an extensive list of noncitizens who should not be granted admittance into the United States because of their prior conduct or because of certain personal characteristics. These are found at INA § 212, 8 U.S.C. § 1182, and include:

INA § 212(a)(1): Health and medical-related grounds;

INA § 212(a)(2): Criminal and related grounds;

INA § 212(a)(3): Security and related grounds;

INA § 212(a)(4): Public charge;

INA § 212(a)(6): Illegal entrants, immigration violators, misrepresentation; and

INA § 212(a)(9): Previously removed, unlawfully present, unlawfully present after previous immigration violations.

Remember that these grounds for exclusion apply to two distinct groups of noncitizens: those living outside the United States who wish to enter and those inside the United States who entered without authorization. A migrant seeking lawful entry into the United States by, for example, obtaining a B-2 tourist visa, will be assessed during the admission process outlined in Chapter 7 to make sure that they are not ineligible for that visa due to INA § 212. In addition, a migrant who enters the United States without authorization, circumventing the admission process, if placed into removal proceedings by the government following the process outlined in Chapter 10, will also be assessed under INA § 212.

Finally, a note on vocabulary: immigration practitioners interchangeably use the terms "inadmissibility," "inadmissible," "exclusion," and "excludability." Some will use the term "inadmissibility" solely in relation to noncitizens outside the United States seeking lawful entry and the term "exclusion" 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.

6.2 Unlawful Entry, Unlawful Presence, and Post-Exclusion Bars

Noncitizens who enter the United States without authorization are subject to removal under INA § 212(a)(6). Beyond removal, noncitizens who have been "unlawfully present" in the United States also face lengthy bars to any lawful return to this country. This hurdle applies both to noncitizens who never had permission to be present in the United States and entered without authorization as well as those noncitizens who may have had initial permission to enter 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, 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 cannot return for at least ten years. INA § 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II). Noncitizens who return to the United States, without authorization, after being removed following more than a year

of unlawful presence, face a lifetime ban from the country. INA § 212(a)(9)(C)(i)(I), 8 U.S.C. § 1182(a)(9)(C)(i)(I). A note about unlawful presence: it only accrues when the noncitizen is over the age of 18. INA § 212(a)(9)(B)(iii)(I), 8 U.S.C. § 1182(a)(9)(B)(iii)(I). Finally, these prohibitions are waivable by the government under certain limited circumstances. INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v); see also Appendix A.3.

Other bars to returning to the United States exist for those who flaunt the U.S. immigration laws. Noncitizens who "without reasonable cause" fail to attend their removal proceedings may not return to the United States for at least five years. INA § 212(a)(6)(B), 8 U.S.C. § 1182(a)(6)(B). Noncitizens who engage in fraud or willful misrepresentation of material facts during the immigration process face a lifetime ban from the country. INA § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i).

6.3 Case: Matter of Arabally

The following case rests on statutory interpretation of INA 212(a)(9)(B)(i)(II), 8 U.S.C. § 11821(a)(i)(B)(i)(II), regarding unlawful presence. However, full understanding of the case requires a brief introduction to two concepts described in more detail in future chapters: advance parole (section 7.6) and adjustment of status (section 7.9).

A noncitizen who is present without authorization in the United States and who needs to leave the country can petition the government for "advance parole" so that they can re-enter the United States upon their return. The word "advance" refers to the timing—the noncitizen is seeking government permission to reenter the United States before they leave the country. "Parole" stands in contrast to the formal admission process outlined in Chapter 7. A noncitizen without a valid nonimmigrant or immigrant visa can physically enter the United States when granted parole; they have not been formally admitted.

Adjustment of status is a process by which a noncitizen can obtain an immigrant visa without having to depart the United States and appear at an American consulate in a foreign country. Adjustment of status is only available to noncitizens "admitted or paroled" who are immediately eligible for an immigrant visa (see section 3.2) and are admissible (see chapter 6).

Matter of Manohar Rao Arabally and Sarala Yerabelly
5 I. & N. Dec. 771 (Board of Immigration Appeals Aug. 16, 2012)

In a decision dated August 20, 2009, an Immigration Judge found the respondents inadmissible as charged under section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act˜ as intending immigrants not in possession of valid immigrant visas or other entry documents. He further found them ineligible for adjustment of status˜ based on their inadmissibility under section 212(a)(9)(B)(i)(II), and he ordered them removed from the United States.

This case presents the question whether the respondents, who left the United States temporarily under a grant of advance parole, thereby effected a "departure," which resulted in their inadmissibility under section 212(a)(9)(B)(i)(II). We hold that they did not. Consequently, the respondents' appeal will be sustained in part and the record will be remanded to the Immigration Judge for further proceedings.

I. FACTUAL AND PROCEDURAL HISTORY

The respondents, a husband and wife, are natives and citizens of India. The male respondent and his wife were admitted to the United States temporarily as nonimmigrants on December 15, 1999, and October 29, 2000, respectively. The male respondent's visa expired on June 14, 2000, but he remained in the United States without lawful immigration status for more than 5 years thereafter, and his wife also remained in this country for several years after her visa expired on April 28, 2001.

On May 11, 2004, the male respondent became the beneficiary of an approved employment-based immigrant visa petition, Form I-140 (Immigrant Petition for Alien Worker), with a priority date of April 27, 2001. On June 2, 2004, he and his wife applied for adjustment of status˜ before the United States Citizenship and Immigration Services ("USCIS"), a component of the Department of Homeland Security ("DHS").˜

The respondents' applications for˜ adjustment were prima facie approvable when filed, but they were held in abeyance for several years to await the availability of visa numbers in the male respondent's oversubscribed preference category. During this interval, the respondents found it necessary to return to India to attend to their aging parents, but they were appropriately concerned that the USCIS would deem their adjustment applications abandoned if they left the United States.

To prevent their applications from being deemed abandoned, the respondents applied for "advance parole" from the USCIS pursuant to section 212(d)(5)(A) of the Act. *See* 8 C.F.R. §§ 212.5(f) (providing for the advance authorization of parole); 245.2(a)(4)(ii)(A) (2004) (providing that "the departure of an [adjustment] applicant ...

shall be deemed an abandonment of the application constituting grounds for termination of any pending application for adjustment of status, unless the applicant was previously granted advance parole by the Service for such absences, and was inspected upon returning to the United States”). The respondents’ requests for advance parole were granted, and they traveled to India and back on several occasions between 2004 and 2006, returning each time in accordance with the terms of their advance parole. On September 10, 2006, the respondents returned from India for the last time and were paroled into the United States.

In separate notices issued on October 15, 2007, the USCIS informed the respondents that their applications for adjustment of status were denied. Specifically, the notices informed the respondents that they were no longer “admissible” to the United States, as required for adjustment of status, because they had departed this country (under grants of advance parole) after having been “unlawfully present” here for 1 year or more and were seeking admission less than 10 years after having departed, a set of circumstances that rendered them inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

The male respondent promptly sought reopening of his adjustment application before the USCIS, noting the humanitarian considerations that had prompted his request for advance parole and contending that he and his wife should not be punished for having departed the United States when the DHS knew about, and expressly approved of, those departures by granting them advance parole. On July 21, 2008, a USCIS Field Office Director issued a decision acknowledging the force of some of the male respondent’s arguments but ultimately concluding that his inadmissibility under section 212(a)(9)(B)(i)(II) of the Act necessitated the denial of his application.˜

On November 21, 2008 the DHS commenced these removal proceedings by filing notices to appear in Immigration Court, charging the respondents with inadmissibility under section 212(a)(7)(A)(i)(I) of the Act. By serving these notices to appear on the respondents, the DHS terminated their parole, thereby restoring them to the status they allegedly held at the time of their last parole into the United States, that is, as intending immigrants who are not in possession of valid admission documents.˜ On February 12, 2009, the respondents conceded removability through counsel and sought to renew their adjustment applications before the Immigration Judge. At the conclusion of an evidentiary hearing conducted on August 20, 2009, the Immigration Judge found the respondents inadmissible under section 212(a)(9)(B)(i)(II) of the Act and ineligible for˜ adjustment, and he ordered them removed to India.

II. ANALYSIS

The respondents' first argument on appeal is that their departures from the United States under a grant of advance parole were not the sort of "departures" that render aliens inadmissible under section 212(a)(9)(B)(i)(II) of the Act. For the following reasons, we agree.

As previously noted, the USCIS and the Immigration Judge found the respondents inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act, which provides as follows: "Any alien (other than an alien lawfully admitted for permanent residence) who ... (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's *departure* or removal from the United States, is inadmissible." (Emphasis added.)

The terms "depart" and "departure" are employed in numerous different contexts throughout the Act, but they are not statutorily defined. This is understandable. It would be a daunting task for any statutory draftsman to supply a single comprehensive definition for terms of such broad and variable application. Nevertheless, according to one dictionary, "depart" means simply "to go away: leave," while "departure" denotes "the act or an instance of departing."˜ As used in section 212(a)(9)(B)(i)(II) of the Act, a "departure" could thus be interpreted to encompass *any* instance in which a person has "gone away" from or "left" the territory of the United States. Indeed, we have stated that the term "departure" should be given such a broad construction in the section 212(a)(9)(B)(i)(II) context.˜

In [*Matter of Lemus*, 24 I&N Dec. 272 (BIA 2007)], the respondent maintained that section 212(a)(9)(B)(i)(II) should be construed so that the term "departure" would cover only a formal "voluntary departure" under section 240B of the Act˜ that is, a departure made after the commencement of removal proceedings and in lieu of an order of removal.˜ We disagreed, concluding that this interpretation of "departure" was too narrow.˜ Indeed, in refuting the argument presented, we opined that the term should be interpreted broadly, "to encompass any 'departure' from the United States, regardless of whether it is a voluntary departure in lieu of removal or under threat of removal, or it is a departure that is made wholly outside the context of a removal proceeding."˜

We continue to espouse the view that an alien like the respondent in *Lemus*˜—who accrued more than 1 year of unlawful presence in the United States and then departed of his own volition without having obtained advance permission to return—fell within the class of individuals that Congress intended to cover when it enacted section 212(a)(9)(B)(i)(II).˜ However, our unqualified declaration in *Lemus*˜ that inadmissibility under section 212(a)(9)(B)(i)(II) could be triggered by literally "any

departure" from the United States has had implications that bear additional consideration. Specifically, as this case illustrates, immigration adjudicators have interpreted our "any departure" statement to cover departures made pursuant to a grant of advance parole.˜

Purely as a matter of semantics, there is nothing to preclude the term "departure" from being interpreted to encompass departures made by advance parolees. Indeed, viewed in isolation and taken in its broadest possible sense, "departure" would also presumably include departures by people who stray across the border by accident, are induced to cross the border by deception or threat, or are kidnaped outright and spirited across the border against their will. It is well established, however, that we do *not* interpret statutory terms in isolation.

Instead, when interpreting the Act, we should be guided to a degree by common sense, taking into account Congress' intention to enact "a symmetrical and coherent regulatory scheme" in which all parts are fit into a harmonious whole.˜ The words of section 212(a)(9)(B)(i)(II) of the Act should thus "be read in their context and with a view to their place in the overall statutory scheme," since it is only by reading the language in context that its meaning can become evident.˜ When section 212(a)(9)(B)(i)(II) is understood in context, it becomes clear to us that Congress did not intend it to cover aliens—like the respondents—who have left and returned to the United States pursuant to a grant of advance parole.˜ To the extent that *Lemus*˜ suggested otherwise, we hereby clarify it accordingly.

As we have noted elsewhere, section 212(a)(9)(B)(i)(II) was enacted pursuant to section 301(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996˜. The legislative history of section 212(a)(9)(B)(i)(II) is rather sparse. Nevertheless, the manifest purpose of the provision (and of the related provisions surrounding it) is to "compound the adverse consequences of immigration violations by making it more difficult for individuals who have left the United States after committing such violations to be lawfully readmitted thereafter."˜

Section 212(a)(9)(B)(i)(II) thus places most aliens who are unlawfully present in the United States for a significant period of time on fair notice that if they leave this country—whether through removal, extradition, formal "voluntary departure," or other means—they will be unwelcome to return for at least 10 years thereafter. But the same cannot be said for the respondents, who left the United States and returned with Government authorization pursuant to a grant of advance parole.

Typically, an alien who presents himself for inspection at a United States port of entry is permitted to enter only if he possesses a valid visa or other document authorizing

his "admission."˜ Sometimes, however, an alien who lacks a valid visa or other entry document may need to come into the United States temporarily "for urgent humanitarian reasons or [for] significant public benefit," in which case, with certain exceptions not pertinent here, the DHS may, in its discretion, "parole" the alien into this country for a limited time, subject to conditions. Section 212(d)(5)(A) of the Act.˜ Although a grant of parole does not "admit" an alien into the United States, *see* section 101(a)(13)(B) of the Act,˜ it does typically allow him to leave the inspection facility free from official custody and to be physically present inside the United States until the purpose of his parole is completed.˜ Once the DHS determines that the purpose of an alien's parole has been satisfied, parole is terminated and the alien reverts to the status of any other applicant for admission by operation of law. Section 212(d)(5)(A) of the Act˜.

As its name implies, "advance parole" is simply parole that has been requested and authorized in advance based on an expectation that the alien will be presenting himself for inspection without a valid visa in the future. 8 C.F.R. § 212.5(f). Advance parole can be requested from abroad or at a port of entry, but typically it is sought by an alien who is already inside the United States and who wants to leave temporarily but fears that he will either be excluded as an inadmissible alien upon return or be deemed to have abandoned a pending application for an immigration benefit.˜

The DHS takes the position that a grant of advance parole does not technically authorize such an alien to *depart* from the United States.˜ But as a practical matter, the DHS is well aware that aliens who are inside the United States only request advance parole in order to facilitate foreign travel. By granting advance parole, the DHS thus understands that, as a discretionary humanitarian measure, it is telling the alien that he can leave the United States with assurance that his pending applications for immigration benefits will not be deemed abandoned during his absence and "that he will be *paroled* back into the United States upon return, under prescribed conditions, if he cannot establish that he is admissible at that time."˜ To obtain this assurance, the alien submits an Application for Travel Document (Form I-131), which requires him to explain how he qualifies for advance parole—such as through the pendency of an adjustment application together with a need to travel abroad for emergent personal or bona fide business reasons—and to identify the circumstances that warrant its issuance. Advance parole is thus treated as a distinct benefit for which the alien must demonstrate his eligibility and worthiness.

In short, an undocumented alien's departure under a grant of advance parole is qualitatively different from other departures, because it presupposes both that he will be permitted to return to the United States thereafter and that he will, upon return, continue to pursue the adjustment of status application he filed before

departing. Nothing in the foregoing discussion is intended to suggest that a grant of parole into the United States following a trip abroad is ever guaranteed. Rather, we acknowledge that at the time of the returning alien's application for admission, the DHS possesses discretionary authority under section 212(d)(5) of the Act to determine whether parole is appropriate. We do not believe that Congress intended an alien to become inadmissible under section 212(a)(9)(B)(i)(II) and, by extension, ineligible for adjustment of status solely by virtue of a trip abroad that (1) was *approved* in advance by the United States Government on the basis of an application demonstrating the alien's qualification for and worthiness of the benefit sought, (2) presupposed the alien's *authorized return* thereafter, and (3) was requested solely for the purpose of *preserving* the alien's eligibility for adjustment of status. Applying section 212(a)(9)(B)(i)(II) to such an alien vindicates none of the purposes for which the statute was enacted, largely defeats the regulatory purpose of preserving advance parolees' eligibility for adjustment of status, and has the paradoxical effect of transforming advance parole from a humanitarian benefit into a means for barring relief. The language of section 212(a)(9)(B)(i)(II) does not require such a result. Accordingly, we hold that an alien who has left and returned to the United States under a grant of advance parole has not made a "departure … from the United States" within the meaning of section 212(a)(9)(B)(i)(II) of the Act.

We emphasize that we hold only that an alien cannot become inadmissible *under section 212(a)(9)(B)(i)(II)* solely by virtue of a trip abroad undertaken pursuant to a grant of advance parole. Our decision does not preclude a trip under a grant of advance parole from being considered a "departure" for other purposes, nor does it call into question the applicability of any other inadmissibility ground. On the contrary, it is well settled that an alien who leaves the United States and returns under a grant of advance parole is subject to the grounds of inadmissibility once parole is terminated, even if he had been "deportable" rather than "inadmissible" before the trip's commencement.

This can sometimes lead to harsh consequences, particularly for aliens with criminal convictions, when the relevant grounds of inadmissibility are more expansive than the corresponding deportability grounds. But ordinarily the relevant inadmissibility grounds were already applicable to the alien before he traveled abroad (as potential bars to adjustment of status, for instance), and thus the alien's trip outside the United States only affects the *manner* in which the fact of inadmissibility arises, by also making it an available basis for a removability charge. Section 212(a)(9)(B) is fundamentally different, however, because its focus on "departure" means that it alone *creates* a condition of inadmissibility that may not have existed before the alien left the

United States. The respondents were not even arguably covered by section 212(a)(9)(B) until they left under grants of advance parole.

In light of the foregoing, we conclude that the respondents are *not* inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act. Consequently, they are not ineligible for˜ adjustment˜.˜

III. CONCLUSION

In conclusion, the respondents are˜ not inadmissible under section 212(a)(9)(B)(i)(II) or ineligible for˜ adjustment on that basis. The respondents' appeal will therefore be sustained in part, and the record will be remanded to the Immigration Judge for further proceedings.˜

DISSENTING OPINION:˜

I respectfully dissent. The majority labors unpersuasively to find that a departure under a grant of advance parole is not a "departure" for purposes of inadmissibility under section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act˜ such that the respondents are not ineligible for adjustment of status˜. As noted in the majority opinion, however, such a construction is at odds with the straightforward meaning of "departure." Moreover, no claim is made that giving the term "departure" an expansive meaning˜ leads to absurd results. Rather, it merely leads to an outcome that the majority apparently deem undesirable.

Moreover, the majority's position is not merely at odds with the normal and natural meaning of the term "departure"; it is contrary to the consistent understanding of the Department of Homeland Security ("DHS") and its predecessors at the former Immigration and Naturalization Service ("INS"), which, from shortly after the April 1, 1997, effective date of section 212(a)(9)(B) to the present time, have interpreted a departure under a grant of advance parole as a "departure" for purposes of section 212(a)(9)(B)(i)(II).˜ While such internal interpretive policies are not binding on the Board, courts, including the Supreme Court, have found that similar agency policies are entitled to "great deference," "[p]articularly ... when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are as yet untried and new.'"˜

Not only does the majority not accord these agency understandings "great deference," it gives them no weight. Furthermore, the relevant enforcement agency (INS and DHS) reached this conclusion because˜ "[b]y granting advance parole or a refugee travel document, USCIS does not authorize the alien's departure from the United

States; it merely provides a means for the alien to return to the United States, regardless of admissibility." In short, a grant of advance parole is *not a Government-authorized departure* such as might support a finding that Congress could not have intended to subject an alien who thereby departs to the provisions of section 212(a)(9)(B).

In light of the above, and notwithstanding the majority's view, Congress could reasonably determine that aliens who leave the United States under a grant of advance parole do so at their own risk in terms of eligibility for relief upon their return as applicants for admission and must weigh the benefit of leaving pursuant to such a grant against the possible adverse consequences. Furthermore, as the majority acknowledges, grants of advance parole come with an explicit warning (mandated by, and applicable ever since the 1997 Virtue Memo, *supra)* that the alien may, upon return, be inadmissible under section 212(a)(9)(B) and ineligible for adjustment of status.˜ While the majority may disagree with requiring such an election, aliens may be put to such a choice, and whether or not to do so is precisely the sort of consideration that is for the Congress, not adjudicators like the Board.˜

6.4 Terrorism Related Inadmissibility Grounds

Terrorism related inadmissibility grounds, referred to colloquially as "TRIG," are outlined at INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B). An exploration of this statutory provision reveals a broad definition of terrorist activity. TRIG exclusion rests on both engaging in terrorist activity as well as support for or membership in a terrorist organization. The following cases provide more insight about TRIG.

6.5 Case: In Re S-K-

In Re S-K-

23 I. & N. Dec. 936 (Board of Immigration Appeals 2006)

In a decision dated February 2, 2005, an Immigration Judge found the respondent removable as charged and denied her applications for asylum, withholding of removal, and protection under the Convention Against Torture˜. The respondent appealed that decision˜. The respondent's appeal will be sustained in part and dismissed in part.

I. FACTUAL AND PROCEDURAL HISTORY

The respondent, a native and citizen of Burma, is a Christian and an ethnic Chin. According to the respondent, she faces persecution and/or torture if returned to Burma because the Government, currently a military dictatorship ruled by the majority Burman ethnic group, regularly commits human rights abuses against ethnic and

religious minorities and, in fact, arrested and detained both the respondent's brother and fiancé, the latter ultimately being killed by the military.

In 2001, the respondent became acquainted with an undercover agent for the Chin National Front ("CNF") who was a friend of her deceased fiancé. She became sympathetic to the CNF's goal of securing freedom for ethnic Chin people and donated money to the organization for approximately 11 months. In addition, she attempted to donate some other goods, such as a camera and binoculars, to the CNF, but they were confiscated after she had given them to the undercover agent. The agent informed the respondent that she should flee Burma because the Burmese military, known to torture anyone affiliated with the CNF, had seen a letter written by the respondent to the CNF; the military knew that the respondent was the person who had attempted to provide the material goods. The respondent was actually residing in Singapore at the time, but since her temporary work visa was about to expire and she could not return to Burma, she fled to the United States in order to request asylum.

Although the Immigration Judge found that the respondent had established a well-founded fear of persecution in order to qualify for asylum, he denied her application for relief because, by providing money and other support to the CNF, an organization which uses land mines and engages in armed conflict with the Burmese Government, the respondent provided material support to an organization or group of individuals who she knew, or had reason to know, uses firearms and explosives to endanger the safety of others or to cause substantial property damage. Therefore, she was statutorily barred from asylum and from withholding of removal under either section 241(b)(3) of the Immigration and Nationality Act˜ or the Convention Against Torture.˜

[W]e view˜ the major questions arising in the case: (1) what standards or definition should be used to assess whether the term "material support" should be defined narrowly or more broadly; whether it should take into consideration the mens rea of the provider, as proposed by the respondent; and whether it includes the type of support provided by the respondent to the CNF;˜ and (2) to what extent, in light of our precedent, we should factor in an organization's purpose and goals in order to assess whether an organization, like the CNF, is engaged in terrorist activity.˜ We will address these issues in reverse order.

II. ANALYSIS

A. Terrorist Organization

During oral argument and on appeal, the respondent argued that the Burmese Government is not legitimate because the military junta rules the country under martial law and crushes any attempts at democratic reform. According to the respondent, the

United States does not recognize the Burmese Government's legislative acts, and therefore the CNF's actions are not unlawful under Burmese law. Rather, she asserts, the organization's actions are similar to those of forces fighting the Taliban in Afghanistan or forces rebelling against Saddam Hussein in Iraq, which are supported by the United States. Its goals are democracy and it uses force only in self-defense. Moreover, the CNF is allied with the National League of Democracy, which the United States has recognized as a legitimate representative of the Burmese people and is recognized by the United Nations. Therefore, the respondent contends that the Immigration Judge erred in concluding that the CNF is a terrorist organization. *See* section 212(a)(3)(B)(iii) of the Act (requiring that terrorist activity must be unlawful under the laws of the place where it is committed or under the laws of the United States).˜

During oral argument, the respondent pointed to testimony from the Assistant Secretary of State describing the Burmese military as a "group of thugs," as well as to the fact that the United States Government has passed the Burmese Freedom and Democracy Act of 2003,˜ acknowledging that the National League of Democracy is the legitimate representative of the Burmese people.˜

[T]the respondent acknowledged, upon questioning, that the United States does maintain a diplomatic relationship with the Burmese Government and maintains an embassy there. Therefore, in some sense or degree, the United States recognizes as legitimate the Burmese Government, which appears to consider the activities of the CNF unlawful.

Although the respondent urges us to determine that the Burmese Government is illegitimate and argues that we have such authority, we are unable to agree with the respondent's argument. While there may have been cases in which we determined that certain acts by foreign governments were unlawful in terms of harming individuals who sought asylum here, we have not gone so far as to determine that a foreign sovereignty would not be recognized by the United States Government. Such a determination is beyond our delegated authority and is a matter left to elected and other high-level officials in this country.

Furthermore, the respondent cites to past case law interpreting asylum applicants' claims and granting relief where aliens have attempted to overthrow governments that do not allow citizens to change the political structure and therefore exercise illegitimate power when prosecuting such individuals. In other words, she asserts that the motivation of the group seeking to effect change in a country must be analyzed in order to determine whether the harm produced is persecution or, as claimed in this case, terrorist activity.˜ During oral argument, counsel for the respondent acknowledged that

by utilizing such factors to determine whether an organization falls within section 212(a)(3) of the Act, he was advocating that we apply a “totality of the circumstances” test.

We are unable to find any support for the respondent’s assertion that such a test should be utilized. Our past case law is not inconsistent with some of the respondent’s arguments. However, that case law does not address the bar to relief in section 212(a)(3)(B)(i)(I) of the Act. In this case, we are dealing with specific statutory language, which we read as applying to the respondent.˜

As noted by the DHS during oral argument, the fact that Congress included exceptions elsewhere in the Act for serious nonpolitical offenses and aliens who have persecuted others, even where persecuted themselves, and that it has not done so in section 212(a)(3)(B), indicates that the omission of an exception for justifiable force was intentional. In fact, having reviewed the statutory sections, we find that Congress intentionally drafted the terrorist bars to relief very broadly, to include even those people described as “freedom fighters,” and it did not intend to give us discretion to create exceptions for members of organizations to which our Government might be sympathetic. Rather, Congress attempted to balance the harsh provisions set forth in the Act with a waiver, but it only granted the power to make exemptions to the Attorney General and the Secretaries of State and Homeland Security, who have not delegated such power to the Immigration Judges or the Board of Immigration Appeals.˜

In sum, we find no error in the Immigration Judge’s conclusion that the CNF is a terrorist organization within the definition of the Act. Contrary to the respondent’s assertions on appeal and during oral argument, there is no exception in the Act to the bar to relief in cases involving the use of justifiable force to repel attacks by forces of an illegitimate regime. As noted by the Immigration Judge, there was sufficient evidence in the record to conclude that the CNF uses firearms and/or explosives to engage in combat with the Burmese military, and the respondent has not provided evidence that would rebut this conclusion or lead us to interpret the Act differently. Moreover, the record shows that the respondent knew or should have known of the CNF’s use of arms.˜ Thus, assuming the respondent provided material support to the CNF, her sole remedy to extricate herself from the statutory bar appears to lie in the waiver afforded by Congress for this purpose, for which the DHS stated at oral argument she is eligible to apply.˜ However, the Immigration Judges and the Board have no role in the adjudication of such a waiver.

B. Materiality of Support Provided

The respondent also argues that the type and amount of support which she provided to the CNF was not material. She asserts that the Immigration Judge failed to take into consideration whether the funds and goods she provided were relevant to the planning or implementation of a terrorist act˜. Since no evidence was submitted to support a conclusion that the respondent's contributions were relevant to a specific terrorist goal, the respondent asserts that finding that her contributions were material goes against congressional intent to tie materiality to terrorist activity.˜

Section 212(a)(3)(B)(iv)(VI) of the Act states that "material support" includes "a safe house, transportation, communication, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training."˜

We are unaware of any legislative history which indicates a limitation on the definition of the term "material support."˜ Rather, the statute is clearly drafted in this respect to require only that the provider afford material support to a terrorist organization, with the sole exception being a showing by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was of that character. Section 212(a)(3)(B)(iv)(VI)(dd) of the Act. We thus reject the respondent's assertion that there must be a link between the provision of material support to a terrorist organization and the intended use by that recipient organization of the assistance to further a terrorist activity. Especially where assistance as fungible as money is concerned, such a link would not be in keeping with the purpose of the material support provision, as it would enable a terrorist organization to solicit funds for an ostensibly benign purpose, and then transfer other equivalent funds in its possession to promote its terrorist activities.

We turn then to the respondent's claim that the statute's requirement of material support means that trivial or unsubstantial amounts of assistance, such as she allegedly provided, are not within the statutory bar.˜ In *Singh- Kaur v. Ashcroft,* [385 F.3d 293 (3d Cir. 2004)], the Third Circuit found that the provision of very modest amounts of food and shelter to individuals who the alien reasonably should have known had committed or planned to commit terrorist activity did constitute material support.˜ The court also found that the listed examples in section 212(a)(3)(B)(iv)(VI) of the Act were not exhaustive but were "intended to illustrate a broad concept rather than narrowly circumscribe a term with exclusive categories."˜

As the DHS contends, it is certainly plausible, in light of the decision in *Singh-Kaur v. Ashcroft, supra,* and recent amendments to the Act, ˜The definition of "material

support" was amended recently in 2001 in order to add the term "transfer of funds or other material financial benefit." that the list in section 212(a)(3)(B) was intended to have an expanded reach and cover virtually all forms of assistance, even small monetary contributions. Congress has not expressly indicated its intent to provide an exception for contributions which are de minimis. Thus the DHS asserts that the term "material support" is effectively a term of art and that all the listed types of assistance are covered, irrespective of any showing that they are independently "material."

On the other hand, the respondent's contrary argument that "material" should be given independent content is by no means frivolous. However, we find it unnecessary to resolve this issue now, inasmuch as we agree with the DHS that based on the amount of money the respondent provided, her donations of S$1100 (Singapore dollars) constituted material support. We take administrative notice that this corresponded at the time to approximately US$685. Specifically, the respondent testified that she contributed approximately S$100 per month over an 11-month period, representing approximately one-eighth of her monthly income. This was sufficiently substantial by itself to have some effect on the ability of the CNF to accomplish its goals, whether in the form of purchasing weaponry or providing routine supplies to its forces, for example. We therefore agree with the Immigration Judge that the respondent provided material support to the CNF.

III. CONCLUSION

Based on the foregoing, we agree with the Immigration Judge's decision that the respondent is statutorily ineligible for asylum and withholding of removal for having provided material support to a terrorist organization. The respondent's appeal will therefore be dismissed in part regarding her applications for that relief. However, during oral argument, the DHS conceded that the respondent is eligible for deferral of removal under the Convention Against Torture. We agree and will therefore sustain the respondent's appeal and vacate the Immigration Judge's decision in that regard. The record will be remanded for the appropriate background checks to be updated.

CONCURRING OPINION:

I join the majority's decision. I agree with the majority that the Immigration Judge properly denied the respondent's applications for asylum and withholding of removal, as this result is compelled by the specific language of the statute. I write separately because I have considerable doubts that this result is what Congress had in mind when it enacted the "material support" bar to asylum.

We are finding that a Christian member of the ethnic Chin minority in Burma, who clearly has a well-founded fear of being persecuted by one of the more repressive governments in the world, one that the United States Government views as illegitimate, is ineligible to avail herself of asylum in the United States despite posing no threat to the security of this country. It may be, as the majority states, that Congress intended the material support bar to apply very broadly. However, when the bar is applied to cases such as this, it is difficult to conclude that this is what Congress intended.

Unfortunately, there is virtually no legislative history that accompanies the material support bar. We therefore have nothing to examine to determine congressional intent, beyond the statutory language itself. And that language mandates that we bar this respondent from asylum.

The respondent clearly faces persecution in her home country. The Immigration Judge found her credible. He also found that the respondent has a well-founded fear of persecution due to her imputed political opinion. The Immigration Judge denied asylum, however, after finding that the respondent was barred from establishing eligibility because she is inadmissible under section 212(a)(3)(B)(i)(I)˜ for having "engaged in a terrorist activity." Under the Act, to "engage in terrorist activity" includes committing an act the actor knows, or reasonably should know, affords "material support" to, among others, a designated terrorist organization or to "a group of two or more individuals, whether organized or not," which engages in any of a number of activities, including the use of an "explosive, firearm, or other weapon or dangerous device ... with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property."˜ The organization that the respondent provided support to, the Chin National Front ("CNF"), has an armed wing that is resisting the Government of Burma. The CNF is allied with the National League of Democracy, which is recognized by the United States as a legitimate representative of the Burmese people.

In enacting the material support bar, Congress was rightly concerned with preventing terrorists and their supporters from exploiting this country's asylum laws. It is unclear, however, how barring this respondent from asylum furthers those goals. The respondent provided funds and some equipment to a member of the CNF, an organization that has *not* been designated by the Department of State as a terrorist organization under section 212(a)(3)(B)(vi) of the Act. The available information in the record indicates that the CNF engages in violence primarily as a means of self-defense against the Burmese Government, a known human rights abuser that has engaged in systematic persecution of Burmese ethnic minorities, including the Chin Christians. By reference to common definitions of the term "terrorism" and "terrorist," it is doubtful

that the CNF would be considered a terrorist organization.˜ Indeed, the Resource Information Center of the Department of Homeland Security ("DHS") reported in February 2004 that there is no information that the CNF has been involved in terrorist activities or in abuses against civilians on any large or systematic scale.˜

The CNF, however, is a group that has resorted to violence in self-defense, including the use of explosives. The Immigration Judge was thus correct to find that the assistance that the respondent provided to the CNF constituted material support to any individual who the respondent knew, or should have known, "has committed or plans to commit a terrorist activity."˜ The fact that this language goes beyond common notions of "terrorism" is immaterial in the context of this case.

Yet, the statutory language is breathtaking in its scope. Any group that has used a weapon for any purpose other than for personal monetary gain can, under this statute, be labeled a terrorist organization. This includes organizations that the United States Government has not thought of as terrorist organizations because their activities coincide with our foreign policy objectives.˜

It also includes groups and organizations that are not normally thought of as "terrorists" per se. Read literally, the definition includes, for example, a group of individuals discharging a weapon in an abandoned house, thus causing "substantial damage to property." Section 212(a)(3)(B)(iii)(V) of the Act. This may constitute inappropriate or even criminal behavior, but it is not what we normally think of as "terrorist" activity.˜

The broad reach of the material support bar becomes even starker when viewed in light of the nature of the Burmese regime, and how it is regarded by the United States Government. In 2003, Congress passed the Burmese Freedom and Democracy Act of 2003˜ which, among other things, imposes sanctions on the Burmese Government as a result of its deplorable human rights record. The Secretary of State has designated Burma as one of a handful of "countries of particular concern" in light of this record, including its treatment of ethnic and religious minorities.˜ In particular, the Burmese Government has engaged in arrests of Christian clergy, destruction of churches, prohibition of religious services and proselytizing by Christians, and forced conversions of Christians.˜ These efforts are part of a larger effort to "Burmanize" the Chin ethnic minority.˜

In sum, what we have in this case is an individual who provided a relatively small amount of support to an organization that opposes one of the most repressive governments in the world, a government that is not recognized by the United States as legitimate and that has engaged in a brutal campaign against ethnic minorities. It is clear

that the respondent poses no danger whatsoever to the national security of the United States. Indeed, by supporting the CNF in its resistance to the Burmese junta, it is arguable that the respondent actually acted in a manner consistent with United States foreign policy. And yet we cannot ignore the clear language that Congress chose in the material support provisions; the statute that we are required to apply mandates that we find the respondent ineligible for asylum for having provided material support to a terrorist organization.

Accordingly, I concur in the majority's result. I note, however, that the law provides for a limited waiver of the material support bar to be exercised by the DHS in appropriate cases. Section 212(d)(3) of the Act. I suggest that the DHS may wish to consider this respondent as someone to whom the grant of such a waiver is appropriate.

6.6 Case: Matter of A-C-M-

Matter of A-C-M-

27 I. & N. Dec. 303 (Board of Immigration Appeals 2018)

˜I. FACTUAL AND PROCEDURAL HISTORY

The respondent is a native and citizen of El Salvador who claims that she entered the United States without inspection in 1991.˜ The DHS initiated removal proceedings against her, charging that she is removable as an alien without a valid entry document under section 212(a)(7)(A)(i)(I) of the Act˜. [Respondent sought asylum.]˜

In her August 8, 2016, decision, the Immigration Judge found that the respondent is ineligible for asylum and withholding of removal based on the material support bar in section 212(a)(3)(B)(iv)(VI) of the Act. The Immigration Judge stated that, but for the material support bar, she would have granted the respondent's asylum application on humanitarian grounds˜, noting the horrific harm she experienced from the guerrillas in El Salvador because, in addition to being kidnapped and required to perform cooking and cleaning for the guerrillas under threat of death, the respondent was forced to witness her husband, a sergeant in the Salvadoran Army, dig his own grave before being killed. However, the Immigration Judge granted the respondent's request for deferral of removal pursuant to the Convention Against Torture.

II. ISSUE

The principal issue on appeal is whether the respondent is subject to the "material support" bar in section 212(a)(3)(B)(iv)(VI) of the Act. Specifically, we must decide if the statutory definition of "material support" has any limitation based on the extent and type of support rendered.

III. ANALYSIS

A. Statutory Provisions

Section 208(b)(2)(A)(v) of the Act bars the Attorney General from granting asylum to an alien who is inadmissible˜. The Attorney General is also barred from granting withholding of removal to an alien when "there are reasonable grounds to believe that the alien is a danger to the security of the United States." Section 241(b)(3)(B)(iv) of the Act˜. For purposes of that provision, an alien who is described in section 237(a)(4)(B) of the Act—that is, inter alia, any alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity, as that term is defined in section 212(a)(3)(B)(iv)— "shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States." Section 241(b)(3)(B) of the Act.

As relevant to the respondent, section 212(a)(3)(B)(iv)(VI) of the Act provides that a person engages in terrorist activity when she "commit[s] an act that [she] knows, or reasonably should know, affords material support" to a terrorist organization, as that term is defined in section 212(a)(3)(B)(vi). Section 212(a)(3)(B)(iv)(VI)(dd) of the Act requires "only that the [alien] afford material support to a terrorist organization, with the sole exception being a showing by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was of that character."˜ If the evidence indicates that the terrorism bar applies to an alien, he or she has the burden of proving by a preponderance of the evidence that the bar is not applicable.˜

B. Material Support Bar

The respondent argues on appeal that the Immigration Judge erred by finding that she is subject to the material support bar, claiming that any assistance she provided to the guerrillas in El Salvador was de minimis and therefore not "material." She further asserts that even if the material support bar is applicable to her, she is entitled to a duress exception. However, in *Matter of M-H-Z-*, 26 I&N Dec. 757 (BIA 2016), we ruled that the "material support bar" in section 212(a)(3)(B)(iv)(VI) of the Act does not include an implied exception for an alien whose material support to a terrorist organization was provided under duress. The United States Court of Appeals for the Second Circuit, in whose jurisdiction this case arises, has deferred to our interpretation. *See Hernandez v. Sessions*, 884 F.3d 107, 109 (2d Cir. 2018). Consequently, we will not address that issue further.

We must therefore decide whether the phrase "material support" contains a quantitative requirement. The respondent and the dissent contend that an insignificant

degree of support provided by an alien to a terrorist organization does not constitute "material" support. We hold that no such quantitative limitation exists in the bar.˜

We first observe that, while not dispositive, the fact that the Board and the Federal courts have uniformly rejected a duress exception to the material support bar counsels against adopting the interpretation that the respondent and the dissent support.˜

We agree˜ that the word "material" in the phrase "material support" must be "ascribed some meaning."˜ However, we conclude that the meaning does not relate to a quantitative requirement. We reiterate that there is no legislative history to support taking a quantitative approach and separating out what amount of support is necessary to make it "material." If an alien affords material support to a terrorist organization, he or she is subject to the bar, regardless of how limited that support is in amount.

This interpretation does not render the word "material" superfluous. Without that qualification, the bar could have been construed to apply to a person who merely expressed general "support" for a terrorist organization, which would have raised substantial freedom of expression concerns.˜

In sum, "material support" is a term of art that "relates to the type of aid provided," that is, aid of a material and normally tangible nature,˜ and it is not quantitative.˜ ↳[T]he term "material" relates to the type of aid provided *rather than whether it is substantial or considerable*.↲

˜[W]e conclude that an alien provides "material support" to a terrorist organization, regardless of whether it was intended to aid the organization, if the act has a logical and reasonably foreseeable tendency to promote, sustain, or maintain the organization, even if only to a de minimis degree.

Our view that the phrase "material support" has no quantitative component is also borne out by the fact that Congress, through section 212(d)(3)(B)(i) of the Act, has conferred upon the Secretary of Homeland Security the authority to grant a waiver regarding the application of the material support bar in order to address excusable violations including, among other things, support provided under duress or to only a de minimis degree.˜ As relevant here, the DHS has construed the waiver to apply specifically in situations where an alien has afforded only "insignificant material support" to an undesignated terrorist organization, a member of such an organization, or an individual the applicant knew, or reasonably should have known, had committed or planned to commit a terrorist activity.˜

In *Matter of S-K-*,˜we noted that the inclusion of the waiver was a means of balancing the "harsh provisions" of the material support bar. By creating the waiver,

Congress effectively addressed the over-inclusive nature of the bar by allowing the Secretary to consider each situation in a more holistic manner.˜

Obviously, if providing merely an "insignificant" amount of support did not constitute "material support," the DHS would not have found a need for a waiver addressing this type of circumstance. The fact that the waiver covers such situations is clear evidence that the DHS regards the bar as extending to the provision of even "insignificant" support, contrary to the contention of the respondent and the dissent.˜ Thus, regardless of how sympathetic the circumstances of an alien's case may be, we find no support for concluding that Congress intended to provide a quantitative exclusion from the term "material support."˜

We therefore conclude that, on the facts before us, the respondent afforded material support when she aided guerillas in continuing their mission of armed and violent opposition to the Salvadoran Government in 1990.˜ While the respondent's assistance may have been relatively minimal, if she had not provided the cooking and cleaning services she was forced to perform, another person would have needed to do so.˜

DISSENTING OPINION:˜

I respectfully dissent from the majority's conclusion that the respondent is subject to the bar to asylum and withholding of removal for applicants who have provided "material support" to a terrorist organization˜.

The primary question presented by this case is whether the respondent's activities are of the kind and magnitude that would meet the threshold requirement of "material." I would conclude that they are not.

To prevent Congress' use of the word "material" from being superfluous, that word must have an independent meaning. Had Congress intended the word "material" to add little or nothing to the threshold requirements, it presumably would have simply prohibited "support." Far from having done so, Congress went into detail about the kinds of activities that the general term "material support" entails. Specifically, section 212(a)(3)(B)(iv)(VI) of the Act states that "material support" includes "a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training."

Admittedly, this is not an exclusive list. Nevertheless, the listed specific examples imply that certain kinds and levels of support are required in order to constitute "material" support.˜ It is a well-settled canon of statutory construction that general

statutory terms like "material support" "should be understood to refer to items belonging to *the same class* that is defined by the more specific terms in the list."˜

I cannot conclude that the menial and incidental tasks that the respondent performed— as a slave—for Salvadoran guerrillas, including cooking, cleaning, and washing clothes, are of "the same class" as the enumerated forms of assistance set forth in the statute. The enumerated examples all involve items that either can directly be used to plan or carry out terrorist activities or, in the case of funds, have the liquidity and fungibility to readily be diverted to such use. Cooking and cleaning services for individuals who happen to belong to a terrorist organization cannot validly be placed in the same category as items that can be used to plan and carry out the organization's goals. If Congress had intended to include such incidental services in the definition of "material support," there would have been no need—and, indeed, it would have been counterproductive—to list multiple specific examples that relate directly to terrorist activity.

Similarly, I cannot conclude that the incidental assistance the respondent afforded to the guerillas provides "material" support in the logical sense of having at least some importance to promoting, sustaining, or maintaining the organization's goals.˜ The majority's apparent interpretation of "material," as referencing anything and everything that "another person would have needed to do" if the respondent had not done it, is without effective limits and would lead to absurd results.˜

For example, under the majority's strained interpretation, providing a glass of water to a thirsty individual who happened to belong to a terrorist organization would constitute material support of that organization, because the individual otherwise would have needed to obtain water from another source. Providing medical care to a flu-stricken member of a terrorist organization would also qualify as material support, since the individual otherwise would have needed to seek help from another doctor. Myriad other everyday activities that involve the crossing of paths with individuals who happen to be members of terrorist organizations would also be covered, such as selling such a member groceries on the same terms as are applied to the public generally, or cooking breakfast or doing laundry for one's spouse who is a member. All of these examples, like the majority's application of the bar to the minimal and menial activities in which the respondent has engaged, essentially read the word "material" out of the statute and render it superfluous, an outcome with which I cannot agree.˜

In view of our relatively recent holding in *Matter of M-H-Z-*, 26 I&N Dec. 757 (BIA 2016), that the material support bar contains no exception for duress, "it is especially important to give meaning to the statutory limit of 'material.'"˜ Unlike the

majority, which apparently would apply the bar without any meaningful limit, I would not decline to carry out our responsibility to strike the foregoing critical balance.

6.7 Inadmissibility Based on Criminal Conduct, Generally

Criminal conduct is a basis for inadmissibility. INA § 212(a)(2), 8 U.S.C. § 1182(a)(2). There are strong similarities between the criminal grounds for exclusion and the criminal grounds for deportation, the latter of which will be discussed in Chapter 8. While this and subsequent chapters (sections 6.9-6.14) provide an overview of crime-based inadmissibility under INA § 212, the majority of the discussion regarding crime-based removal will be found in Chapter 8.

6.8 Convictions

In general, noncitizens who have been convicted of certain crimes are inadmissible. INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i). The term "convicted" is defined by statute. 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 be 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 that 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 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 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. In contrast, INA § 237 includes language regarding the immigration consequences of pardons for noncitizens facing deportation. See section 8.5.

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 6.10, do eliminate attendant INA § 212 consequences. 22 C.F.R. § 40.21(a)(5).

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.

6.9 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 6.10 below) or a controlled substance offence (see section 6.11 below) may also be excluded. INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i).

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 6.11. 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.

6.10 Crimes Involving Moral Turpitude

Noncitizens convicted of or admitting to having committed a crime involving moral turpitude, referred to as a "CIMT," are excludable. INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I). As one court has put it, CIMTs involve "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).

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).

6.11 Controlled Substance Offenses

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).

6.12 Multiple Criminal Convictions

Noncitizens convicted of "2 or more offenses (other than purely political offenses)" for which they were sentenced to imprisonment of "5 years or more" are also excludable. INA § 212(a)(2)(B), 8 U.S.C. § 1

6.13 Economic Grounds

Exclusion also applies to noncitizens deemed "likely at any time to become a public charge." INA § 212(a)(4)(A), 8 U.S.C. § 1182(a)(4)(A). "Public charge" means that the noncitizen is "likely to become primarily dependent on the U.S. Government for subsistence" by either: (a) receiving public cash assistance for income maintenance, or (b) being institutionalized for long-term care at U.S. government expense. 9 FAM 302.8-2(B)(1)(a)(1). By statute, "public charge" is evaluated "at a minimum" by considering the noncitizen's age, health, family status, assets, resources, and financial status, as well their education and skills. INA § 212(a)(4)(B), 8 U.S.C. § 1182(a)(4)(B). It is a "totality of the circumstances" test. 9 FAM 302.8-2(B)(1)(a)(2).

A noncitizen who might be deemed a "public charge" can nevertheless be admitted if a "sponsor"—the U.S.-based citizen or LPR petitioning for the noncitizen's admission as an immigrant—submits an "affidavit of support." INA § 213A, 8 U.S.C. § 1183a. The affidavit of support is a contract between the sponsor and the U.S. government pursuant to which the sponsor agreed to provide financial support for the visa beneficiary in the amount of 125% of the Federal poverty line until the sponsored beneficiary becomes a U.S. citizen, has paid into Social Security for 40 quarters (10 years), leaves the U.S. permanently, or dies. INA § 213A, 8 U.S.C. § 1183a.

6.14 Public Health and Morals

Noncitizens determined to have "a communicable disease of public health significance" are excludable under INA § 212(a)(1)(A)(i), 8 U.S.C. § 1182(a)(1)(A)(i). In addition, noncitizens determined to have a "physical or mental disorder" either associated with behaviors or an actual history of behavior that poses "a threat to the property, safety, or welfare of the aliens or others" are also excludable. INA § 212(a)(1)(A)(iii), 8 U.S.C. § 1182(a)(1)(A)(iii). A final provision of note is the exclusion of noncitizens determined to be "a drug abuser or addict." INA § 212(a)(1)(A)(iv), 8 U.S.C. § 1182(a)(1)(A)(iv).

6.15 Other Exclusion Grounds

There are myriad other grounds for exclusion of noncitizens.

Foreign Policy. A noncitizen whose admission would "have potentially serious adverse foreign policy consequences" is excludable under INA § 212(a)(3)(C)(i), 8 U.S.C. § 1182(a)(3)(C)(i).

Communists. Membership in the Communist or other totalitarian party is a basis for excluding immigrants, but not nonimmigrants. INA § 212(a)(3)(D)(i), 8 U.S.C. § 1182(a)(3)(D)(i). There are exceptions for membership that was involuntary, before the age of 16, a function of law, or solely to obtain "employment, food rations, or other essentials of living." INA § 212(a)(3)(D)(ii), 8 U.S.C. § 1182(a)(3)(D)(ii). There's another exception for membership that ended two years before seeking an immigrant visa where the noncitizen is not a threat to U.S. security. INA § 212(a)(3)(D)(iii), 8 U.S.C. § 1182(a)(3)(D)(iii). Finally, there is a discretionary exception available for the close family members of U.S. citizens and lawful permanent residence so long as their admission is "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest," if the noncitizen is not a threat to U.S. security. INA § 212(a)(3)(D)(iv), 8 U.S.C. § 1182(a)(3)(D)(iv).

Nazis. Those who "order, incited, assisted or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion" as a Nazi between March 23, 1933 and May 8, 1945, is inadmissible under INA § 212(a)(3)(E)(i), 8 U.S.C. § 1182(a)(3)(E)(i).

Genocide. Participating in geocide is a basis for exclusion under INA § 212(a)(3)(E)(ii), 8 U.S.C. § 1182(a)(3)(E)(ii).

Torture, Extra-judicial killing, recruiting/using child soldiers. Like the exclusions of Nazis and those who have participated in genocide, noncitizens who have committed

torture, extra-judicial killings, or who have recruited or used child soldiers are also inadmissible. INA § 212(a)(3)(E)(iii) & (a)(3)(G), 8 U.S.C. § 1182(a)(3)(E)(iii) & (a)(3)(G).

Polygamists. Coming to the United States to practice polygamy is grounds for excluding immigrants, but not nonimmigrants. INA § 212(a)(10)(A), 8 U.S.C. § 1182(a)(10)(A).

Unlawful voters. Voting in a U.S. federal or state election is grounds for exclusion. INA § 212(a)(10)(D), 8 U.S.C. § 1182(a)(10)(D).

Former citizens if tax evaders. If a U.S. citizen renounced their citizenship in order to avoid taxes, they become inadmissible under INA § 212(a)(10)(E), 8 U.S.C. § 1182(a)(10)(E).

6.16 Waivers

Many of the exclusion grounds outlined in INA § 212 are subject to waiver. That is, the government can exercise its discretion to grant a visa to a noncitizen who would otherwise be inadmissible. See INA § 212(d), (e), (g), (h). Note that the criteria for INA § 212 waivers differ for immigrants and nonimmigrants. In addition to the following descriptive material regarding waivers relating to noncitizens excludable on the basis of past criminal conduct, Appendix A.3 replicates a USCIS chart regarding waiver grounds.

Waivers for Immigrants, 9 FAM 302.3-2(D)(1)

a. Principal Alien: An immigrant alien who is ineligible under INA 212(a)(2)(A)(i)(I) is legally eligible to apply for a waiver of inadmissibility under INA 212(h) if it is established to the satisfaction of the Secretary of Homeland Security (DHS) that:

(1) The activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa for admission, or adjustment of status; the alien's admission to the United States would not be contrary to the national welfare, safety, or security, and the alien has been rehabilitated; or

(2) In certain cases involving close relatives˜; or

(3) If the alien is a Violence Against Women's Act (VAWA) self-petitioner.˜

b. Certain Relatives Of U.S. Citizens Or Legal Permanent Residents (LPRs): An alien immigrant who is the spouse, parent, son, or daughter of a U.S. citizen or an alien

lawfully admitted for permanent residence in the United States legally may apply for a waiver under INA 212(h) if:

(1) It is established of the Secretary of Homeland Security's (DHS) satisfaction that the alien's denial of admission would result in extreme hardship to the U.S. citizen or lawfully resident spouse, parent, son, or daughter; and

(2) The Secretary of Homeland Security (DHS) has consented to the alien's applying or reapplying for a visa for admission or adjustment of status to the United States.˜

d. Procedures:

(1) Aliens Submit Waiver Requests Directly to The Department of Homeland Security˜

—-—

Waivers for Nonimmigrants, 9 FAM 302.3-2(D)(2)

For a finding of 212(a)(2)(A)(i)(I) ineligibility, INA 212(d)(3)(A) waivers are legally available. As with any INA 212(a)(d)(3)(A) waiver, the Department of Homeland Security cannot approve the waiver request unless it is accompanied by a favorable recommendation from either the consular officer or the Secretary of State. You should consider the following factors, among others, when deciding whether to recommend a waiver:

(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;˜

—-—

6.17 Test Your Knowledge

PROBLEM 6.1

Mimma Mahmood is an undocumented migrant from Myanmar. She is a member of the Muslim Rohingya minority, a group that has been systematically persecuted by the Myanmar military in what the United Nations has called a "textbook example of ethnic cleansing."

For the past year, Mimma has served as the administrator for the Facebook page of the Arakan Rohingya Salvation Army (ARSA), an armed Rohingya defense organization that the Myanmar government considers a terrorist organization. ARSA has attacked military outposts in an effort to steal guns, which ARSA then uses to thwart government-backed military attacks on Rohingya in Myanmar.

Is Mimma potentially removable under INA § 212(a)(3)(B)?

PROBLEM 6.2

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?

Chapter Seven: Admission

In prior chapters, we covered *who* is lawfully coming to the United States: immigrants (Chapter 3) and nonimmigrants (Chapter 4). This chapter covers *how* noncitizens lawfully come to the United States. It explores the process by which noncitizens get a visa (section 7.2), if a visa is needed (section 7.3), and how they enter the United States (section 7.4), noting the presidential power over admission (section 7.5) and the "parole" alternative to admission (section 7.6). In addition, this chapter introduces "expedited removal," an administrative process that applies at the border to exclude noncitizens without proper documents and those engaged in misrepresentation (section 7.7). Finally, this chapter discusses an alternative to admission—adjustment of status—which allows noncitizens present in the United States to become LPRs without leaving the country (section 7.9).

Before we delve into the admission process, it is a good time to remember that admission is a key dividing point in immigration law. As we already touched upon in Chapter 6, removal (the process of which will be discussed in Chapter 10) is the mechanism that the United States uses to expel noncitizens from this country whether those noncitizens have been lawfully admitted or not. But admission determines the criteria used to remove a noncitizen: those not lawfully admitted are subject to INA § 212 (Chapter 6); those lawfully admitted are subject to the different removal grounds outlined in INA § 237 (Chapter 8).

7.1 Admission Procedure: The Big Picture

Admission to the United States is a multi-step process involving multiple federal agencies.

DEPARTMENT OF LABOR

For some noncitizens looking to come to the United States on a work-based visa, the admission process starts when an employer files necessary paperwork with the Department of Labor. See sections 3.14 (labor certification for EB-2 and EB-3 immigrants), 4.4 (labor condition application for H-1B, H-1B1, or E-3 nonimmigrants), and 4.5 (labor certification for H-2A and H-2B nonimmigrants).

USCIS

The next step for all immigrants and many nonimmigrants is to file a visa petition with USCIS. This will be 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. As discussed in Chapters 3 and 4, 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 National Visa Center (NVC) in Portsmouth, New Hampshire. The NVC is run by the Department of State, and it is the agency's processing center in the United States. The petition remains with the NVC until the beneficiary's priority date is likely to become current. Recall section 3.2 regarding immigrant visa wait times. Immediate relatives, who are not subject to those wait times, will have their petitions processed by the NVC rapidly. Other family- and employment-based beneficiaries may have to wait years for their priority date to become current.

When ready, immigrant petitions will be sent from the NVC to the appropriate U.S. embassy or consulate abroad. This is typically, but not always, the embassy or consulate servicing the beneficiary's country of origin. At this point, the noncitizen completes a visa application. Immigrant applicants must also complete a medical examination. INA § 221(d), 8 U.S.C. § 1201(d). The application, results from the medical exam, photographs, supporting documentation, and any other necessary material is considered by the consular official when interviewing the would-be immigrant, their spouse, and any qualified unmarried children immigrating with them. If successful, the noncitizen and their derivative beneficiaries will each receive a physical visa authorizing their entry into the United States.

Many noncitizens are entitled to just start with a nonimmigrant visa application at a consular office. Tourists, for example, apply at the consulate without the need to interact with the DOL or USCIS in advance. As explained, however, many work-based nonimmigrants are screened through the DOL and USCIS before their paperwork is sent to the appropriate consulate. INA § 214(b) governs consular consideration of the nonimmigrant visa application: the noncitizen is "presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa … that he is entitled to a nonimmigrant status."

Immigrants and nonimmigrants alike are screened for INA § 212 exclusion grounds by consular officials. INA § 221(g)(1), 8 U.S.C. § 1201(g)(1) ("No visa … shall be issued to an alien if … it appears to the consular officer, from statements in the application, or in the papers submitted therewith, that such alien is ineligible to receive a visa … under section 212.").

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: actual entry 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.

In considering the admission of nonimmigrants, OFO officers are bound by INA § 214(b), which dictates that every nonimmigrant is "presumed to be an immigrant until he establishes to the satisfaction of the … immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status."

Finally, note that visas expire. Immigrants must use their visa within six months of issuance from the State Department. INA § 221(c)(1), 8 U.S.C. § 1201(c)(1). The expiration dates of nonimmigrant visas vary. INA § 221(c)(2), 8 U.S.C. § 1201(c)(2).

7.2 Getting a Visa

EOUSA, OLE, Immigration Law (2005)

WHO NEEDS A VISA

Most foreigners who want to travel to the United States either as visitors, or who seek to enter as intending immigrants must apply for a visa at an American embassy or consulate abroad. See INA § 211(a), 8 U.S.C. § 1181 (immigrants), INA § 212(a)(7)B)(i)(II), 8 U.S.C. § 1182(a)(7)(B)(i)(II) (nonimmigrants). However, under the Visa Waiver Program (VWP) authorized by INA § 217, 8 U.S.C. § 1187, citizens of certain participating countries can travel to the United States for tourism or business for ninety days or less without a visa.˜ The visa allows a foreign citizen to travel to a port of entry in the United States, such as a[n] international airport, a seaport or a land border crossing.

IMMIGRANT VISA PETITIONS

An alien who seeks to obtain permanent residence in the United States (Green Card), must either obtain an immigrant visa at a U.S. consular post abroad or in certain limited circumstances, the alien may obtain adjustment of status if residing in the U.S.˜ To obtain an immigrant visa an alien must have a qualifying relative, an offer of employment or luck in the diversity visa lottery. Additionally, the alien must not be subject to any grounds of inadmissibility.

To obtain a family-based visa, the qualifying relative who is a U.S. citizen or a lawful permanent resident (LPR), files a visa petition, known as an "I-130" form with the USCIS. The petitioning party is referred to as the "Petitioner," while the alien is referred to as the "beneficiary."˜ The allocation of immigrant visas, with the exception of immigrant visas for "immediate relatives," is subject to numerical limitations. Consequently, an immigrant visa may not always be immediately available. Therefore, even though USCIS will approve the I-130 visa petition, applicants must wait in line to actually obtain their visas. Moreover, the approval of the I-130 does not guarantee that the immigrant visa will be issued or that the adjustment of status will be granted. The USCIS forwards the approved I-130 to the Department of State's Visa Processing Center, which will contact the intending immigrant with further information.

The date of the filing of the I-130 with the USCIS is known as the "priority date" for purpose for visa issuance. To determine whether an immigrant visa is immediately available for a family based preference, one must consult the Department of State Visa Bulletin, now published only online at http://www.travel.state.gov. For example, the

Visa Bulletin for March 2005 indicates that first preference family-based visas are available to applicants who had a priority date earlier than February 22, 2001. This suggests that an applicant who applied for such visa in March 2005 would have to wait for four years.

Once a family-based visa becomes immediately available, the applicant who is abroad is notified that he or she must submit additional documents and attend a visa interview. If the U.S consular official approves the immigrant visa, the applicant is issued a travel document to present himself for inspection and admission at a U.S. port of entry. On the other hand, an applicant who is in the United States may, if qualified, apply for adjustment of status (Form I-485) under INA § 245, 8 U.S.C. § 1255. Once USCIS grants the adjustment application, the applicant will be issued form I-551 (Green Card), as evidence of lawful permanent residence.

Obtaining an immigrant visa based on an offer of employment may require an additional step. For most employment-based preferences, the petitioning party, in this case an employer, must demonstrate to the DOL that it could not find a qualified U.S. worker for that particular position. The employer does so by filing an Application for Alien Employment Certification (ETA-750). If DOL grants the application, the petitioner must file a Petition for Immigrant Worker (I-140) with USCIS or with the U.S. Embassy or consular post with jurisdiction over the alien's residence.˜ Following the submission of the I-140, the beneficiary will be interviewed either by a consular official abroad, or by USCIS if the beneficiary is in the United States. If the applicant qualifies, USCIS will grant lawful permanent residence status˜. If abroad, the beneficiary must appear for inspection and admission at a United States port of entry.

NONIMMIGRANT VISA PETITIONS

An alien who seeks to enter the United States as a nonimmigrant must obtain a nonimmigrant visa (NIV) abroad by submitting Form DS-156 to the American embassy or consular post. Most nonimmigrants who travel to the United States do so as visitors for pleasure. However, there are broad categories of aliens who must first get approval from USCIS prior to submitting an application for a nonimmigrant visa. For example, an employer who seeks a temporary worker must file with USCIS˜ a Petition For a Nonimmigrant Worker (I-129)˜ on behalf of the employee beneficiary. USCIS is responsible for determining the conditions of the worker's entry, including duration of status. INA § 214, 8 U.S.C. § 1184. Consultation with the DOL and the Departments of Agriculture regarding the conditions of employment must occur when the alien is seeking admission as a temporary worker or trainee (H-visa), as an intracompany transferee (L-visa), as an individual with extraordinary ability in the sciences, arts,

education, business or athletics (O-visa) or as a member of an internationally recognized entertainment group (P-visa). INA § 214(b), 8 U.S.C. § 1184(b). Once USCIS approves a nonimmigrant visa petition, the alien may apply for a visa from a consular officer overseas or for a change of nonimmigrant status if the alien already is in the United States. INA§ 248, 8 U.S.C. § 1258.˜

CONSULAR NONREVIEWABILITY

Decisions of consular officials are not judicially reviewable under the well-established doctrine of "consular nonreviewability."

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Role of Consular Officers, 9 FAM 102.2-1

When reviewing a visa application and interviewing a visa applicant you must: consider the applicant's qualifications for the visa under the law based on the specific visa type; decide each case on its own merit; consider, if applicable to the visa type, the presumption of immigrant intent; review the case for fraud considerations, if applicable; and, ensure the applicant has no ineligibilities or, if there are ineligibilities, whether the applicant must have a waiver. The consular officer is responsible for conducting as complete a clearance as is necessary to establish the eligibility of an applicant to receive a visa.

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Adjudication Decisions Based On Law, Regulations,
9 FAM 301.1-2

(1) Legal Basis for Issuance, Refusal:˜ [A] consular officer may issue a visa to an immigrant or nonimmigrant who has made proper application˜. However˜ no visa or other documentation may be issued to an alien if:

(a) It appears to the consular officer, from statements in the application, or in the papers submitted therewith, that such alien is ineligible to receive a visa or such other documentation under INA 212, or any other provision of law;

(b) The application fails to comply with the provisions of the INA, or the regulations issued thereunder; or

(c) The consular officer knows or has reason to believe that such alien is ineligible to receive a visa or such other documentation under INA 212, or any other provision of law.

(2) Issuing a Visa: Eligibility for a visa is based on three legal and regulatory criteria – if all three of the criteria below are met, an applicant would generally be considered eligible for a visa:

(a) Classification: The applicant successfully demonstrates that they fall within a visa classification as established in INA 101(a)(15) for nonimmigrants and INA 201 or INA 203 for immigrants.˜;

(b) Documentary and Processing Requirements: The applicant provides a complete visa application and completes all required steps in the application process.˜;

(c) Ineligibilities: The applicant successfully demonstrates that they are not subject to any legal provision which would make them ineligible for a visa and therefore inadmissible into the United States.˜

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CRS, The Power of Congress and the Executive to Exclude Aliens: Constitutional Principles (2019)

The doctrine of consular nonreviewability precludes judicial review of challenges brought by nonresident aliens located abroad against visa denials˜. Under the doctrine, the millions of nonresident aliens denied visas each year at U.S. consulates abroad cannot themselves challenge their visa denials in federal court on statutory or constitutional grounds.˜ The general unavailability of judicial review of visa denials under the doctrine means that U.S. consular officers (the officials who adjudicate visas abroad)˜ have considerable power to make final decisions about visa applications.˜

No statute speaks expressly to the issue of whether visa decisions should be subject to judicial review.˜ Even so, lower federal courts recognize the doctrine with apparent uniformity˜. As authority for the doctrine, courts often cite [United States ex rel. Knauff v. Shauhnessy, 338 U.S. 537 (1950) and other]˜ Supreme Court precedents for the proposition that Congress's plenary immigration power includes the power to have statutes governing the admission of aliens "enforced exclusively through executive officers, without judicial intervention"˜ and that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."˜

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7.3 Visa Waiver Program

CRS, Visa Waiver Program (2021)

The Visa Waiver Program (VWP), originally established in 1986 as a trial program and made permanent in 2000 (P.L. 106-396), allows nationals from 40 countries, many of which are in Europe, to enter the United States as temporary visitors (nonimmigrants) for business or pleasure without first obtaining a visa.˜

In FY2019, there were more than 22.9 million admissions to the United States under this program, constituting nearly a third (31%) of all temporary visitor admissions.˜

To qualify for the VWP, a country must offer reciprocal travel privileges to U.S. citizens; have had a nonimmigrant visa refusal rate of less than 3% for the previous year; issue their nationals machine-readable passports that incorporate biometric identifiers; issue tamper-resistant, machine-readable visa documents that incorporate biometric identifiers which are verifiable at the country's port of entry; report the loss and theft of passports; share specified information regarding nationals of the country who represent a threat to U.S. security; and not compromise the law enforcement or security interests of the United States by its inclusion in the program. Countries can be terminated from the VWP if they fail to meet any of these conditions or otherwise threaten the United States' security or immigration interests.

All foreign nationals˜ entering under the VWP must present passports that contain electronic data chips (e-passports). Under Department of Homeland Security (DHS) regulations, travelers who seek to enter the United States through the VWP are subject to the biometric requirements of the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) program. In addition, aliens seeking to travel to the United States under the VWP must get an approval from the Electronic System for Travel Authorization (ESTA), a web-based system that checks the alien's information against relevant law enforcement and security databases, before they can board a plane to the United States.˜

[In 2015, Congress] changed eligibility for the VWP by prohibiting people who were present in certain countries since March 1, 2011, with limited exceptions, from traveling under the VWP.˜ Currently, the prohibition affects those who were present in any of the following countries: Democratic People's Republic of Korea, Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. The statutory exceptions from this restriction apply to foreign nationals who were in one of the specified countries in order to perform military service in the armed forces of a VWP country, or to perform official duties as

an employee of the VWP country. In addition, DHS can grant waivers on a case-by-case basis.˜

[A]nyone who is a dual national of a VWP country and the Democratic People's Republic of Korea, Iran, Iraq, Sudan, or Syria is ineligible to travel under the VWP.

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7.4 Admission to the United States

EOUSA, OLE, Immigration Law (2005)

An alien must apply for admission at a U.S. port of entry within the validity period of his or her visa or entry document. A CBP Officer will verify the alien is the person issued the visa or entry document and is admissible to the United States. INA §§ 212(b), 235, 8 U.S.C. §§ 1182(b), 1225˜.

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CRS, Expedited Removal of Aliens: Legal Framework (2019)

INSPECTION

An alien arriving in the United States or an alien present in the United States who has not been admitted is considered an "applicant for admission" who is subject to inspection by an immigration officer.˜ At a designated port of entry, the initial phase of the inspection process is referred to as "primary inspection."˜ During this stage, "the immigration officer literally has only a few seconds to examine documents, run basic lookout queries, and ask pertinent questions to determine admissibility and issue relevant entry documents."˜ If the immigration officer finds discrepancies in the alien's documents or statements, "or if there are any other problems, questions, or suspicions that cannot be resolved within the exceedingly brief period allowed for primary inspection," the alien will be referred to "secondary inspection" for "a more thorough inquiry."˜ During secondary inspection, the immigration officer˜ [will] question[] the alien to assess whether the alien is inadmissible.˜ In order to make that determination, the immigration officer may obtain statements under oath about the purpose and intention of the applicant incoming to the United States.˜

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7.5 Presidential Hurdles to Admission

Congress has given the president broad power to affect admission. If the president determines that the entry of noncitizens (whether immigrants or nonimmigrants) "would be detrimental to the interest of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate." INA § 212(f), 8 U.S.C. § 1182(f). In 2017, President Donald J. Trump issued an Executive Order pursuant to this statutory power to restrict the entry of noncitizens from several Muslim-majority nations. The Supreme Court held that the president's actions were a "lawful exercise" of the "broad discretion" authorized by statute. Trump v. Hawaii, 585 U.S. __ (2018).

7.6 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 thusfar. Some noncitizens are allowed to enter the United States under a status called "parole." Parole is the mechanism by which the government may permit entry into the United States to a noncitizen who is ineligible to receive a visa and ineligible to be admitted to the United States under INA § 212. For example, the government might grant a drug addict the opportunity to enter the United States for purposes of seeking treatment at a U.S. rehabilitation center. Parole is also the mechanism by which the government might grant a noncitizen, presently in the United States without authorization, permission to reenter the country after leaving.

DHS, Definition of Terms

Parolee - A parolee is an alien, appearing to be inadmissible to the inspecting officer, allowed into the United States for urgent humanitarian reasons or when that alien's entry is determined to be for significant public benefit. Parole does not constitute a formal admission to the United States and confers temporary status only, requiring parolees to leave when the conditions supporting their parole cease to exist. Types of parolees include:

1. Deferred inspection: authorized at the port upon alien's arrival; may be conferred by an immigration inspector when aliens appear at a port of entry with documentation, but after preliminary examination, some question remains about their admissibility which can best be answered at their point of destination.

2. Advance parole: authorized at an DHS District office in advance of alien's arrival; may be issued to aliens residing in the United States in other than lawful permanent resident status who have an unexpected need to travel and return, and whose conditions of stay do not otherwise allow for readmission to the United States if they depart.

3. Port-of-entry parole: authorized at the port upon alien's arrival; applies to a wide variety of situations and is used at the discretion of the supervisory immigration inspector, usually to allow short periods of entry. Examples include allowing aliens who could not be issued the necessary documentation within the required time period, or who were otherwise inadmissible, to attend a funeral and permitting the entry of emergency workers, such as fire fighters, to assist with an emergency.

4. Humanitarian parole: authorized at DHS headquarters for "urgent humanitarian reasons" specified in the law. It is used in cases of medical emergency and comparable situations.

5. Public interest parole: authorized at DHS headquarters for "significant public benefit" specified in the law. It is generally used for aliens who enter to take part in legal proceedings.

6. Overseas parole: authorized at an DHS District or suboffice while the alien is still overseas; designed to constitute long-term admission to the United States. In recent years, most of the aliens the DHS has processed through overseas parole have arrived under special legislation or international migration agreements.

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Parole Authorization, 9 FAM 202.3-2(A)

a. Parole authority is governed by section 212(d)(5) of the Immigration and Nationality Act.˜

b. Parole is an extraordinary measure, sparingly utilized to permit an otherwise inadmissible alien to enter the United States for a temporary period due to an urgent humanitarian reason or for significant public benefit. Parole may be requested for an alien outside the United States by filing Form I-131, Application for Travel Document, or by a request from a U.S. Government agency, including the Department.

c. Parole under INA 212(d)(5)(A) is not an admission to the United States.

d. ˜While USCIS and ICE can authorize issuance of an advance parole document, CBP makes the actual decision whether to parole an individual when the individual arrives at the port of entry in the United States on a case-by-case basis.

e. There is only one parole authority, but there are different terms used for granting parole. "Authorization of Parole" refers to the DHS issuance of a document, before the alien travels to a port of entry and requests parole. Advance authorization requests can be made for aliens outside the United States who seek to travel to the United States on a temporary basis but cannot obtain visas or other proper travel documents. Alternatively, "Advance Parole" may be authorized for aliens inside the United States who seek to depart and return to the United States. In most cases, Advance Parole authority for individuals within the United States rests with DHS' U.S. Citizenship and Immigration Services (USCIS) and are processed by a USCIS Service Center or domestic Field Office. Some cases may be processed by ICE, Homeland Security Investigations (HSI).

f. Parole is not a method for circumventing normal visa issuing procedures, including noncurrent priority dates˜. Parole is neither a method to bypass established refugee processing nor should it be used to avoid meeting host country or U.S. legal requirements in adoption cases. It should be seen as a last resort for persons with urgent needs to travel to the United States or for cases with significant public benefit.

g. Neither the Department nor consular officers have the authority to approve or extend any type of parole under any circumstances. Parole is a discretionary authority of the Secretary of Homeland Security.

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Parole Does Not Confer Immigration Benefits, 9 FAM 202.3-2(B)

a. Parole does not, in and of itself, confer any immigration benefits. Parole is authorized for a specific and temporary period, and parolees must depart the United States at the end of their parole authorization period, adjust to immigrant status (usually based on a previously approved petition), otherwise obtain lawful immigration status, or request to be re-paroled. Generally, parole authorization permits the alien to travel to the United States only one time and does not allow an alien to travel abroad and then return to the United States after the initial parole, without prior approval from DHS.

b. Those authorized parole based on a Department request for protection of that alien may apply for asylum in the United States, and, if asylum is approved, may eventually adjust status to lawful permanent resident, if qualified.

c. Parolees may apply for employment authorization. Parolees who are paroled pursuant to INA 212(d)(5)(A) for urgent humanitarian reasons or for significant public benefit reasons do not receive the type of resettlement assistance that is provided to refugees. Therefore, it is imperative that all parole requests, whether by Form I-131 or

by government request, identify a sponsor who will provide financial support for the parolee once in the United States.

d. Parolees generally must depart the United States before the end of the authorized parole period; however, some circumstances may permit an alien to remain in the United States beyond the authorized parole period. In such situations, an alien may request to be˜ re-paroled. USCIS and ICE grant such requests on a case-by-case basis and approve them only for a specific period, not indefinitely.˜

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7.7 Expedited Removal

As discussed in section 7.2, an applicant for admission at the border may be rejected, despite having been issued a visa by a U.S. consular official. An inspecting office may conclude, for example, that an individual holding a tourist visa does not intend to visit the United States for pleasure but instead plans to work without authorization.

For some noncitizens, being rejected at the border can have even greater consequences than mere denial of entry. Noncitizens believed to be engaging in misrepresentation are subject to expedited removal under INA § 235. As a consequence, the affected noncitizen will be inadmissible under INA 212(a)(9)(A)(i) for five years after the date of their removal.

As explained in the reading below, expedited removal applies not only to cases of misrepresentation but also whenever a noncitizen arrives in the United States, whether at a port of entry or between ports of entry, without paperwork.

CRS, Expedited Removal of Aliens:
Legal Framework (2019)

Congress˜ has broad authority over the admission of aliens *seeking to enter* the United States.˜ The Supreme Court has repeatedly held that the government may exclude an alien seeking to enter this country without affording him the traditional due process protections that otherwise govern formal removal proceedings; instead, an alien seeking initial entry is entitled only to those procedural protections that Congress expressly authorized.˜

Consistent with this broad authority, Section 235(b)(1) of the INA provides for the expedited removal of arriving aliens who do not have valid entry documents or have attempted to gain their admission by fraud or misrepresentation.˜ Under this streamlined removal procedure, which Congress established through the Illegal

Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, such aliens may be summarily removed without a hearing or further review.˜

In limited circumstances, however, an alien subject to expedited removal may be entitled to certain procedural protections before he or she may be removed from the United States. For example, an alien who expresses a fear of persecution may obtain administrative review of his or her claim and, if the review determines that the alien's fear is credible, the alien will be placed in "formal" removal proceedings where he or she can pursue asylum and related protections.˜ Additionally, an alien may seek administrative review of a claim that he or she is a U.S. citizen, lawful permanent resident (LPR), admitted refugee, or asylee.˜ Unaccompanied alien children also are not subject to expedited removal.˜

In addition to providing for expedited removal of certain arriving aliens, INA Section 235(b)(1) also confers the Secretary of the Department of Homeland Security (DHS) with the ability 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 do not have valid entry documents or have attempted to gain their admission by fraud or misrepresentation.˜ In practice, the government currently employs expedited removal only to such aliens when they (1) are arriving aliens; (2) arrived in the United States by sea within the last two years, and have not been admitted or paroled by immigration authorities; or (3) are found in the United States within 100 miles of the border within 14 days of entering the country, and have not been admitted or paroled by immigration authorities.˜

Nevertheless, expedited removal is a major component of immigration enforcement, and in recent years it has been one of the most regularly employed means by which immigration authorities remove persons from the United States.˜

As an alternative to expedited removal, DHS may permit an alien to voluntarily withdraw his or her application for admission if the alien intends, and is able, to depart the United States immediately.

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CRS, Expedited Removal of Aliens:
An Introduction (2021)

INA § 242(a)(2) generally bars judicial review of an expedited removal order. But judicial review is still available in limited circumstances.˜

Under INA § 242(e)(2), an alien may challenge an expedited removal order in habeas corpus proceedings, contesting the legality of his or her detention. The habeas

court's jurisdiction, however, is limited to whether (1) the petitioner in the habeas action is an alien; (2) the petitioner was ordered removed under INA § 235(b)(1)'s expedited removal provisions; and (3) the petitioner can prove by a preponderance of the evidence that he or she is an LPR, refugee, or asylee. Most courts have construed INA § 242(e)(2) as barring review of the legality of the underlying expedited removal proceedings. In Dep't of Homeland Security v. Thuraissigiam, the Supreme Court upheld these judicial review limitations against a constitutional challenge.˜

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7.8 Withdrawal

CRS, Alien Removals and Returns: Overview and Trends (2015)

WITHDRAW OF APPLICATION (INA § 235(A)(4))

At the discretion of the government, an applicant for admission to the United States may be permitted to withdraw his or her application and depart immediately from the United States without being subject to the five-year bar on reentry.˜ An alien may be permitted to withdraw the application if it is determined that it is in the best interest of justice that a removal (or expedited removal) order not be issued, and that the alien has both the intent and means to depart immediately from the United States.˜ The alien's decision to withdraw the application must be made voluntarily. In general, an alien who has withdrawn an application for admission must be detained, either by DHS or the owner of the vessel (e.g., airline) on which he or she arrived, until departure.˜

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7.9 Adjustment of Status

As discussed in section 7.2, 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, as explained below. This is a particularly important option for would-be immigrants who, due to periods of unlawful presence in the United States, would be barred from returning to the country after leaving (see section 6.2). Note: noncitizens cannot use adjustment of status to obtain a nonimmigrant visa; though, some nonimmigrant visa holders can change their nonimmigrant classification without leaving the country, as discussed in section 4.12.

Consider Saanvi, a Canadian citizen, who is lawfully present in the United States on a nonimmigrant work visa (see section 4.3). She meets and marries a U.S. citizen and thereby becomes eligible for a family-based immigrant visa (see section 3.5). Saanvi's spouse will file an immigrant visa petition on Saanvi's behalf. Saanvi can visit the U.S. consulate in Montreal, Quebec, for "consular processing" as outlined in section 7.2. But Saavni has an alternative option available: She can remain in the United States and, without traveling to an overseas consulate, "adjust status" and obtain her visa stateside. Saavni might well choose consular processing, despite the availability of adjustment of status, because it can be a faster process.

Yet if we tweak a few facts, the allure of adjustment of status becomes clear. What if Saanvi is a citizen of Australia who currently lives in Boston, Massachusetts? Consular processing for Saanvi would require a journey of more than 10,000 miles, multiple flights with more than 22 hours of travel each way, and it would cost several thousand dollars. What if Saanvi came to the U.S. as an international student and overstayed her visa? If she overstayed by more than 180 days, and returned to Australia for consular processing, she would have to live abroad for a minimum of three years before reuniting with her husband in the United States (see section 6.2). Adjustment of status, on the other hand, would allow Saanvi to obtain her family-based immigrant visa without expense or exile.

CRS, Deferred Action, Advance Parole,
and Adjustment of Status (2015)

ADJUSTMENT OF STATUS PURSUANT TO INA § 245(A)

INA § 245(a) generally 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 provided the alien is "admissible ... for permanent residence," among other things.˜

The requirements that an alien (1) has been "inspected and admitted or paroled" and (2) is admissible as an LPR generally serve to limit unlawfully present aliens' eligibility to adjust their status while within the United States, even if the alien has a family member or an employer who is able and willing to sponsor the alien for an immigrant visa.

Aliens who are unlawfully present as the result of having entered the United States without authorization generally cannot satisfy the requirement that an alien have been "inspected and admitted or paroled" in order to qualify for adjustment of status. Under the INA, admission specifically refers to the "lawful entry of an alien ... after inspection

and authorization by an immigration officer," while *parole* refers to an entry—which does not constitute an admission—that is also authorized by immigration officials.˜

Aliens who are unlawfully present, either as the result of an unauthorized entry or because they overstayed a visa or otherwise violated the conditions of their temporary presence in the United States, are also often inadmissible pursuant to INA § 212(a)(9)(B)(i), 8 U.S.C. § 1182(a)(9)(B)(i). INA § 212(a)(9)(B)(i) generally bars aliens who have been unlawfully present in the United States for a period of more than 180 days and less than 1 year from admission within 3 years of their "departure or removal." Those who are unlawfully present for one year or more are generally barred from admission for 10 years.

ADVANCE PAROLE PURSUANT TO INA § 212(D)(5)(A)

A grant of advance parole pursuant to INA § 212(d)(5)(A) could, however, help an alien to qualify for adjustment of status by enabling the alien to (1) leave the United States and return to it in such a way that the alien is seen to have been "inspected and admitted or paroled" and (2) avoid the 3- and 10-year bars on admission that would generally be triggered by the "departure" of aliens who have been unlawfully present in the United States for over 180 days (and thus potentially be "admissible…for permanent residence").˜

LIMITATIONS ON ADJUSTMENT UNDER INA § 245(A)

Not all aliens granted advance parole will qualify for adjustment of status˜. This is, in part, because other grounds of inadmissibility—beyond the 3- and 10-year bars—could still apply. These include criminal and security grounds.

Aliens who are not "immediate relatives" (e.g., spouses, minor children) of U.S. citizens are generally also ineligible for adjustment because INA § 245(a) requires that an immigrant visa be "immediately available" to the alien at the time when s/he applies for adjustment. However, aliens who are not immediate relatives of U.S. citizens are generally subject to statutory caps on the number of immigrant visas issued per year that can delay the issuance of visas (i.e., make them not "immediately available").

In addition, INA § 245(b) expressly bars certain aliens from adjustment of status, including aliens (other than "immediate relatives") who were employed while lacking employment authorization; have otherwise violated the terms of a nonimmigrant visa; or are not in legal status when they apply for adjustment.

WAIVERS OF THE 3- AND 10-YEAR BARS ALSO POSSIBLE

It should also be noted that adjustment as the result of a grant of advance parole is not the only means by which aliens granted deferred action (among others) could acquire LPR status. INA § 212(a)(9)(B)(v) expressly permits the Secretary of Homeland Security to waive the 3- and 10-year bars for aliens who are the spouses, sons, or daughters of U.S. citizens or LPRs, if the Secretary determines that refusing admission to the alien would result in "extreme hardship" to the alien's citizen or LPR spouse or parent. (Aliens are granted such waivers in conjunction with leaving the country to obtain an immigrant visa.)

Such waivers differ from a grant of advance parole, however, in that a waiver requires a finding of "extreme hardship" to a qualifying relative, while a grant of advance parole does not.

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USCIS Policy Memorandum 602-0091 (2013)

Military preparedness can potentially be adversely affected if active members of the U.S. Armed Forces and individuals serving in the Selected Reserve of the Ready Reserve, who can be quickly called into active duty, worry about the immigration status of their spouses, parents and children.

Similarly, our veterans, who have served and sacrificed for our nation, can face stress and anxiety because of the immigration status of their family members in the United States. We as a nation have made a commitment to our veterans, to support and care for them. It is a commitment that begins at enlistment, and continues as they become veterans.˜

INA § 212(d)(5)(A) gives the Secretary the discretion, on a case-by-case basis, to "parole" for "urgent humanitarian reasons or significant public benefit" an alien applying for admission to the United States. Although it is most frequently used to permit an alien who is outside the United States to come into U.S. territory, parole may also be granted to aliens who are already physically present in the U.S. without inspection or admission. This latter use of parole is sometimes called "parole in place."˜

The fact that the individual is a spouse, child or parent of an Active Duty member of the U.S. Armed Forces, an individual in the Selected Reserve of the Ready Reserve or an individual who previously served in the U.S. Armed Forces or the Selected Reserve of the Ready Reserve, however, ordinarily weighs heavily in favor of parole in place. Absent a criminal conviction or other serious adverse factors, parole in place would generally be an appropriate exercise of discretion for such an individual. If USCIS

decides to grant parole in that situation, the parole should be authorized in one-year increments, with extensions of parole as appropriate.

7.10 Test Your Knowledge

PROBLEM 7.1

Fifteen years ago, Renata Roman, a citizen of Sierra Leone, entered the United States without authorization. Roman has led a largely exemplary life in the United States, with just one slip up. Ten years ago, Roman pled guilty to simple possession of 1.4 grams of marijuana. She served no time in jail. Five years ago, Roman married U.S. Army Specialist Adam Armstrong. The couple has one child, Cristina Celeste.

Roman suffers from lupus, a long-term autoimmune disease in which the body's immune system becomes hyperactive and attacks normal, healthy tissue. She relies on medicines and treatments available in the United States that are not available in Sierra Leone. Indeed, Sierra Leone currently bears the dubious distinction of being the nation recognized by the World Health Organization as providing the worst healthcare in the world to its citizens.

Is Roman currently eligible for adjustment of status? Are there any steps that Renata could take to make her eligible for adjustment of status?

Chapter Eight: Deportation

Not every immigrant or nonimmigrant who has been admitted to the United States is welcome to stay. INA § 237, 8 U.S.C. § 1227, delineates classes of immigrants and nonimmigrants who are deportable from the United States.

This chapter begins by exploring the important distinction between entry and admission (section 8.2). Next, this chapter explores the varied classes of individuals marked for deportation including those who have failed to adhere to U.S. immigration laws (section 8.4), have criminal convictions (sections 8.5-8.17), and face other grounds for deportation (section 8.18).

8.1 Deportation Basics

Noncitizens who have been lawfully admitted to the United States and thereafter become removable fall under the provisions of INA § 237, 8 U.S.C. § 1227. Such noncitizens are deportable and their removal is often called deportation.

There are many grounds for deportation laid out at INA § 237, 8 U.S.C. § 1227, and they include:

INA § 237(a)(1): Inadmissible at time of entry or of adjustment of status or violates status;

INA § 237(a)(2): Criminal offenses;

INA § 237(a)(3): Failure to register and falsification of documents;

INA § 237(a)(4): Security and related grounds; and

INA § 237(a)(5): Public charge.

8.2 Entry Versus Admission

It is critical to understand the distinction between removal under INA § 237 ("deportation") and removal under INA § 212 ("exclusion"), the latter of which was discussed in Chapter 6. Removal under INA § 237 applies to those noncitizens who followed the process outlined in Chapter 7 and were admitted to the United States, whether as immigrants or nonimmigrants. Removal under INA § 212 applies to those noncitizens who entered the United States surreptitiously and without authorization.

As discussed in the readings that follow, this distinction did not always exist. Prior to 1996, the critical point of distinction was 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 § 237 and INA § 212.

EOUSA, OLE, Immigration Law (2005)

Before the enactment of IIRIRA, the term "entry" was originally defined in § 101(a)(13) of the INA, 8 U.S.C. § 1101(a)(13), as "any coming of an alien into the United States from a foreign port or place or from an outlying possession."~ Before IIRIRA, to effect an "entry" an alien must have: (1) crossed into the territorial limits of the United States; (2) been inspected and admitted by immigration officials or actually or intentionally evaded inspection by border officials; and (3) been free from official restraint.~ Thus, an alien waiting in the immigration inspection area at a port of entry or airport would not have effected an "entry" under immigration law. Similarly, an alien granted "advanced parole" or "parole" also did not effect entry. Ironically, if an alien managed to bypass the immigration inspectors and physically reach the interior of the country, the alien was considered to have made an "entry." The legal fiction created by the entry doctrine fostered the development of a two-tier immigration system under which aliens who had not yet made an "entry" were placed into exclusion proceedings, while aliens who could establish entry were placed into deportation proceedings.

A major limitation to the entry doctrine was created by the Supreme Court in Rosenberg v. Fleuti, 374 U.S. 449 (1963), called the Fleuti doctrine. Under Fleuti, lawful permanent residents returning to the United States were not considered to have made a new entry or reentry if their departure was "brief, casual and innocent." Consequently, they were entitled to be placed into deportation proceedings rather than exclusion even when they were in the act of returning to the United States from abroad. If the trip outside the United States was made for an illegal purpose, however, the trip was not considered "brief, casual and innocent," and the returning resident would be placed into exclusion proceedings. See Landon v. Plasencia, 459 U.S. 21 (1977).

In 1996, IIRIRA § 301(a) replaced the term "entry" with the terms "admission" and "admitted." "Admitted" is defined as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A). The term "arriving alien" is defined in the regulations as an alien "who seeks admission to or transit through the United States ... or an alien who is interdicted in international or United States waters." 8 C.P.R. § 1001.1(q). Despite IIRIRA's amendments, entry continues to be an important factor in immigration proceedings, because a ground of removal still exists for aliens who were "inadmissible" at the time they entered. INA § 237(a)(l)(A), 8 U.S.C. § 1227(a)(1)(A). Thus, although the term "entry" no longer exists, understanding the theory behind it continues to be important to fully comprehend the immigration laws.

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8.3 Case: Rosenberg v. Fleuti

Rosenberg v. Fleuti
374 U.S. 449 (1963)

MR. JUSTICE GOLDBERG DELIVERED THE OPINION OF THE COURT.

Respondent Fleuti is a Swiss national who was originally admitted to this country for permanent residence on October 9, 1952, and has been here continuously since except for a visit of 'about a couple hours' duration to Ensenada, Mexico, in August 1956. The Immigration and Naturalization Service, of which petitioner Rosenberg is the Los Angeles District Director, sought in April 1959 to deport respondent on the ground that˜ he had been excludable at the time of his 1956 return as an alien 'afflicted with psychopathic personality,' § 212(a)(4)˜, by reason of the fact that he was a homosexual. Deportation was ordered on this ground and Fleuti's appeal to the Board of Immigration Appeals was dismissed, whereupon he brought the present action for declaratory judgment and review of the administrative action. It was stipulated that among the issues to be litigated was the question whether § 212(a)(4) is 'unconstitutional as being vague and ambiguous.' The trial court rejected respondent's contentions in this regard and in general, and granted the Government's motion for summary judgment. On appeal, however, the United States Court of Appeals for the Ninth Circuit set aside the deportation order and enjoined its enforcement, holding that as applied to Fleuti § 212(a)(4) was unconstitutionally vague in that homosexuality was not sufficiently encompassed within the term 'psychopathic personality.'˜

The Government petitioned this Court for certiorari, which we granted in order to consider the constitutionality of § 212(a)(4) as applied to respondent. Upon consideration of the case, however, and in accordance with the long-established principle that 'we ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable,' we have concluded that there is a threshold issue of statutory interpretation in the case, the existence of which obviates decision here as to whether § 212(a)(4) is constitutional as applied to respondent.

That issue is whether Fleuti's return to the United States from his afternoon trip to Ensenada, Mexico, in August 1956 constituted an 'entry' within the meaning of § 101(a)(13) of the Immigration and Nationality Act of 1952, such that Fleuti was excludable for a condition existing at that time even though he had been permanently and continuously resident in this country for nearly four years prior thereto. Section 101(a)(13), which has never been directly construed by this Court in relation to the kind of brief absence from the country that characterizes the present case, reads as follows: "The term 'entry' means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: Provided, That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception."

The question we must consider, more specifically, is whether Fleuti's short visit to Mexico can possibly be regarded as a 'departure to a foreign port or place * * * (that) was not intended,' within the meaning of the exception to the term 'entry' created by the statute. Whether the 1956 return was within that exception is crucial, because Fleuti concededly was not excludable as a 'psychopathic personality' at the time of his 1952 entry. The 1952 Act became effective on December 24, 1952, and Fleuti entered the country for permanent residence on October 9, 1952, a fact which is of significance because § 241(a)(1) of the Act only commands the deportation of aliens 'excludable by the law existing at the time of such entry * * *.' Hence, since respondent's homosexuality did not make him excludable by any law existing at the time of his 1952 entry, it is critical to determine whether his return from a few hours in Mexico in 1956 was an 'entry' in the statutory sense. If it was not, the question whether § 212(a)(4) could constitutionally be applied to him need not be resolved.

The definition of ‘entry’ as applied for various purposes in our immigration laws was evolved judicially, only becoming encased in statutory form with the inclusion of § 101(a)(13) in the 1952 Act. In the early cases there was developed a judicial definition of ‘entry’ which had harsh consequences for aliens. This viewpoint was expressed most restrictively in United States ex rel. Volpe v. Smith, 289 U.S. 422,˜ in which the Court˜upheld deportation of an alien who, after 24 years of residence in this country following a lawful entry, was held to be excludable on his return from ‘a brief visit to Cuba’˜. The Court stated that ‘the word ‘entry’ * * * includes any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one.’˜ Although cases in the lower courts applying the strict re-entry doctrine to aliens who had left the country for brief visits to Canada or Mexico or elsewhere were numerous,˜ many courts applied the doctrine in such instances with express reluctance and explicit recognition of its harsh consequences,˜ and there were a few instances in which district judges refused to hold that aliens who had been absent from the country only briefly had made ‘entries’ upon their return.˜

Reaction to the severe effects produced by adherence to the strict definition of ‘entry’ resulted in a substantial inroad being made upon that definition in 1947 by a decision of the Second Circuit and a decision of this Court. The Second Circuit, in an opinion by Judge Learned Hand, refused to allow a deportation which depended on the alien’s being regarded as having re-entered this country after having taken an overnight sleeper from Buffalo to Detroit on a route lying through Canada. Di Pasquale v. Karnuth, 158 F.2d 878. Judge Hand recognized that the alien ‘acquiesced in whatever route the railroad might choose to pull the car,’˜ but held that it would be too harsh to impute the carrier’s intent to the alien, there being no showing that the alien knew he would be entering Canada. ‘Were it otherwise,’ Judge Hand went on, ‘the alien would be subjected without means of protecting himself to the forfeiture of privileges which may be, and often are, of the most grave importance to him.’˜ If there were a duty upon aliens to inquire about a carrier’s route, it ‘would in practice become a trap, whose closing upon them would have no rational relation to anything they could foresee as significant. We cannot believe that Congress meant to subject those who had acquired a residence, to the sport of chance, when the interests at stake may be so momentous.’˜ Concluding, Judge Hand said that if the alien’s return were held to be an ‘entry’ under the circumstances, his ‘vested interest in his residence’ would: “be forfeited because of perfectly lawful conduct which he could not possibly have supposed would result in anything of the sort. Caprice in the incidence of punishment is one of the indicia of tyranny, and nothing can be more disingenuous than to say that deportation in these circumstances is not punishment. It is well that we should be free to rid ourselves of those who abuse our hospitality; but it is more important that the continued enjoyment

of that hospitality once granted, shall not be subject to meaningless and irrational hazards."˜

Later the same year this Court, because of a conflict between Di Pasquale and Del Guercio v. Delgadillo, 159 F.2d 130 (C.A.9th Cir. 1947), granted certiorari in the latter case and reversed a deportation order affecting an alien who, upon rescue after his intercoastal merchant ship was torpedoed in the Caribbean during World War II, had been taken to Cuba to recuperate for a week before returning to this country.˜ The Court pointed out that it was 'the exigencies of war, not his voluntary act,'˜which put the alien on foreign soil, adding that '(w)e might as well hold that if he had been kidnapped and taken to Cuba, he made a statutory 'entry' on his voluntary return. Respect for law does not thrive on captious interpretations.'˜ Since '(t)he stakes are indeed high and momentous for the alien who has acquired his residence here,'˜ the Court held that "'(w)e will not attribute to Congress a purpose to make his right to remain here dependent on circumstances so fortuitous and capricious as those upon which the Immigration Service has here seized. The hazards to which we are now asked to subject the alien are too irrational to square with the statutory scheme.'"˜

The increased protection of returning resident aliens which was brought about by the Delgadillo decision, both in its result and in its express approval of Di Pasquale, was reflected in at least two subsequent lower-court decisions prior to the enactment of § 101(a)(13). In Yukio Chai v. Bonham, 165 F.2d 207 (C.A.9th Cir. 1947), the court held that no 'entry' had occurred after a ship carrying a resident alien back from seasonal cannery work in Alaska made an unscheduled stop in Vancouver, B.C., and in Carmichael v. Delaney, 170 F.2d 239 (C.A.9th Cir. 1948), the court held that a resident alien returning from wartime service with the United States Maritime Service during which he had stopped at many foreign ports made no 'entry' because all of the movements of the ship to which he had been assigned were pursuant to Navy orders.˜

It was in light of all of these developments in the case law that § 101(a)(13) was included in the immigration laws with the 1952 revision. As the House and Senate Committee Reports, the relevant material from which is quoted in the margin,˜ make clear, the major congressional concern in codifying the definition of 'entry' was with 'the status of an alien who has previously entered the United States and resided therein * * *.'[The following footnote material appears after the phrase "in the margin" in the previous sentence.] ↳The House and Senate Committee Reports preceding enactment of the bill both contained the following relevant paragraph: "Section 101(a)(13) defines the term 'entry.' Frequent reference is made to the term 'entry' in the immigration laws, and many consequences relating to the entry and departure of aliens flow from its use, but the term is not precisely defined in the present law. Normally an entry occurs when

the alien crosses the border of the United States and makes a physical entry, and the question of whether an entry has been made is susceptible of a precise determination. However, for the purposes of determining the effect of a subsequent entry upon the status of an alien who has previously entered the United States and resided therein, the preciseness of the term 'entry' has not been found to be as apparent. Earlier judicial constructions of the term in the immigration laws, as set forth in United States ex rel. Volpe v. Smith (289 U.S. 422˜ (1933)), generally held that the term 'entry' included any coming of an alien from a foreign country to the United States whether such coming be the first or a subsequent one. More recently, the courts have departed from the rigidity of that rule and have recognized that an alien does not make an entry upon his return to the United States from a foreign country where he had no intent to leave the United States (Di Pasquale v. Karnuth, 158 F.2d 878 (C.C.A.2d 1947)), or did not leave the country voluntarily (Delgadillo v. Carmichael, 332 U.S. 388˜ (1947)). The bill defines the term 'entry' as precisely as practicable, giving due recognition to the judicial precedents. Thus any coming of an alien from a foreign port or place or an outlying possession into the United States is to be considered an entry, whether voluntary or otherwise, unless the Attorney General is satisfied that the departure of the alien, other than a deportee, from this country was unintentional or was not voluntary."˜↩ This concern was in the direction of ameliorating the harsh results visited upon resident aliens by the rule of United States ex rel. Volpe v. Smith, as is indicated by the recognition that 'the courts have departed from the rigidity of (the earlier) rule,' and the statement that '(t)he bill (gives) due recognition to the judicial precedents.' It must be recognized, of course, that the only liberalizing decisions to which the Reports referred specifically were Di Pasquale and Delgadillo, and that there is no indication one way or the other in the legislative history of what Congress thought about the problem of resident aliens who leave the country for insignificantly short periods of time. Nevertheless, it requires but brief consideration of the policies underlying § 101(a)(13), and of certain other aspects of the rights of returning resident aliens, to conclude that Congress, in approving the judicial undermining of Volpe,˜ and the relief brought about by the Di Pasquale and Delgadillo decisions, could not have meant to limit the meaning of the exceptions it created in § 101(a)(13) to the facts of those two cases.

The most basic guide to congressional intent as to the reach of the exceptions is the eloquent language of Di Pasquale and Delgadillo themselves, beginning with the recognition that the 'interests at stake' for the resident alien are 'momentous,'˜ and that '(t)he stakes are indeed high and momentous for the alien who has acquired his residence here,'˜. This general premise of the two decisions impelled the more general conclusion that 'it is * * * important that the continued enjoyment of (our) hospitality once granted, shall not be subject to meaningless and irrational hazards.'˜ Coupling these essential

principles of the two decisions explicitly approved by Congress in enacting § 101(a)(13) with the more general observation, appearing in Delgadillo as well as elsewhere,˜ that '(d)eportation can be the equivalent of banishment or exile,' it is difficult to conceive that Congress meant its approval of the liberalization wrought by Di Pasquale and Delgadillo to be interpreted mechanistically to apply only to cases presenting factual situations identical to what was involved in those two decisions.

The idea that the exceptions to § 101(a)(13) should be read nonrestrictively is given additional credence by the way in which the immigration laws define what constitutes 'continuous residence' for an alien wishing to be naturalized. Section 316 of the 1952 Act,˜ which liberalized previous law in some respects, provides that an alien who wishes to seek naturalization does not begin to endanger the five years of 'continuous residence' in this country which must precede his application until he remains outside the country for six months, and does not damage his position by cumulative temporary absences unless they total over half of the five years preceding the filing of his petition for naturalization. This enlightened concept of what constitutes a meaningful interruption of the continuous residence which must support a petition for naturalization, reflecting as it does a congressional judgment that an alien's status is not necessarily to be endangered by his absence from the country, strengthens the foundation underlying a belief that the exceptions to § 101(a)(13) should be read to protect resident aliens who are only briefly absent from the country.˜

Given that the congressional protection of returning resident aliens in § 101(a)(13) is not to be woodenly construed, we turn specifically to construction of the exceptions contained in that section as they relate to resident aliens who leave the country briefly. What we face here is another harsh consequence of the strict 'entry' doctrine which, while not governed directly by Delgadillo, nevertheless calls into play the same considerations,˜ which led to the results specifically approved in the Congressional Committee Reports. It would be as 'fortuitous and capricious,' and as 'irrational to square with the statutory scheme,'˜ to hold that an alien may necessarily be deported because he falls into one of the classes enumerated in § 212(a) when he returns from 'a couple hours' visit to Mexico as it would have been to uphold the order of deportation in Delgadillo. Certainly when an alien like Fleuti who has entered the country lawfully and has acquired a residence here steps across a border and, in effect, steps right back, subjecting him to exclusion for a condition, for which he could not have been deported had he remained in the country seems to be placing him at the mercy of the 'sport of chance' and the 'meaningless and irrational hazards' to which Judge Hand alluded.˜ In making such a casual trip the alien would seldom be aware that he was possibly walking into a trap, for the insignificance of a brief trip to Mexico or Canada bears little rational

relation to the punitive consequence of subsequent excludability. There are, of course, valid policy reasons for saying that an alien wishing to retain his classification as a permanent resident of this country imperils his status by interrupting his residence too frequently or for an overly long period of time, but we discern no rational policy supporting application of a re-entry limitation in all cases in which a resident alien crosses an international border for a short visit.~ Certainly if that trip is innocent, casual, and brief, it is consistent with all the discernible signs of congressional purpose to hold that the 'departure * * * was not intended' within the meaning and ameliorative intent of the exception of § 101(a)(13). Congress unquestionably has the power to exclude all classes of undesirable aliens from this country, and the courts are charged with enforcing such exclusion when Congress has directed it, but we do not think Congress intended to exclude aliens long resident in this country after lawful entry who have merely stepped across an international border and returned in 'about a couple hours.' Such a holding would be inconsistent with the general purpose of Congress in enacting § 101(a)(13) to ameliorate the severe effects of the strict 'entry' doctrine.

We conclude, then, that it effectuates congressional purpose to construe the intent exception to § 101(a)(13) as meaning an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence. One major factor relevant to whether such intent can be inferred is, of course, the length of time the alien is absent. Another is the purpose of the visit, for if the purpose of leaving the country is to accomplish some object which is itself contrary to some policy reflected in our immigration laws, it would appear that the interruption of residence thereby occurring would properly be regarded as meaningful. Still another is whether the alien has to procure any travel documents in order to make his trip, since the need to obtain such items might well cause the alien to consider more fully the implications involved in his leaving the country. Although the operation of these and other possibly relevant factors remains to be developed 'by the gradual process of judicial inclusion and exclusion,'~ we declare today simply that an innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been 'intended' as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an 'entry' into the country on his return. The more civilized application of our immigration laws given recognition by Congress in § 101(a)(13) and other provisions of the 1952 Act protects the resident alien from unsuspected risks and unintended consequences of such a wholly innocent action. Respondent here, so far as appears from the record, is among those to be protected. However, because attention was not previously focused upon the application of § 101(a)(13) to the case, the record contains no detailed description or characterization of his trip to Mexico in 1956, except for his testimony that he was gone 'about a couple hours,' and that he was 'just visiting;

taking a trip.' That being the case, we deem it appropriate to remand the case for further consideration of the application of § 101(a)(13) to this case in light of our discussion herein. If it is determined that respondent did not 'intend' to depart in the sense contemplated by § 101(a)(13), the deportation order will not stand and adjudication of the constitutional issue reached by the court below will be obviated.˜

Mr. Justice Clark, with whom Mr. Justice Harlan, Mr. Justice Stewart and Mr. Justice White join, dissenting.

I dissent from the Court's judgment and opinion because 'statutory construction' means to me that the Court can construe statutes but not that it can construct them. The latter function is reserved to the Congress, which clearly said what it meant and undoubtedly meant what it said when it defined 'entry' for immigration purposes˜.

That this definition of 'entry' includes the respondent's entry after his brief trip to Mexico in 1956 is a conclusion which seems to me inescapable. The conclusion is compelled by the plain meaning of the statute, its legislative history, and the consistent interpretation by the federal courts. Indeed, the respondent himself did not even question that his return to the United States was an 'entry' within the meaning of § 101(a)(13). Nonetheless, the Court has rewritten the Act sua sponte, creating a definition of 'entry' which was suggested by many organizations during the hearings prior to its enactment but which was rejected by the Congress. I believe the authorities discussed in the Court's opinion demonstrate that 'entry' as defined in § 101(a)(13) cannot mean what the Court says it means˜.

The federal courts in numerous cases were called upon to apply this definition of 'entry' and did so consistently, specifically recognizing that the brevity of one's stay outside the country was immaterial to the question of whether his return was an 'entry'.˜

The House and Senate reports quoted by the Court show that the Congress recognized the courts' difficulty with the rule that 'any coming of an alien into the United States was an 'entry,' even when the departure from the country was unintentional or involuntary. The reports discuss the broad rule of the Volpe case and the specific limitations of the Di Pasquale and Delgadillo cases, citing those cases by name˜.

Thus there is nothing in the legislative history or in the statute itself which would exempt the respondent's return from Mexico from the definition of 'entry'. Rather, the statute in retaining the definition expressed in Volpe seems clearly to cover respondent's entry, which occurred after he knowingly left the United States in order to travel to a city in Mexico. That the trip may have been 'innocent, casual, and brief' does not alter

the fact that, in the words of the Court in Delgadillo, the respondent 'plainly expected or planned to enter a foreign port or place.'˜

It is true that this application of the law to a resident alien may be harsh, but harshness is a far cry from the irrationality condemned in Delgadillo˜. There and in Di Pasquale contrary results would have meant that a resident alien, who was not deportable unless he left the country and reentered, could be deported as a result of circumstances either beyond his control or beyond his knowledge. Here, of course, there is no claim that respondent did not know he was leaving the country to enter Mexico and, since one is presumed to know the law, he knew that his brief trip and reentry would render him deportable. The Congress clearly has chosen so to apply the long-established definition, and this Court cannot alter that legislative determination in the guise of statutory construction. Had the Congress not wished the definition of 'entry' to include a return after a brief but voluntary and intentional trip, it could have done so. The Court's discussion of § 316 of the Act shows that the Congress knows well how to temper rigidity when it wishes.˜

All this to the contrary notwithstanding, the Court today decides that one does not really intend to leave the country unless he plans a long trip, or his journey is for an illegal purpose, or he needs travel documents in order to make the trip. This is clearly contrary to the definition in the Act and to any definition of 'intent' that I was taught.˜

What the Court should do is proceed to the only question which either party sought to resolve: whether the deportation order deprived respondent of due process of law in that the term 'afflicted with psychopathic personality,' as it appears in § 212(a)(4) of the Act, is unconstitutionally vague. Since it fails to do so, I must dissent.

8.4 Immigration Law Violators

INA § 237 outlines multiple grounds for removal based on violations of immigration law. Among them are the following:

Inadmissibility. Noncitizens who were inadmissible "at the time of entry or adjustment of status . . . by the law existing at such time" are removable under INA § 237(a)(1)(A), 8 U.S.C. § 1127(a)(1)(A).

Nonimmigrant status violators. Noncitizens admitted as nonimmigrants who violate the terms of their nonimmigrant visas are removable under INA § 237(a)(1)(C)(i), 8 U.S.C. § 1227(a)(1)(C)(i).

Termination of conditional permanent residence. Some LPRs are admitted to the United States on a conditional basis. See section 3.8 (conditional permanent residence

for spouses married less than two years) and section 3.17 (conditional permanent residence for immigrant investors). If conditional residence is terminated, as opposed to lifted and converted to nonconditional residence, the noncitizen is subject to removal under INA § 237(a)(1)(D)(1), 8 U.S.C. § 1127(a)(1)(D)(1).

Smuggling. Knowingly encouraging, inducing, assisting, abetting, or aiding another noncitizen to enter the United States in violation of law is a deportable offense. INA § 237(a)(1)(E)(i), 8 U.S.C. § 1227(a)(1)(E)(i). There is a time limitation on this removal ground: "prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry." Discretionary waivers are available for "humanitarian purposes, to assure family unity, or when it is otherwise in the public interest . . . in the case of any alien lawfully admitted for permanent residence if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law." INA § 237(a)(1)(E)(iii), 8 U.S.C. § 1227(a)(1)(E)(iii).

Marriage fraud. If the noncitizen obtained LPR status on the basis of a marriage that was fraudulent, they are removable under INA § 237(a)(1)(G), 8 U.S.C. § 1227(a)(1)(G).

Failure to register. All noncitizens have an obligation to notify the government regarding any change of address within ten days of moving. INA § 265(a), 8 U.S.C. § 1305(a). Failure to provide the government with notice of a change of address is grounds for deportation. INA § 237(a)(3)(A), 8 U.S.C. § 1227(a)(3)(A).

Falsely claiming citizenship. Noncitizens who hold themselves out as U.S. citizens are removable under INA § 237(a)(3)(D), 8 U.S.C. § 1227(a)(3)(D).

8.5 Crime-Based Deportation: Convictions and Post-Conviction Relief

Noncitizens convicted of certain crimes are deportable under INA § 237(a)(2).

The definition of "conviction" is the same for INA § 237 and INA § 212. It is defined at INA § 101(a)(48). Review section 6.8, which provides an explanation of this term.

Note that pardons are treated differently for purposes of INA § 212 and INA § 237 because INA § 237 explicitly permits pardons to eliminate the § 237 consequences of certain crimes whereas INA § 212 contains no comparable language. See section 6.8. 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).

Another difference between INA § 212 and INA § 237 concerns admissions of criminal conduct. As discussed in section 6.9, noncitizens can be deemed inadmissible on the basis not of not only convictions but also admission of criminal conduct. There is no comparable provision under INA § 237. A conviction is required for the removal of a previously admitted noncitizen.

What can a noncitizen with a criminal conviction do to avoid deportation under INA § 237(a)(2)? As the following case explains, if their conviction rests on a guilty plea, it may be possible to withdraw that guilty plea and thereby eliminate the conviction that is the basis for their removal. A common justification for post-conviction relief ("PCR"), including vacating convictions and sentences, is ineffective assistance of counsel ("IAC") during the criminal proceeding.

8.6 Case: Padilla v. Kentucky

Padilla v. Kentucky
599 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 non-citizen 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 discusses 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.˜

8.7 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.

8.8 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.

8.9 Crime-Based Deportation: Key Crimes

There are multiple crime-based deportation grounds. Three of the most important are aggravated felonies, crimes involving moral turpitude, and controlled substance offenses.

AGGRAVATED FELONIES

A noncitizen convicted of an "aggravated felony at any time after admission is deportable." INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii). 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). And they include attempt or conspiracy to commit a delineated offense. 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.

CRIMES INVOLVING MORAL TURPITUDE

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 under INA § 237(a)(2)(A)(i). There's a lot to unpack in that sentence. First, we are talking about CIMTs, a concept already covered in section 6.10. Second, note the timing: it's important *when* the criminal act is committed: within five years of admission. This is very different from the just-discussed basis for crime-based removal, aggravated felony, which has no similar time cut-off. Third, note that it does not matter what the actual sentence received is; what matters is what the potential sentence for the crime is.

CONTROLLED SUBSTANCE OFFENSES

There are multiple ways in which a controlled substance offense can lead to deportation. One such offense, "illicit trafficking in a controlled substance" is an aggravated felony. INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). As discussed in section 6.11, the Supreme Court has held that "ordinarily 'trafficking' means some sort of commercial dealing." Lopez v. Gonzales, 549 U.S. 47, 53 (2006). Beyond trafficking, the commission of any violation of a controlled substance law after admission is a basis for removal, though there is an exception 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). Presently being or having been at any time after admission "a drug abuser or addict" is another basis for deportation. INA § 237(a)(2)(B)(ii), , 8 U.S.C. § 1227(a)(2)(B)(ii).

8.10 The Categorical Approach to Crime-Based Deportation

Courts follow what is called the "categorial approach" to determine whether a noncitizen is removable based on certain criminal convictions—including, specifically, analysis of whether a noncitizen is removable because of an aggravated felony, a crime involving moral turpitude, or a controlled substance offense. 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 that 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.

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." 548 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 with 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. __ (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 9.6.

MODIFIED CATEGORICAL 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 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).

8.11 Case: Moncrieffe v. Holder

Moncrieffe v. Holder
569 U.S. 184 (2013)

JUSTICE SOTOMAYOR DELIVERED THE OPINION OF THE COURT.

The Immigration and Nationality Act (INA)˜ provides that a noncitizen who has been convicted of an "aggravated felony" may be deported from this country. The INA also prohibits the Attorney General from granting discretionary relief from removal to an aggravated felon, no matter how compelling his case. Among the crimes that are

classified as aggravated felonies, and thus lead to these harsh consequences, are illicit drug trafficking offenses. We must decide whether this category includes a state criminal statute that extends to the social sharing of a small amount of marijuana. We hold it does not.

I

A˜

The INA defines "aggravated felony" to include a host of offenses.˜ Among them is "illicit trafficking in a controlled substance." [INA § 101(a)(43)B).] This general term is not defined, but the INA states that it "includ[es] a drug trafficking crime (as defined in section 924(c) of title 18)."˜ In turn, 18 U.S.C. § 924(c)(2) defines "drug trafficking crime" to mean "any felony punishable under the Controlled Substances Act," or two other statutes not relevant here. The chain of definitions ends with § 3559(a)(5), which provides that a "felony" is an offense for which the "maximum term of imprisonment authorized" is "more than one year." The upshot is that a noncitizen's conviction of an offense that the Controlled Substances Act (CSA) makes punishable by more than one year's imprisonment will be counted as an "aggravated felony" for immigration purposes. A conviction under either state or federal law may qualify, but a "state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law."˜

B

Petitioner Adrian Moncrieffe is a Jamaican citizen who came to the United States legally in 1984, when he was three. During a 2007 traffic stop, police found 1.3 grams of marijuana in his car. This is the equivalent of about two or three marijuana cigarettes. Moncrieffe pleaded guilty to possession of marijuana with intent to distribute, a violation of Ga.Code Ann. § 16–13–30(j)(1) (2007). Under a Georgia statute providing more lenient treatment to first-time offenders, § 42–8–60(a) (1997), the trial court withheld entering a judgment of conviction or imposing any term of imprisonment, and instead required that Moncrieffe complete five years of probation, after which his charge will be expunged altogether. ↳The parties agree that this resolution of Moncrieffe's Georgia case is nevertheless a "conviction" as the INA defines that term[.]↲

Alleging that this Georgia conviction constituted an aggravated felony, the Federal Government sought to deport Moncrieffe. The Government reasoned that possession of marijuana with intent to distribute is an offense under the CSA, 21 U.S.C. § 841(a), punishable by up to five years' imprisonment, § 841(b)(1)(D), and thus an aggravated

felony. An Immigration Judge agreed and ordered Moncrieffe removed.˜ The Board of Immigration Appeals (BIA) affirmed that conclusion on appeal.˜

The Court of Appeals denied Moncrieffe's petition for review.˜

We granted certiorari,˜ to resolve a conflict among the Courts of Appeals with respect to whether a conviction under a statute that criminalizes conduct described by both § 841's felony provision and its misdemeanor provision, such as a statute that punishes all marijuana distribution without regard to the amount or remuneration, is a conviction for an offense that "proscribes conduct punishable as a felony under" the CSA.˜ We now reverse.

II

A

When the Government alleges that a state conviction qualifies as an "aggravated felony" under the INA, we generally employ a "categorical approach" to determine whether the state offense is comparable to an offense listed in the INA.˜ Under this approach we look "not to the facts of the particular prior case," but instead to whether "the state statute defining the crime of conviction" categorically fits within the "generic" federal definition of a corresponding aggravated felony.˜ By "generic," we mean the offenses must be viewed in the abstract, to see whether the state statute shares the nature of the federal offense that serves as a point of comparison. Accordingly, a state offense is a categorical match with a generic federal offense only if a conviction of the state offense "'necessarily' involved ... facts equating to [the] generic [federal offense]."˜

Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction "rested upon [nothing] more than the least of th[e] acts" criminalized, and then determine whether even those acts are encompassed by the generic federal offense.˜ [O]ur 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."˜

This categorical approach has a long pedigree in our Nation's immigration law.˜ The reason is that the INA asks what offense the noncitizen was "convicted" of,˜ not what acts he committed. "[C]onviction" is "the relevant statutory hook."˜

B

The aggravated felony at issue here, "illicit trafficking in a controlled substance," is a "generic crim[e]."˜ So the categorical approach applies.˜ As we have explained,˜ this

aggravated felony encompasses all state offenses that "proscrib[e] conduct punishable as a felony under [the CSA]."˜ In other words, to satisfy the categorical approach, a state drug offense must meet two conditions: It must "necessarily" proscribe conduct that is an offense under the CSA, and the CSA must "necessarily" prescribe felony punishment for that conduct.

Moncrieffe was convicted under a Georgia statute that makes it a crime to "possess, have under [one's] control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute marijuana." Ga.Code Ann. § 16–13–30(j)(1). We know from his plea agreement that Moncrieffe was convicted of the last of these offenses.˜ We therefore must determine whether possession of marijuana with intent to distribute is "necessarily" conduct punishable as a felony under the CSA.

We begin with the relevant conduct criminalized by the CSA. There is no question that it is a federal crime to "possess with intent to ... distribute ... a controlled substance," 21 U.S.C. § 841(a)(1), one of which is marijuana, § 812(c).˜ So far, the state and federal provisions correspond. But this is not enough, because the generically defined federal crime is "any felony punishable under the Controlled Substances Act," 18 U.S.C. § 924(c)(2), not just any "offense under the CSA." Thus we must look to what punishment the CSA imposes for this offense.

Section 841 is divided into two subsections that are relevant here: (a), titled "Unlawful acts," which includes the offense just described, and (b), titled "Penalties." Subsection (b) tells us how "any person who violates subsection (a)" shall be punished, depending on the circumstances of his crime (*e.g.,* the type and quantity of controlled substance involved, whether it is a repeat offense).˜ Subsection (b)(1)(D) provides that if a person commits a violation of subsection (a) involving "less than 50 kilograms of marihuana," then "such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years," *i.e.,* as a felon. But one of the exceptions is important here. Paragraph (4) provides, "Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as" a simple drug possessor, 21 U.S.C. § 844, which for our purposes means as a misdemeanant.˜ These dovetailing provisions create two mutually exclusive categories of punishment for CSA marijuana distribution offenses: one a felony, and one not. The only way to know whether a marijuana distribution offense is "punishable as a felony" under the CSA,˜ is to know whether the conditions described in paragraph (4) are present or absent.

A conviction under the same Georgia statute for "sell[ing]" marijuana, for example, would seem to establish remuneration. The presence of remuneration would mean that

paragraph (4) is not implicated, and thus that the conviction is necessarily for conduct punishable as a felony under the CSA (under paragraph (1)(D)). In contrast, the fact of a conviction for possession with intent to distribute marijuana, standing alone, does not reveal whether either remuneration or more than a small amount of marijuana was involved. It is possible neither was; we know that Georgia prosecutes this offense when a defendant possesses only a small amount of marijuana, see, *e.g., Taylor v. State,* 260 Ga.App. 890˜ (2003) (6.6 grams), and that "distribution" does not require remuneration, see, *e.g., Hadden v. State,* 181 Ga.App. 628, 628–629˜ (1987). So Moncrieffe's conviction could correspond to either the CSA felony or the CSA misdemeanor. Ambiguity on this point means that the conviction did not "necessarily" involve facts that correspond to an offense punishable as a felony under the CSA. Under the categorical approach, then, Moncrieffe was not convicted of an aggravated felony.

III

A

The Government advances a different approach that leads to a different result. In its view, § 841(b)(4)'s misdemeanor provision is irrelevant to the categorical analysis because paragraph (4) is merely a "mitigating exception," to the CSA offense, not one of the "elements" of the offense.˜ And because possession with intent to distribute marijuana is "presumptive[ly]" a felony under the CSA, the Government asserts, any state offense with the same elements is presumptively an aggravated felony.˜ These two contentions are related, and we reject both of them.˜

Here, the facts giving rise to the CSA offense establish a crime that may be either a felony or a misdemeanor, depending upon the presence or absence of certain factors that are not themselves elements of the crime. And so to qualify as an aggravated felony, a conviction for the predicate offense must necessarily establish those factors as well.

The Government˜ [argues]˜ that any marijuana distribution conviction is "presumptively" a felony. But that is simply incorrect, and the Government's argument collapses as a result. Marijuana distribution is neither a felony nor a misdemeanor until we know whether the conditions in paragraph (4) attach: Section 841(b)(1)(D) makes the crime punishable by five years' imprisonment "*except* as provided" in paragraph (4), and § 841(b)(4) makes it punishable as a misdemeanor "*[n]otwithstanding* paragraph (1)(D)" when only "a small amount of marihuana for no remuneration" is involved. (Emphasis added.) The CSA's text makes neither provision the default. Rather, each is drafted to be exclusive of the other.

Like the BIA and the Fifth Circuit, the Government believes the felony provision to be the default because, in practice, that is how federal criminal prosecutions for marijuana distribution operate.˜

We cannot discount § 841's text, however, which creates no default punishment, in favor of the procedural overlay or burdens of proof that would apply in a hypothetical federal criminal prosecution. In *Carachuri–Rosendo,* we rejected the Fifth Circuit's "'hypothetical approach,'" which examined whether conduct "'could have been punished as a felony' 'had [it] been prosecuted in federal court.'"˜ The outcome in a hypothetical prosecution is not the relevant inquiry. Rather, our "more focused, categorical inquiry" is whether the record of conviction of the predicate offense necessarily establishes conduct that the CSA, on its own terms, makes punishable as a felony.˜

Here we consider a "generic" federal offense in the abstract, not an actual federal offense being prosecuted before a jury. Our concern is only which facts the CSA relies upon to distinguish between felonies and misdemeanors˜.

Finally, there is a more fundamental flaw in the Government's approach: It would render even an undisputed misdemeanor an aggravated felony. This is "just what the English language tells us not to expect," and that leaves us "very wary of the Government's position."˜ Consider a conviction under a New York statute that provides, "A person is guilty of criminal sale of marihuana in the fifth degree when he knowingly and unlawfully sells, *without consideration,* [marihuana] of an aggregate weight of *two grams or less* ; or one cigarette containing marihuana." N.Y. Penal Law Ann. § 221.35 (West 2008) (emphasis added). This statute criminalizes only the distribution of a small amount of marijuana for no remuneration, and so all convictions under the statute would fit within the CSA misdemeanor provision, § 841(b)(4). But the Government would categorically deem a conviction under this statute to be an aggravated felony, because the statute contains the corresponding "elements" of (1) distributing (2) marijuana, and the Government believes all marijuana distribution offenses are punishable as felonies.

The same anomaly would result in the case of a noncitizen convicted of a misdemeanor in federal court under § 841(a) and (b)(4) directly. Even in that case, under the Government's logic, we would need to treat the federal misdemeanor conviction as an aggravated felony, because the conviction establishes elements of an offense that is presumptively a felony. This cannot be. "We cannot imagine that Congress took the trouble to incorporate its own statutory scheme of felonies and misdemeanors," only to have courts presume felony treatment and ignore the very factors that distinguish felonies from misdemeanors.˜

B

Recognizing that its approach leads to consequences Congress could not have intended, the Government hedges its argument by proposing a remedy: Noncitizens should be given an opportunity during immigration proceedings to demonstrate that their predicate marijuana distribution convictions involved only a small amount of marijuana and no remuneration, just as a federal criminal defendant could do at sentencing.˜

This solution is entirely inconsistent with both the INA's text and the categorical approach. As noted, the relevant INA provisions ask what the noncitizen was "convicted of," not what he did, and the inquiry in immigration proceedings is limited accordingly.˜ The Government cites no statutory authority for such case-specific factfinding in immigration court, and none is apparent in the INA. Indeed, the Government's main categorical argument would seem to preclude this inquiry: If the Government were correct that "the fact of a marijuana-distribution conviction *alone* constitutes a CSA felony,"˜ then all marijuana distribution convictions would categorically be convictions of the drug trafficking aggravated felony, mandatory deportation would follow under the statute, and there would be no room for the Government's follow-on factfinding procedure. The Government cannot have it both ways.

Moreover, the procedure the Government envisions would require precisely the sort of *post hoc* investigation into the facts of predicate offenses that we have long deemed undesirable. The categorical approach serves "practical" purposes: It promotes judicial and administrative efficiency by precluding the relitigation of past convictions in minitrials conducted long after the fact.˜ Yet the Government's approach would have our Nation's overburdened immigration courts entertain and weigh testimony from, for example, the friend of a noncitizen who may have shared a marijuana cigarette with him at a party, or the local police officer who recalls to the contrary that cash traded hands. And, as a result, two noncitizens, each "convicted of" the same offense, might obtain different aggravated felony determinations depending on what evidence remains available or how it is perceived by an individual immigration judge. The categorical approach was designed to avoid this "potential unfairness."˜

Furthermore, the minitrials the Government proposes would be possible only if the noncitizen could locate witnesses years after the fact, notwithstanding that during removal proceedings noncitizens are not guaranteed legal representation and are often subject to mandatory detention,˜ where they have little ability to collect evidence.˜ A noncitizen in removal proceedings is not at all similarly situated to a defendant in a

federal criminal prosecution. The Government's suggestion that the CSA's procedures could readily be replicated in immigration proceedings is therefore misplaced.˜

In short, to avoid the absurd consequences that would flow from the Government's narrow understanding of the categorical approach, the Government proposes a solution that largely undermines the categorical approach.˜

C

The Government fears the consequences of our decision, but its concerns are exaggerated. The Government observes that, like Georgia, about half the States criminalize marijuana distribution through statutes that do not require remuneration or any minimum quantity of marijuana.˜ As a result, the Government contends, noncitizens convicted of marijuana distribution offenses in those States will avoid "aggravated felony" determinations, purely because their convictions do not resolve whether their offenses involved federal felony conduct or misdemeanor conduct, even though many (if not most) prosecutions involve either remuneration or larger amounts of marijuana (or both).

Escaping aggravated felony treatment does not mean escaping deportation, though. It means only avoiding mandatory removal.˜ Any marijuana distribution offense, even a misdemeanor, will still render a noncitizen deportable as a controlled substances offender. [INA 237(a)(2)(B)(i).] At that point, having been found not to be an aggravated felon, the noncitizen may seek relief from removal such as asylum or cancellation of removal, assuming he satisfies the other eligibility criteria.˜ But those forms of relief are discretionary. The Attorney General may, in his discretion, deny relief if he finds that the noncitizen is actually a member of one "of the world's most dangerous drug cartels," *post,* at 1696 (opinion of ALITO, J.), just as he may deny relief if he concludes the negative equities outweigh the positive equities of the noncitizen's case for other reasons. As a result, "to the extent that our rejection of the Government's broad understanding of the scope of 'aggravated felony' may have any practical effect on policing our Nation's borders, it is a limited one."˜

In any event, serious drug traffickers may be adjudicated aggravated felons regardless, because they will likely be convicted under greater "trafficking" offenses that necessarily establish that more than a small amount of marijuana was involved. See, *e.g.,* Ga.Code Ann. § 16–13–31(c)(1) (Supp.2012) (separate provision for trafficking in more than 10 pounds of marijuana). Of course, some offenders' conduct will fall between § 841(b)(4) conduct and the more serious conduct required to trigger a "trafficking" statute.˜ Those offenders may avoid aggravated felony status by operation of the categorical approach. But the Government's objection to that underinclusive

result is little more than an attack on the categorical approach itself.˜ We prefer this degree of imperfection to the heavy burden of relitigating old prosecutions.˜ And we err on the side of underinclusiveness because ambiguity in criminal statutes referenced by the INA must be construed in the noncitizen's favor.˜

Finally, the Government suggests that our holding will frustrate the enforcement of other aggravated felony provisions, like § 1101(a)(43)(C), which refers to a federal firearms statute that contains an exception for "antique firearm[s]," 18 U.S.C. § 921(a)(3). The Government fears that a conviction under any state firearms law that lacks such an exception will be deemed to fail the categorical inquiry. But *Duenas–Alvarez* requires that there 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." 549 U.S., at 193˜. To defeat the categorical comparison in this manner, a noncitizen would have to demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms.˜

* * *

This is the third time in seven years that we have considered whether the Government has properly characterized a low-level drug offense as "illicit trafficking in a controlled substance," and thus an "aggravated felony." Once again we hold that the Government's approach defies "the 'commonsense conception'" of these terms.˜ Sharing a small amount of marijuana for no remuneration, let alone possession with intent to do so, "does not fit easily into the 'everyday understanding'" of "trafficking," which " 'ordinarily ... means some sort of commercial dealing.'"˜ Nor is it sensible that a state statute that criminalizes conduct that the CSA treats as a misdemeanor should be designated an "aggravated felony." We hold that it may not be. If a noncitizen's conviction for a marijuana distribution offense fails to establish that the offense involved either remuneration or more than a small amount of marijuana, the conviction is not for an aggravated felony under the INA. The contrary judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, DISSENTING.

A plain reading of 18 U.S.C. § 924(c)(2) identifies two requirements that must be satisfied for a state offense to qualify as a "felony punishable under the Controlled Substances Act [(CSA)]." "First, the offense must be a felony; second, the offense must be capable of punishment under the [CSA]."˜ Moncrieffe's offense of possession of

marijuana with intent to distribute satisfies both elements. No one disputes that Georgia punishes Moncrieffe's offense as a felony. See Ga.Code Ann. § 16–13–30(j)(2) (Supp.2012). ("Except as otherwise provided in subsection (c) of Code Section 16–13–31 or in Code Section 16–13–2, any person who violates this subsection shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than ten years").˜ And, the offense is "punishable under the [CSA]," 18 U.S.C. § 924(c)(2), because it involved "possess[ion] with intent to manufacture, distribute, or dispense, a controlled substance," 21 U.S.C. § 841(a)(1). Accordingly, Moncrieffe's offense is a "drug trafficking crime," 18 U.S.C. § 924(c)(2), which constitutes an "aggravated felony" under the Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(43)(B).˜

[T]he majority's ill-advised approach once again leads to an anomalous result. It is undisputed that, for federal sentencing purposes, Moncrieffe's offense would constitute a federal felony unless he could prove that he distributed only a small amount of marijuana for no remuneration.˜ But, the Court holds that, for purposes of the INA, Moncrieffe's offense would necessarily correspond to a federal misdemeanor, regardless of whether he could in fact prove that he distributed only a small amount of marijuana for no remuneration.˜ The Court's decision, thus, has the effect of treating a substantial number of state felonies as federal misdemeanors, even when they would result in federal felony convictions.

The majority notes that "[t]his is the third time in seven years that we have considered whether the Government has properly characterized a low-level drug offense as … an 'aggravated felony.'"˜ The Court has brought this upon itself.˜ If the Court continues to disregard the plain meaning of § 924(c)(2), I expect that these types of cases will endlessly—and needlessly—recur.

I respectfully dissent.

JUSTICE ALITO, DISSENTING.

The Court's decision in this case is not supported by the language of the Immigration and Nationality Act (INA) or by this Court's precedents, and it leads to results that Congress clearly did not intend.

Under the INA, aliens˜ who are convicted of certain offenses may be removed from this country, 8 U.S.C. § 1227(a)(2)˜, but in many instances, the Attorney General (acting through the Board of Immigration Appeals (BIA)) has the discretion to cancel removal,˜. Aliens convicted of especially serious crimes, however, are ineligible for

cancellation of removal.~ Among the serious crimes that carry this consequence is "illicit trafficking in a controlled substance."~

Under the Court's holding today, however, drug traffickers in about half the States are granted a dispensation. In those States, even if an alien is convicted of possessing tons of marijuana with the intent to distribute, the alien is eligible to remain in this country. Large-scale marijuana distribution is a major source of income for some of the world's most dangerous drug cartels~, but the Court now holds that an alien convicted of participating in such activity may petition to remain in this country.

The Court's decision also means that the consequences of a conviction for illegal possession with intent to distribute will vary radically depending on the State in which the case is prosecuted. Consider, for example, an alien who is arrested near the Georgia–Florida border in possession of a large supply of marijuana. Under the Court's holding, if the alien is prosecuted and convicted in Georgia for possession with intent to distribute, he is eligible for cancellation of removal. But if instead he is caught on the Florida side of the line and is convicted in a Florida court—where possession with intent to distribute a small amount of marijuana for no remuneration is covered by a separate statutory provision~—the alien is likely to be ineligible. Can this be what Congress intended?

I

Certainly the text of the INA does not support such a result.~

Where an alien has a prior federal conviction, it is a straightforward matter to determine whether the conviction was for a "felony punishable under the [CSA]." But 8 U.S.C. § 1101(a)(43) introduces a complication. That provision states that the statutory definition of "aggravated felony" "applies to an offense described in this paragraph *whether in violation of Federal or State law*." (Emphasis added.) As noted, the statutory definition of "aggravated felony" includes a "felony punishable under the [CSA]," and therefore § 1101(a)(43)(B) makes it necessary to determine what is meant by a state "offense" that is a "felony punishable under the [CSA]."

What § 1101(a)(43) obviously contemplates is that the BIA or a court will identify conduct associated with the state offense and then determine whether that conduct would have supported a qualifying conviction under the federal CSA.~ Identifying and evaluating this relevant conduct is the question that confounds the Court's analysis. Before turning to that question, however, some preliminary principles should be established.

In *Lopez v. Gonzales,* 549 U.S. 47, 50˜ (2006), we held that felony status is controlled by federal, not state, law. As a result, once the relevant conduct is identified, it must be determined whether proof of that conduct would support a felony conviction under the CSA. The federal definition of a felony is a crime punishable by imprisonment for more than one year. 18 U.S.C. § 3559(a)(1)-(5). Consequently, if the proof of the relevant conduct would support a conviction under the CSA for which the maximum term of imprisonment is more than one year, the state conviction qualifies as a conviction for an "aggravated felony."

II˜

The Court's opinion in this case conveys the impression that its analysis is based on the categorical approach, but that is simply not so. On the contrary, a pure categorical approach leads very quickly to the conclusion that petitioner's Georgia conviction was a conviction for an "aggravated felony."

The elements of the Georgia offense were as follows: knowledge, possession of marijuana, and the intent to distribute it.˜ Proof of those elements would be sufficient to support a conviction under 21 U.S.C. § 841(a), and the maximum punishment for that offense is imprisonment for up to five years, § 841(b)(1)(D)˜, more than enough to qualify for felony treatment. Thus, under a pure categorical approach, petitioner's Georgia conviction would qualify as a conviction for an "aggravated felony" and would render him ineligible for cancellation of removal.

The Court departs from this analysis˜ [by] proceed[ing] as if the CSA created a two-tiered possession-with-intent-to-distribute offense: a base offense that is punishable as a misdemeanor and a second-tier offense (possession with intent to distribute more than a "small amount" of marijuana or possession with intent to distribute for remuneration) that is punishable as a felony.

If the CSA actually created such a two-tiered offense, the pure categorical approach would lead to the conclusion that petitioner's Georgia conviction was not for an "aggravated felony." The elements of the Georgia offense would not suffice to prove the second-tier offense, which would require proof that petitioner possessed more than a "small amount" of marijuana or that he intended to obtain remuneration for its distribution. Instead, proof of the elements of the Georgia crime would merely establish a violation of the base offense, which would be a misdemeanor.

The CSA, however, does not contain any such two-tiered provision. And § 841(b)(4) does not alter the elements of the § 841(a) offense. As the Court notes, every Court of Appeals to consider the question has held that § 841(a) is the default offense

and that § 841(b)(4) is only a mitigating sentencing guideline,˜ and the Court does not disagree˜.

In sum, contrary to the impression that the Court's opinion seeks to convey, the Court's analysis does not follow the pure categorical approach.

III

Nor is the Court's analysis supported by prior case law.˜

IV

Unsupported by either the categorical approach or our prior cases, the decision of the Court rests instead on the Court's belief—which I share—that the application of the pure categorical approach in this case would lead to results that Congress surely did not intend.

Suppose that an alien who is found to possess two marijuana cigarettes is convicted in a state court for possession with intent to distribute based on evidence that he intended to give one of the cigarettes to a friend. Under the pure categorical approach, this alien would be regarded as having committed an "aggravated felony." But this classification is plainly out of step with the CSA's assessment of the severity of the alien's crime because under the CSA the alien could obtain treatment as a misdemeanant by taking advantage of 21 U.S.C. § 841(b)(4).

For this reason, I agree with the Court that such an alien should not be treated as having committed an "aggravated felony." In order to avoid this result, however, it is necessary to depart from the categorical approach, and that is what the Court has done. But the particular way in which the Court has departed has little to recommend it.

To begin, the Court's approach is analytically confused.˜

In addition, the Court's approach leads to the strange and disruptive results noted at the beginning of this opinion.˜

For these reasons, departures from the categorical approach are warranted, and this Court has already sanctioned such departures in several circumstances.˜ Consistent with the flexibility that the Court has already recognized, I would hold that the categorical approach is not controlling where the state conviction at issue was based on a state statute that encompasses both a substantial number of cases that qualify under the federal standard and a substantial number that do not. In such situations, it is appropriate to look beyond the elements of the state offense and to rely as well on facts that were admitted in state court or that, taking a realistic view, were clearly proved. Such a look beyond the elements is particularly appropriate in a case like this, which involves

a civil proceeding before an expert agency that regularly undertakes factual inquiries far more daunting than any that would be involved here.˜

Petitioner, for whatever reason, availed himself only of the opportunity to show that his conviction had involved a small amount of marijuana and did not present evidence—or even contend—that his offense had not involved remuneration.˜ As a result, I think we have no alternative but to affirm the decision of the Court of Appeals, which in turn affirmed the BIA.

8.12 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. 26 I. & N. Dec. 469 (2015). "[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, deferring to the Board's interpretation of sexual abuse of a minor under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837˜ (1984).˜ 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. See Mellouli v. Lynch, 575 U.S. __˜ (2015). 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." Moncrieffe v. Holder, 569 U.S. 184˜ (2013)˜. 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." Leocal v. Ashcroft, 543 U.S. 1, 8˜ (2004); see also Lopez v. Gonzales, 549 U.S. 47, 53˜ (2006) ("The everyday understanding of" the term used in § 1101 "should count for a lot here, for the statutes in play do not define the term, and so remit us to regular usage to see what Congress probably meant").

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. See Taylor, 495 U.S., at 598˜ (interpreting "'burglary'" under the Armed Career Criminal Act of 1984 according to "the generic sense in which the term is now used in

the criminal codes of most States"); Duenas–Alvarez, 549 U.S., at 190˜ (interpreting "theft" in the INA in the same manner). 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.

III

Finally, petitioner and the Government debate whether the Board's interpretation of sexual abuse of a minor is entitled to deference under Chevron, 467 U.S. 837˜. Petitioner argues that any ambiguity in the meaning of this phrase must be resolved in favor of the alien under the rule of lenity.˜ The Government responds that ambiguities should be resolved by deferring to the Board's interpretation.˜ We have no need to resolve whether the rule of lenity or Chevron receives priority in this case because the statute, read in context, unambiguously forecloses the Board's interpretation. Therefore, neither the rule of lenity nor Chevron applies.

* * *

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.

8.13 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.

8.14 Case: Sessions v. Dimaya

Sessions v. Dimaya
584 U.S. __ (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, this Court held that part of a federal law's definition of "violent felony" was impermissibly vague. See 576 U.S. __˜ (2015). 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. __˜ (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.

8.15 Case: Borden v. United States

Borden v. United States
593 U.S. __ (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.˜

8.16 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.˜

8.17 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.

8.18 Other Removal Grounds

Terrorists. Noncitizens who engage in terrorist activities or who have been associated with a terrorist organization are deportable under INA § 237(a)(4)(B), 8 U.S.C. § 1127(a)(4)(B).

Foreign Policy. A noncitizen whose presence and activities would "have potentially serious adverse foreign policy consequences" is deportable under INA § 237(a)(4)(C)(i), 8 U.S.C. § 1127(a)(4)(C)(i).

Nazis. Those who "order, incited, assisted or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion" as a Nazi between March 23, 1993 and May 8, 1945, are deportable under INA § 237(a)(4)(D), 8 U.S.C. § 1127(a)(4)(D).

Genocide. Participating in geocide is a basis for exclusion under INA § 237(a)(4)(D), 8 U.S.C. § 1127(a)(4)(D).

Public Charge. A noncitizen who "within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable" pursuant to INA § 237(a)(5), 8 U.S.C. § 1127(a)(5).

Unlawful voters. Voting in a U.S. federal or state election is grounds for deportation. INA § 237(a)(6), 8 U.S.C. § 1227(a)(6).

8.19 Test Your Knowledge

PROBLEM 8.1

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. __ (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 8.2

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 8.3

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)?

Chapter Nine: Relief from Removal

Just because a noncitizen is subject to removal under either INA § 212 (Chapter 6) or INA § 237 (Chapter 8) does not mean that they must be removed. Noncitizens can petition for relief from removal.

Some forms of relief from removal allow a lawful permanent resident to keep their LPR status or provide the means for an undocumented migrant to obtain LPR status. These include cancellation of removal (sections 9.1-9.8), registry (section 9.9), legalization/amnesty (section 9.10), adjustment of status (section 9.11), and private bills (section 9.12).

Other forms of relief from removal do not offer a permanent solution for staying in the United States but offer limited protection from removal. These include exercises of prosecutorial discretion (section 9.13) and Deferred Action for Childhood Arrivals (DACA) (section 9.14).

Finally, another form of relief from removal—voluntary departure (section 9.15)—does not enable the recipient to stay in the United States but does give them some freedom to wrap up their affairs before departing the country.

9.1 Cancellation of Removal

Cancellation of removal was created by Congress in 1996 with the passage of IIRIRA § 304(a). You may recall from Chapters 6 and 8 that IIRIRA created a unified removal process with different grounds for removal based on whether a noncitizen present in the United States had been admitted (Chapter 8) or not (Chapter 6), a change from the previous focus on entry into the United States. See section 8.2. In addition to

that change, IIRIRA replaced prior forms of relief from removal—"waiver of excludability" and "suspension of deportation"—with "cancellation of removal".

There are two forms of cancellation of removal. One applies 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.

For most LPRs, the key issue with regards to the first element is what should be the end date of their LPR status. The answer is found at 8 C.F.R. § 1.2: "[LPR] status terminates upon entry of a final administrative order of exclusion, deportation, or removal." INA § 101(a)(47)(B) provides further assistance in parsing this language, stating that an "order of deportation... shall become final upon the earlier of—(i) a determination by the Board of Immigration Appeals affirming such order; or (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals." This means that an LPR may not initially be eligible for cancellation of removal at the start of their removal proceedings, due to insufficient time in LPR status, but may become eligible for this form of relief during the course of their removal proceedings or subsequent appeal.

Other LPRs will be prohibited from seeking 42A relief because they were never "lawfully admitted for permanent residence" despite holding LPR status. An immigrant who acquired permanent resident status through fraud or misrepresentation has never been "lawfully admitted for permanent residence" and so is ineligible for 42A relief. See In re Koloamatangi, 23 I. & N. Dec. 548, 549–50 (BIA 2003).

The ins and outs of the second element of 42A relief—continuous residence—are discussed in section 9.2. Finally, review section 8.9 for discussion of aggravated felonies.

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 first element of 42B relief, physical presence, is somewhat straightforward if the noncitizen has lived in and never left the United States for significantly more than 10 years. Noncitizens who have left the country need to consult INA § 240A(d)(2), 8 U.S.C. § 1229b(d)(2), which states that "continuous physical presence" has not been maintained if the noncitizen departed the United States for: (i) any period in excess of 90 days; or (ii) any periods in the aggregate exceeding 180 days. Section 9.2 addresses when presence in the United States is determined to end.

The second element of 42B relief, good moral character, is a statutorily defined term found at INA § 101(f), 8 U.S.C. § 1101(f). Good moral character is defined in the negative. 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).

To understand the third element of 42B relief—criminal convictions—review sections 6.7-12 (INA § 212) and sections 8.5-8.17 (INA § 237).

The final element of 42B relief—"exceptional and extremely unusual hardship"—is discussed in sections 9.3 and 9.4.

9.2 Cancellation of Removal: 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.

SERVICE OF THE NTA

In order for residence/presence to end based on the service of an NTA, that NTA must be valid. In Pereira v. Sessions, 585 U.S. __ (2018), an 8-1 decision, the Supreme Court held that when a noncitizen receives a document called a notice to appear, and where that document does not have a time or place listed for the removal proceedings, then it is not a valid notice to appear, and thus it does not "stop time" for purposes of establishing the noncitizen's continuous physical presence in the United States. Such a document, the court wrote, is only a "putative" NTA.

Following Pereira, the BIA held that the government could meet its notice obligations by serving on a noncitizen a notice to appear containing the grounds for their removability and a subsequent notice of hearing with the time and date of their hearing. Matter of Bermudez-Cota, 27 I. & N. Dec. 441 (B.I.A. 2018). However, three years later, in Niz-Chavez v. Garland, 593 U.S. __ (2021), the Supreme Court rejected the BIA's approach, clarifying that noncitizens are statutorily entitled to a single document—the notice to appear—outlining both their grounds for removal and the time and date of their hearing. Only receipt of an NTA containing all the statutorily required information is sufficient to stop time for purposes of establishing continuous presence.

Here is the first paragraph of the Court's opinion in Niz-Chavez, authored by Justice Gorsuch: "Anyone who has applied for a passport, filed for Social Security benefits, or sought a license understands the government's affinity for forms. Make a mistake or skip a page? Go back and try again, sometimes with a penalty for the trouble. But it turns out the federal government finds some of its forms frustrating too. The

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009–546, requires the government to serve 'a notice to appear' on individuals it wishes to remove from this country. At first blush, a notice to appear might seem to be just that—a single document containing all the information an individual needs to know about his removal hearing. But, the government says, supplying so much information in a single form is too taxing. It needs more flexibility, allowing its officials to provide information in separate mailings (as many as they wish) over time (as long as they find convenient). The question for us is whether the law Congress adopted tolerates the government's preferred practice."

The final paragraph of the majority's opinion is equally compelling: "In this case, the law's terms ensure that, when the federal government seeks a procedural advantage against an individual, it will at least supply him with a single and reasonably comprehensive statement of the nature of the proceedings against him. If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them."

CRIMINAL CONDUCT

In Barton v. Barr, 590 U.S. __ (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.

9.3 Cancellation of Removal: Exceptional and Extremely Unusual Hardship

The last element of 42B relief is "exceptional and extremely unusual hardship" to the alien's spouse, parent, or child, who is a citizen of the United States or an LPR.

When cancellation of removal came into being through IIRIRA in 1996, it eliminated a prior form of relief from removal—suspension of deportation—that, unlike cancellation, allowed for consideration of (1) "extreme hardship" as opposed to "exceptional and extremely unusual hardship" and (2) hardship experienced by the noncitizen themselves, not just their USC/LPR spouse, parent or child. The breadth of the previous form of relief is evidenced in In re O-F-O, 21 I &N. Dec. 381 (BIA 1996), where the BIA held that a noncitizen established that his removal would cause "extreme hardship" given the fact that he had been living in the U.S. for ten years since the age of 13, attended U.S. schools, spoke fluent English, and "fully assimilated into American culture and society."

IIRIRA clearly intended to restrict the availability of relief from removal when it jettisoned suspension of deportation in favor of cancellation of removal. The following case explains just how tough the new criteria of "exceptional and extremely unusual hardship" is.

9.4 Case: In Re Recinas

In Re Recinas

23 I. & N. Dec. 467 (Board of Immigration Appeals) (2012)

The respondents have appealed from the decision of an Immigration Judge dated December 18, 2000, denying their application for cancellation of removal pursuant to section 240A(b) of the Immigration and Nationality Act˜ (2000). The appeal will be sustained.

I. FACTUAL BACKGROUND

The adult respondent is a 39-year-old native and citizen of Mexico. She is the mother of four United States citizen children, aged 12, 11, 8, and 5, and the two minor respondents, aged 15 and 16, both of whom are natives and citizens of Mexico. Her parents are lawful permanent residents and her five siblings are United States citizens. She is divorced and has no immediate family in Mexico.

The three respondents entered the United States in 1988 on nonimmigrant visas and stayed longer than authorized. Except for a brief absence in 1992, they have remained in this country since their initial entry.

II. ISSUE

The sole issue on appeal is whether the Immigration Judge erred in finding that the respondent failed to demonstrate that her removal would result in exceptional and extremely unusual hardship to her four United States citizen children and/or her lawful permanent resident parents. As the Immigration Judge noted, the minor respondents do not have a qualifying relative for purposes of cancellation of removal. See section 240A(b)(1)(D) of the Act.

III. ANALYSIS

Congress created the relief of cancellation of removal under section 240A(b)(1) of the Act as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Cancellation of removal is available to an alien who has been physically present in the United States for at least 10 years, has been a person of good moral character, has not been convicted of a specified criminal offense, and has established that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a United States citizen or lawful permanent resident. This case requires us to interpret the "exceptional and extremely unusual hardship" standard.

A. Exceptional and Extremely Unusual Hardship Standard

In Matter of Monreal, 23 I&N Dec. 56 (BIA 2001), we first considered the "exceptional and extremely unusual" hardship standard in a precedent decision in the case of a 34-year-old Mexican national who was the father of three United States citizen children. We held that to establish exceptional and extremely unusual hardship under section 240A(b) of the Act, an alien must demonstrate that his or her spouse, parent, or child would suffer hardship that is substantially beyond that which would ordinarily be expected to result from the person's departure. We specifically stated, however, that the alien need not show that such hardship would be "unconscionable." We also noted that, in deciding a cancellation of removal claim, consideration should be given to the age, health, and circumstances of the qualifying family members, including how a lower standard of living or adverse country conditions in the country of return might affect those relatives.

After reviewing the case, we dismissed the respondent's appeal, finding that he had not satisfied the new hardship standard. We noted that the respondent had been working for 10 years at his uncle's business, but had a brother living in Mexico who also

worked for the same business. Our decision emphasized that the respondent was in good health and would be able to work and support his United States citizen children in Mexico. We further found that, upon his return to Mexico, the respondent would be reunited with family members, including his wife (the mother of their three children), who had already returned to Mexico with one of the children.˜ Finally, we noted that the respondent's children were in good health and that the eldest, who was 12 years old, could speak, read, and write Spanish.˜

We revisited the issue in Matter of Andazola, 23 I&N Dec. 319 (BIA 2002), finding that the exceptional and extremely unusual hardship standard was not met in the case of a single Mexican woman. The respondent had two United States citizen children, who were 11 and 6 years old. Their father (who apparently had authorization to remain in the United States) contributed financially to the family, was a presence in the lives of the children, and could continue to help support the family upon their return to Mexico. All of the respondent's siblings were living in the United States, but were without documentation. The respondent had not shown that her United States citizen children would be deprived of all schooling, or of an opportunity to obtain any education. In denying relief, we considered it "significant" that the respondent had accumulated assets, including $7,000 in savings and a retirement fund, and owned a home and two vehicles.˜ We noted that these assets could help ease the family's transition to Mexico. Accordingly, we found that the case presented a common fact pattern that was insufficient to satisfy the exceptional and extremely unusual hardship standard.˜

While any hardship case ultimately succeeds or fails on its own merits and on the particular facts presented, Matter of Andazola and Matter of Monreal are the starting points for any analysis of exceptional and extremely unusual hardship. Cancellation of removal cases coming before the Immigration Judges and the Board must therefore be examined under the standards set forth in those cases.

B. Hardship Factors

In the present case, the adult respondent is a single mother of six children, four of whom are United States citizens. The respondent and her children have no close relatives remaining in Mexico. Her entire family lives in the United States, including her lawful permanent resident parents and five United States citizen siblings. As in Matter of Andazola, the respondent's mother serves as her children's caretaker and watches the children while the respondent manages her own motor vehicle inspection business.

The respondent is divorced from the father of her United States citizen children. Although the respondent's former husband at one point was paying $146.50 per month in child support, there is no indication that he remains actively involved in their lives.

He is currently out of status and was in immigration proceedings in Denver as of the date of the respondent's last hearing.

The respondent has been operating her own business performing vehicle inspections for 2 years. The business has two employees. She reported having $4,600 in assets, which is apparently the value of an automobile she owns. The respondent testified that after 2 months in business her proceeds were $10,000 a month, but she was also repaying her mother and brother money that she and her former husband had borrowed from them. After meeting expenses, her net profits were $400-500 per month.

The respondent's four United States citizen children have all spent their entire lives in this country and have never traveled to Mexico. She and her family live 5 minutes away from her mother, with whom they have a close relationship. According to the respondent, her children, particularly two of her United States citizen children, experience difficulty speaking Spanish and do not read or write in that language.

Finally, the respondent has no alternative means of immigrating to the United States in the foreseeable future. There is a significant backlog of visa availability to Mexican nationals with preference classification. Therefore, the respondent has little hope of immigrating through her United States citizen siblings, or even her parents, should they naturalize.

C. Assessment of Hardship

While this case presents a close question, we find it distinguishable from both Matter of Monreal, supra, and Matter of Andazola, supra. As we noted in those decisions, the exceptional and extremely unusual hardship standard for cancellation of removal applicants constitutes a high threshold that is in keeping with Congress' intent to substantially narrow the class of aliens who would qualify for relief.˜ Nevertheless, the hardship standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief. We consider this case to be on the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met. Keeping in mind that this hardship standard must be assessed solely with regard to the qualifying relatives in this case, we find the following factors to be significant.

The respondent has raised her family in the United States since 1988, and her four United States citizen children know no other way of life. The respondent's children do not speak Spanish well, and they are unable to read or write in that language.

Unlike the children in Monreal and Andazola, the respondent's four United States citizen children are entirely dependent on their single mother for support. The

respondent is divorced from the children's father, and there is no indication that he remains involved in their lives in any manner. This increases the hardship the children would face upon return to Mexico, as they would be completely dependent on their mother's ability, not only to find adequate employment and housing, but also to provide for their emotional needs.

The respondent has been able to leave her children in the care of her lawful permanent resident mother while she attended courses to obtain a vehicle inspector's certificate and established a business. This assistance from her mother has enabled her to support her children within a stable environment. The respondent's ability to provide for the needs of her family will be severely hampered by the fact that she does not have any family in Mexico who can help care for her six children. As a single mother, the respondent will no doubt experience difficulties in finding work, especially employment that will allow her to continue to provide a safe and supportive home for her children.

From the perspective of the United States citizen children, it is clear that significant hardship will result from the loss of the economic stake that their mother has gained in this country, coupled with the difficulty she will have in establishing any comparable economic stability in Mexico. We emphasize that the respondent is a single parent who is solely responsible for the care of six children and who has no family to return to in Mexico. These are critical factors that distinguish her case from many other cancellation of removal claims.

In addition to the hardship of the United States citizen children, factors that relate only to the respondent may also be considered to the extent that they affect the potential level of hardship to her qualifying relatives.˜ In Andazola we found that similar factors were not sufficient to meet the high standard of exceptional and extremely unusual hardship. However, in this case, there are additional factors that we find raise the level of hardship, by a close margin, to that required to establish eligibility for relief.

The respondent's lawful permanent resident parents also are qualifying relatives. While we have not considered their hardship in assessing the respondent's claim, her parents form part of the strong system of family support that the respondent and the minor qualifying relatives would lose if they are removed from the United States.

Although the minor respondents lack a qualifying relative for purposes of cancellation of removal, their existence also cannot be ignored. In a family such as this, headed by a single parent, the hardship of their parent inherently translates into hardship on the rest of the family, in this case to all six children. In considering the hardship that the United States citizen children would face in Mexico, we must also consider the totality of the burden on the entire family that would result when a single mother must

support a family of this size.˜ Unlike the situation in Monreal and Andazola, all of the respondent's family, including her siblings, reside lawfully in the United States. We find this significant because they are unlikely to be subject to immigration enforcement and will probably remain in the United States indefinitely. The respondent's family members are very close and have been instrumental in helping her raise her children and obtain the necessary funds to establish her business. The loss of this support would further increase the hardship that she, and therefore her United States citizen children, would suffer if they are compelled to return to Mexico, where no support structure exists.

Finally, we note that the respondent's prospects for lawful immigration through her United States citizen siblings or lawful permanent resident parents are unrealistic due to the backlog of visa availability for Mexican nationals with preference classification. There are no other apparent methods of adjustment available to any of the respondents. These are factors we have previously found to be significant when considering an identical hardship standard for suspension of deportation.˜

The hardship factors present in this case are more different in degree than in kind from those present in Monreal and Andazola. For this reason, we see no need to depart from the analysis set forth in those cases. Part of that analysis requires the assessment of hardship factors in their totality, often termed a "cumulative" analysis. Here, the heavy financial and familial burden on the adult respondent, the lack of support from the children's father, the United States citizen children's unfamiliarity with the Spanish language, the lawful residence in this country of all of the respondent's immediate family, and the concomitant lack of family in Mexico combine to render the hardship in this case well beyond that which is normally experienced in most cases of removal. The level of hardship presented here is higher than that established in either Monreal or Andazola and, in our view, is sufficient to be considered exceptional and extremely unusual.

We emphasize, in conclusion, that this decision cannot be read in isolation from Monreal and Andazola. Those cases remain our seminal interpretations of the meaning of "exceptional and extremely unusual hardship" in section 240A(b)(1)(D) of the Act. The cumulative factors present in this case are indeed unusual and will not typically be found in most other cases, where respondents have smaller families and relatives who reside in both the United States and their country of origin.

IV. CONCLUSION

Given the unusual facts presented in this case, we find that the adult respondent has shown that her United States citizen children will suffer exceptional and extremely

unusual hardship if she is removed from the United States. Accordingly, her appeal will be sustained and she will be granted cancellation of removal.

As the adult respondent has been granted relief and appears to have no impediment to adjusting her status, the minor respondents are likely to soon have a qualifying relative for purposes of establishing eligibility for cancellation of removal. Given this fact, we find it appropriate to remand their records to the Immigration Judge for their cases to be held in abeyance pending a disposition regarding the adult respondent's status.~

9.5 Cancellation of Removal: 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. § 1229a(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 8.10.

9.6 Case: Pereida v. Wilkinson

Pereida v. Wilkinson
592 U.S. __ (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.˜

9.7 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 sections 9.1-9.6. 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).

9.8 Cancellation of Removal: Numerical Limitations

By statute, the Attorney General may not grant cancellation of removal relief to more than 4,000 noncitizens in any fiscal year. INA § 240A(3)(1), 8 U.S.C. § 1129b(e)(1). This limitation is referred to as a "cap."

The Office of the Chief Immigration Judge (OCIJ) alerts immigration judges when the cancellation of removal cap has been reached. At that point, immigration judges must "reserve" decisions in which they would otherwise grant cancellation of removal until the next fiscal year.

9.9 Registry

EOUSA, OLE, Immigration Law (2005)

An Immigration Judge may grant lawful admission for permanent residence for aliens who establish entry into the United States prior to January 1, 1972; continuous residence since entry; good moral character; and eligibility for citizenship. INA § 249, 8 U.S.C. § 1259. The continual residence requirement is not as stringent as the continuous physical presence requirement applicable to suspension.

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CRS, Immigration: Registration as Means of Obtaining Lawful Permanent Residence (2001)

Registry is a provision of immigration law that enables certain unauthorized aliens in the United States to acquire lawful permanent resident status. It grants the Attorney General the discretionary authority to create a record of lawful admission for permanent residence for an alien who lacks such a record, has continuously resided in the United States since before January 1, 1972, and meets other specified requirements. The registry provision originated in a 1929 law. That law set the required entry date from which continuous residence had to be shown (known as the registry date) at June 3, 1921. The registry provision has been amended several times since 1929, most commonly to update the registry date. The first update came in 1940, when the registry date was changed to July 1, 1924. The registry provision underwent significant change in 1958. That year, the registry date was changed to June 28, 1940, and the registry requirements were revised. As a result of the 1958 changes, the registry mechanism became available to aliens who had entered the country illegally or who had overstayed, or violated the terms of, a temporary period of entry. The registry date was subsequently changed to June 30, 1948, and then to January 1, 1972, where it stands today. Since 1985, approximately 60,000 people have adjusted to lawful permanent residence under the registry provision.

There is debate about the merits of advancing the registry date. Supporters maintain that long-time immigrants with strong ties to the country should be allowed to become lawful permanent residents. Opponents argue that aliens in the country illegally should not be rewarded with legal status and that advancing the registry date could encourage future illegal immigration.

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9.10 Legalization/Amnesty

CRS, Alien Legalization and Adjustment of Status: A Primer (2010)

The issue of whether aliens residing in the United States without legal authorization may be permitted to become LPRs has been debated periodically, and at various times Congress has enacted legalization programs.˜

When Congress passed the Immigration Reform and Control Act (IRCA) of 1986, it included provisions that enabled several million aliens illegally residing in the United States to become LPRs. Generally, legislation such as IRCA is referred to as an "amnesty" or a legalization program because it provides LPR status to aliens who are otherwise residing illegally in the United States.˜ Although legalization is considered distinct from adjustment of status, most legalization provisions are codified under the adjustment or change of status chapter of INA.

There were two temporary legalization programs created by IRCA.˜ The "pre-1982" program provided legal status for otherwise eligible aliens who had resided continuously in the United States in an unlawful status since before January 1, 1982. They were required to apply during a 12-month period beginning May 5, 1987. The "special agricultural worker" (SAW) program provided legal status for otherwise eligible aliens who had worked at least 90 days in seasonal agriculture in the United States during the year ending May 1, 1986. They were required to apply during an 18-month period beginning June 1, 1987, and ending November 30, 1988. Approximately 2.7 million aliens qualified for legal status under the pre-1982 and SAW programs. Of this total, 1.6 million or 59% qualified under the pre-1982 program, and 1.1 million or 41% qualified under the SAW program.˜

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CRS, NACARA: Hardship Relief and Long-Term Illegal Aliens (1998)

[One important legislative example of legalization or amnesty is the Nicaraguan Adjustment and Central American Relief Act (NACARA). The CRS described the legislation as follows:] [NACARA] establishes special procedures through which hundreds of thousands of aliens in the U.S., primarily Central Americans, may seek legal permanent resident status.˜

NACARA directs the Attorney General to adjust to permanent resident status˜ an alien in one of the classes listed below, if the alien meets two conditions. First, the alien must apply for adjustment before April 1, 2000. Second, the alien must not be legally

inadmissible to the U.S. on grounds other than being a prospective public charge, failing to have proper documents, failing to meet certain labor-related requirements, or entering the U.S. surreptitiously (e.g., aliens who are inadmissible on health grounds or as criminal aliens or security threats are ineligible for adjustment absent a waiver). The classes of aliens covered include:

- Nicaraguans and Cubans who have been in the U.S. continuously for a period beginning before December 1, 1995, and ending the date of application.˜; and
- Nicaraguans and Cubans who are the spouses or unmarried children of aliens in the foregoing class.˜

[NACARA also included "hardship relief" for certain Salvadoran and Guatemalan nationals as well as nationals of various Eastern European nations.]

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9.11 Adjustment of Status

Adjustment of status has already been covered in section 7.9. Review that section at this time. Perhaps counterintuitively, adjustment of status can be sought not only through an affirmative application, as discussed in section 7.9, but can also be raised defensively in the course of a removal proceeding.

EOUSA, OLE, Immigration Law (2005)

In certain circumstances, aliens in deportation proceedings may apply for adjustment of status to permanent resident status under INA § 245, 8 U.S.C. § 1255. The prerequisites are: (1) the alien must have a basis of eligibility for permanent resident status; (2) a visa must be immediately available (an approved visa petition); and (3) the applicant must be statutorily eligible to seek adjustment of status and not be excludable. In essence, the alien is given the opportunity to receive legal status while in the United States rather than the usual overseas visa process for immigrants.

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When adjustment of status is sought as relief from removal, it rests on the immigration judge's exercise of discretion. It is "a matter of grace" that requires the noncitizen to "persuade the immigration judge that he merits a favorable exercise of discretion." Patel v. Garland, 596 U.S. __ (2022). By statute, federal courts do not have jurisdiction to review "any judgment regarding the granting of" adjustment of status relief. INA § 242(a)(2)(B)(i), 8 U.S.C. § 1252(a)(2)(B)(i). The Supreme Court has

interpreted this statute to preclude review of facts found as part of adjustment of status proceedings. Patel v. Garland, 596 U.S. __ (2022).

9.12 Private Bills

Letter from Thomas D. Homan, Acting Director of ICE, to Senator Chuck Grassley, May 5, 2017

Private immigration bills introduced by Members of Congress serve as a last resort for individuals who have exhausted ordinary administrative and judicial immigration remedies. The majority or present-day private immigration bills are introduced to confer lawful permanent resident (LPR) status on beneficiaries by circumventing the normal immigration law framework, including inadmissibility grounds and legal requirements that ordinarily apply to those seeking LPR status.

As a matter of agency practice, ICE has in the past granted a stay of removal when it received a written request for an investigative report from the Chair of the House or Senate Judiciary Committee (or appropriate House or Senate Judiciary Subcommittee) regarding an individual for whom a private immigration bill had been introduced. Although it is not mandated by law or regulation, ICE routinely granted these stays of removal. The stay usually remained in place until Congress either took action on the bill or adjourned without taking action on the bill and the grace period (March 15 of the new Congress) expired.

The stay mechanism, combined with the repeated introduction of bills, which are rarely, if ever enacted, could prevent ICE from removing aliens who fall within the enforcement priorities outlined in Executive Order 13768, *Enhancing Public Safety in the Interior of the United States*, including those who pose a risk to public safety or national security. Therefore, ICE is implementing the following policy changes regarding the issuance of stays of removal in connection with private immigration bills:

1. ICE will consider and issue a stay only if the Chair of the full Committee or Subcommittee expressly makes a written request that ICE stay the beneficiary's removal independent of any request for an investigative report. A request for an investigative report will no longer trigger an automatic stay or removal.

2. ICE will not grant a beneficiary more than one stay of removal through the private immigration bill process. As such, ICE will not honor subsequent requests for a stay of removal from the Chair of the Committee or subcommittee for beneficiaries who have already received a stay through the private immigration bill process.

3. The duration of a stay of removal will be limited to 6 months. However, the ICE Director, at his or her discretion, can provide a 1-time 90-day extension beyond the initial 6-month stay if specifically requested by the Chair of the Committee or Subcommittee and, if necessary, to accommodate extenuating circumstances.

4. ICE will take appropriate action, including the removal of the alien-beneficiary, in cases where ICE discovers derogatory information about an alien-beneficiary after issuing a stay of removal. ICE will notify the appropriate Committee or Subcommittee of the action it takes.

9.13 Prosecutorial Discretion

CRS, Prosecutorial Discretion in Immigration Enforcement: Legal Issues (2013)

The term prosecutorial discretion is commonly used to describe the wide latitude that prosecutors have in determining when, whom, how, and even whether to prosecute apparent violations of the law. The Immigration and Naturalization Service (INS) and, later, the Department of Homeland Security (DHS) and its components have historically described themselves as exercising prosecutorial discretion in immigration enforcement.˜

In *Reno v. American-Arab Anti-Discrimination Committee*, [525 U.S. 471 (1999),] a majority of the Supreme Court found that the various prudential concerns that prompt deference to the executive branch's determinations as to whether to prosecute criminal offenses are "greatly magnified in the deportation context,"˜ which entails civil (rather than criminal) proceedings.˜ While the reasons cited by the Court for greater deference to exercises of prosecutorial discretion in the immigration context than in other contexts reflect the facts of the case, which arose when certain removable aliens challenged the government's decision *not* to exercise prosecutorial discretion in their favor,˜ the Court's language is broad and arguably can be construed to encompass decisions to favorably exercise such discretion. More recently, in its decision in *Arizona v. United States*, [567 U.S. 387 (2012),] a majority of the Court arguably similarly affirmed the authority of the executive branch not to seek the removal of certain aliens, noting that "[a] principal feature of the removal system is the broad discretion entrusted to immigration officials," and 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."˜ According to the majority, such exercises of prosecutorial discretion may reflect "immediate human concerns" and the "equities of … individual

case[s]," such as whether the alien has children born in the United States or ties to the community, as well as "policy choices that bear on … international relations."˜

Going beyond such general affirmations of the executive branch's prosecutorial discretion in the immigration context, other cases have specifically noted that certain decisions are within the prosecutorial discretion of INS and, later, the immigration components of DHS. These decisions include

- whether to parole an alien into the United States;˜
- whether to commence removal proceedings and what charges to lodge against the respondent;˜
- whether to pursue formal removal proceedings;˜
- whether to cancel a Notice to Appear or other charging document before jurisdiction vests with an immigration judge;˜
- whether to grant deferred action or extended voluntary departure;˜
- whether to appeal an immigration judge's decision or order, and whether to file a motion to reopen;˜
- whether to invoke an automatic stay during the pendency of an appeal;˜ and
- whether to impose a fine for particular offenses.˜

As used here, *deferred action* is "generally an act of prosecutorial discretion to suspend [taking action] against a particular individual or group of individuals for a specific timeframe; it cannot resolve an individual's underlying immigration status."˜ It is generally granted on a case-by-case basis, although the executive branch has sometimes provided that individuals who share certain characteristics (e.g., advanced or young age) are to be given particular consideration for deferred action.˜ In contrast, *extended voluntary departure*—sometimes also referred to as *deferred departure* or *deferred enforced departure*—generally involves "blanket relief" from removal to particular countries.˜

Many of the actions that judicial and administrative tribunals have noted are within the prosecutorial discretion of immigration officers have also been mentioned in INS and, later, DHS, guidance regarding the exercise of prosecutorial discretion. Memoranda or other documents providing such guidance have been issued intermittently since at least 1976, and have suggested that officers may generally exercise discretion in

- deciding whether to issue or cancel a notice of detainer;

- deciding whether to issue, reissue, serve, file, or cancel a Notice to Appear;
- focusing administrative resources on particular violations or conduct;
- deciding whom to stop, question, or arrest for a violation;
- deciding whether to detain aliens who are not subject to "mandatory detention" pending removal, or whether to release them on bond, supervision, personal recognizance, or other conditions;
- seeking expedited removal or removal by means other than formal proceedings in immigration court;
- settling or dismissing a proceeding;
- granting deferred action or parole;
- staying a final order of removal;
- agreeing to voluntary departure, the withdrawal of an application for admission, or other action in lieu of a formal order of removal;
- pursuing an appeal;
- executing a removal order; and
- responding to or joining in a motion to reopen removal proceedings, or joining in a motion to grant relief or a benefit.˜

Often, this executive branch guidance has highlighted resource constraints,˜ as well as humanitarian considerations,˜ that may warrant a favorable exercise of prosecutorial discretion, although such guidance has generally also indicated that determinations as to whether to exercise discretion in particular cases are to be based on the "totality of the circumstances"˜ and whether a "substantial federal interest" is present.˜ The guidance may also suggest when in the process such discretion is to be exercised (generally as early in the process as possible, so as to avoid wasting government resources),˜ as well as which officers may exercise particular forms of discretion.˜ While personnel are generally instructed that they should "always consider prosecutorial discretion on a case-by-case basis,"˜ classes of individuals warranting consideration for favorable—or unfavorable—exercises of discretion have sometimes been identified (e.g., minors and elderly individuals, known gang members).˜

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9.14 Deferred Action for Childhood Arrivals (DACA)

On June 15, 2012, Janet Napolitano, Secretary of Homeland Security, released a memo entitled Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children. This memo was the basis for granting 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. This was known as DACA, Deferred Action for Childhood Arrivals.

The Napolitano memo was rescinded and replaced by formal regulations that came into effect on October 31, 2022. See 8 CFR §§ 236.21-236.25. A noncitizen is eligible for this current form of DACA if they:

- came to the United States before the age of sixteen;
- continuously resided in the United States from June 15, 2007 to the time of filing their request, with exceptions for "brief, casual, and innocent" absences from the country (recall section 8.3);
- were physically present in the United States on June 15, 2012 and on the date of their regulation-based DACA request;
- lack lawful immigration status;
- are currently enrolled in school, have graduated from high school or obtained a certificate of completion from high school, have a G.E.D., or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- have not been convicted of a felony offense, a significant misdemeanor offense, three or more misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
- were born on or after June 16, 1981.

9.15 Voluntary Departure

EOUSA, OLE, Immigration Law (2005)

The privilege of voluntary departure in lieu of deportation may be granted in the exercise of discretion to one who meets the statutory requirements. To be eligible for voluntary departure, the alien must show a readiness, willingness, and financial ability to leave the United States at his own expense; good moral character for the previous five years; and that a favorable exercise of discretion is warranted. See INA§§ 244(e),

240B(b), 8 U.S.C. §§ 1254a, 1229c (specific requirements). The advantage of voluntary departure to the alien is that it is not a bar to return to the United States if the alien is otherwise eligible to return as an immigrant or nonimmigrant. An alien who receives voluntary departure, but fails to depart as ordered, becomes ineligible for certain other forms of discretionary relief.

Note. An alien convicted of an aggravated felony after November 29, 1990, or murder at any time, cannot show good moral character.~

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9.16 Citizenship

U.S. citizens are not subject to removal. As described in Chapter 17, citizenship can be a complicated question. An individual might believe that they are not a U.S. citizen when, in fact, they are. If it becomes clear that the individual being removed is a U.S. citizen, that is an absolute defense to the removal process.

9.17 Test Your Knowledge

PROBLEM 9.1

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 a F 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 Ten: Removal Procedure

This chapter covers the process of removal, namely the mechanics of how noncitizens are expelled from the United States. See INA §§ 239, 240, 8 U.S.C. §§ 1229, 1229a. Recall that there are two distinct grounds for removal: INA § 212 applies to noncitizens who entered the United States without authorization (Chapter 6) and INA § 237 applies to noncitizens who have been lawfully admitted (Chapter 8). See INA § 240(e)(2) (defining "removable" to mean either "inadmissible" or "deportable"). The same removal process, however, applies to both groups. INA § 240.

Formal removal proceedings take place before an immigration judge (sections 10.1-10.6), are appealable to the BIA (section 10.7), and a decision from the BIA can be appealed to the federal circuit where the removal proceeding took place (section 10.8). The Attorney General also has the power to weigh in on a case (section 10.9). There are, however, three alternative forms of removal that do not take place before an immigration judge and have limited opportunities for appeal: expedited removal, administrative removal, and reinstatement of removal (section 10.10).

Keep in mind that removal is a civil process. As the U.S. Supreme Court has said, removal, "while it may be burdensome and severe for the alien, is not a punishment." Mahler v. Eby, 264 U.S. 32, 39 (1924). As such, protections that a noncitizen would have in a criminal trial—for example, a right to counsel—are not available during removal proceedings.

10.1 Removal Basics

CRS, Formal Removal Proceedings: An Introduction (2020)

The Fifth Amendment's Due Process Clause confers substantive and procedural protections to all persons within the United States, including non-U.S. nationals (aliens) who the federal government seeks to remove from the country. Once an alien has "passed through our gates, even illegally," the Supreme Court has declared, the alien "may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." Shaughnessy v. Mezei, 345 U.S. 206 (1953).

Against this backdrop, the 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.˜

Formal removal proceedings are conducted before an immigration judge (IJ) within the Executive Office for Immigration Review (EOIR).˜

The process for initiating and conducting formal removal proceedings is primarily governed by INA §§ 239 and 240, implementing regulations found in 8 C.F.R. chapter V, and EOIR's *Immigration Court Practice Manual*.˜

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. The NTA must be served on the alien in person or, if personal service is not practicable, mailed to the alien or the alien's counsel of record.˜ [See INA § 239, 1229.]

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. 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). An interpreter might also be used to facilitate communication in the hearing and other proceedings.

At the first or a subsequent Master Calendar hearing, the alien is required to plead to the allegations and charges in the NTA, either admitting or denying them. The alien may also submit an application for any relief from removal. In the alternative, the alien may request the opportunity to voluntarily depart the United States at his or her own expense in lieu of removal proceedings (unless statutorily barred). If an alien files an application for relief, the IJ must schedule a "merits" hearing. An IJ may also schedule a merits hearing to address any contested issues about the alien's removability.˜

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 BIA

Both the alien and DHS may appeal an IJ's decision to the BIA. The Notice of Appeal must be filed within 30 days of the IJ's decision. Absent an appeal, the IJ's decision becomes administratively final.

Generally, following the Notice of Appeal, the BIA will order the parties to submit briefs in support of and against the appeal. 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 judicial circuit in which the immigration court proceedings were completed. The petition must be filed within 30 days of the BIA's decision. 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.

MOTIONS TO REOPEN AND RECONSIDER

An alien with a final order of removal may move to reopen proceedings before the BIA. Typically, a motion to reopen seeks relief based on new, previously unavailable evidence. The motion must come with an application for relief and supporting documents. Generally, an alien may file only one motion to reopen, filed within 90 days of the BIA's decision. But exceptions exist, including when the motion is made to apply for asylum based on changed conditions in the alien's country of nationality, or when DHS agrees to join the motion. Some courts have held that the time and/or numerical limitations may be waived ("equitably tolled") in some situations, such as if the alien was defrauded or received ineffective assistance of counsel, if the alien exercised due diligence in filing the motion.˜

An alien subject to a final order of removal may also move to reconsider with the BIA. The motion must be filed within 30 days of the BIA's decision and specify the alleged errors in that decision. The alien generally may file one motion to reconsider. But some courts have held that the time and numerical limitations on motions to reconsider may be equitably tolled (e.g., because of ineffective assistance of counsel).˜ If the BIA denies a motion to reopen or reconsider, the alien generally may seek judicial review of that decision.

The BIA also may reopen or reconsider a case in which it has rendered a decision on its own motion ("sua sponte"). The decision to reopen or reconsider sua sponte is discretionary and generally not subject to judicial review.

An alien who has not appealed to the BIA may move to reopen or reconsider an order of removal before the IJ (subject to time and numerical limitations). But if the alien already appealed and the BIA issued a decision, the alien must file the motion with the BIA. And if the alien files the motion while an appeal to the BIA is pending, the BIA may treat it as a motion to remand the case to the IJ for further proceedings, and consolidate it with the appeal for decision.

ATTORNEY GENERAL (AG) CERTIFICATION

The 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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EOUSA, OLE, Immigration Law (2005)

REMOVAL PROCEEDINGS

Removal proceedings apply to all actions commenced on or after April 1, 1997. See IIRIRA § 309. Removal proceedings commence with the issuance of a Notice To Appear. See INA § 239, 8 U.S.C. § 1229. If an alien is an applicant for admission, he has the burden of establishing that he is "clearly and beyond a doubt entitled to be admitted." See INA § 240(c)(2)(A), 8 U.S.C. § 1229a(c)(2)(A). An alien seeking admission into the United States will be charged as "inadmissible" under INA § 212, 8 U.S.C. § 1182, and bears the burden of establishing that he is not inadmissible as charged. See INA § 240(c)(2)(A), 8 U.S.C. § 1229a(c)(2)(A).

If the alien is not an applicant for admission, he must demonstrate by "clear and convincing evidence" that he is lawfully present "pursuant to a prior admission." See INA § 240(c)(2)(B), 8 U.S.C. § 1229a(c)(2)(B). If the alien can establish his lawful presence pursuant to a prior admission, he will be charged as "deportable" under INA § 237, 8 U.S.C. § 1227, and the burden is on the INS to establish the alien's removability

by "clear and convincing evidence." See INA § 240(c)(3), 8 U.S.C. § 1229a(c)(3), 8 C.F.R. § 1240.8.

Regardless of whether they are considered inadmissible or deportable, aliens in removal proceedings have the burden to prove that they are eligible for any relief they request. Similarly, aliens in removal proceedings may appeal the Immigration Judge's decision to the BIA. See 8 C.F.R. § 1003.1. Review of Board decisions by the circuit courts is permitted only in certain delineated circumstances. See INA § 242, 8 U.S.C. § 1252.˜

RIGHTS OF THE NONCITIZEN IN JUDICIAL REMOVAL PROCEEDINGS

An Immigration Judge presides over the hearings, and an alien is accorded:

- The right to an attorney or representative at no expense to the government (INA § 292, 8 U.S.C. § 1362; 8 C.F.R. §§ 1003.16(b), 1240.3 (removal), 1240.32(a) (exclusion), 1240.42 (deportation)).
- The opportunity reasonably to examine and object to evidence against him, including cross-examining any witnesses (8 C.F.R. §§ 1240.10(a)(4) (removal), 1240.32(a) (exclusion), 1240.48(a) (deportation)).
- The opportunity to present evidence on his own behalf (8 C.F.R. §§ 1240.10(a)(4) (removal), 1240.32(a) (exclusion), 1240.48(a) (deportation)).
- A list of free legal service providers in the area (8 C.F.R. §§ 1240.10(a)(2) (removal), l240.32(a) (exclusion), l240.48(a) (deportation)).
- The right to appeal to the Board of Immigration Appeals (BIA) in certain cases (8 C.F.R. §§ 1003.38, 1240.15 (removal), 1240.37 (exclusion), 1240.53 (deportation)).

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10.2 Right to Counsel

Immigration Court Practice Manual (2018)

The regulations specify who may represent parties in immigration proceedings. See 8 C.F.R. § 1292.1. As a practical matter, there are four categories of people who may present cases in Immigration Court: unrepresented aliens˜, attorneys˜, accredited representatives˜, and certain categories of persons who are expressly recognized by the Immigration Court˜.

An alien in immigration proceedings may be represented by an attorney of his or her choosing, at no cost to the government. Unlike in criminal proceedings, the government is *not* obligated to provide legal counsel.˜

A fully accredited representative is an individual who is not an attorney and is approved by the Director of the Office of Legal Access Programs (OLAP) to represent aliens before the Board, the Immigration Courts, and the Department of Homeland Security (DHS). A partially accredited representative is authorized to practice solely before DHS. An accredited representative must, among other requirements, have the character and fitness to represent aliens and be employed by, or be a volunteer for, a non-profit religious, charitable, social service, or similar organization which has been recognized by the OLAP Director to represent aliens.˜

Law students and law graduates (law school graduates who are not yet admitted to practice law) may appear before the Immigration Court if certain conditions are met and the appearance is approved by the Immigration Judge.˜

If a party is a child, then a parent or legal guardian may represent the child before the Immigration Court, provided the parent or legal guardian clearly informs the Immigration Court of their relationship.˜

Upon request, an Immigration Judge has the discretion to allow a reputable individual to appear on behalf of an alien, if the Immigration Judge is satisfied that the individual is capable of providing competent representation to the alien. See 8 C.F.R. § 1292.1(a)(3). To qualify as a reputable individual, an individual must meet all of the following criteria:

- be a person of good moral character
- appear on an individual basis, at the request of the alien
- receive no direct or indirect remuneration for his or her assistance
- file a declaration that he or she is not being remunerated for his or her assistance
- have a preexisting relationship with the alien (e.g., relative, neighbor, clergy), except in those situations where representation would otherwise not be available, and
- be officially recognized by the Immigration Court˜

All representatives must file a Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court (Form EOIR-28). See 8 C.F.R. §§ 1003.17(a), 1003.23(b)(1)(ii).

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10.3 Case: Aguilera-Enriquez v. INS

Aguilera-Enriquez v. INS
516 F.2d 565 (6th Cir. 1975)

CELEBREZZE, CIRCUIT JUDGE.

Petitioner, Jesus Aguilera-Enriquez, seeks reversal of a deportation order on the ground that he was constitutionally entitled to but was not afforded the assistance of counsel during his deportation hearing.˜

A thirty-nine-year-old native and citizen of Mexico, Petitioner has resided in the United States since December 18, 1967, when he was admitted for permanent residence. He is a married farm worker, living with his wife and three daughters in Saginaw, Michigan.

In December 1971, Petitioner traveled to Mexico for a vacation. An officer of the Saginaw, Michigan Police Department notified federal customs officers at the Mexican border that he had reason to believe that Petitioner would be returning with a quantity of heroin. When Petitioner crossed the border on his return, he was subjected to a search which produced no heroin but did reveal two grams of cocaine.

On April 12, 1972, Petitioner pleaded guilty in the United States District Court for the Western District of Texas, on one count of knowingly possessing a quantity of cocaine, a Schedule II controlled substance, in violation of 21 U.S.C. § 844(a) (1970). Petitioner received a suspended one-year sentence, was placed on probation for five years, and was fined $3,000, to be paid in fifty-dollar monthly installments over the five-year probationary period. Neither Petitioner's appointed counsel nor the District Court informed him that a narcotics conviction would almost certainly lead to his deportation.

On December 7, 1972, the Immigration and Naturalization Service issued an Order to Show Cause and Notice of Hearing, charging that because of his narcotics conviction, Petitioner should be deported under section 241(a)(11) of the Immigration and Nationality Act˜.

On February 6, 1973 Petitioner appeared before the Immigration Judge and requested appointed counsel. The Immigration Judge refused this request. After a

hearing Petitioner was ordered deported and was not afforded the option of voluntary departure.

Shortly after the Immigration Judge's ruling, Petitioner engaged as counsel a Michigan legal assistance attorney, who in turn secured the services of a Texas attorney.

On February 14, 1973, Petitioner filed an appeal to the Board of Immigration Appeals, stating that the validity of the Texas conviction was being challenged.

On May 23, 1973, Petitioner's Texas counsel filed a motion to withdraw his guilty plea under Rule 32(d), F.R.Crim.P. The motion asserted that the District Court had not followed Rule 11 in accepting the plea because it had not properly determined that there was a factual basis for the plea and that the plea was made with a full understanding of the probable consequences.

On February 1, 1974, after full briefing and oral argument by counsel for Petitioner and the Government, the Board of Immigration Appeals dismissed Petitioner's appeal. A petition for review was timely filed in this Court.

The issue Petitioner raises here is whether an indigent alien has the right to appointed counsel in a deportation proceeding. He attacks the constitutional validity of 8 U.S.C. § 1252(b)(2) (1970), which gives an alien facing deportation proceedings "the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."~ The Immigration Judge held that this section prevented appointment of counsel at Government expense. Since he could not afford to hire a lawyer, he did not have one before the Immigration Judge.

The courts have been vigilant to ensure that aliens receive the protections Congress has given them before they may be banished from our shores. As this Circuit noted in United States ex rel. Brancato v. Lehmann, 239 F.2d 663, 666 (6th Cir. 1956), "Although it is not penal in character, * * * deportation is a drastic measure, at times the equivalent of banishment or exile, for which reason deportation statutes should be given the narrowest of the several possible meanings."~ The Supreme Court has held that once an alien has been admitted to lawful residence, "not even Congress may expel him without allowing him a fair opportunity to be heard." Kwong Hai Chew v. Colding, 344 U.S. 590~ (1953). Thus, if procedures mandated by Congress do not provide an alien with procedural due process, they must yield, and the constitutional guarantee of due process must provide adequate protection during the deportation process.~

The test for whether due process requires the appointment of counsel for an indigent alien is whether, in a given case, the assistance of counsel would be necessary to provide "fundamental fairness the touchstone of due process." Gagnon v. Scarpelli, 411

U.S. 778, 790 (1973). The Supreme Court's holdings in Gagnon, Morrissey v. Brewer, 408 U.S. 471 (1972), and In re Gault, 387 U.S. 1 (1967), have undermined the position that counsel must be provided to indigents only in criminal proceedings. Decisions such as Tupacyupanqui-Marin v. Immigration and Naturalization Service, 447 F.2d 603 (7th Cir. 1971), and Murgia-Melendrez v. Immigration and Naturalization Service, 407 F.2d 207 (9th Cir. 1969), which contain dictum appearing to set forth a per se rule against providing counsel to indigent aliens facing deportation, rested largely on the outmoded distinction between criminal cases (where the Sixth Amendment guarantees indigents appointed counsel) and civil proceedings (where the Fifth Amendment applies). Where an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the Government's expense. Otherwise, "fundamental fairness" would be violated.

In Petitioner's case the absence of counsel at his hearing before the Immigration Judge did not deprive his deportation proceeding of fundamental fairness.

Petitioner was held to be deportable under section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. s 1251(a)(11), which states in relevant part: "(a) Any alien in the United States ... shall, upon the order of the Attorney General, be deported who (11) ... at any time has been convicted of a violation of ... any law or regulation relating to the illicit possession of or traffic in narcotic drugs . . .."

Before the Immigration Judge, Petitioner raised no defense to the charge that he had been convicted in April 1972 of a violation of 21 U.S.C. § 844(a). Thus, he was clearly within the purview of section 241(a)(11) of the Act, and no defense for which a lawyer would have helped the argument was presented to the Immigration Judge for consideration. After the decision of the Immigration Judge, Petitioner moved to withdraw his guilty plea in the Texas District Court under Rule 32(d), F.R.Crim.P. He then urged before the Board of Immigration Appeals that this motion took him outside the reach of section 241(a)(11), because the likelihood of success on that motion meant that he had not been "convicted" of a narcotics offense. He was effectively represented by counsel before the Board, and his argument was considered upon briefing and oral argument. The lack of counsel before the Immigration Judge did not prevent full administrative consideration of his argument. Counsel could have obtained no different administrative result. "Fundamental fairness," therefore, was not abridged during the administrative proceedings, and the order of deportation is not subject to constitutional attack for a lack of due process.

The petition for review is denied.

DEMASCIO, DISTRICT JUDGE (DISSENTING).

A deportation proceeding so jeopardizes a resident alien's basic and fundamental right to personal liberty that I cannot agree due process is guaranteed by a "fundamental fairness" analysis on a case-by-case basis.˜ I think a resident alien has an unqualified right to the appointment of counsel.˜ When the government, with plenary power to exclude, agrees to allow an alien lawful residence, it is unconscionable for the government to unilaterally terminate that agreement without affording an indigent resident alien assistance of appointed counsel. Expulsion is such lasting punishment that meaningful due process can require no less. Assuredly, it inflicts punishment as grave as the institutionalization which may follow an In re Gault finding of delinquency. A resident alien's right to due process should not be tempered by a classification of the deportation proceeding as "civil", "criminal", or "administrative." No matter the classification, deportation is punishment, pure and simple.˜

The court today has fashioned a test to resolve whether a resident alien's due-process right requires appointment of counsel. That test is whether "... in a given case, the assistance of counsel would be necessary to provide 'fundamental fairness the touchstone of due process.'"˜ The majority concludes that lack of counsel before the immigration judge did not prevent full consideration of petitioner's sole argument and no different result would have been obtained had counsel been appointed. Accordingly, the court holds the hearing was fundamentally fair.˜ These conclusions are reached by second guessing the record a record made without petitioner's meaningful participation.

In my view, the absence of counsel at respondent's hearing before the immigration judge inherently denied him fundamental fairness. Moreover, I do not believe that we should make the initial determination that counsel is unnecessary; or that lack of counsel did not prevent full administrative consideration of petitioner's argument; or that counsel could not have obtained a different administrative result.˜ We should not speculate at this stage what contentions appointed counsel could have raised before the immigration judge. For example, a lawyer may well have contended that § 1251(a)(11) is an unconstitutional deprivation of the equal protection of the laws by arguing that alienage was the sole basis for the infliction of punishment, additional to that imposed by criminal law; that since the government elected to rely upon the criminal law sanctions, it may not now additionally exile petitioner without demonstrating a compelling governmental interest.

I do not intend to imply such a contention has validity. I cite this only to emphasize the danger of attempting to speculate at this stage whether counsel could have obtained a different result and to show that it is possible that the immigration judge did not fully consider all of petitioner's arguments.

Because the consequences of a deportation proceeding parallels punishment for crime, only a per se rule requiring appointment of counsel will assure a resident alien due process of law. In this case, the respondent, a resident alien for seven years, committed a criminal offense. Our laws require that he be punished and he was. Now, he must face additional punishment in the form of banishment. He will be deprived of the life, liberty, and pursuit of happiness he enjoyed by governmental consent.↳Of course, what I have said applies only to a resident alien. I readily agree that an alien who enters illegally is entitled to less due process, if any at all. It is interesting to note that the Immigration Act seems to treat all aliens alike.↵ It may be proper that he be compelled to face the consequences of such a proceeding. But, when he does, he should have a lawyer at his side and one at government expense, if necessary. When the government consents to grant an alien residency, it cannot constitutionally expel unless and until it affords that alien due process. Our country's constitutional dedication to freedom is thwarted by a watered-down version of due process on a case-by-case basis.

I would reverse and remand for the appointment of counsel before the immigration judge.

10.4 Case: Matter of Lozada

Matter of Lozada
19 I. & N. Dec. 637 (Board of Immigration Appeals 1988)

On March 13, 1985, an immigration judge found the respondent deportable as charged on the basis of his concessions at the hearing under section 241(a)(4) of the Immigration and Nationality Act˜, as an alien who was convicted of a crime involving moral turpitude committed within 5 years of entry and was sentenced to confinement for 1 year or more, denied his applications for relief under section 212(c) of the Act˜, and for voluntary departure under section 244(e) of the Act˜, and ordered him deported to the Dominican Republic. That same day, the respondent filed a Notice of Appeal (Form I–290A), indicating that he would be filing a separate written brief or statement in support of his appeal. No such brief or statement was forthcoming. On July 8, 1986, over a year after the immigration judge had entered his decision in the case, the Board summarily dismissed the appeal, noting that the respondent had in no meaningful manner identified the claimed error in the immigration judge's comprehensive decision of March 13, 1985.

On January 20, 1987, the respondent, through present counsel,˜ filed a motion to reopen the proceedings, alleging (1) that prior counsel's failure to submit a written brief or statement explaining the basis for appeal constituted ineffective assistance of counsel

and (2) that the immigration judge erred as a matter of law and discretion in deciding the case. The respondent also filed a petition for review of the Board's decision with the United States Court of Appeals for the First Circuit. The court has stayed action on the petition for review pending the Board's resolution of the motion to reopen. The motion will be denied.

Any right a respondent in deportation proceedings may have to counsel is grounded in the fifth amendment guarantee of due process.˜ Ineffective assistance of counsel in a deportation proceeding is a denial of due process only if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.˜ One must show, moreover, that he was prejudiced by his representative's performance.˜

The Government maintains that the fact that prior counsel did not submit a brief does not in itself amount to deprivation of due process. We agree.

Failure to specify reasons for an appeal is grounds for summary dismissal under 8 C.F.R. § 3.1(d)(1–a)(i) (1988).˜ It would be anomalous to hold that the same action or, more accurately, inaction that gives rise to a summary dismissal of an appeal could, without more, serve as the basis of a motion to reopen. To allow such anomaly would permit an alien to circumvent at will the appeals process, with its regulatory time constraints, by the simple expedient of failing to properly pursue his appeal rights, then claiming ineffective assistance of counsel. Litigants are generally bound by the conduct of their attorneys, absent egregious circumstances.˜ No such egregious circumstances have been established in this case.

A motion based upon a claim of ineffective assistance of counsel should be supported by an affidavit of the allegedly aggrieved respondent attesting to the relevant facts. In the case before us, that affidavit should include a statement that sets forth in detail the agreement that was entered into with former counsel with respect to the actions to be taken on appeal and what counsel did or did not represent to the respondent in this regard. Furthermore, before allegations of ineffective assistance of former counsel are presented to the Board, former counsel must be informed of the allegations and allowed the opportunity to respond. Any subsequent response from counsel, or report of counsel's failure or refusal to respond, should be submitted with the motion. Finally, if it is asserted that prior counsel's handling of the case involved a violation of ethical or legal responsibilities, the motion should reflect whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not.

The high standard announced here is necessary if we are to have a basis for assessing the substantial number of claims of ineffective assistance of counsel that come before the Board. Where essential information is lacking, it is impossible to evaluate the substance of such claim. In the instant case, for example, the respondent has not alleged, let alone established, that former counsel ever agreed to prepare a brief on appeal or was engaged to undertake the task. Then, too, the potential for abuse is apparent where no mechanism exists for allowing former counsel, whose integrity or competence is being impugned, to present his version of events if he so chooses, thereby discouraging baseless allegations. The requirement that disciplinary authorities be notified of breaches of professional conduct not only serves to deter meritless claims of ineffective representation but also highlights the standards which should be expected of attorneys who represent persons in immigration proceedings, the outcome of which may, and often does, have enormous significance for the person.

The respondent's motion is wholly insufficient in light of the foregoing guidelines. We note, moreover, that no prejudice was shown to have resulted from prior counsel's failure to or decision not to file a brief in support of the appeal. The respondent received a full and fair hearing at which he was given every opportunity to present his case. We do not find, and the respondent does not allege, any inadequacy in the quality of prior counsel's representation at the hearing. The immigration judge considered and properly evaluated all the evidence presented, and his conclusions that the respondent did not merit a grant of section 212(c) relief as a matter of discretion and that he was ineligible for voluntary departure as a matter of law are supported by the record.˜

ORDER: The motion is denied.

10.5 Immigration Court Characteristics

Immigration Court Practice Manual (2018)

IMMIGRATION JUDGES

Immigration Judges are responsible for conducting Immigration Court proceedings and act independently in deciding matters before them. Immigration Judges are tasked with resolving cases in a manner that is timely, impartial, and consistent with the Immigration and Nationality Act, federal regulations, and precedent decisions of the Board of Immigration Appeals and federal appellate courts.˜

[Immigration Judges are employees of the Executive Office for Immigration Review (EOIR), which] is a component of the Department of Justice and operates under the authority and supervision of the Attorney General.˜

Immigration Judges generally have the authority to:

- make determinations of removability, deportability, and excludability
- adjudicate applications for relief from removal or deportation, including, but not limited to, asylum, withholding of removal ("restriction on removal"), protection under the Convention Against Torture, cancellation of removal, adjustment of status, registry, and certain waivers
- review credible fear and reasonable fear determinations made by the Department of Homeland Security (DHS)
- conduct claimed status review proceedings
- conduct custody hearings and bond redetermination proceedings
- make determinations in rescission of adjustment of status and departure control cases
- take any other action consistent with applicable law and regulation as may be appropriate, including such actions as ruling on motions, issuing subpoenas, and ordering pre-hearing conferences and statements

See 8 C.F.R. §§ 1240.1(a), 1240.31, 1240.41.˜

[T]he Immigration Judge should be referred to as "the Immigration Judge" and addressed as "Your Honor" or "Judge __"˜.

GOVERNMENT COUNSEL

[The ICE Office of Principal Legal Advisor (OPLA), a part of DHS, represents the United States Government in administrative proceedings (Immigration Court and the Board of Immigration Appeals). The Office of Immigration Litigation (OIL), within Department of Justice's Civil Division, represents the United States government in appellate litigation in the federal courts.]

[In court,] the attorney˜ should be referred to as "the Assistant Chief Counsel," "the DHS attorney," or "the government attorney"˜.

THE RESPONDENT

[T]he alien should be referred to as "the respondent"˜.

FILINGS

Documents are filed either with the Immigration Judge during a hearing or with the Immigration Court outside of a hearing.˜ For all filings before the Immigration

Court, a party must˜ provide, or "serve," an identical copy on the opposing party (or, if the party is represented, the party's representative), and except for filings served during a hearing or jointly-filed motions agreed upon by all parties, declare in writing that a copy has been served. The written declaration is called a "Proof of Service," also referred to as a "Certificate of Service."˜

All documents filed with the Immigration Court must be in the English language or accompanied by a certified English translation. See 8 C.F.R. §§ 1003.33, 1003.23(b)(1)(i).˜

FORM OF PROCEEDINGS

An Immigration Judge may conduct removal hearings:

- in person
- by video conference
- by telephone conference, except that evidentiary hearings on the merits may only be held by telephone if the respondent consents after being notified of the right to proceed in person or by video conference

CONDUCT OF HEARING

While the Immigration Judge decides how each hearing is conducted, parties should be prepared to:

- make an opening statement
- raise any objections to the other party's evidence
- present witnesses and evidence on all issues
- cross-examine opposing witnesses and object to testimony
- make a closing statement˜

All witnesses, including the respondent if he or she testifies, are placed under oath by the Immigration Judge before testifying.˜

INTERPRETATION

Interpreters are provided at government expense to individuals whose command of the English language is inadequate to fully understand and participate in removal proceedings. In general, the Immigration Court endeavors to accommodate the language needs of all respondents and witnesses. The Immigration Court will arrange

for an interpreter both during the individual calendar hearing and, if necessary, the master calendar hearing. See 8 C.F.R. § 1003.22, Chapter 4.15(o) (Other requests).

The Immigration Court uses staff interpreters employed by the Immigration Court, contract interpreters, and telephonic interpretation services. Staff interpreters take an oath to interpret and translate accurately at the time they are employed by the Department of Justice. Contract interpreters take an oath to interpret and translate accurately in court. See 8 C.F.R. § 1003.22.˜

Record of Proceedings

Immigration Court hearings are recorded digitally. If a party is requesting a copy of a hearing that was recorded digitally, the court will provide the compact disc.˜

Decisions

After the parties have presented their cases, the Immigration Judge renders a decision. The Immigration Judge may render an oral decision at the hearing's conclusion, or he or she may render an oral or written decision on a later date. See Chapter 1.5(c) (Immigration Judge decisions). If the decision is rendered orally, the parties are given a signed summary order from the court.˜

Special Issues Regarding Minor Respondents

Immigration Courts do their best to schedule cases involving unaccompanied juveniles on a separate docket or at a fixed time in the week or month, separate and apart from adult cases.˜

An Immigration Judge cannot appoint a legal representative or a guardian ad litem for unaccompanied juveniles. However, the Executive Office for Immigration Review encourages the use of pro bono legal resources for unaccompanied juveniles.˜

Juveniles are encouraged, under the supervision of court personnel, to explore an empty courtroom, sit in all locations, and practice answering simple questions before the hearing. The Department of Health and Human Services, Office of Refugee Resettlement, provides orientation for most juveniles in their native languages, explaining Immigration Court proceedings.˜

Immigration Judges make reasonable modifications for juveniles. These may include allowing juveniles to bring pillows, or toys, permitting juveniles to sit with an adult companion, and permitting juveniles to testify outside the witness stand next to a trusted adult or friend.˜

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Immigration Judge Benchbook (2017)

The rules of evidence applicable to criminal proceedings do not apply to removal hearings. The Supreme Court in United States ex rel. Bilokumsky v. Tod, 236 U.S. 149 (1923), noted that a failure to abide by judicial rules of evidence does not render a removal hearing unfair.˜

Evidence is admissible when it is probative and its admission would not be so fundamentally unfair as to deprive the alien of due process.˜

Evidence during a removal proceeding is controlled by the Code of Federal Regulations; any type of evidence is admissible so long as it is material and relevant to the issues before the hearing. 8 C.F.R. § 1240.7(a).˜

Since the rules of evidence are not applicable and admissibility is favored, the pertinent question regarding most evidence in immigration proceedings is not whether or not it is admissible, but what weight the fact finder should accord it in adjudicating the issues on which the evidence has been submitted.˜

The Federal Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c).˜ Hearsay evidence is admissible in deportation proceedings unless its use is fundamentally unfair.˜

Types of hearsay evidence regularly admitted against aliens include: country conditions reports; documents such as birth records, marriage certificates, or conviction records; ex parte affidavits and other statements of witnesses; and out- of-court admissions of the alien˜.

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10.6 Adjusted 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).

10.7 Board of Immigration Appeals

BIA Practice Manual (2020)

FUNCTION OF THE BOARD

The Board of Immigration Appeals is the highest administrative body for interpreting and applying immigration laws. The Board is responsible for applying the immigration and nationality laws uniformly throughout the United States. Accordingly, the Board has been given nationwide jurisdiction to review the orders of Immigration Judges and certain decisions made by the Department of Homeland Security (DHS), and to provide guidance to the Immigration Judges, DHS, and others, through published decisions. The Board is tasked with resolving the questions before it in a manner that is timely, impartial, and consistent with the Immigration and Nationality Act and regulations, and to provide clear and uniform guidance to Immigrations Judges, DHS, and the general public on the proper interpretation and administration of the Immigration and Nationality Act and its implementing regulations. 8 C.F.R. § 1003.1(d)(1).˜

COMPOSITION OF THE BOARD

The Board consists of 21 Board Members, including a Chairman and up to two Vice Chairmen. Under the direction of the Chairman, the Board uses a case management system to screen all cases and manage its caseload. 8 C.F.R. § 1003.1(e). Under this system, the Board adjudicates cases in one of three ways:

Individual. – The majority of cases at the Board are adjudicated by a single Board Member. In general, a single Board Member decides the case unless the case falls into one of six categories that require a decision by a panel of three Board Members. These categories are:

- the need to settle inconsistencies among the rulings of different immigration judges
- the need to establish a precedent construing the meaning of laws, regulations, or procedures
- the need to review a decision by an Immigration Judge or DHS that is not in conformity with the law or with applicable precedents
- the need to resolve a case or controversy of major national import
- the need to review a clearly erroneous factual determination by an Immigration Judge
- the need to reverse the decision of an Immigration Judge or DHS in a final order, other than nondiscretionary dispositions.˜

Panel. – Cases not suitable for consideration by a single Board Member are adjudicated by a panel consisting of three Board Members. The panel of three Board Members renders decisions by majority vote. Cases are assigned to specific panels pursuant to the Chairman's administrative plan. The Chairman may change the composition of the sitting panels and may reassign Board Members from time to time.

En Banc. – The Board may, by majority vote or by direction of the Chairman, assign a case or group of cases for full en banc consideration. 8 C.F.R. § 1003.1(a)(5). By regulation, en banc proceedings are not favored.˜

SCOPE OF REVIEW

Questions of fact. – By regulation, the Board applies a clearly erroneous standard to an Immigration Judge's findings of fact, including credibility findings. See 8 C.F.R. § 1003.1(d)(3)(i).

Questions of law. – The Board applies a de novo standard of review to questions of law, discretion, judgment, and other issues. See 8 C.F.R. § 1003.1(d)(3)(ii).˜

ORAL ARGUMENT˜

Oral argument is held at the discretion of the Board and is rarely granted.˜ Oral argument is conducted on site at the Board in Falls Church, Virginia.˜

SUMMARY AFFIRMANCE

Under certain circumstances, the Board may affirm, without opinion, the decision of an Immigration Judge or DHS officer. The Board may affirm a decision if all of these conditions are met:

- the Immigration Judge or DHS decision reached the correct result
- any errors in the decision were harmless or nonmaterial
- either (a) the issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of a precedent to a novel factual situation, or (b) the factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion

See 8 C.F.R § 1003.1(e)(4). By regulation, a summary affirmance order reads: "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. See 8 C.F.R. 3.1(e)(4)." 8 C.F.R. § 1003.1(e)(4)(ii).

A summary affirmance order will not contain further explanation or reasoning. Such an order approves the result reached by the Immigration Judge or DHS. Summary affirmance does not mean that the Board approves of all the reasoning of that decision, but it does reflect that any errors in the decision were considered harmless or not material to the outcome of the case. See 8 C.F.R. § 1003.1(e)(4).˜

SUMMARY DISMISSAL˜

Under certain circumstances, the Board is authorized to dismiss an appeal without reaching its merits. See 8 C.F.R. § 1003.1(d)(2)(i).

Failure to specify grounds for appeal. – When a party takes an appeal, the Notice of Appeal˜ must identify the reasons for the appeal. A party should be specific and detailed in stating the grounds of the appeal, specifically identifying the finding of fact, the conclusions of law, or both, that are being challenged. 8 C.F.R. § 1003.3(b). An appeal, or any portion of an appeal, may be summarily dismissed if the Notice of Appeal˜, and any brief or attachment, fails to adequately inform the Board of the specific reasons for the appeal. 8 C.F.R. § 1003.1(d)(2)(i)(A).

Failure to file a brief. – An appeal may be summarily dismissed if the Notice of Appeal˜ indicates that a brief or statement will be filed in support of the appeal, but no brief, statement, or explanation for not filing a brief is filed within the briefing deadline. 8 C.F.R. § 1003.1(d)(2)(i)(E).˜

Other grounds for summary dismissal. – An appeal can also be summarily dismissed for the following reasons:

- the appeal is based on a finding of fact or conclusion of law that has already been conceded by the appealing party

- the appeal is from an order granting the relief requested the appeal is filed for an improper purpose
- the appeal does not fall within the Board's jurisdiction the appeal is untimely
- the appeal is barred by an affirmative waiver of the right of appeal
- the appeal fails to meet essential statutory or regulatory requirements the appeal is expressly prohibited by statute or regulation

See 8 C.F.R. § 1003.1(d)(2)(i).˜

Publication

Published decisions. – Published decisions are binding on the parties to the decision. Published decisions also constitute precedent that binds the Board, the Immigration Courts, and DHS. The vast majority of the Board's decisions are unpublished, but the Board periodically selects cases to be published. See 8 C.F.R. § 1003.1(g).˜

Decisions selected for publication meet one or more of several criteria, including but not limited to: the resolution of an issue of first impression; alteration, modification, or clarification of an existing rule of law; reaffirmation of an existing rule of law; resolution of a conflict of authority; and discussion of an issue of significant public interest.˜

Precedent decisions are collected and published in bound volumes of *Administrative Decisions Under Immigration and Nationality Laws of the United States* ("I&N Decisions").˜

Unpublished decisions. – Unpublished decisions are binding on the parties to the decision but are *not* considered precedent for unrelated cases.

Stays

A stay prevents DHS from executing an order of removal, deportation, or exclusion. Stays are automatic in some instances and discretionary in others.˜

Automatic Stays.˜ There are certain circumstances when an Immigration Judge's order of removal is automatically stayed pending further action on an appeal or motion. When a stay is automatic, the Immigration Courts and the Board do not issue a written order on the stay.˜

After an Immigration Judge issues a final decision on the merits of a case (not including bond or custody, credible fear, claimed status review, or reasonable fear determinations), the order is automatically stayed for the 30-day period for filing an

appeal with the Board. However, the order is not stayed if the losing party waived the right to appeal. 8 C.F.R. § 1003.6(a).˜

If a party appeals an Immigration Judge's decision on the merits of the case (not including bond and custody determinations) to the Board during the appeal period, the order of removal is automatically stayed during the Board's adjudication of the appeal. 8 C.F.R. § 1003.6(a). The stay remains in effect until the Board renders a final decision in the case.˜

Discretionary Stays.˜ In most cases, the Board entertains stays only when there is an appeal from an Immigration Judge's denial of a motion to reopen removal proceedings or a motion to reopen or reconsider a prior Board decision pending before the Board.

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10.8 Judicial Review

EOUSA, OLE, Immigration Law (2005)

All judicial review of exclusion, deportation, and removal orders must take place in the court of appeals for the judicial circuit in which an alien's administrative proceedings were completed. All aliens are required to file their review petitions within thirty days of an administrative final order, and the filing of a review petition no longer automatically stays the execution of a final order in the case of any alien.˜ The IIRIRA permanent provisions˜ preclude judicial review of discretionary judgments regarding these forms of relief, and further specifically preclude review "any other decision or action of the Attorney General ... the authority for which is specified ... to be in the discretion of the Attorney General ... other than the granting of [asylum] under section 208(a)." INA§ 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B).˜

IIRIRA further limited the jurisdiction of courts by providing in INA § 242(g), 8 U.S.C. § 1252(g), that no court shall review the Attorney General's decision "to commence proceedings, adjudicate cases, or execute [a final order of exclusion, deportation or removal]" except as provided in INA § 106(a) and INA § 242, 8 U.S.C. § 1252. The Supreme Court has concluded that, rather than being a general bar to jurisdiction, INA § 242(g), 8 U.S.C. § 1252(g), serves to limit review in district court in three discrete areas by providing that "'no deferred action' decisions and similar discretionary determinations" are reviewable, if at all, only in the court of appeals.˜ The Court expressly cited as an example a case where an alien seeks a stay of deportation in district court.˜

[In addition,] Congress took significant steps˜ to remove access to the courts for criminal aliens in the AEDPA and IIRIRA. Under both statutes, judicial review of deportation, exclusion, and removal orders generally is unavailable for aliens convicted of serious crimes. Crimes precluding judicial review include aggravated felonies, two or more crimes involving moral turpitude, drug offenses, firearms offenses, and certain miscellaneous offenses such as treason and sabotage. See AEDPA § 440(a), IIRIRA §§ 306(a), 309(c)(4)(G).

The foregoing bars to judicial review do not completely eliminate all judicial review. The courts of appeals have almost universally agreed that the courts retain "jurisdiction to determine jurisdiction"-that is, the courts retain the authority to ascertain whether the conditions precluding jurisdiction actually exist (i.e, that the petitioner is an alien who is actually removable for a criminal ground).˜

Following enactment of the AEDPA and IIRIRA jurisdictional limitations for criminal aliens, many aliens filed habeas corpus petitions in district courts alleging that AEDPA and IIRIRA have not limited the availability or scope of habeas corpus under 28 U.S.C. § 2241 for criminal alien offenders seeking to challenge their removal, deportation, and exclusion orders.˜

On May 11, 2005, the President signed into law the REAL ID Act of 2005. Section 106(a)(1)(A)(iii) added a new subsection (a)(2)(0) to INA § 242, 8 U.S.C. § 1252, that codified the government's position that district courts should not have jurisdiction over habeas cases brought by noncitizens challenging their removal orders. INA § 242(a)(2)(0) [now] states: "(D) JUDICIAL REVIEW OF CERTAIN LEGAL CLAIMS-Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." REAL ID Act § 106(a)(1)(A)(iii). Thus, it is now clear that the courts of appeals have exclusive jurisdiction to consider constitutional claims and questions of law raised in petitions for review.

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10.9 Attorney General Decisions

Immigration Court Practice Manual (2018)

Decisions of Immigration Judges are reviewable by the Board of Immigration Appeals. The Board's decisions may be referred to the Attorney General for review.

Referral may occur at the Attorney General's request, or at the request of the Department of Homeland Security or the Board. The Attorney General may vacate any decision of the Board and issue his or her own decision in its place. See 8 C.F.R. § 1003.1(d)(1)(i), (h). Decisions of the Attorney General may be published as precedent decisions. The Attorney General's precedent decisions appear with the Board's precedent decisions in *Administrative Decisions Under Immigration and Nationality Law of the United States* ("I&N Decisions").

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10.10 Other Forms of Removal

Chapter 10 has, up until now, focused on judicial removal as outlined in INA §§ 239, 240, 8 U.S.C. §§ 1229, 1229a. That is, it is focused on removal where a noncitizen appears in court before an immigration judge for a hearing on the merits of removal. There are, however, other forms of removal that do not involve a hearing before an immigration judge.

EXPEDITED REMOVAL

Section 7.7 explained the process of expedited removal provided for at INA § 235. This process applies at the border to noncitizens seeking entry into the United States. If the noncitizen is found either to be engaged in misrepresentation or does not have proper entry documents (and assuming they are not seeking asylum), then they can be summarily removed through the expedited removal process without seeing an immigration judge.

ADMINISTRATIVE REMOVAL

INA § 238(b), 8 U.S.C. § 1228(b), provides that a noncitizen who has been convicted of an aggravated felony and who is not a lawful permanent resident, that is, a nonimmigrant, may be subject to an administrative removal order. This means that a nonimmigrant convicted of an aggravated felony can be removed pursuant to streamlined removal procedures that authorize DHS to remove such noncitizens without a hearing before an IJ.

Although the noncitizen subject to administrative removal is not entitled to a hearing before an immigration judge, the alien is entitled to "reasonable" notice of the charges and an opportunity to inspect the evidence and rebut the charges; counsel, at no expense to the government; a determination that the foreign national is in fact the person named in the notice; and a record of the proceedings. INA § 238(b)(4).

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 reentered the United States. See 8 C.F.R. § 241.8. This means that a previously removed noncitizen will be removed for the second time without a new hearing before an IJ.

A reinstatement order is not subject to review by an immigration judge. Noncitizens subject to reinstatement are ineligible for all forms of relief from removal except for withholding of removal (see section 11.37) and claims based on the Convention Against Torture (see section 11.38).

Chapter Eleven: 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 currently living 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: "The term 'refugee' means˜ any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion˜."

This chapter begins with a brief history of U.S. law regarding refugees and asylees (section 11.1). Next, it provides background on refugee admissions including the process by which refugees are identified and screened for admission (section 11.2) and the numbers of refugees admitted yearly into the United States (section 11.3). The remainder of the chapter focuses on asylum, walking through the asylum process (section 11.4), the elements of asylum (sections 11.5-11.27), and bars to asylum (sections 11.28-11.36). Finally, we cover alternative forms of humanitarian relief including withholding of removal (section 11.37), the Convention Against Torture (section 11.38), and temporary protected status (section 11.39).

11.1 The History of U.S. Refugee Law

The United States did not always welcome refugees. The tragic story of the M.S. St. Louis illuminates the United States' attitude towards Jewish refugees during World War II.

70th Anniversary of the Tragedy of the M.S. St. Louis, 155 Cong. Rec. S5646-01 (2009)

The story starts on May 13, 1939, when the M.S. St. Louis sailed from Hamburg, Germany, to Havana, Cuba with 937 passengers, mostly Jewish refugees, searching for freedom and safety. State-supported antisemitism including violent pogroms, expulsion from public schools and services, and arrest and imprisonment solely because of Jewish heritage forced those passengers to leave their homes.

When the M.S. St. Louis arrived in Havana, the Cuban Government allowed only 28 passengers to disembark. Corruption and political maneuvering within the Cuban Government invalidated the transit visas of the other passengers. Before returning to Europe, the ship sailed toward Miami hoping for a solution. The ship sailed so close to Florida that the passengers could see the lights of Miami. One survivor remembers his father commenting that "Florida's golden shores, so near, might as well be 4,000 miles away for all the good it did them."

The U.S. Immigration and Nationality Act of 1924 strictly limited the number of immigrants admitted to the United States each year and in 1939 the waiting list for German-Austrian immigration was several years long. While the press and citizens were largely sympathetic to the passengers' plight, no extraordinary measures were taken to permit the refugees to enter the United States. The passengers were told that they must "await their turns on the waiting list and qualify for and obtain immigration visas."

On June 6, 1939, the M.S. St. Louis sailed back to Europe with nearly all of its original passengers. The passengers obtained refuge in Great Britain, the Netherlands, Belgium, and France. World War II started 3 months later and those countries, with the exception of Great Britain, fell to Nazi occupation. Two hundred and fifty-four of those passengers died during the Holocaust and many others suffered under Nazi persecution and in concentration camps.

DHS, Refugees and Asylees: 2019

[It took a long time for the United States to codify refugee protections into law.] The Displaced Persons Act of 1948 was passed to address the migration crisis in Europe resulting from World War II, wherein millions of people had been forcibly displaced from their home countries and could not return. By 1952, the United States had

admitted over 400,000 displaced people under the Act. [However, the Immigration and Nationality Act (INA) of 1952, as originally enacted, did not contain any language on asylum.] The United States extended its commitments to refugee resettlement through legislation including the Refugee Relief Act of 1953 and the Fair Share Refugee Act of 1960. The United States also used the Attorney General's parole authority to bring large groups of persons into the country for humanitarian reasons, including over 38,000 Hungarian nationals beginning in 1956 and over a million Indochinese beginning in 1975.

Obligations of the United States under the 1967 United Nations Protocol relating to the Status of Refugees (to which the United States acceded in 1968) generally prohibit the United States from returning a refugee to a country where their life or freedom would be threatened on account of a protected ground. The Refugee Act of 1980 amended the INA to bring U.S. law into greater accord with U.S. obligations under the Protocol, which specifies a geographically and politically neutral refugee definition. The Act also established formal refugee and asylum programs.

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11.2 The Refugee Process

CRS, Refugee Admissions and Resettlement Policy (2018)

The admission of refugees to the United States and their resettlement here are authorized by the Immigration and Nationality Act (INA), as amended by the Refugee Act of 1980.˜ The intent of the legislation was to end an ad hoc approach to refugee admissions and resettlement that had characterized U.S. refugee policy since World War II.

Under the INA, a *refugee* is a person who is outside his or her country and who is unable or unwilling to return 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 Bureau of Population, Refugees, and Migration (PRM) of the Department of State (DOS) coordinates and manages the U.S. refugee program, and U.S. Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (DHS) makes final determinations about eligibility for admission. Refugees are processed and admitted to the United States from abroad.˜ After one year in refugee status in the United States, refugees are required to apply to adjust to lawful permanent resident (LPR) status.˜

REFUGEE PROCESSING PRIORITIES

PRM is responsible for processing refugee cases. Generally, it arranges for a nongovernmental organization (NGO), an international organization, or U.S. embassy contractors to manage a Resettlement Support Center (RSC) that assists in refugee processing. RSC staff conduct pre-screening interviews of prospective refugees and prepare cases for submission to USCIS, which handles refugee adjudications. Refugee processing is conducted through a system of three priorities for admission. These priorities provide access to U.S. resettlement consideration, and are separate and distinct from whether such persons qualify for refugee status.

Priority 1 covers refugees for whom resettlement seems to be the appropriate durable solution, who are referred to the U.S. refugee program by the United Nations High Commissioner for Refugees (UNHCR), a U.S. embassy, or a designated NGO. Such persons often have compelling protection needs, and may be in danger of attack or of being returned to the country they fled. All nationalities are eligible for this priority.

Priority 2 covers groups of special humanitarian concern to the United States. It includes specific groups that may be defined by their nationalities, clans, ethnicities, or other characteristics. Unlike Priority 1 cases, individuals falling under Priority 2 are able to access the U.S. refugee program without a UNHCR, embassy, or NGO referral.˜

Priority 3 covers family reunification cases. Refugee applications under Priority 3 are based upon an *affidavit of relationship* (AOR) filed by an eligible relative in the United States. The Priority 3 program is limited to designated nationalities. For FY2019, Priority 3 processing is available to nationals of 15 countries.˜ Individuals falling under Priority 3, like those falling under Priority 2, are able to access the U.S. refugee program without a UNHCR, embassy, or NGO referral.˜

REFUGEE ADJUDICATIONS

The Secretary of DHS has discretionary authority to admit refugees to the United States. USCIS is responsible for adjudicating refugee cases. To be eligible for admission to the United States as a refugee, an individual must meet the INA definition of a refugee, not be firmly resettled in another country, be determined to be of special humanitarian concern to the United States, and be admissible to the United States.˜ [T]hese adjudications are handled by USCIS officers in the Refugee Corps.

ADMISSIBILITY OF REFUGEES

To be admitted to the United States, a prospective refugee must be admissible under immigration law. The INA sets forth various grounds of inadmissibility, which

include health-related grounds, security-related grounds, public charge (i.e., indigence), and lack of proper documentation.˜ Some inadmissibility grounds (public charge, lack of proper documentation) are not applicable to refugees. Others can be waived for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.˜

SECURITY SCREENING

To be admissible to the United States under the INA security-related grounds of inadmissibility discussed above, a prospective refugee must clear all required security checks. According to an August 2018 USCIS fact sheet on refugee security screening: "USCIS has the sole discretion to approve an application for refugee status and only does so after it has obtained and cleared the results of all required security checks for the principal applicant, as well as any derivative family members included on their case. Just as DOS commonly denies visas, USCIS also routinely denies refugee cases, including for reasons of national security."˜

The fact sheet summarizes the security screening process, as follows: "[U.S. Refugee Admissions Program] screening includes both biometric and biographic checks, which occur at multiple stages throughout the process, including immediately after the preliminary RSC interview, before a refugee's departure to the United States, and on arrival in the U.S. at a port of entry."˜

LAUTENBERG AMENDMENT AND SPECTER AMENDMENT

The "Lautenberg Amendment"˜ was originally enacted as part of the FY1990 Foreign Operations Appropriations Act. It required the Attorney General to designate categories of former Soviet and Indochinese nationals for whom less evidence would be needed to prove refugee status, and provided for adjustment to permanent resident status of certain Soviet and Indochinese nationals granted parole after being denied refugee status.˜ To be eligible to apply for refugee status under the special provision, an individual had to have close family in the United States. Applicants under the Lautenberg standard were required to prove that they were members of a protected category with a credible, but not necessarily individual, fear of persecution. By contrast, the INA requires prospective refugees to establish a well-founded fear of persecution on an individual basis.

The Lautenberg Amendment has been regularly extended in appropriations acts[.]˜

The Consolidated Appropriations Act, 2004, in addition to extending the amendment through FY2004, amended the Lautenberg Amendment to add a new provision known as the "Specter Amendment."˜ The Specter Amendment required the

designation of categories of Iranian nationals, specifically religious minorities, for whom less evidence would be needed to prove refugee status.˜

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11.3 Refugee Numbers

CRS, Global Refugee Resettlement: Selected Issues and Questions (2021)

The U.N. Office for the Coordination of Humanitarian Affairs anticipates that in 2021 more than 235 million people worldwide will require humanitarian assistance and protection due to conflict and disaster. The U.N. High Commissioner for Refugees (UNHCR) reported that at the end of 2019 (latest data available) more than 79.5 million people were forcibly displaced worldwide due to armed conflict, widespread or indiscriminate violence, or human rights violations. Those displaced included 26 million refugees, 4.2 million asylum seekers, 45.7 million Internally Displaced Persons (IDPs) and 3.6 million Venezuelans displaced abroad. The United States is the single largest donor, consistently providing nearly one-third (more than $9.5 billion in FY2020) of total humanitarian and emergency food assistance through global accounts.˜

An average of 30 countries, including the United States, annually take part in UNHCR's worldwide resettlement program. The United States is one of the main recipients of UNHCR referrals and the world's top resettlement country. In 2016, UNHCR submitted 163,206 individuals for resettlement, with 108,197 referrals to the United States. In 2017, UNHCR submitted 75,188 individuals for resettlement across 35 countries, including 26,782 referrals to the United States. In 2018, UNHCR submitted 81,337 individuals for resettlement across 29 countries, with 29,026 referrals to the United States. In 2019, UNHCR submitted 81,671 individuals across 29 countries, with 24,810 referrals to the United States. In 2020, UNHCR submitted 39,522 individuals for resettlement, with 2,081 referrals to the United States. The U.S. worldwide refugee admissions ceiling has varied in recent fiscal years: 70,000 (FY2015); 85,000 (FY2016); 110,000 (FY2017); 45,000 (FY2018); 30,000 (FY2019); 18,000 (FY2020); and 15,000 (FY2021). On May 3, 2021, the Biden Administration raised the refugee admissions ceiling to 62,500 for the remainder of FY2021. [The refugee admissions ceiling was set at 125,000 for both FY2022 and FY2023.]

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CRS, Refugee Admissions and Resettlement Policy (2018)

By law, the annual number of refugee admissions and the allocation of these numbers by region of the world are set by the President after consultation with Congress.˜ Each year, the President submits a report to Congress, known as the *consultation document*, which contains the Administration's proposed worldwide refugee ceiling and regional allocations for the upcoming fiscal year.˜ Following congressional consultations on the Administration's proposal, the President issues a Presidential Determination setting the refugee numbers for that year.˜

Refugee Admission Ceilings and Regional Allocations, FY2014-2019

Region	FY2014	FY2015	FY2016	FY2017	FY2018	FY2019
Africa	17,500	20,400	27,000	35,000	19,000	11,000
East Asia	14,700	17,300	14,000	12,000	5,000	4,000
Europe and Central Asia	1,000	2,300	4,000	4,000	2,000	3,000
Latin America/Caribbean	4,300	2,300	1,500	5,000	1,500	3,000
Near East/South Asia	32,500	27,700	38,000	40,000	17,500	9,000
Unallocated	-	-	-	14,000	-	-
Total ceilings	70,000	70,000	85,000	110,000	45,000	30,000
Actual admissions	69,987	69,933	84,994	53,716	22,491	N/A

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11.4 The Asylum Process

CRS, Immigration: U.S. Asylum Policy (2019)

WHAT IS ASYLUM?˜

The Immigration and Nationality Act (INA) of 1952, as amended, provides for the granting of asylum to an alien˜ who applies for such relief in accordance with applicable requirements and is determined to be a refugee.˜ The INA defines a refugee, in general, as a person who is outside his or her country of nationality and is unable or unwilling to

return to, or to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution based on one of five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion.˜

The INA distinguishes between applicants for refugee status and applicants for asylum by their physical location. Refugee applicants are outside the United States, while applicants for asylum are physically present in the United States or at a land border or port of entry.˜ After one year as a refugee or asylee (a person granted asylum), an individual can apply to be become a U.S. lawful permanent resident (LPR).˜

ASYLUM APPLICATION PROCESS

Applications for asylum are either defensive or affirmative. A different set of procedures applies to each type of application.

AFFIRMATIVE ASYLUM

An asylum application is affirmative if an alien who is physically present in the United States (and not in removal proceedings) submits an application for asylum to DHS's USCIS. An alien may file an affirmative asylum application regardless of his or her immigration status, subject to applicable restrictions. There is no fee to apply for asylum.˜

The INA prohibits the granting of asylum until the identity of the asylum applicant has been checked against appropriate records and databases to determine if he or she is inadmissible or deportable, or ineligible for asylum.˜ As part of the affirmative asylum process, applicants are scheduled for fingerprinting appointments. The fingerprints are used to confirm the applicant's identity and perform background and security checks.

Asylum applicants are interviewed by USCIS asylum officers. In scheduling asylum interviews, the USCIS Asylum Division is currently giving priority to applications that have been pending for 21 days or less. According to USCIS, "Giving priority to recent filings allows USCIS to promptly place such individuals into removal proceedings, which reduces the incentive to file for asylum solely to obtain employment authorization."˜ Under DHS regulations, the asylum interview is to be conducted in "a nonadversarial manner." The applicant may bring counsel or a representative to the interview, present witnesses, and submit other evidence. After the interview, the applicant or the applicant's representative can make a statement.˜

An asylum officer's decision on an application is reviewed by a supervisory asylum officer, who may refer the case for further review.˜ If an asylum officer ultimately

determines that an applicant is eligible for asylum, the applicant receives a letter and form documenting the grant of asylum.˜

If the asylum officer determines that an applicant is not eligible for asylum and the applicant has immigrant status, nonimmigrant status, or temporary protected status (TPS),˜ the asylum officer denies the application.˜ If the asylum officer determines than an applicant is not eligible for asylum and the applicant appears to be inadmissible or deportable under the INA, however, DHS regulations direct the officer to refer the case to an immigration judge for adjudication in removal proceedings.˜ In those proceedings, the immigration judge evaluates the asylum claim independently as a *defensive* application for asylum.

Defensive Asylum

An asylum application is defensive when the applicant is in standard removal proceedings in immigration court˜ and requests asylum as a defense against removal.˜

There are different ways that an alien can be placed in standard removal proceedings. An alien who is living in the United States can be charged by DHS with violating immigration law. In such a case, DHS initiates removal proceedings when it serves the alien with a Notice to Appear before an immigration judge.

Another way to be placed in standard removal proceedings relates to the statutory expedited removal and credible fear screening provisions˜. Under the INA, an individual who is determined by DHS to be inadmissible to the United States because he or she lacks proper documentation or has committed fraud or willful misrepresentation of facts to obtain documentation or another immigration benefit (and thus is subject to expedited removal) and expresses the intent to apply for asylum or a fear of persecution is to be interviewed by an asylum officer to determine if he or she has a credible fear of persecution. Credible fear of persecution means that “there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum.”˜ If the alien is found to have a credible fear, the asylum officer is to refer the case to an immigration judge for a full hearing on the asylum request during removal proceedings.˜

During a removal proceeding, an attorney from DHS’s Immigration and Customs Enforcement (ICE) presents the government’s case for removing the alien, the alien or their representative may present evidence on the alien’s behalf and cross examine witnesses, and an immigration judge from EOIR determines whether the alien should

be removed. An immigration judge's removal decision is generally subject to administrative and judicial review.˜

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USCIS, Fact Sheet: Implementation of the Credible Fear and Asylum Processing Interim Final Rule (2022)

On May 31, 2022, the Department of Homeland Security (DHS) and Department of Justice (DOJ) will begin implementing a rule to ensure that those subject to expedited removal who are eligible for asylum are granted relief quickly, and those who are not are promptly removed. Due to existing court backlogs, the process for hearing and deciding these asylum cases currently takes several years on average. By establishing a process for the efficient and thorough review of asylum claims, the new rule will help reduce existing immigration court backlogs and will shorten the process to several months.˜

SCOPE˜

[T]he rule "applies prospectively and only to adults and families who are placed in expedited removal proceedings and indicate an intention to apply for asylum, a fear of persecution or torture, or a fear of return to their home country, after the rule's effective date." The rule does not apply to unaccompanied children.˜

PROCESSING

Below is a step-by-step description of how the process will work˜:

Placement into Expedited Removal: Individuals encountered at the border by Customs and Border Protection (CBP) who are placed into expedited removal and who claim fear will be transferred to ICE detention, consistent with current procedure.

Credible Fear Interview: Individuals will receive their credible fear interview while in detention, consistent with current procedure. DHS and DOJ are working to provide individuals with an opportunity to access Legal Orientation Program providers before their credible fear interview. If the credible fear interview results in a negative determination, the individual can request IJ review of the decision, consistent with current procedure. USCIS also may reconsider, in its discretion, a negative credible fear determination that an IJ has already concurred with, if the request is submitted within seven days of the IJ's concurrence or before removal, whichever comes first.

Referral for an Asylum Merits Interview (AMI): During phased implementation, individuals who are placed in expedited removal, and who receive a positive credible fear determination, and whom ICE determines on a case-by-case basis that it is appropriate

to release may be referred to USCIS for a non-adversarial AMI. The individual must indicate an intent to reside in one of six destination cities where AMIs will take place during phased implementation (Boston, Los Angeles, Miami, New York, Newark, and San Francisco). Individuals will be notified they are being placed into the AMI process when they are served with their positive credible fear determination. The record of the positive credible fear determination will constitute the asylum application, and the service date of the positive credible fear determination will become the filing date of the asylum application. The AMI will take place no earlier than 21 days and no later than 45 days after the positive credible fear determination.

Individuals who are released from detention during this time period will be placed in alternatives to detention (ATD) as necessary to ensure compliance with their reporting, interview, and hearing obligations.

Individuals will have until seven days (if submitting in person) or 10 days (if submitting by mail) before the AMI to amend or correct the record resulting from the credible fear interview and submit additional evidence. If an individual fails to appear at the AMI, appropriate enforcement action will be taken.

If USCIS finds the individual eligible for asylum, the individual will receive a grant letter informing them of applicable benefits and related procedures.

Streamlined Removal Proceedings: If USCIS does not grant asylum, the agency will refer the case to EOIR for streamlined removal proceedings under [INA § 240]. The asylum officer will include an assessment as to whether the applicant demonstrated eligibility for withholding or deferral of removal based on the evidence presented before USCIS.

There will be dockets for these proceedings available in the six cities listed above. During these proceedings, the IJ will review the noncitizen's asylum application and supporting evidence and determine whether asylum should be granted.˜

[I]f the IJ also does not grant asylum and issues a final removal order, the IJ may confirm the USCIS asylum officer's determination that the individual is eligible for withholding or deferral of removal. If the asylum officer did not find the individual eligible for withholding or deferral of removal, the IJ will further review those claims and make an independent assessment whether the applicant is eligible. If the IJ concludes that the individual is ineligible for relief or protection, they will issue a removal order, and the individual will be expeditiously removed from the United States.

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11.5 Asylum Elements: Persecution

INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), provides: "The term "refugee" means˜ any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of **persecution** or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion˜."

Ninth Circuit Immigration Outline (2020)

"The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution." 8 C.F.R. § 1208.13(b). More specifically, "the applicant can show past persecution on account of a protected ground. Once past persecution is demonstrated, then fear of future persecution is presumed, and the burden shifts to the government to show, by a preponderance of the evidence, that there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution, or [t]he applicant could avoid future persecution by relocating to another part of the applicant's country. An applicant may also qualify for asylum by actually showing a well-founded fear of future persecution, again on account of a protected ground."˜

The term "persecution" is not defined by the Immigration and Nationality Act. "Our caselaw characterizes persecution as an extreme concept, marked by the infliction of suffering or harm … in a way regarded as offensive."˜ Persecution covers a range of acts and harms, and "[t]he determination that actions rise to the level of persecution is very fact-dependent."˜ Minor disadvantages or trivial inconveniences do not rise to the level of persecution.˜

A subjective intent to harm or punish an applicant is not required for a finding of persecution.˜

"The hallmarks of persecutory conduct include, but are not limited to, the violation of bodily integrity and bodily autonomy."˜ Various forms of physical violence, including rape, torture, assault, and beatings, amount to persecution.˜ "[S]ome forms of physical violence are so extreme that even attempts to commit them constitute persecution.˜"

The court will "generally look at all of the surrounding circumstances to determine whether … threats are actually credible and rise to the level of persecution."˜ Threats of serious harm, particularly when combined with confrontation or other mistreatment,

may constitute persecution.˜ "Death threats alone can constitute persecution[.]"˜ "Threats on one's life, within a context of political and social turmoil or violence, have long been held sufficient to satisfy a petitioner's burden of showing an objective basis for fear of persecution.... What matters is whether the group making the threat has the will or the ability to carry it out."˜

Physical harm is not required for a finding of persecution.˜ "Persecution may be emotional or psychological, as well as physical."

Substantial economic deprivation that constitutes a threat to life or freedom may constitute persecution.˜ However, "mere economic disadvantage alone does not rise to the level of persecution."

Persecution generally "does not include mere discrimination, as offensive as it may be."˜ However, discrimination, in combination with other harms, may be sufficient to establish persecution.˜

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11.6 Asylum Elements: Prosecution as Persecution

Ninth Circuit Immigration Outline (2020)

Ordinary prosecution for criminal activity is generally not persecution.˜ "[W]here there is evidence of legitimate prosecutorial purpose, foreign authorities enjoy much latitude in vigorously enforcing their laws."˜

"Understanding that persecution may appear in the guise of prosecution, [the court has] carved out exceptions to the general rule that applicants avoiding prosecution for violations of criminal law are ineligible for asylum. Chief among these exceptions to the general rule are disproportionately severe punishment and pretextual prosecution."˜

[I]f the prosecution is motivated by a protected ground, and the punishment is sufficiently serious or disproportionate, the sanctions imposed could amount to persecution.˜ Additionally, "even if the government authorities' motivation for detaining and mistreating [an applicant] was partially for reasons of security, persecution in the absence of any legitimate criminal prosecution, conducted at least in part on account of political opinion, provides a proper basis for asylum and withholding of deportation, even if the persecution served intelligence gathering purposes."˜

"Criminal prosecution for illegal departure is generally not considered to be persecution."˜ However, an applicant may establish persecution where there is evidence

that departure control laws provide severe or disproportionate punishment, or label violators as defectors, traitors, or enemies of the government.˜

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11.7 Asylum Elements: Well-Founded Fear

INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), provides: "The term "refugee" means˜ any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a **well-founded fear of persecution** on account of race, religion, nationality, membership in a particular social group, or political opinion˜."

Ninth Circuit Immigration Outline (2020)

Even in the absence of past persecution, an applicant may be eligible for asylum based on a well-founded fear of future persecution. See 8 C.F.R. § 1208.13(b). "Absent evidence of past persecution, [an applicant] must establish a well-founded fear of future persecution by showing both a subjective fear of future persecution, as well as an objectively 'reasonable possibility' of persecution upon return to the country in question."˜ A well-founded fear must be subjectively genuine and objectively reasonable.˜ An applicant can demonstrate a well-founded fear of persecution if: (A) she has a fear of persecution in her country; (B) there is a reasonable possibility of suffering such persecution; and (C) she is unable or unwilling to return to that country because of such fear. See 8 C.F.R. § 1208.13(b)(2)(i). A "'well-founded fear' ... can only be given concrete meaning through a process of case-by-case adjudication."˜

The subjective prong of the well-founded fear test is satisfied by an applicant's credible testimony that he or she genuinely fears harm.˜ A fear of persecution need not be the applicant's only reason for leaving his country of origin.˜

The objective prong of the well-founded fear analysis can be satisfied in two different ways: "One way to satisfy the objective component is to prove persecution in the past, giving rise to a rebuttable presumption that a well-founded fear of future persecution exists. The second way is to show a good reason to fear future persecution by adducing credible, direct, and specific evidence in the record of facts that would support a reasonable fear of persecution. The objective requirement can be met by either through the production of specific documentary evidence or by credible and persuasive testimony."˜ "A well-founded fear does not require certainty of persecution or even a

probability of persecution."˜ "[E]ven a ten percent chance of persecution may establish a well-founded fear."˜

An applicant may demonstrate a well-founded fear by showing that he has been targeted for persecution.˜ Acts of violence against an applicant's family members and friends may establish a well-founded fear of persecution.˜ The violence must "create a pattern of persecution closely tied to the petitioner."˜

An applicant need not show that she will be singled out individually for persecution if: (A) The applicant establishes that there is a pattern or practice in his or her country … of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and (B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.˜

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11.8 Asylum Elements: Source of Persecution

INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), provides: "The term "refugee" means˜ any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is **unable or unwilling to avail himself or herself of the protection of, that country** because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion˜."

Ninth Circuit Immigration Outline (2020)

In order to qualify for asylum, the source of the persecution must be the government, a quasi-official group, or persons or groups that the government is unwilling or unable to control.˜ "[P]olice officers are the prototypical state actor for asylum purposes."˜

Affirmative state action is not necessary to establish a well-founded fear of persecution if the government is unable or unwilling to control the agents of persecution.˜ In cases of non-governmental persecution, "we consider whether an applicant reported the incidents to police, because in such cases a report of this nature may show governmental inability to control the actors."˜

"A government's inability or unwillingness to control violence by private parties can be established in other ways – for example, by demonstrating that a country's laws

or customs effectively deprive the petitioner of any meaningful recourse to governmental protection."~ "Willingness to control persecutors notwithstanding, authorities may nevertheless be 'powerless to stop' them because of a 'lack of … resources or because of the character or pervasiveness of the persecution.' … Conversely, authorities may simply be unwilling to control persecutors, where, for instance, they themselves harbor animus towards a protected group. … In other words, the question on this step is whether the government both 'could and would provide protection.'"~

"There is no exception to the asylum statute for violence from family members; if the government is unable or unwilling to control persecution, it matters not who inflicts it."~

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11.9 Asylum Elements: The Relocation Question

Ninth Circuit Immigration Outline (2020)

"The asylum regulation makes asylum unavailable if '[t]he applicant could avoid future persecution by relocating to another part of the applicant's country of nationality … and under all the circumstances, it would be reasonable to expect the applicant to do so.'"~

"When an asylum applicant has established that he suffered past persecution, the burden is on the government to show by a preponderance of the evidence that the applicant either no longer has a well-founded fear of persecution in the country of his nationality, or that he can reasonably relocate internally to an area of safety."~

"Relocation is generally not unreasonable solely because the country at large is subject to generalized violence."~ "Relocation analysis consists of two steps: (1) 'whether an applicant could relocate safely,' and (2) 'whether it would be reasonable to require the applicant to do so.' … For an applicant to be able to safely relocate internally, 'there must be an area of the country where he or she has no well-founded fear of persecution.'"~ "The reasonableness of internal relocation is determined by considering whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and family ties."~ This non-exhaustive list of factors "may, or may not, be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate." 8 C.F.R. § 1208.13(b)(3).~

Relocating to another part of the country does not mean living in hiding.˜

Where the persecutor is the government, "[i]t has never been thought that there are safe places within a nation" for the applicant to return.˜ "In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate." 8 C.F.R. § 1208.13(b)(3)(ii).

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11.10 Burden of Proof

Ninth Circuit Immigration Outline (2020)

An applicant bears the burden of establishing that he or she is eligible for asylum. 8 C.F.R. § 208.13(a)˜.

"An applicant alleging past persecution has the burden of establishing that (1) his treatment rises to the level of persecution; (2) the persecution was on account of one or more protected grounds; and (3) the persecution was committed by the government, or by forces that the government was unable or unwilling to control."˜

"If a noncitizen establishes past persecution, 'a rebuttable presumption of a well-founded fear arises, and the burden shifts to the government to demonstrate that there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear.'"˜

Pursuant to 8 C.F.R. § 1208.13(b)(1)(i) & (ii), the government may rebut the presumption of a well-founded fear by showing "by a preponderance of the evidence" that there has been a "fundamental change in circumstances such that the applicant no longer has a well-founded fear."˜ [For example, the government can establish that country conditions have changed so as to remove a well-founded fear of persecution.]

The IJ or BIA may grant asylum to a victim of past persecution, even where the government has rebutted the applicant's fear of future persecution, "if the asylum seeker establishes (1) 'compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution,' 8 C.F.R. § 1208.13(b)(1)(iii)(A), or (2) 'a reasonable possibility that he or she may suffer other serious harm upon removal to that country,' 8 C.F.R. § 1208.13(b)(1)(iii)(B)."˜

Under the standards established by [the REAL ID] Act, an applicant's testimony alone is sufficient to establish eligibility for asylum if it satisfies three requirements: the 'testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.'~ "If, however, the applicant's credible testimony alone is not sufficiently persuasive, 'the IJ must give the applicant notice of the corroboration that is required and an opportunity either to produce the requisite corroborative evidence or to explain why that evidence is not reasonably available.'"~

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11.11 Case: Matter of Acosta

Matter of Acosta

19 I. & N. Dec. 211 (Board of Immigration Appeals 1985)

In a decision dated December 22, 1983, the immigration judge found the respondent deportable~ for entering the United States without inspection, denied the respondent's application~ for a grant of asylum~, but granted the respondent the privilege of departing voluntarily in lieu of deportation. The respondent has appealed from that portion of the immigration judge's decision denying the application~ for asylum~. The appeal will be dismissed.

The respondent is a 36-year-old male native and citizen of El Salvador. In a deportation hearing held before an immigration judge~, the respondent conceded his deportability for entering the United States without inspection and accordingly was found deportable as charged. The respondent sought relief from deportation by applying for a discretionary grant of asylum pursuant to section 208 of the Act~. In an oral decision, the immigration judge denied the respondent's applications for~ relief finding that he had failed to meet his burden of proof~. It is this finding that the respondent has challenged on appeal.~

In order to be eligible for a grant of asylum, an alien must show he or she is a 'refugee' as defined by section 101(a)(42)(A) of the Act~. That definition includes the requirement that an alien must have 'a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.'~

THE EVIDENTIARY BURDENS OF PROOF AND PERSUASION~

Case law and the regulations have always made clear that it is the alien who bears the burden of proving that he would be subject to, or fears, persecution.~ However, to date our decisions have not articulated the burden of persuasion an alien must meet in

order to convince the trier-of-fact of the truth of the allegations that form the basis of the claim for asylum˜.

It is the general rule in both administrative and immigration law that the party charged with the burden of proof must establish the truth of his allegations by a preponderance of the evidence.˜ We see no reason to depart from this burden of persuasion when aliens seek asylum˜. Thus, in such cases we consider it to be incumbent upon an alien to establish the facts supporting his claim by a preponderance of the evidence.˜ In determining whether a preponderance of the evidence supports an alien's allegations, it is necessary to assess the credibility and the probative force of the evidence put forward by the alien.˜

In order to prove the facts underlying his application˜ for asylum˜, the respondent testified, and attested in an affidavit attached to his asylum application, to the following facts. In 1976 he, along with several other taxi drivers, founded COTAXI, a cooperative organization of taxi drivers of about 150 members. COTAXI was designed to enable its members to contribute the money they earned toward the purchase of their taxis. It was one of five taxi cooperatives in the city of San Salvador and one of many taxi cooperatives throughout the country of El Salvador. Between 1978 and 1981, the respondent held three management positions with COTAXI, the duties of which he described in detail, and his last position with the cooperative was that of general manager. He held that position from 1979 through February or March of 1981. During the time he was the general manager of COTAXI, the respondent continued on the weekends to work as a taxi driver.

Starting around 1978, COTAXI and its drivers began receiving phone calls and notes requesting them to participate in work stoppages. The requests were anonymous but the respondent and the other members of COTAXI believed them to be from anti-government guerrillas who had targeted small businesses in the transportation industry for work stoppages, in hopes of damaging El Salvador's economy. COTAXI's board of directors refused to comply with the requests because its members wished to keep working, and as a result COTAXI received threats of retaliation. Over the course of several years, COTAXI was threatened about 15 times. The other taxi cooperatives in the city also received similar threats.

Beginning in about 1979, taxis were seized and burned, or used as barricades, and COTAXI drivers were assaulted or killed. Ultimately, five members of COTAXI were killed in their taxis by unknown persons. Three of the COTAXI drivers who were killed were friends of the respondent and, like him, had been founders and officers of COTAXI. Each was killed after receiving an anonymous note threatening his life. One of these drivers, who died from injuries he sustained when he crashed his cab in order to

avoid being shot by his passengers, told his friends before he died that three men identifying themselves as guerrillas had jumped into his taxi, demanded possession of his car, and announced they were going to kill him.

During January and February 1981, the respondent received three anonymous notes threatening his life. The first note, which was slipped through the window of his taxi and was addressed to the manager of COTAXI, stated: 'Your turn has come, because you are a traitor.' The second note, which was also put on the respondent's car, was directed to 'the driver of Taxi No. 95,' which was the car owned by the respondent, and warned: 'You are on the black list.' The third note was placed on the respondent's car in front of his home, was addressed to the manager of COTAXI, and stated: 'We are going to execute you as a traitor.' In February 1981, the respondent was beaten in his cab by three men who then warned him not to call the police and took his taxi. The respondent is of the opinion that the men who threatened his life and assaulted him were guerrillas who were seeking to disrupt transportation services in the city of San Salvador. He also has the impression, however, that COTAXI was not favored by some government officials because they viewed the cooperative as being too socialistic.

After being assaulted and receiving the three threatening notes, the respondent left El Salvador because he feared for his life. He declared at the hearing that he would not work as a taxi driver if he returned to El Salvador because he understands that there is little work for taxi drivers now. He explained that the people are too poor to call taxis. Additionally, he stated that the terrorists are no longer active.

As evidence of the truth of his version of the facts, the respondent submitted a letter from the present manager of COTAXI, stating that the respondent was a member of that organization for 3 years. The respondent also submitted several articles reporting that leftist guerrillas had threatened to kill American advisors and personnel in El Salvador, had launched an offensive in three of the provinces in the country, and had engaged in a campaign designed to sabotage the transportation industry and the country's economy˜.

The respondent described in specific detail the circumstances surrounding the deaths of his three friends shortly after they received threatening notes, the threats he received, and the facts surrounding his assault. His testimony as to these matters was logically consistent with his testimony about the threats made to COTAXI and its members for failing to participate in guerrilla-sponsored work stoppages. Moreover, the respondent submitted objective evidence to establish his membership in COTAXI and to corroborate his testimony that the guerrillas sought to disrupt the public transportation system of El Salvador. Thus, absent an adverse credibility finding by the immigration judge, we find the respondent's testimony, which was corroborated by

other objective evidence in the record, to be worthy of belief. It remains to be determined, however, whether the respondent's facts are sufficient to meet the statutory standard˜ of eligibility for asylum˜.

THE STATUTORY STANDARD FOR ASYLUM

A grant of asylum is a matter of discretion. See section 208 of the Act˜. However, an alien is eligible for a favorable exercise of discretion only if he qualifies as a 'refugee' under section 101(a)(42)(A) of the Act. Therefore, that section establishes the statutory standard of eligibility for asylum.˜

This section creates four separate elements that must be satisfied before an alien qualifies as a refugee: (1) the alien must have a 'fear' of 'persecution'; (2) the fear must be 'well-founded'; (3) the persecution feared must be 'on account of race, religion, nationality, membership in a particular social group, or political opinion'; and (4) the alien must be unable or unwilling to return to his country of nationality or to the country in which he last habitually resided because of persecution or his well-founded fear of persecution.˜

(1) The alien must have a 'fear' of 'persecution.'˜

Congress did not identify what one must show in order to establish a 'fear of persecution.'˜

'Fear' is a subjective condition, an emotion characterized by the anticipation or awareness of danger.˜ The Office of the United Nations High Commissioner for Refugees (UNHCR) has suggested in the Handbook that the definition of a refugee found in the Protocol requires fear to be a person's primary motivation for seeking refugee status.˜ While we do not consider the UNHCR's position in the Handbook to be controlling,˜ the Handbook nevertheless is a useful tool to the extent that it provides us with one internationally recognized interpretation of the Protocol.˜

[W]e conclude that an alien seeking to qualify under section 101(a)(42)(A) of the Act must demonstrate that his primary motivation for requesting refuge in the United States is 'fear,' i.e., a genuine apprehension or awareness of danger in another country. No other motivation, such as dissent or disagreement with the conditions in another country or a desire to experience greater economic advantage or personal freedom in the United States, satisfies the definition of a refugee created in the Act.˜

'[P]ersecution' as used in section 101(a)(42)(A) clearly contemplates that harm or suffering must be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome. The word does not embrace harm arising out of civil strife or anarchy. In fact, Congress specifically rejected a definition of

a refugee that would have included 'displaced persons,' i.e., those who flee harm generated by military or civil disturbances.~ This construction is consistent with the international interpretation of 'refugee' under the Protocol, for that term does not include persons who are displaced by civil or military strife in their countries of origin.~

In the case before us, we find that the respondent has adequately established that his primary motivation for seeking asylum is fear of persecution. We must now consider whether it has been demonstrated that this fear is well founded and whether the other elements necessary to establish eligibility for asylum have been satisfied.

(2) The fear of persecution must be 'well-founded.'~

[W]e continue to construe 'a well-founded fear of persecution' to mean that an individual's fear of persecution must have its basis in external, or objective, facts that show there is a realistic likelihood he will be persecuted upon his return to a particular country.

As has always been the case, our construction of the well-founded-fear standard reflects two fundamental concepts. The first is that in order to be 'well-founded,' an alien's fear of persecution cannot be purely subjective or conjectural—it must have a solid basis in objective facts or events.~ This concept, after all, is consistent with the generally understood meaning of the term 'well-founded,' which refers to something that has a firm foundation in fact or is based on excellent reasoning, information, judgment, or grounds.~

The second fundamental concept that is, and always has been, reflected in our construction of 'a well-founded fear of persecution' is that in order to warrant the protection afforded by a grant of refuge, an alien must show it is likely he will become the victim of persecution.~ Since language by its nature is inexact, we have used such words as 'likelihood,' or 'realistic likelihood,' or even 'probability' of persecution to express this concept.~ By use of such words we do not mean that 'a well-founded fear of persecution' requires an alien to establish to a particular degree of certainty, such as a 'probability' as opposed to a 'possibility,' that he will become a victim of persecution. Rather, as a practical matter, what we mean can best be described as follows: the evidence must demonstrate that (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien. The first of these factors is inherent in the showing that the conduct the alien fears amounts to 'persecution' under the Act, i.e., the infliction of suffering or harm in order to punish an alien because he

differs in a way a persecutor deems offensive and seeks to overcome. The second, third, and fourth factors are all indispensable in showing that there is a real chance an alien will become a victim of persecution, for if the persecutor is not aware or could not easily become aware that an alien possesses the characteristic that is the basis for persecution, or if the persecutor lacks the capability to carry out persecution, or if the persecutor has no inclination to punish the particular alien, then it cannot reasonably be found that the alien is likely to become the persecutor's victim. The issue of whether an alien's facts demonstrate these four factors is one that ordinarily must be decided on a case-by-case basis, for the question of what kinds of facts show a likelihood of persecution ultimately depends upon each alien's own particular situation.˜

No matter how the courts have described the well-founded-fear standard, they have required an alien to come forward with more than his purely subjective fears of persecution; he has been required to show that his fears have a sound basis in personal experience or in other external facts or events.˜ In addition, each of the courts has assessed an alien's facts to determine whether he is likely to become a victim of persecution and, in so doing, has looked for facts demonstrating some combination of the four factors we have used to describe a likelihood of persecution.˜

In the case before us, the respondent claims he fears persecution at the hands of two groups: the government and the guerrillas. Therefore, under our construction of the well-founded-fear standard, the respondent must show that his fear of persecution by these groups is more than a matter of personal conjecture or speculation; he must show by objective events that his fear has a sound basis in fact and that persecution by the government or by the guerrillas is likely to occur if he is returned to El Salvador. This means that he must demonstrate that (1) he possesses characteristics the government or the guerrillas seek to overcome by means of punishment of some sort; (2) the government or the guerrillas are aware or could easily become aware that he possesses these characteristics; (3) the government or the guerrillas have the capability of punishing him; and (4) the government and the guerrillas have the inclination to punish him.

The respondent's fear of persecution by the government has no basis whatsoever in either his personal experiences or in other external events. To the contrary, by the respondent's own admission, this fear is based solely on his impression that some officials in the government may have viewed COTAXI as being too socialistic. This purely subjective impression is not sufficient to show a well-founded fear of persecution by the government.

In addition, whatever the facts may have been prior to the respondent's departure from El Salvador, those facts have changed significantly since 1981. Most importantly,

the respondent admitted that he does not intend to work as a taxi driver upon his return to El Salvador. The respondent's facts do not show that the persecution of taxi drivers continued even after they stopped working as drivers. Furthermore, the respondent testified that the guerrillas' strength has diminished significantly in El Salvador since 1981. For these reasons, the respondent has not shown that at the present time he possesses characteristics the guerrillas seek to overcome or that the guerrillas have the inclination to punish him. Thus, the facts do not demonstrate that there is a likelihood the respondent would be persecuted by the guerrillas should he be returned to El Salvador, and accordingly his fear of persecution upon deportation has not been shown to be 'well-founded.'˜

(4) The alien must be unable or unwilling to return to his country of nationality or to the country in which he last habitually resided because of persecution or his well-founded fear of persecution.

Traditionally, a refugee has been an individual in whose case the bonds of trust, loyalty, protection, and assistance existing between a citizen and his country have been broken and have been replaced by the relation of an oppressor to a victim.˜ Thus, inherent in refugee status is the concept that an individual requires international protection because his country of origin or of habitual residence is no longer safe for him.˜ We consider this concept to be expressed, in part, by the requirement in the Act and the Protocol that a refugee must be unable or unwilling to return to a particular 'country.' See section 101(a)(42)(A) of the Act. We construe this requirement to mean that an alien seeking to meet the definition of a refugee must do more than show a well-founded fear of persecution in a particular place or abode within a country—he must show that the threat of persecution exists for him country-wide.

In the respondent's case, the facts show that taxi drivers in the city of San Salvador were threatened with persecution by the leftist guerrillas. However, the facts do not show that this threat existed in other cities in El Salvador. It may be the respondent could have avoided persecution by moving to another city in that country.˜ In any event, the respondent's facts did not demonstrate that the guerrillas' persecution of taxi drivers occurred throughout the country of El Salvador. Accordingly, the respondent did not meet this element of the standard for asylum.

In summary, the respondent's facts fail to show that (1) his present fear of persecution by the government and the guerrillas is 'well-founded'; (2) the persecution he fears is on account of one of the five grounds specified in the Act; and (3) he is unable to return to the country of El Salvador, as opposed to a particular place in that country, because of persecution. Thus, he has not met three of the four elements in the statutory

definition of a refugee created by section 101(a)(42)(A) of the Act. Accordingly, the respondent has not shown he is eligible for a grant of asylum.˜

Therefore, we shall dismiss his appeal.

ORDER: The appeal is dismissed.

11.12 Asylum Elements: Nexus or "Because of"

INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), provides: "The term "refugee" means˜ any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country **because of** persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion˜."

The "because of" language in INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) is known as the "nexus" requirement. The asylum applicant must establish the "nexus" between persecution and one of the five statutorily protected grounds.

Ninth Circuit Immigration Outline (2020)

[An asylum] applicant [must] establish that "race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason* for persecuting the applicant." 8 U.S.C. § 1158(b)(1)(B)(i) (emphasis added). "[A] motive is a 'central reason' if the persecutor would not have harmed the applicant if such motive did not exist. Likewise, a motive is a 'central reason' if that motive, standing alone, would have led the persecutor to harm the applicant. ... [P]ersecution may be caused by more than one central reason, and an asylum applicant need not prove which reason was dominant. Nevertheless, to demonstrate that a protected ground was 'at least one central reason' for persecution, an applicant must prove that such ground was a cause of the persecutors' acts."˜

The persecutor's motivation may be established by direct or circumstantial evidence.˜ Direct proof of motivation may consist of evidence concerning statements made by the persecutor to the victim, or by victim to persecutor.˜ Circumstantial proof of motivation may consist of severe or disproportionate punishment for violations of laws, or other evidence that the persecutor generally regards those who resist as political enemies.˜ Circumstantial evidence of motive may also include, inter alia, the timing of

the persecution and signs or emblems left at the site of persecution.˜ Statements made by the persecutor may constitute circumstantial evidence of motive.˜

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11.13 Asylum Elements: Race

INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), provides: "The term "refugee" means˜ any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of **race**, religion, nationality, membership in a particular social group, or political opinion˜."

Ninth Circuit Immigration Outline (2020)

Claims of race and nationality persecution often overlap.˜ Recent cases use the more precise term "ethnicity," "which falls somewhere between and within the protected grounds of race and nationality."

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UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019)

[The 1951 Refugee Convention relating to the Status of Refugees and its 1967 Protocol provide international law regarding refugee status. The UNHCR, which serves as "guardian" of the these legal documents, explains "race" with regard to refugee status as follows:] Race˜ has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as "races" in common usage. Frequently it will also entail membership of a specific social group of common descent forming a minority within a larger population.

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11.14 Asylum Elements: Religion

INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), provides: "The term "refugee" means˜ any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually

resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, **religion**, nationality, membership in a particular social group, or political opinion˜."

Ninth Circuit Immigration Outline (2020)

Persecution on the basis of religion may assume various forms, including: "prohibition of membership of a religious community, or worship in private or in public, of religious instruction, or serious measures of discrimination imposed on persons because they practise their religion or belong to a particular religious community."˜ UNHCR Handbook˜, para. 72

"The Universal Declaration of Human Rights and the Human Rights Covenant proclaim the right to freedom of thought, conscience, and religion, which right includes the freedom of a person to change his religion and his freedom to manifest it in public or private, in teaching, practice, worship and observance." UNHCR Handbook, para. 71.

Moreover, "[a]n individual (or group) may be persecuted on the basis of religion, even if the individual or other members of the group adamantly deny that their belief, identity and/or way of life constitute a 'religion.'"˜

An applicant cannot be required to practice his religious beliefs in private in order to escape persecution.˜

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11.15 Asylum Elements: Nationality

INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), provides: "The term "refugee" means˜ any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, **nationality**, membership in a particular social group, or political opinion˜."

Ninth Circuit Immigration Outline (2020)

Claims of race and nationality persecution often overlap.˜ Some cases use the more precise term "ethnicity," "which falls somewhere between and within the protected grounds of race and nationality."˜

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UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019)

The term "nationality"˜ is not to be understood only as "citizenship". It refers also to membership of an ethnic or linguistic group and may occasionally overlap with the term "race". Persecution for reasons of nationality may consist of adverse attitudes and measures directed against a national (ethnic, linguistic) minority and in certain circumstances the fact of belonging to such a minority may in itself give rise to well-founded fear of persecution.

11.16 Asylum Elements: Political Opinion

INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), provides: "The term "refugee" means˜ any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or **political opinion**˜."

Ninth Circuit Immigration Outline (2020)

"[A]n asylum applicant must satisfy two requirements in order to show that he was persecuted 'on account of' a political opinion. First, the applicant must show that he held (or that his persecutors believed that he held) a political opinion. Second, the applicant must show that his persecutors persecuted him (or that he faces the prospect of such persecution) because of his political opinion."˜ In other words, that an applicant holds a political opinion "is not, by itself, enough to establish that any future persecution would be 'on account' of this opinion. He must establish that the political opinion would motivate his potential persecutors."˜

"Under the provisions of the REAL ID Act, the protected characteristic must be 'at least one central reason' for the persecution. 8 U.S.C. § 1158(b)(1)(B)(i)."˜

"[P]olitical opinion encompasses more than electoral politics or formal political ideology or action."~ An applicant may manifest his or her political opinion by membership or participation in an organization with political purposes or goals. An applicant may manifest a political opinion by his refusal to join or support an organization, or departing from the same.~ A conscious choice not to side with any political faction can be a manifestation of a political opinion.~ An applicant's neutrality must be the result of an affirmative decision to remain neutral, rather than mere apathy.~

[Political opinion also includes]~ "an opinion imputed to him or her by the persecutor." "An imputed political opinion arises when '[a] persecutor falsely attributes an opinion to the victim, and then persecutes the victim because of that mistaken belief about the victim's views.'" Under the imputed political opinion doctrine, the applicant's own opinions are irrelevant.~ "[O]ur analysis focuses on how the persecutor perceived the applicant's actions and allegiances, and what motivated their abuse."~ "[D]irect and indirect evidence, taken together, [can compel the conclusion] that the petitioner was subjected to abuse because of 'imputed political opinion.'"~ An imputed political opinion claim may arise from the applicant's associations with others, including family, organizational, governmental or personal affiliations, which cause assumptions to be made about him.~ An applicant's status as a government employee alone may establish imputed political opinion.

[Finally, INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), specifies that "For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion."]

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11.17 Case: INS v. Elias-Zacarias

INS v. Elias-Zacarias
502 U.S. 478 (1992)

JUSTICE SCALIA DELIVERED THE OPINION OF THE COURT.

The principal question presented by this case is whether a guerrilla organization's attempt to coerce a person into performing military service necessarily constitutes

"persecution on account of … political opinion" under § 101(a)(42) of the Immigration and Nationality Act˜.

I

Respondent Elias–Zacarias, a native of Guatemala, was apprehended in July 1987 for entering the United States without inspection. In deportation proceedings brought by petitioner Immigration and Naturalization Service (INS), Elias–Zacarias conceded his deportability but requested asylum˜.

The Immigration Judge summarized Elias–Zacarias' testimony as follows: "[A]round the end of January in 1987 [when Elias–Zacarias was 18], two armed, uniformed guerrillas with handkerchiefs covering part of their faces came to his home. Only he and his parents were there…. [T]he guerrillas asked his parents and himself to join with them, but they all refused. The guerrillas asked them why and told them that they would be back, and that they should think it over about joining them. [Elias–Zacarias] did not want to join the guerrillas because the guerrillas are against the government and he was afraid that the government would retaliate against him and his family if he did join the guerrillas. [H]e left Guatemala at the end of March [1987] … because he was afraid that the guerrillas would return."˜

The Immigration Judge understood from this testimony that Elias–Zacarias' request for asylum˜ was "based on this one attempted recruitment by the guerrillas."˜ She concluded that Elias–Zacarias had failed to demonstrate persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, and was not eligible for asylum.˜

The Board of Immigration Appeals (BIA) summarily dismissed Elias–Zacarias' appeal on procedural grounds. Elias–Zacarias then moved the BIA to reopen his deportation hearing so that he could submit new evidence that, following his departure from Guatemala, the guerrillas had twice returned to his family's home in continued efforts to recruit him. The BIA denied reopening on the ground that even with this new evidence Elias–Zacarias had failed to make a prima facie showing of eligibility for asylum and had failed to show that the results of his deportation hearing would be changed.

The Court of Appeals for the Ninth Circuit, treating the BIA's denial of the motion to reopen as an affirmance on the merits of the Immigration Judge's ruling, reversed.˜ The court ruled that acts of conscription by a nongovernmental group constitute persecution on account of political opinion, and determined that Elias–Zacarias had a "well-founded fear" of such conscription.˜ We granted certiorari.˜

II

The Court of Appeals found reversal warranted. In its view, a guerrilla organization's attempt to conscript a person into its military forces necessarily constitutes "persecution on account of ... political opinion," because "the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and because the persecutors' motive in carrying out the kidnapping is political."˜ The first half of this seems to us untrue, and the second half irrelevant.

Even a person who supports a guerrilla movement might resist recruitment for a variety of reasons—fear of combat, a desire to remain with one's family and friends, a desire to earn a better living in civilian life, to mention only a few. The record in the present case not only failed to show a political motive on Elias–Zacarias' part; it showed the opposite. He testified that he refused to join the guerrillas because he was afraid that the government would retaliate against him and his family if he did so. Nor is there any indication (assuming, arguendo, it would suffice) that the guerrillas erroneously believed that Elias–Zacarias' refusal was politically based.

As for the Court of Appeals' conclusion that the guerrillas' "motive in carrying out the kidnapping is political": It apparently meant by this that the guerrillas seek to fill their ranks in order to carry on their war against the government and pursue their political goals.˜ But that does not render the forced recruitment "persecution on account of ... political opinion." In construing statutes, "we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used."˜ The ordinary meaning of the phrase "persecution on account of ... political opinion" in § 101(a)(42) is persecution on account of the victim's political opinion, not the persecutor's. If a Nazi regime persecutes Jews, it is not, within the ordinary meaning of language, engaging in persecution on account of political opinion; and if a fundamentalist Moslem regime persecutes democrats, it is not engaging in persecution on account of religion. Thus, the mere existence of a generalized "political" motive underlying the guerrillas' forced recruitment is inadequate to establish (and, indeed, goes far to refute) the proposition that Elias–Zacarias fears persecution on account of political opinion, as § 101(a)(42) requires.

Elias–Zacarias appears to argue that not taking sides with any political faction is itself the affirmative expression of a political opinion. That seems to us not ordinarily so, since we do not agree with the dissent that only a "narrow, grudging construction of the concept of 'political opinion,'"˜ would distinguish it from such quite different concepts as indifference, indecisiveness, and risk averseness. But we need not decide whether the evidence compels the conclusion that Elias–Zacarias held a political opinion. Even if it does, Elias–Zacarias still has to establish that the record also compels

the conclusion that he has a "well-founded fear" that the guerrillas will persecute him because of that political opinion, rather than because of his refusal to fight with them. He has not done so with the degree of clarity necessary to permit reversal of a BIA finding to the contrary; indeed, he has not done so at all.˜

Elias–Zacarias objects that he cannot be expected to provide direct proof of his persecutors' motives. We do not require that. But since the statute makes motive critical, he must provide some evidence of it, direct or circumstantial.˜ That he has not done.

The BIA's determination should therefore have been upheld in all respects, and we reverse the Court of Appeals' judgment to the contrary.

It is so ordered.

Justice Stevens, with whom Justice Blackmun and Justice O'Connor join, dissenting.˜

It is undisputed that respondent has a well-founded fear that he will be harmed, if not killed, if he returns to Guatemala. It is also undisputed that the cause of that harm, if it should occur, is the guerrilla organization's displeasure with his refusal to join them in their armed insurrection against the government. The question of law that the case presents is whether respondent's well-founded fear is a "fear of persecution on account of … political opinion" within the meaning of § 101(a)(42) of the Immigration and Nationality Act.˜

Today the Court holds that respondent's fear of persecution is not "on account of … political opinion" for two reasons. First, he failed to prove that his refusal to join the guerrillas was politically motivated; indeed, he testified that he was at least in part motivated by a fear that government forces would retaliate against him or his family if he joined the guerrillas.˜ Second, he failed to prove that his persecutors' motives were political. In particular, the Court holds that the persecutors' implicit threat to retaliate against respondent "because of his refusal to fight with them,"˜ is not persecution on account of political opinion. I disagree with both parts of the Court's reasoning.

I

A political opinion can be expressed negatively as well as affirmatively. A refusal to support a cause—by staying home on election day, by refusing to take an oath of allegiance, or by refusing to step forward at an induction center—can express a political opinion as effectively as an affirmative statement or affirmative conduct. Even if the refusal is motivated by nothing more than a simple desire to continue living an ordinary life with one's family, it is the kind of political expression that the asylum provisions of the statute were intended to protect.

As the Court of Appeals explained in Bolanos-Hernandez v. INS, 767 F.2d 1277 (CA9 1985): “Choosing to remain neutral is no less a political decision than is choosing to affiliate with a particular political faction. Just as a nation’s decision to remain neutral is a political one˜, so is an individual’s. When a person is aware of contending political forces and affirmatively chooses not to join any faction, that choice is a political one. A rule that one must identify with one of two dominant warring political factions in order to possess a political opinion, when many persons may, in fact, be opposed to the views and policies of both, would frustrate one of the basic objectives of the Refugee Act of 1980—to provide protection to all victims of persecution regardless of ideology. Moreover, construing ‘political opinion’ in so short-sighted and grudging a manner could result in limiting the benefits under the ameliorative provisions of our immigration laws to those who join one political extreme or another; moderates who choose to sit out a battle would not qualify.”˜

The narrow, grudging construction of the concept of “political opinion” that the Court adopts today is inconsistent with the basic approach to this statute that the Court endorsed in [prior case law].˜

In my opinion, the record in this case is more than adequate to support the conclusion that this respondent’s refusal was a form of expressive conduct that constituted the statement of a “political opinion” within the meaning of § 208(a).˜

II

It follows as night follows day that the guerrillas’ implied threat to “take” him or to “kill” him if he did not change his position constituted threatened persecution “on account of” that political opinion. As the Court of Appeals explained in Bolanos–Hernandez: “It does not matter to the persecutors what the individual’s motivation is. The guerrillas in El Salvador do not inquire into the reasoning process of those who insist on remaining neutral and refuse to join their cause. They are concerned only with an act that constitutes an overt manifestation of a political opinion. Persecution because of that overt manifestation is persecution because of a political opinion.”˜

It is important to emphasize that the statute does not require that an applicant for asylum prove exactly why his persecutors would act against him; it only requires him to show that he has a “well-founded fear of persecution on account of ... political opinion.”˜ Because respondent expressed a political opinion by refusing to join the guerrillas, and they responded by threatening to “take” or to “kill” him if he did not change his mind, his fear that the guerrillas will persecute him on account of his political opinion is well founded.˜

Accordingly, I would affirm the judgment of the Court of Appeals.

11.18 Asylum Elements: Membership in a Particular Social Group

INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), provides: "The term "refugee" means˜ any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, **membership in a particular social group**, or political opinion˜."

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The "phrase 'particular social group' is ambiguous."˜ The Board has previously interpreted the phrase "particular social group" to refer to a group that is "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question." Matter of M-E-V-G-, 26 I. & N. Dec. 227, 237 (B.I.A. 2014).˜

A particular social group "implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest."˜ "[A] 'particular social group' is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it."˜ Large, internally diverse, demographic groups rarely constitute distinct social groups.˜

"The common immutable characteristic has been defined [by the BIA] as one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."˜

The "particularity" requirement˜ is relevant in considering whether a group's boundaries are so amorphous that, in practice, the persecutor does not consider it a group. The ultimate question is whether a group "can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons."˜ "The particularity element requires characteristics that 'provide a clear benchmark for determining who falls within the group,' wherein the relevant society must have a 'commonly accepted definition[]' of the group."˜

The˜ "social distinction" prong of the social group analysis "refers to social recognition" and requires that a group "be perceived as a group by society."˜ The BIA further clarified that recognition of a particular social group "is determined by the perception of the society in question, rather than by the perception of the persecutor."˜

"[The social distinction] requirement refers to general social perception, which can be assessed from the perspective of "the society in question as a whole," "the residents of a particular region," or "members of a different social group," depending of the facts of the case. … It is not, however, assessed from the perspective of the persecutors."˜

To make the social-distinction determination, the agency must perform an "evidence-based" inquiry into "whether the relevant society recognizes [the petitioner's] proposed social group."˜ "Evidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like may establish that a group exists and is perceived as 'distinct' or 'other' in a particular society."˜ Because the inquiry is based on country-specific evidence, the inquiry is necessarily conducted case-by-case, country-by-country, and, in some cases, region-by-region.˜

Clan membership may constitute membership in a particular social group.˜ Sexual orientation and sexual identity can be the basis for establishing a particular social group.˜ An applicant's status based on her former occupations, associations, or shared experiences, may be the basis for social group claim.˜

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11.19 Case: Matter of Acosta, Revisited

Matter of Acosta
19 I. & N. Dec. 211 (Board of Immigration Appeals 1985)

(3) The persecution feared must be 'on account of race, religion, nationality, membership in a particular social group, or political opinion.'

The respondent has argued that the persecution he fears at the hands of the guerrillas is on account of his membership in a particular social group comprised of COTAXI drivers and persons engaged in the transportation industry of El Salvador and is also on account of his political opinion.

The requirement of persecution on account of 'membership in a particular social group' comes directly from the Protocol and the U.N. Convention.˜ Congress did not indicate what it understood this ground of persecution to mean, nor is its meaning clear in the Protocol.˜

We find the well-established doctrine of ejusdem generis, meaning literally, 'of the same kind,' to be most helpful in construing the phrase 'membership in a particular social group.' That doctrine holds that general words used in an enumeration with

specific words should be construed in a manner consistent with the specific words.˜ The other grounds of persecution in the Act and the Protocol listed in association with 'membership in a particular social group' are persecution on account of 'race,' 'religion,' 'nationality,' and 'political opinion.' Each of these grounds describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.˜ Thus, the other four grounds of persecution enumerated in the Act and the Protocol restrict refugee status to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.

Applying the doctrine of ejusdem generis, we interpret the phrase 'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution under the Act, namely, something that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not be required to be changed. By construing 'persecution on account of membership in a particular social group' in this manner, we preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.

In the respondent's case, the facts demonstrate that the guerrillas sought to harm the members of COTAXI, along with members of other taxi cooperatives in the city of San Salvador, because they refused to participate in work stoppages in that city. The characteristics defining the group of which the respondent was a member and subjecting that group to punishment were being a taxi driver in San Salvador and refusing to participate in guerrilla-sponsored work stoppages. Neither of these characteristics is immutable because the members of the group could avoid the threats of the guerrillas either by changing jobs or by cooperating in work stoppages. It may be unfortunate that the respondent either would have had to change his means of earning a living or

cooperate with the guerrillas in order to avoid their threats. However, the internationally accepted concept of a refugee simply does not guarantee an individual a right to work in the job of his choice.˜ Therefore, because the respondent's membership in the group of taxi drivers was something he had the power to change, so that he was able by his own actions to avoid the persecution of the guerrillas, he has not shown that the conduct he feared was 'persecution on account of membership in a particular social group' within our construction of the Act.˜

11.20 Case: Matter of Toboso-Alfonso

Matter of Toboso-Alfonso
20 I. & N. Dec. 819 (Board of Immigration Appeals 1990)˜

The applicant is a 40-year-old native and citizen of Cuba who was paroled into the United States in June of 1980, as part of the Mariel boat lift. In 1985 his parole was terminated. He was placed in exclusion proceedings and appeared before an immigration judge in Houston, Texas. The applicant conceded his excludability and applied for asylum˜.

The immigration judge ultimately concluded that the applicant was statutorily eligible for asylum˜ as a member of a particular social group who fears persecution by the Cuban Government.˜

The Service contends that the applicant did not meet his burden of proof, that the evidence presented was inadequate to prove the existence of a particular social group˜.˜

In the instant case, the applicant asserts that he is a homosexual who has been persecuted in Cuba and would be persecuted again on account of that status should he return to his homeland. He submits that homosexuals form a particular social group in Cuba and suffer persecution by the government as a result of that status.

The applicant testified that there is a municipal office within the Cuban Government which registers and maintains files on all homosexuals. He stated that his file was opened in 1967, and every 2 or 3 months for 13 years he received a notice to appear for a hearing. The notice, the applicant explained, was a sheet of paper, "it says Fidel Armando Toboso, homosexual and the date I have to appear." Each hearing consisted of a physical examination followed by questions concerning the applicant's sex life and sexual partners. While he indicated the "examination" was "primarily a health examination," he stated that on many occasions he would be detained in the police station for 3 or 4 days without being charged, and for no apparent reason. He testified that it was a criminal offense in Cuba simply to be a homosexual. The

government's actions against him were not in response to specific conduct on his part (e.g., for engaging in homosexual acts); rather, they resulted simply from his status as a homosexual. He further testified that on one occasion when he had missed work, he was sent to a forced labor camp for 60 days as punishment because he was a homosexual (i.e., had he not been a homosexual he would not have been so punished).

The applicant stated that at the time of the Mariel boat lift, the Union of Communist Youth received permission to hold a demonstration against homosexuals at the factory where he worked. Several of the members got on top of a table and screamed that all homosexuals should leave-should go to the United States. He testified that on that same day there was a sheet of paper tacked to the door of his home which stated that he should report to "the public order." The applicant presented himself at the police station in the town of "Guines" where he was informed by the chief of police that he could spend 4 years in the penitentiary for being a homosexual, or leave Cuba for the United States. He was given a week to decide and decided to leave rather than be jailed.

The applicant further testified that the day he left his town, the neighbors threw eggs and tomatoes at him. He claims that the situation was so grave that the authorities were forced to reschedule his departure time from the afternoon to 2:00 a.m., in order to quell the protesting residents.

In addition to the applicant's testimony, he supplemented the record with the following information: several articles describing "Improper Conduct," a film which centers on the testimony of 28 Cuban refugees and recounts the human rights violations, including incarceration in forced labor camps known as "Military Units to Aid Production," suffered by Cubans whom the Government considers to be dissidents or "antisocial," particularly male homosexuals; a newspaper article entitled, "Gay Cubans Survive Torture and Imprisonment," in which Cuban homosexuals in the United States, most of whom were part of the Mariel boat lift, describe their treatment by the Cuban Government, including repeated detentions, incarcerations, and physical beatings; and, Amnesty International's Report for 1985 which describes the political situation in Cuba.

The immigration judge found the "applicant's testimony to be credible and worthy of belief, and, if anything, perceive[d] that he was restrained in his testimony as to the difficulty of his life during the years that he lived in Cuba." The immigration judge further concluded that the applicant had been persecuted in Cuba and that he has a well-founded fear of continued persecution in that country. He found that this persecution resulted from the applicant's membership in a particular social group, namely homosexuals.˜

The Immigration and Naturalization Service˜ argues that "socially deviated behavior, i.e. homosexual activity is not a basis for finding a social group within the contemplation of the Act" and that such a conclusion "would be tantamount to awarding discretionary relief to those involved in behavior that is not only socially deviant in nature, but in violation of the laws or regulations of the country as well." The applicant's testimony and evidence, however, do not reflect that it was specific activity that resulted in the governmental actions against him in Cuba, it was his having the status of being a homosexual. Further, the immigration judge's initial finding that a particular social group existed in Cuba was not "tantamount to awarding discretionary relief" to that group. Individuals in a particular social group are not eligible for relief based on that fact alone, among other showings they must establish facts demonstrating that members of the group are persecuted, have a well-founded fear of persecution, or that their life or freedom would be threatened because of that status.

We principally note regarding this issue, however, that the Service has not challenged the immigration judge's finding that homosexuality is an "immutable" characteristic. Nor is there any evidence or argument that, once registered by the Cuban government as a homosexual, that that characterization is subject to change. This being the case, we do not find the Service's challenge to the immigration judge's finding that this applicant was a member of a particular social group in Cuba adequately supported by the arguments set forth on appeal.˜

ORDER: The Service's appeal is dismissed.

11.21 Case: Matter of M-E-V-G-

Matter of M-E-V-G-

26 I. & N. Dec. 227 (Board of Immigration Appeals 2014)

This case is before us on remand from the United States Court of Appeals for the Third Circuit for further consideration of the respondent's application˜ for asylum˜. [W]e˜ clarify our interpretation of the phrase "particular social group."˜ We adhere to our prior interpretations of the phrase but emphasize that literal or "ocular" visibility is not required, and we rename the "social visibility" element as "social distinction."˜

I. FACTUAL AND PROCEDURAL HISTORY˜

[T]he respondent claims that he suffered past persecution and has a well-founded fear of future persecution in his native Honduras because members of the Mara Salvatrucha gang beat him, kidnaped and assaulted him and his family while they were traveling in Guatemala, and threatened to kill him if he did not join the gang. In

addition, the respondent testified that the gang members would shoot at him and throw rocks and spears at him about two to three times per week. The respondent asserts that he was persecuted "on account of his membership in a particular social group, namely Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs."˜

II. ISSUE

The question before us is whether the respondent qualifies as a "refugee" as a result of his past mistreatment, and his fear of future persecution, at the hands of gangs in Honduras. Specifically, we address whether the respondent has established an asylum claim based on his membership in a particular social group.

III. PARTICULAR SOCIAL GROUP

A. Origins˜

The phrase "membership in a particular social group," which is not defined in the Act, the Convention, or the Protocol, is ambiguous and difficult to define.˜

Congress has assigned the Attorney General the primary responsibility of construing ambiguous provisions in the immigration laws, and this responsibility has been delegated to the Board.˜ The Board's reasonable construction of an ambiguous term in the Act, such as "membership in a particular social group," is entitled to deference.˜

We first interpreted the phrase "membership in a particular social group" in Matter of Acosta. We found the doctrine of "ejusdem generis" helpful in defining the phrase, which we held should be interpreted on the same order as the other grounds of persecution in the Act.˜ The phrase "persecution on account of membership in a particular social group" was interpreted to mean "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic."˜ The common characteristic that defines the group must be one "that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."˜

B. Evolution of the Board's Analysis of Social Group Claims˜

Now, close to three decades after Acosta, claims based on social group membership are numerous and varied. The generality permitted by the Acosta standard provided flexibility in the adjudication of asylum claims. However, it also led to confusion and a lack of consistency as adjudicators struggled with various possible social groups, some of which appeared to be created exclusively for asylum purposes.˜ [W]e cautioned that "the social group concept would virtually swallow the entire refugee definition if

common characteristics, coupled with a meaningful level of harm, were all that need be shown."~

To provide clarification and address the evolving nature of the claims presented by asylum applicants, we refined the particular social group interpretation first discussed in Matter of Acosta to provide the additional analysis required once an applicant demonstrated membership based on a common immutable characteristic.

In a series of cases, we applied the concepts of "social visibility" and "particularity" as important considerations in the particular social group analysis, and we ultimately deemed them to be requirements.~ Although we expanded the particular social group analysis beyond the Acosta test, the common immutable characteristic requirement set forth there has been, and continues to be, an essential component of the analysis.~

We~ determined that a "particular social group" cannot be defined exclusively by the claimed persecution, that it must be "recognizable" as a discrete group by others in the society, and that it must have well-defined boundaries.~

[W]e held that—in addition to the common immutable characteristic requirement set forth in Acosta—the previously introduced concepts of "particularity" and "social visibility" were distinct requirements for the "membership in a particular social group" ground of persecution.~ [W]e stated that we were seeking to provide "greater specificity to the definition of a social group" outlined in Acosta by requiring an applicant to establish "particularity" and "social visibility," consistent with our prior decisions.~

IV. ANALYSIS

We take this opportunity to clarify our interpretation of the phrase "membership in a particular social group."~ In this regard, we clarify that the "social visibility" test was never intended to, and does not require, literal or "ocular" visibility.

A. Protection Within the Refugee Context

The interpretation of the phrase "membership in a particular social group" does not occur in a contextual vacuum.~

The Act and the Protocol do not extend protection to all individuals who are victims of persecution. They identify "refugees" as only those who face persecution on account of "race, religion, nationality, membership in a particular social group, or political opinion." Section 101(a)(42) of the Act~.

The limited nature of the protection offered by refugee law is highlighted by the fact that it does not cover those fleeing from natural or economic disaster, civil strife, or

war.˜ Similarly, asylum and refugee laws do not protect people from general conditions of strife, such as crime and other societal afflictions.˜

Societies use a variety of means to distinguish individuals based on race, religion, nationality, and political opinion. The distinctions may be based on characteristics that are overt and visible to the naked eye or on those that are subtle and only discernible by people familiar with the particular culture. The characteristics are sometimes not literally visible. Some distinctions are based on beliefs and characteristics that are largely internal, such as religious or political beliefs. Individuals with certain religious or political beliefs may only be treated differently within society if their beliefs were made known or acted upon by the individual. The members of these factions generally understand their own affiliation with the grouping, and other people in the particular society understand that such a distinct group exists.

Therefore these enumerated grounds of persecution have more in common than simply describing persecution aimed at an immutable characteristic. They have an external perception component within a given society, which need not involve literal or "ocular" visibility. Considering the refugee context in which they arise, we find that the enumerated grounds all describe persecution aimed at an immutable characteristic that separates various factions within a particular society.

B. Particular Social Group˜

The primary source of disagreement with, or confusion about, our prior interpretation of the term "particular social group" relates to the social visibility requirement.˜ Contrary to our intent, the term "social visibility" has led some to believe that literal, that is, "ocular" or "on-sight," visibility is required to make a particular social group cognizable under the Act.˜ Because of that misconception, we now rename the "social visibility" requirement as "social distinction."˜ This new name more accurately describes the function of the requirement.

Thus, we clarify that an applicant for asylum or withholding of removal seeking relief based on "membership in a particular social group" must establish that the group is

(1) composed of members who share a common immutable characteristic,

(2) defined with particularity, and

(3) socially distinct within the society in question.

1. Overview of Criteria˜

Our interpretation of the phrase “membership in a particular social group” incorporates the common immutable characteristic standard set forth in Matter of Acosta because members of a particular social group would suffer significant harm if asked to give up their group affiliation, either because it would be virtually impossible to do so or because the basis of affiliation is fundamental to the members’ identities or consciences. Our interpretation also encompasses the underlying rationale of both the “particularity” and “social distinction” tests.

The “particularity” requirement relates to the group’s boundaries or, as earlier court decisions described it, the need to put “outer limits” on the definition of a “particular social group.” The particular social group analysis does not occur in isolation, but rather in the context of the society out of which the claim for asylum arises. Thus, the “social distinction” requirement considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way. In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it. A viable particular social group should be perceived within the given society as a sufficiently distinct group. The members of a particular social group will generally understand their own affiliation with the grouping, as will other people in the particular society. Although members of a particular social group will generally understand their own affiliation with the group, such self-awareness is not a requirement for the group’s existence. See, e.g., Henriquez-Rivas v. Holder, 707 F.3d at 1089 (“[F]or example, an infant may not be aware of race, sex, or religion.”). Nevertheless, as a practical matter, this point is of little import because the applicants in removal proceedings are generally professing their membership in these groups in the process of seeking asylum.

Literal or “ocular” visibility is not, and never has been, a prerequisite for a viable particular social group. An immutable characteristic may be visible to the naked eye, and it is possible that a particular social group could be set apart within a given society based on such visible characteristics. However, our use of the term “social visibility” was not intended to limit relief solely to those with outwardly observable characteristics. Such a literal interpretation would be inconsistent with the principles of refugee protection underlying the Act and the Protocol.

In fact, we have recognized particular social groups that are clearly not ocularly visible. See, e.g., Matter of Kasinga, 21 I&N Dec. 357, 365-66 (BIA 1996) (determining that young tribal women who are opposed to female genital mutilation (“FGM”) constitute a particular social group); Matter of Toboso-Alfonso, 20 I&N Dec. 819, 822-23 (BIA 1990) (holding that homosexuals in Cuba were shown to be a particular social

group); Matter of Fuentes, 19 I&N Dec. 658, 662 (BIA 1988) (holding that former national police members could be a particular social group in certain circumstances). Our precedents have collectively focused on the extent to which the group is understood to exist as a recognized component of the society in question. See Matter of E-A-G-, 24 I&N Dec. at 594 (describing social visibility as "the extent to which members of a society perceive those with the characteristic in question as members of a social group").

2. "Particularity"

While we addressed the immutability requirement in Acosta, the term "particularity" is included in the plain language of the Act and is consistent with the specificity by which race, religion, nationality, and political opinion are commonly defined. However, there is a critical difference between a political opinion or religious belief, which may in theory be entirely personal and idiosyncratic, and membership in a particular social group, which requires that others in the society share the characteristics that define the group.

A particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group. Matter of A-M-E- & J-G-U-, 24 I&N Dec. at 76 (holding that wealthy Guatemalans lack the requisite particularity to be a particular social group). It is critical that the terms used to describe the group have commonly accepted definitions in the society of which the group is a part. Id. (observing that the concept of wealth is too subjective to provide an adequate benchmark for defining a particular social group).

The group must also be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective. The particularity requirement clarifies the point, at least implicit in earlier case law, that not every "immutable characteristic" is sufficiently precise to define a particular social group. See, e.g., Escobar v. Gonzales, 417 F.3d 363, 368 (3d Cir. 2005) (finding the characteristics of poverty, homelessness, and youth to be "too vague and all encompassing" to set perimeters for a protected group within the scope of the Act).

3. "Social Distinction"

Our definition of "social visibility" has emphasized the importance of "perception" or "recognition" in the concept of "particular social group." See Matter of H-, 21 I&N Dec. 337, 342 (BIA 1996) (stating that in Somali society, clan membership is a "highly recognizable" characteristic that is "inextricably linked to family ties"). The term was never meant to be read literally. The renamed requirement "social distinction" clarifies that social visibility does not mean "ocular" visibility—either of the group as a whole or of individuals within the group—any more than a person holding a protected religious

or political belief must be "ocularly" visible to others in society. See, e.g., Henriquez-Rivas v. Holder, 707 F.3d at 1087-89. Social distinction refers to social recognition, taking as its basis the plain language of the Act—in this case, the word "social." To be socially distinct, a group need not be seen by society; rather, it must be perceived as a group by society.˜ Society can consider persons to comprise a group without being able to identify the group's members on sight.

The examples in Matter of Kasinga, Matter of Toboso-Alfonso, and Matter of Fuentes, illustrate this point. It may not be easy or possible to identify who is opposed to FGM, who is homosexual, or who is a former member of the national police. These immutable characteristics are certainly not ocularly visible. Nonetheless, a society could still perceive young women who oppose the practice of FGM, homosexuals, or former members of the national police to comprise a particular social group for a host of reasons, such as sociopolitical or cultural conditions in the country. For this reason, the fact that members of a particular social group may make efforts to hide their membership in the group to avoid persecution does not deprive the group of its protected status as a particular social group.˜

The "social distinction" and "particularity" requirements each emphasize a different aspect of a particular social group. They overlap because the overall definition is applied in the fact-specific context of an applicant's claim for relief. While "particularity" chiefly addresses the "outer limits" of a group's boundaries and is definitional in nature,˜ this question necessarily occurs in the context of the society in which the claim for asylum arises, see Matter of S-E-G-, 24 I&N Dec. at 584 (inquiring whether the group can be described in sufficiently distinct terms that it "would be recognized, in the society in question, as a discrete class of persons"). Societal considerations have a significant impact on whether a proposed group describes a collection of people with appropriately defined boundaries and is sufficiently "particular." Similarly, societal considerations influence whether the people of a given society would perceive a proposed group as sufficiently separate or distinct to meet the "social distinction" test.

For example, in an underdeveloped, oligarchical society, "landowners" may be a sufficiently discrete class to meet the criterion of particularity, and the society may view landowners as a discrete group, sufficient to meet the social distinction test. However, such a group would likely be far too amorphous to meet the particularity requirement in Canada, and Canadian society may not view landowners as sufficiently distinct from the rest of society to satisfy the social distinction test. In analyzing whether either of these hypothetical claims would establish a particular social group under the Act, an Immigration Judge should make findings whether "landowners" share a common

immutable characteristic, whether the group is discrete or amorphous, and whether the society in question considers "landowners" as a significantly distinct group within the society. Thus, the concepts may overlap in application, but each serves a separate purpose.

4. Society's Perception˜

Interpreting "membership in a particular social group" consistently with the other statutory grounds within the context of refugee protection, we clarify that a group's recognition for asylum purposes is determined by the perception of the society in question, rather than by the perception of the persecutor.˜

[D]efining a particular social group from the perspective of the persecutor is in conflict with our prior holding that "a social group cannot be defined exclusively by the fact that its members have been subjected to harm."˜ The perception of the applicant's persecutors may be relevant, because it can be indicative of whether society views the group as distinct. However, the persecutors' perception is not itself enough to make a group socially distinct, and persecutory conduct alone cannot define the group.˜

C. Evidentiary Burdens˜

In all asylum and withholding of removal cases, including those involving the other grounds of persecution, an applicant is required to establish the existence of the underlying basis for the alleged persecution.˜

[T]he applicant has the burden to establish a claim based on membership in a particular social group and will be required to present evidence that the proposed group exists in the society in question. The evidence available in any given case will certainly vary. However, a successful case will require evidence that members of the proposed particular social group share a common immutable characteristic, that the group is sufficiently particular, and that it is set apart within the society in some significant way. Evidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like may establish that a group exists and is perceived as "distinct" or "other" in a particular society. Thus, when the requirements for "membership in a particular social group" are consistent with the other grounds of persecution, the overall burdens are equivalent to those placed on applicants asserting claims based on the other grounds.˜

V. APPLICATION TO THE RESPONDENT˜

The prevalence of gang violence in many countries is a large societal problem. The gangs may target one segment of the population for recruitment, another for extortion, and yet others for kidnapping, trafficking in drugs and people, and other crimes.

Although certain segments of a population may be more susceptible to one type of criminal activity than another, the residents all generally suffer from the gang's criminal efforts to sustain its enterprise in the area. A national community may struggle with significant societal problems resulting from gangs, but not all societal problems are bases for asylum.˜ Congress may choose to provide relief to those suffering from difficult situations not covered by asylum and withholding of removal.˜

Nevertheless, we emphasize that our holding˜ should not be read as a blanket rejection of all factual scenarios involving gangs.˜ Social group determinations are made on a case-by-case basis.˜ For example, a factual scenario in which gangs are targeting homosexuals may support a particular social group claim. While persecution on account of a protected ground cannot be inferred merely from acts of random violence and the existence of civil strife, it is clear that persecution on account of a protected ground may occur during periods of civil strife if the victim is targeted on account of a protected ground.˜

VI. CONCLUSION

We interpret the "particular social group" ground of persecution in a manner consistent with the other enumerated grounds of persecution in the Act and clarify that our interpretation of the phrase "membership in a particular social group" requires an applicant for asylum or withholding of removal to establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. Not every "immutable characteristic" is sufficiently precise to define a particular social group. The additional requirements of "particularity" and "social distinction" are necessary to ensure that the proposed social group is perceived as a distinct and discrete group by society. We further clarify that a particular social group does not require literal or "ocular" visibility.˜

The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion˜.

11.22 The Problem of Gender

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"Gender" is not listed as a protected ground in the refugee definition. However, [courts]˜ have begun to address the circumstances under which gender is relevant to a statutorily protected ground, including gender as a social group and gender-related harm.˜

Gender-specific harm may take many forms, including sexual violence, domestic or family violence, female genital mutilation or cutting, persecution of gays and lesbians, coerced family planning, and repressive social norms.˜

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11.23 Case: Fatin v. INS

Fatin v. INS
12 F.3d 1233 (3d Cir. 1993)

Alito, Circuit Judge:

Parastoo Fatin has petitioned for review of an order of the Board of Immigration Appeals (the "Board" or "BIA") requiring her to depart or be deported from the United States. Arguing that she has a well-founded fear of persecution and that she is likely to be persecuted if she returns to her native country of Iran, the petitioner contends that the Board erred in holding that she is not entitled to asylum˜. Based on the administrative record before us, however, we are constrained to deny the petition for review.

I.

The petitioner is a native and citizen of Iran. On December 31, 1978, approximately two weeks before the Shah left Iran, the petitioner entered the United States as a nonimmigrant student. She was then 18 years old. She attended high school in Philadelphia through May 1979, and the following September she enrolled in Spring Garden College, also in Philadelphia.˜

The INS˜ commenced a deportation proceeding against her in February 1986. In its order to show cause and notice of hearing, the INS alleged that she had stopped attending college and was therefore deportable˜ since she was not in compliance with the conditions of her admission as a nonimmigrant. At a hearing in May of that year, she conceded deportability, but she [applied] for asylum˜.˜

At a˜ hearing in May 1987, [w]hen her attorney asked her why she feared going back to Iran, she responded: "Because of the government that is ruling the country. It is a strange government to me. It has different rules and regulation[s] th[a]n I have been used to."˜ She stated that "anybody who [had] been a Moslem" was required "to practice that religion" or "be punished in public or be jailed," and she added that she had been "raised in a way that you don't have to practice if you don't want to."˜ She subsequently

stated that she would be required "to do things that [she] never had to do," such as wear a veil.˜ When asked by her attorney whether she would wear a veil, she replied:

A. I would have to, sir.

Q. And if you didn't?

A. I would be jailed or punished in public. Public mean by whipped or thrown stones and I would be going back to barbaric years.˜

Later, when the immigration judge asked her whether she would wear a veil or submit to arrest and punishment, she stated: "If I go back, I would try personally to avoid it as much as I could do.… I will start trying to avoid it as much as I could."˜

The petitioner also testified that she considered herself a "feminist" and explained: "As a feminist I mean that I believe in equal rights for women. I believe a woman as a human being can do and should be able to do what they want to do. And over there in … Iran at the time being a woman is a second class citizen, doesn't have any right to herself…."˜

After the hearing, the immigration judge denied the petitioner's application˜ for asylum˜.˜ [T]he immigration judge stated that, although she would be subject to the same discriminatory treatment as all other women in Iran, there was "no indication that there is a likelihood that the Iranian government would be particularly interested in this individual and that they would persecute her."˜ Similarly,˜ the judge stated: "Respondent has offered no objective indic[i]a which would lead the Court to believe that there is a possibility that she would be persecuted upon return to Iran.˜ It would appear that her fear of return to Iran while indeed understandable is based upon uncertainty and the unknown. In addition, it would appear that the respondent's fear upon return to Iran is her apparent dislike for the system and her belief that she as a woman would be subject to the severe restrictions presently imparted on Iranian[s] in that country. Respondent therefore contends that her beliefs as a "feminist" would be compromised. While the Court is very much sympathetic to the respondent's desire not to return to Iran, nonetheless, in applying the law to include case law, the Court is compelled to find that the respondent has failed to sustain her burden of proof necessary to be accorded asylum in the United States."˜

Petitioner then appealed to the Board of Immigration Appeals. In her brief, she argued that she feared persecution "on account of her membership of a particular social group˜."˜ Her brief identified her "particular social group" as "the social group of the upper class of Iranian women who supported the Shah of Iran, a group of educated Westernized free-thinking individuals."˜ Her brief also stated that she had a "deep[ly]

rooted belief in feminism" and in "equal rights for women, and the right to free choice of any expression and development of abilities, in the fields of education, work, home and family, and all other arenas of development."˜ In addition, her brief observed that she would be forced upon return to Iran "to practice the Moslem religion."˜ Her brief stated that "she would try to avoid practicing a religion as much as she could."˜ Her brief added that she had "the personal desire to avoid as much practice as she could," but that she feared that "through religious ignorance and inexperience she would be unable to play the role of a religious Shi'ite woman."˜ Her brief contained one passage concerning the requirement that women in Iran wear a veil in public: "In April 1983, the government adopted a law imposing one year's imprisonment on any women caught in public without the traditional Islamic veil, the Chador. However, from reports, it is clear that in many instances the revolutionary guards ... take the law into their own hands and abuse the transgressing women...."˜

Her brief did not discuss the question whether she would comply with the law regarding the wearing of a chador. Nor did her brief explain what effect submitting to that requirement would have upon her.˜

The Board of Immigration Appeals dismissed the petitioner's appeal. The Board noted that she had argued that she was entitled to relief "as a member of the social group composed of upper-class Iranian women" and as a person who "was educated in the western tradition."˜ Rejecting this argument, the Board stated that there was no evidence that she would be "singled out" for persecution.˜ Instead, the Board observed that she would be "subject to the same restrictions and requirements" as the rest of the population.˜

II.˜

The petitioner in this case contends that she is˜ eligible for asylum based on her "membership in a particular social group"˜.˜

Both courts˜ and commentators˜ have struggled to define "particular social group." Read in its broadest literal sense, the phrase is almost completely open-ended. Virtually any set including more than one person could be described as a "particular social group." Thus, the statutory language standing alone is not very instructive.

Nor is there any clear evidence of legislative intent. The phrase "particular social group" was first placed in the INA when Congress enacted the Refugee Act of 1980.˜ While the legislative history of this act does not reveal what, if any, specific meaning the members of Congress attached to the phrase "particular social group," the legislative history does make clear that Congress intended "to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of

Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, to which the United States acceded in 1968."˜ It is therefore appropriate to consider what the phrase "particular social group" was understood to mean under the Protocol.˜

When the Conference of Plenipotentiaries was considering the Convention in 1951, the phrase "membership of a particular social group" was added to this definition as an "afterthought."˜ The Swedish representative proposed this language, explaining only that it was needed because "experience had shown that certain refugees had been persecuted because they belonged to particular social groups," and the proposal was adopted.˜ Thus, neither the legislative history of the relevant United States statutes nor the negotiating history of the pertinent international agreements sheds much light on the meaning of the phrase "particular social group."

Our role in the process of interpreting this phrase, however, is quite limited. As the Supreme Court has explained, the Board of Immigration Appeals' interpretation of a provision of the Refugee Act is entitled to deference˜.

Here, the Board has˜ reasoned that a particular social group refers to "a group of persons all of whom share a common, immutable characteristic."˜

We have no doubt that this is a permissible construction of the relevant statutes, and we are consequently bound to accept it.˜

With this understanding of the phrase "particular social group" in mind, we turn to the elements that an alien must establish in order to qualify for withholding of deportation or asylum based on membership in such a group. We believe that there are three such elements. The alien must (1) identify a group that constitutes a "particular social group" within the interpretation just discussed, (2) establish that he or she is a member of that group, and (3) show that he or she would be persecuted or has a well-founded fear of persecution based on that membership.

In the excerpt from Acosta quoted above, the Board specifically mentioned "sex" as an innate characteristic that could link the members of a "particular social group." Thus, to the extent that the petitioner in this case suggests that she would be persecuted or has a well-founded fear that she would be persecuted in Iran simply because she is a woman, she has satisfied the first of the three elements that we have noted. She has not, however, satisfied the third element; that is, she has not shown that she would suffer or that she has a well-founded fear of suffering "persecution" based solely on her gender.˜

The petitioner's primary argument, in any event, is not that she faces persecution simply because she is a woman. Rather, she maintains that she faces persecution because she is a member of "a very visible and specific subgroup: Iranian women who refuse to

conform to the government's gender-specific laws and social norms."~ This definition merits close consideration. It does not include all Iranian women who hold feminist views. Nor does it include all Iranian women who find the Iranian government's "gender-specific laws and repressive social norms" objectionable or offensive. Instead, it is limited to those Iranian women who find those laws so abhorrent that they "refuse to conform"-even though, according to the petitioner's brief, "the routine penalty" for noncompliance is "74 lashes, a year's imprisonment, and in many cases brutal rapes and death."~

Limited in this way, the "particular social group" identified by the petitioner may well satisfy the BIA's definition of that concept, for if a woman's opposition to the Iranian laws in question is so profound that she would choose to suffer the severe consequences of noncompliance, her beliefs may well be characterized as "so fundamental to [her] identity or conscience that [they] ought not be required to be changed. "~ The petitioner's difficulty, however, is that the administrative record does not establish that she is a member of this tightly defined group, for there is no evidence in that record showing that her opposition to the Iranian laws at issue is of the depth and importance required.

The Iranian restriction discussed most prominently in the petitioner's testimony was the requirement that women wear the chador or traditional veil, but the most that the petitioner's testimony showed was that she would find that requirement objectionable and would seek to avoid compliance if possible. When asked whether she would prefer to comply with that law or suffer the consequences of noncompliance, she stated only that she "would try to avoid" wearing a chador as much as she could. Similarly, her brief to the BIA stated only that she would seek to avoid Islamic practices "as much as she could." She never testified that she would refuse to comply with the law regarding the chador or any of the other gender-specific laws or social norms. Nor did she testify that wearing the chador or complying with any of the other restrictions was so deeply abhorrent to her that it would be tantamount to persecution. Instead, the most that emerges from her testimony is that she would find these requirements objectionable and would not observe them if she could avoid doing so. This testimony does not bring her within the particular social group that she has defined-Iranian women who refuse to conform with those requirements even if the consequences may be severe.

The "particular social group" that her testimony places her within is, instead, the presumably larger group consisting of Iranian women who find their country's gender-specific laws offensive and do not wish to comply with them. But if the petitioner's "particular social group" is defined in this way, she cannot prevail because the administrative record does not satisfy the third element described above, i.e., it does not

show that the consequences that would befall her as a member of that group would constitute "persecution." According to the petitioner, she would have two options if she returned to Iran: comply with the Iranian laws or suffer severe consequences. Thus, while we agree with the petitioner that the indicated consequences of noncompliance would constitute persecution, we must still inquire whether her other option-compliance-would also constitute persecution.

In considering whether the petitioner established that this option would constitute persecution, we will assume for the sake of argument that the concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs. An example of such conduct might be requiring a person to renounce his or her religious beliefs or to desecrate an object of religious importance. Such conduct might be regarded as a form of "torture" and thus as falling within the Board's description of persecution in Acosta.˜ Such a requirement could constitute "torture" or persecution, however, only if directed against a person who actually possessed the religious beliefs or attached religious importance to the object in question. Requiring an adherent of an entirely different religion or a non-believer to engage in the same conduct would not constitute persecution.˜

Here, while we assume for the sake of argument that requiring some women to wear chadors may be so abhorrent to them that it would be tantamount to persecution, this requirement clearly does not constitute persecution for all women. Presumably, there are devout Shiíte women in Iran who find this requirement entirely appropriate. Presumably, there are other women in Iran who find it either inconvenient, irritating, mildly objectionable, or highly offensive, but for whom it falls short of constituting persecution. As we have previously noted, the petitioner's testimony in this case simply does not show that for her the requirement of wearing the chador or complying with Iran's other gender-specific laws would be so profoundly abhorrent that it could aptly be called persecution. Accordingly, we cannot hold that she is entitled to withholding of deportation or asylum based on her membership in a "particular social group."

11.24 Case: Matter of A-R-C-G-

The following case, Matter of A-R-C-G-, concerns the availability of asylum protection for those fleeing domestic violence. The post-decision history of the case reveals intense political debate about whether intimate violence should be the basis for asylum relief. In 2018, Attorney General Jeff Sessions, serving under President Donald Trump, vacated the A-R-C-G- decision. See Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018). In 2021, Attorney General Merrick Garland, serving under President Joe Biden,

vacated A-B- and reinstated A-R-C-G-. See Matter of A-B-, 28 I&N Dec. 307 (A.G. 2021).

Matter of A-R-C-G-
26 I&N Dec. 388 (Board of Immigration Appeals 2014)

We find that the˜ respondent, a victim of domestic violence in her native country, is a member of a particular social group composed of “married women in Guatemala who are unable to leave their relationship.”˜

I. FACTUAL AND PROCEDURAL HISTORY˜

The Immigration Judge found the respondent to be a credible witness, which is not contested on appeal. It is undisputed that the respondent, who married at age 17, suffered repugnant abuse by her husband. This abuse included weekly beatings after the respondent had their first child.˜ On one occasion, the respondent’s husband broke her nose. Another time, he threw paint thinner on her, which burned her breast. He raped her.

The respondent contacted the police several times but was told that they would not interfere in a marital relationship. On one occasion, the police came to her home after her husband hit her on the head, but he was not arrested. Subsequently, he threatened the respondent with death if she called the police again. The respondent repeatedly tried to leave the relationship by staying with her father, but her husband found her and threatened to kill her if she did not return to him. Once she went to Guatemala City for about 3 months, but he followed her and convinced her to come home with promises that he would discontinue the abuse. The abuse continued when she returned. The respondent left Guatemala in December 2005, and she believes her husband will harm her if she returns.

The Immigration Judge found that the respondent did not demonstrate that she had suffered past persecution or has a well-founded fear of future persecution on account of a particular social group comprised of “married women in Guatemala who are unable to leave their relationship.” The Immigration Judge determined that there was inadequate evidence that the respondent’s spouse abused her “in order to overcome” the fact that she was a “married woman in Guatemala who was unable to leave the relationship.” He found that the respondent’s abuse was the result of “criminal acts, not persecution,” which were perpetrated “arbitrarily” and “without reason.” He accordingly found that the respondent did not meet her burden of demonstrating eligibility for asylum or withholding of removal under the Act.

On appeal, the respondent asserts that she has established eligibility for asylum as a victim of domestic violence. The Department of Homeland Security ("DHS") initially responded that the Immigration Judge's decision should be upheld. We subsequently requested supplemental briefing from both parties and amici curiae to address the issue whether domestic violence can, in some instances, form the basis for a claim of asylum or withholding of removal under sections 208(a) and 241(b)(3) of the Act.˜

In response to our request for supplemental briefing, the DHS now concedes the respondent established that she suffered past harm rising to the level of persecution and that the persecution was on account of a particular social group comprised of "married women in Guatemala who are unable to leave their relationship."˜

II. ANALYSIS

A. Particular Social Group

The question whether a group is a "particular social group" within the meaning of the Act is a question of law that we review de novo.˜ The question whether a person is a member of a particular social group is a finding of fact that we review for clear error. 8 C.F.R. § 1003.1(d)(3)(i).

We initially considered whether victims of domestic violence can establish membership in a particular social group in Matter of R-A-, 22 I&N Dec. [906,] at 907 [(BIA 1999) (en banc)]. We reversed an Immigration Judge's finding that the respondent in that case was eligible for asylum on account of her membership in a particular social group consisting of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination."˜ The majority opinion reasoned that the proffered social group was "defined principally, if not exclusively, for purposes of the asylum case and that it was unclear whether "anyone in Guatemala perceives this group to exist in any form whatsoever," including spousal abuse victims themselves or their male oppressors.˜ We further reasoned that even if the proffered social group was cognizable, the respondent did not establish that her husband harmed her on account of her membership in the group.˜

The Acting Commissioner of the former Immigration and Naturalization Service ("INS") referred the decision to the Attorney General for review.˜ In 2001, Attorney General Janet Reno vacated our decision in Matter of R-A-, 22 I&N Dec. 906. She remanded the case for the Board's reconsideration following final publication of proposed regulations that addressed the meaning of various terms in asylum law, including "persecution," "membership in a particular social group," and "on account

of" a protected characteristic. See Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,597-98 (proposed Dec. 7, 2000).

On February 21, 2003, Attorney General John Ashcroft certified Matter of R-A- for review and provided an opportunity for additional briefing. He remanded the case to the Board in 2005, directing us to reconsider our decision "in light of the final rule." Matter of R-A-, 23 I&N Dec. 694. The proposed regulations were not finalized. On September 25, 2008, Attorney General Michael Mukasey certified the case for his review and issued a decision ordering us to reconsider it, removing the requirement that we await the issuance of the final regulations. Matter of R-A-, 24 I&N Dec. 629. Matter of R-A- is no longer pending.˜

B. Respondent's Claim

The DHS has conceded that the respondent established harm rising to the level of past persecution on account of a particular social group comprised of "married women in Guatemala who are unable to leave their relationship." The DHS's position regarding the existence of such a particular social group in Guatemala under the facts presented in this case comports with our recent precedents clarifying the meaning of the term "particular social group."˜ In this regard, we point out that any claim regarding the existence of a particular social group in a country must be evaluated in the context of the evidence presented regarding the particular circumstances in the country in question.

In˜ Matter of M-E-V-G-, we held that an applicant seeking asylum based on his or her membership in a "particular social group" must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.˜

In this case, the group is composed of members who share the common immutable characteristic of gender.˜ Moreover, marital status can be an immutable characteristic where the individual is unable to leave the relationship. A determination of this issue will be dependent upon the particular facts and evidence in a case. A range of factors could be relevant, including whether dissolution of a marriage could be contrary to religious or other deeply held moral beliefs or if dissolution is possible when viewed in light of religious, cultural, or legal constraints. In evaluating such a claim, adjudicators must consider a respondent's own experiences, as well as more objective evidence, such as background country information.

The DHS concedes that the group in this case is defined with particularity. The terms used to describe the group—"married," "women," and "unable to leave the relationship"—have commonly accepted definitions within Guatemalan society based

on the facts in this case, including the respondent's experience with the police. In some circumstances, the terms can combine to create a group with discrete and definable boundaries. We point out that a married woman's inability to leave the relationship may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation. See Matter of W-G-R-, 26 I&N Dec. at 214 (observing that in evaluating a group's particularity, it may be necessary to take into account the social and cultural context of the alien's country of citizenship or nationality); Committees on Foreign Relations and Foreign Affairs, 111th Cong., 2d Sess., Country Reports on Human Rights Practices for 2008 2598 (Joint Comm. Print 2010) (discussing sexual offenses against women as a serious societal problem in Guatemala). Notably, the group is not defined by the fact that the applicant is subject to domestic violence. See Matter of W-G-R-, 26 I&N Dec. at 215 (noting that circuit courts "have long recognized that a social group must have 'defined boundaries' or a 'limiting characteristic,' other than the risk of being persecuted"). In this case, it is significant that the respondent sought protection from her spouse's abuse and that the police refused to assist her because they would not interfere in a marital relationship.

The group is also socially distinct within the society in question. Matter of M-E-V-G-, 26 I&N Dec. at 240 ("To be socially distinct, a group need not be seen by society; rather it must be perceived as a group by society."). To have "social distinction," there must be "evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group." The group's recognition is "determined by the perception of the society in question, rather than by the perception of the persecutor." The perception of the persecutor, however, is critical to the question whether a person is persecuted "on account" of membership in a particular social group. Matter of M-E-V-G-, 26 I&N Dec. at 242; see also Matter of W-G-R-, 26 I&N Dec. at 214 (noting that there is some degree of overlap between the particularity and social distinction requirements because both take societal context into account).

When evaluating the issue of social distinction, we look to the evidence to determine whether a society, such as Guatemalan society in this case, makes meaningful distinctions based on the common immutable characteristics of being a married woman in a domestic relationship that she cannot leave. Such evidence would include whether the society in question recognizes the need to offer protection to victims of domestic violence, including whether the country has criminal laws designed to protect domestic abuse victims, whether those laws are effectively enforced, and other sociopolitical factors. Cf. Davila-Mejia v. Mukasey, 531 F.3d 624, 629 (8th Cir. 2008) (finding that competing family business owners are not a particular social group because they are not perceived as a group by society).

Supporting the existence of social distinction, and in accord with the DHS's concession that a particular social group exists, the record in this case includes unrebutted evidence that Guatemala has a culture of "machismo and family violence." Sexual offenses, including spousal rape, remain a serious problem. Further, although the record reflects that Guatemala has laws in place to prosecute domestic violence crimes, enforcement can be problematic because the National Civilian Police "often failed to respond to requests for assistance related to domestic violence."

We point out that cases arising in the context of domestic violence generally involve unique and discrete issues not present in other particular social group determinations, which extends to the matter of social distinction. However, even within the domestic violence context, the issue of social distinction will depend on the facts and evidence in each individual case, including documented country conditions; law enforcement statistics and expert witnesses, if proffered; the respondent's past experiences; and other reliable and credible sources of information. Amici for the American Immigration Lawyers Association, the United Nations High Commissioner for Refugees, and the Center for Gender & Refugee Studies argue that gender alone should be enough to constitute a particular social group in this matter. Since the respondent's membership in a particular social group is established under the aforementioned group, we need not reach this issue.

C. Remaining Issues

The DHS stipulates that the respondent suffered mistreatment rising to the level of past persecution. The DHS also concedes in this case that the mistreatment was, for at least one central reason, on account of her membership in a cognizable particular social group. We note that in cases where concessions are not made and accepted as binding, these issues will be decided based on the particular facts and evidence on a case-by-case basis as addressed by the Immigration Judge in the first instance. In particular, the issue of nexus will depend on the facts and circumstances of an individual claim.

We will remand the record for the Immigration Judge to address the respondent's statutory eligibility for asylum in light of this decision. Under controlling circuit law, in order for the respondent to prevail on an asylum claim based on past persecution, she must demonstrate that the Guatemalan Government was unwilling or unable to control the "private" actor.

If the respondent succeeds in establishing that the Government was unwilling or unable to control her husband, the burden shifts to the DHS to demonstrate that there has been a fundamental change in circumstances such that the respondent no longer has a well-founded fear of persecution. 8 C.F.R. § 1208.13(b)(1)(i)(A), (ii) (2014).

Alternatively, the DHS would bear the burden of showing that internal relocation is possible and is not unreasonable. 8 C.F.R. § 1208.13(b)(1)(i)(B), (ii); see also Matter of M-Z-M-R-, 26 I&N Dec. 28 (BIA 2012).˜ The Immigration Judge may also consider, if appropriate, whether the respondent is eligible for humanitarian asylum. See 8 C.F.R. § 1208.13(b)(1)(iii).

III. CONCLUSION

For the foregoing reasons, we will remand the record to the Immigration Judge for further proceedings and for the entry of a new decision. On remand, the Immigration Judge should afford the parties the opportunity to update the evidentiary record.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

11.25 Refugee Sur Place

Sometimes an individual does not qualify as a refugee when they leave their country of origin, but they nonetheless meet the definition at a later point in time. Imagine an individual who has been a vocal supporter of the political party in charge when they left their country but, after arriving in the U.S., a violent coup takes place that would subject the individual to persecution if they returned to their country. Or imagine an international student who comes to the United States from a socially repressive nation who, after living in the U.S., comes to the realization that they are gay, becomes involved in a same-sex relationship, and would be subject to persecution in their home country because of that relationship. Migrants who do not qualify as refugees when entering the U.S., but who meet the refugee definition later due to events occurring after their arrival in this country, are known as "sur place" refugees.

11.26 Discretion

Ninth Circuit Immigration Outline (2020)

"Asylum is a two-step process, requiring the applicant first to establish his *eligibility* for asylum by demonstrating that he meets the statutory definition of a 'refugee,' and second to show that he is *entitled* to asylum as a matter of discretion."˜ Once an "applicant establishes statutory eligibility for asylum, the Attorney General must, by a proper exercise of [] discretion, determine whether to grant that relief."˜

The Attorney General's ultimate decision to grant or deny asylum to an eligible applicant is reviewed for abuse of discretion.˜ In exercising its discretion, the BIA must consider both favorable and unfavorable factors, including the severity of the past

persecution suffered.˜ "There is no definitive list of factors that the BIA must consider or may not consider. Each asylum application is different, and factors that are probative in one context may not be in others. However, all relevant favorable and adverse factors must be considered and weighed."˜ "[T]he likelihood of future persecution is a particularly important factor to consider."˜

Uncontested evidence that an applicant committed immigration fraud is sufficient to support the discretionary denial of asylum.˜ In contrast, an applicant's entry into the United States using false documentation is worth little if any weight in balancing positive and negative factors.˜

If asylum is denied in the exercise of discretion, the applicant remains eligible for withholding [of removal, discussed in section 11.37].˜

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11.27 Derivative Asylees

Ninth Circuit Immigration Outline (2020)

"A spouse or child ... of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien."˜ [INA § 208(b)(3);] 8 U.S.C. § 1158(b)(3).

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11.28 Asylum Bars: One Year Deadline

Ninth Circuit Immigration Outline (2020)

Under IIRIRA, effective April 1, 1997, an applicant must demonstrate by clear and convincing evidence that his or her application for asylum was filed within one year after arrival in the United States.˜ 8 U.S.C. § 1158(a)(2)(B). "The 1-year period shall be calculated from the date of the alien's last arrival in the United States or April 1, 1997, whichever is later." 8 C.F.R. § 1208.4(a)(2)(ii). The first day of the one-year period for filing an asylum application is the day after the noncitizen arrived in the United States.˜ "Where ... the government alleges an alien's arrival date in the Notice to Appear, and the alien admits the government's allegation before the IJ, the allegations are considered judicial admissions rendering the arrival date undisputed."˜

"[T]he Government may still consider a late application if the applicant establishes (1) changed circumstances that materially affect the applicant's eligibility for asylum or

(2) extraordinary circumstances directly related to the delay in filing an application."~ "[T]he applicant need only provide evidence '[t]o the satisfaction of ... the immigration judge ... that he or she qualifies for an exception to the 1-year deadline[.]'"~ If the applicant can show a material change in circumstances or that extraordinary circumstances caused the delay in filing, the limitations period will be tolled. See 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. § 1208.4(a)(4) & (5).~ To determine whether the reasons for petitioner's delay in filing an asylum application is reasonable, the court considers the reasons given to justify the delay, as well as the length of the delay in filing.~

Pursuant to 8 U.S.C. § 1158(a)(3), [federal courts lack]~ jurisdiction to review the agency's determination that an asylum application is not timely.~ However, § 106 of REAL ID Act restored jurisdiction over constitutional claims and questions of law.~ [The Ninth Circuit has held that, under REAL ID Act, it has] jurisdiction over the "changed circumstances" question because it was a mixed question of fact and law.~ The court~ [has also held that it] has jurisdiction to review a claim that an IJ failed to address the argument that an asylum application was untimely due to extraordinary circumstances.~

[Finally,] "There is no statutory time limit for bringing a petition for withholding of removal."~ [Withholding of removal will be discussed in section 11.37.]

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11.29 Asylum Bars: Prior Denial

Ninth Circuit Immigration Outline (2020)

An applicant who previously applied for and was denied asylum is barred. 8 U.S.C. § 1158(a)(2)(C). Pursuant to 8 U.S.C. § 1158(a)(3), [federal courts lack]~ jurisdiction to review the IJ's determination under this section.

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11.30 Asylum Bars: Safe Third Country

Ninth Circuit Immigration Outline (2020)

An applicant has no right to apply for asylum if she "may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality ...) in which the alien's life or freedom would not be threatened on account

of" the statutory grounds. 8 U.S.C. § 1158(a)(2)(A). Pursuant to 8 U.S.C. § 1158(a)(3), [federal courts lack]˜ jurisdiction to review the IJ's determination under this section.˜

The United States and Canada entered into a bilateral agreement, effective December 29, 2004, which recognizes that both countries "offer generous systems of refugee protection" and provides, subject to exceptions, that noncitizens arriving in the United States from Canada at a land border port-of-entry shall be returned to Canada to seek protection under Canadian immigration law.˜ The Agreement indicates that a noncitizen may apply for asylum, withholding of removal or protection under the Convention Against Torture in one or the other, but not both, countries. See also 8 C.F.R. § 208.30(e)(6) (implementing regulation); 69 FR 69480 (Nov. 29, 2004) (rules implementing United States-Canada agreement).˜

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11.31 Asylum Bars: Firm Resettlement

Ninth Circuit Immigration Outline (2020)

[A]n applicant may not be granted asylum if he or she "was firmly resettled in another country prior to arriving in the United States." See 8 U.S.C. § 1158(b)(2)(A)(vi)˜. A finding of firm resettlement is a factual determination reviewed for substantial evidence.˜

Determining whether the firm resettlement rule applies involves a two-step process: First, the government presents "evidence of an offer of some type of permanent resettlement," and then, second, "the burden shifts to the applicant to show that the nature of his [or her] stay and ties was too tenuous, or the conditions of his [or her] residence too restricted, for him [or her] to be firmly resettled."˜

An applicant who received an offer of permanent resettlement will not be firmly resettled if he can establish: (a) That his or her entry into that country was a necessary consequence of his or her flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country; or (b) That the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled. In making his or her determination, the asylum officer or immigration judge shall consider the conditions under which other residents of the country live; the type of housing, whether permanent or temporary, made available to the refugee; the types and extent of employment available to the refugee; and the extent to which the refugee received

permission to hold property and to enjoy other rights and privileges, such as travel documentation that includes a right of entry or reentry, education, public relief, or naturalization, ordinarily available to others resident in the country. 8 C.F.R. § 1208.15.

The government bears the initial burden of showing by direct or indirect evidence an offer of permanent resident status, citizenship, or some other type of permanent resettlement.˜ [T]he focus of the firm resettlement inquiry remains on an offer of permanent resettlement.˜ The fact that a country offers a process for applying for some type of refugee or asylum status is not the same as offering the status itself.˜ However, an applicant may have an offer if he or she is entitled to permanent resettlement and all that remains in the process is for the applicant to complete some ministerial act.˜ Thus, the firm resettlement bar may apply if the applicant chooses to walk away instead of completing the process and accepting the third country's offer of permanent resettlement.˜ The fact that an applicant no longer has travel authorization does not preclude a finding of permanent resettlement when the applicant has permitted his documentation to lapse.˜

Once the government presents evidence of an offer of some type of permanent resettlement, the burden shifts to the applicant to show that the nature of his stay and ties was too tenuous, or the conditions of his residence too restricted, for him to be firmly resettled.˜

A finding of firm resettlement does not bar eligibility for withholding of removal [which will be discussed in section 11.37].

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11.32 Asylum Bars: Persecution of Others

In defining the scope of refugee protections, Congress specifically excluded those who have themselves engaged in persecution: "The term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person 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).

Whether the persecutor bar should apply to individuals who acted under duress has been the subject of debate. In 2018, the Board of Immigration Appeals recognized a "narrow" duress exception to the persecutor bar. Matter of Negusie, 27 I&N Dec. 347, 353 (BIA 2018). Attorney General William Barr, serving under President Donald Trump, referred the BIA's decision to himself and reversed, finding no duress or coercion exception existed. Matter of Negusie, 28 I&N Dec. 120 (A.G. 2020). Attorney General Merrick Garland, serving under President Joe Biden, referred AG Barr's

decision to himself and stayed it. Matter of Negusie, 28 I&N Dec. 299 (A.G. 2021). As of this writing, Garland has not rendered a decision in the case.

There also remain open questions about the burden of proof when it comes to the persecutor bar. The BIA, in its Negusie decision, concluded that "the initial burden is on the DHS to show evidence that indicates the alien assisted or otherwise participated in persecution." Negusie, 27 I&N Dec. at 366. In his Negusie decision, Attorney General Barr disagreed, concluding that "if evidence in the record indicates the persecutor bar may apply, the noncitizen bears the burden of proving by a preponderance of the evidence that it does not." Negusie, 28 I&N Dec. at 154. As noted, this decision has been stayed by Matter of Negusie, 28 I&N Dec. 299 (A.G. 2021).

11.33 Asylum Bars: Particularly Serious Crime

Ninth Circuit Immigration Outline (2020)

An applicant in removal proceedings is barred from relief if, "having been convicted by a final judgment of a particularly serious crime, [he] constitutes a danger to the community in the United States." See 8 U.S.C. § 1158(b)(2)(A)(ii)˜. A person convicted of a particularly serious crime is considered per se to be a danger to the community.˜

[W]hether the applicant committed a particularly serious crime is˜ judged by looking at such factors "'as the nature of conviction, the circumstances underlying the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community.'"˜ Additionally, crimes against persons are more likely to be considered particularly serious. "All aggravated felonies are categorically particularly serious crimes for the purposes of asylum˜".˜

"'[A]ll reliable information may be considered in making a particularly serious crime determination, including the conviction records and sentencing information, as well as other information outside the confines of a record of conviction.'"˜

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11.34 Asylum Bars: Serious Non-Political Crime

Ninth Circuit Immigration Outline (2020)

An applicant is barred from relief if there are serious reasons for believing that he or she committed a serious, non-political crime outside the United States prior to arrival. 8 U.S.C. § 1158(b)(2)(A)(iii)˜.

"[A] 'serious non-political crime' is a crime that was not committed out of 'genuine political motives,' was not directed toward the 'modification of the political organization or ... structure of the state,' and in which there is no direct, 'causal link between the crime committed and its alleged political purpose and object.'"˜

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11.35 Asylum Bars: Security

Ninth Circuit Immigration Outline (2020)

An applicant is ineligible for asylum if there are reasonable grounds for regarding the applicant as a danger to the security of the United States. 8 U.S.C. § 1158(b)(2)(A)(iv)˜.

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11.36 Asylum Bars: TRIG

The terrorism related inadmissibility grounds (TRIG) discussed in sections 6.4-6.6 are grounds for denying asylum.

Ninth Circuit Immigration Outline (2020)

An applicant is ineligible for asylum if he is inadmissible or removable for reasons relating to terrorist activity, unless in the case of an applicant inadmissible as a representative of a terrorist organization or group that espouses or endorses terrorist activity, the Attorney General determines in his discretion that there are not reasonable grounds for regarding the applicant as a danger to the security of the United States. 8 U.S.C. § 1158(b)(2)(A)(v).˜

The commission of "an act that the actor knows, or reasonably should know, affords material support, ... to a terrorist organization or a member of a terrorist organization, unless the alien did not know (and should not reasonably have known) that the organization was a terrorist organization" qualifies as engaging in terrorist

activity.˜ "[T]he INA's material support bar contains no implied exception for de minimis aid in the form of funds."˜

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11.37 Withholding of Removal

A noncitizen who does not qualify for asylum may qualify for a different form of relief called withholding of removal. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3). As explained in the following readings, withholding is subject to a higher burden of proof than asylum. Yet two of the asylum bars discussed above—the one-year filing deadline and firm resettlement—do not apply to withholding cases. Finally, withholding is a less-desirable form of relief as it applies only to the applicant and does not provide for relief for family members such as spouses and children.

EOUSA, OLE, Immigration Law (2005)

Withholding of removal is a distinct mechanism through which an alien can have his or her deportation to a particular country "withheld" because his or her 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 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.˜

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Ninth Circuit Immigration Outline (2020)

Withholding [of removal] codifies the international norm of "nonrefoulement" or non-return to a country where an applicant would face persecution.˜

BURDEN OF PROOF

"The 'clear probability' standard for withholding is a more stringent burden of proof than the standard for asylum, which does not require that the applicant demonstrate that harm would be more likely than not to occur."˜ Because "[t]he 'more likely than not' standard for withholding of removal is 'more stringent' than the 'reasonable possibility' standard for asylum, … an applicant who is unable to show a 'reasonable possibility' of future persecution 'necessarily fails to satisfy the more stringent standard for withholding of removal.'"˜ The standard has "no subjective

component, but instead requires the alien to establish by objective evidence that it is more likely than not that [the alien] will be subject to persecution upon deportation."˜

Although an asylum "applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant," 8 U.S.C. § 1158(b)(1)(B)(i) (emphasis added), the standard for withholding of removal is not as demanding˜. "A withholding of removal applicant, ..., must prove only that a cognizable protected ground is 'a reason' for future persecution."˜ Thus, although the overall standard of proof is more difficult to meet in withholding cases, the motive for persecution is easier to show.˜

The agent of persecution must be "the government or ... persons or organizations which the government is unable or unwilling to control."˜

MANDATORY RELIEF

"Unlike asylum, withholding of removal is not discretionary. The Attorney General is not permitted to deport an alien to a country where his life or freedom would be threatened on account of one of the [] protected grounds ... ."˜

[That said, some of the asylum bars apply in withholding cases as well. Applicants are not entitled to withholding relief if they:]˜ assisted in Nazi persecution or engaged in genocide˜; "ordered, incited, assisted, or otherwise participated in the persecution of an individual" on account of the protected grounds; [have been convicted of particularly serious crimes such as] (1) an aggravated felony resulting in an aggregate sentence of imprisonment of at least five years˜ [a more narrow understanding of this term than is used in asylum cases], or (2) [a crime designed as particularly serious by] the Attorney General˜; "committed a serious nonpolitical crime outside the United States before" arrival;˜ [are]˜ a danger to the security of the United States; [or they are subject to the terrorism related inadmissibility grounds].

NATURE OF RELIEF

Under asylum, an applicant granted relief may apply for permanent residence after one year.˜ Under withholding, the successful applicant is only given a right not to be removed to the country of persecution.˜ Withholding does not confer protection from removal to any other country.˜

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11.38 Convention Against Torture

A noncitizen who does not qualify for asylum or withholding may nonetheless qualify for protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, known as "CAT" relief.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

PART I

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.˜

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Ninth Circuit Immigration Outline (2020)

The United States signed the Convention Against Torture on April 18, 1988, and Congress passed the Foreign Affairs Reform and Restructuring Act ("FARRA") in 1988 to implement Article 3 of CAT.˜ The implementing regulations for the Convention Against Torture are found in 8 C.F.R. § 1208.16 to 1208.18.˜

There are two forms of protection under the Convention Against Torture: (1) withholding of removal under 8 C.F.R. § 1208.16(c) for noncitizens who are not barred

from eligibility under FARRA for having been convicted of a "particularly serious crime" or of an aggravated felony for which the term of imprisonment is at least five years, and (2) deferral of removal under 8 C.F.R. § 1208.17(a) for noncitizens entitled to protection but subject to mandatory denial of withholding.˜

DEFINITION OF TORTURE

"Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."˜ "'Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.'"˜

"The United States included a reservation when it ratified the Convention, narrowing the definition of torture with respect to 'mental pain or suffering.' The reservation states that 'mental pain or suffering refers to the prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality."˜

"'Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'"˜ However, "[w]hether used as a means of punishing desertion or some other form of military or civilian misconduct or whether inflicted on account of a person's political opinion, torture is never a lawful means of punishment."˜ Lawful sanctions encompass "'judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty,' but only so long as those sanctions do not 'defeat the object and purpose of [CAT] to prohibit torture.'"˜ "A government cannot exempt tortuous acts from CAT's prohibition merely by authorizing them as permissible forms of punishment in its domestic law."˜

"The threat of imminent death, whether directed at the applicant or someone the applicant knows, may constitute torture." Additionally, "[r]ape and sexual assault may constitute torture, and 'certainly rise[ ] to the level of torture for CAT purposes' when inflicted due to the victim's sexual orientation."

BURDEN OF PROOF

In order to be eligible for withholding of removal under the Convention Against Torture, the applicant has the burden of establishing that if removed to the proposed country of removal "he is more likely than not to suffer intentionally-inflicted cruel and inhuman treatment that either (1) is not lawfully sanctioned by that country or (2) is lawfully sanctioned by that country, but defeats the object and purpose of CAT." This standard requires that an applicant demonstrate "only a chance greater than fifty percent that he will be tortured" if removed.

A "petitioner carries this burden whenever he or she presents evidence establishing 'substantial grounds for believing that he [or she] would be in danger of being subjected to torture' in the country of removal." The "failure to establish eligibility for asylum does not necessarily doom an application for relief under the United Nations Convention Against Torture." Instead, "the standards for the two bases of relief are distinct and should not be conflated."

In Maldonado v. Lynch, 786 F.3d 1155, 1164 (9th Cir. 2015) (en banc), this court explained that section "1208.16(c)(2) provides that an applicant for deferral of removal must demonstrate that it is more likely than not that he or she will be tortured if removed. In deciding whether the applicant has satisfied his or her burden, the IJ must consider all relevant evidence, including but not limited to the possibility of relocation within the country of removal." The court clarified that "[s]ection 1208.16(c)(2) does not place a burden on an applicant to demonstrate that relocation within the proposed country of removal is impossible because the IJ must consider all relevant evidence; no one factor is determinative. See § 1208.16(c)(3)(i)–(iv); Kamalthas, 251 F.3d at 1282. Nor do the regulations shift the burden to the government because they state that the applicant carries the overall burden of proof." Maldonado, 786 F.3d at 1164.

"[T]he CAT regulations cast a wide evidentiary net, providing that 'all evidence relevant to the possibility of future torture shall be considered, including, but not limited to … evidence of gross, flagrant or mass violations of human rights within the country of removal … .'" "The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."

In evaluating a CAT claim, "the IJ must consider all relevant evidence; no one factor is determinative."˜ Relevant evidence includes:

i. Evidence of past torture inflicted upon the applicant;
ii. Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;
iii. Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and
iv. Other relevant information regarding conditions in the country of removal.˜

DIFFERENCES BETWEEN CAT PROTECTION AND ASYLUM AND WITHHOLDING

"[T]he Convention's reach is both broader and narrower than that of a claim for asylum or withholding of deportation: coverage is broader because a petitioner need not show that he or she would be tortured 'on account of' a protected ground; it is narrower, however, because the petitioner must show that it is 'more likely than not' that he or she will be tortured, and not simply persecuted upon removal to a given country."˜ "Unlike asylum and withholding, there are no mandatory bars to an applicant seeking deferral of removal under CAT."˜

AGENT OR SOURCE OF TORTURE

To qualify for relief under the Convention, the torture must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."˜

"Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity."˜ "Acquiescence" by government officials does not require actual knowledge or willful acceptance, rather awareness and willful blindness by governmental officials is sufficient.˜ Nor does the standard require that public officials sanction the alleged conduct.˜ "It is enough that public officials could have inferred the alleged torture was taking place, remained willfully blind to it, or simply stood by because of their inability or unwillingness to oppose it."˜ "[T]he acquiescence standard is met where the record demonstrates that public officials at any level—even if not at the federal level—would acquiesce in torture the petitioner is likely to suffer."˜

"[A]n applicant for CAT relief need not show that the entire foreign government would consent to or acquiesce in [her] torture."˜ It is enough for her to show that she was subject to torture at the hands of local officials.

"[A] general ineffectiveness on the government's part to investigate and prevent crime will not suffice to show acquiescence." Furthermore, "inability to bring the criminals to justice is not evidence of acquiescence, as defined by the applicable regulations."

An applicant also need not demonstrate that she would face torture while under public officials' prospective custody or physical control.

MANDATORY RELIEF

"If an alien meets his burden of proof regarding future torture, withholding of removal [under CAT] is mandatory under the implementing regulations, just as it is in the case of a well-founded fear of persecution." However, there is one qualification to the mandatory nature of withholding under the CAT. "If the alien has committed a 'particularly serious crime' or an aggravated felony for which the term of imprisonment is at least five years, only deferral of removal, not withholding of removal, is authorized."

Although an applicant will be denied withholding of removal under CAT if the Attorney General has reasonable grounds to believe that the applicant is a danger to the security of the United States, see 8 U.S.C. § 1231(b)(3)(B)(iv) and 8 C.F.R. § 1208.16(d)(2), he may still be eligible for deferral of removal under CAT, see 8 C.F.R. § 1208.17(a).

NATURE OF RELIEF

Unlike asylum, CAT relief does not confer status, only protection from return to the country where the applicant would be tortured. See 8 C.F.R. § 1208.16(f).

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11.39 Temporary Protected Status

CRS, TPS and DED (2021)

TPS is a blanket form of humanitarian relief. The term *blanket relief* refers to relief from removal that is administered to a group of individuals based on their ties to a foreign country; this stands in contrast to asylum, which is a form of relief administered on a case-by-case basis to individuals based on their personal circumstances. It is the statutory embodiment of safe haven for foreign nationals within the United States Foreign nationals outside the United States are not eligible to apply for TPS who may not qualify for asylum but are nonetheless fleeing—or reluctant to return to—

potentially dangerous situations. TPS was established by Congress as part of the Immigration Act of 1990 (P.L. 101-649). The statute gives the Secretary of the Department of Homeland Security (DHS), in consultation with other government agencies (most notably the Department of State), the authority to designate a country for TPS under one or more of the following conditions:

1. ongoing armed conflict in a foreign state that poses a serious threat to personal safety;
2. a foreign state request for TPS because it temporarily cannot handle the return of its nationals due to an environmental disaster; or
3. extraordinary and temporary conditions in a foreign state that prevent its nationals from safely returning.

A foreign state may not be designated for TPS if the Secretary of DHS finds that allowing its nationals to temporarily stay in the United States is against the U.S. national interest. [INA § 244(b)(1), 8 U.S.C. § 1254a(b)(1).]

The Secretary of DHS may designate a country for TPS for periods of 6 to 18 months and can extend these periods if the country continues to meet the conditions for designation. There is no limit on the number of extensions a country can receive. Each designation specifies the date by which individuals must have continuously resided in the United States in order to qualify. If a designation is extended, the arrival date may be moved forward in order to allow those who arrived later to qualify, an action referred to as redesignation.

To obtain TPS, nationals of foreign countries designated for TPS must pay specified fees and submit an application to DHS's U.S. Citizenship and Immigration Services (USCIS) before the deadline set forth in the Federal Register notice announcing the TPS designation. The application must include supporting documentation as evidence of eligibility (e.g., a passport issued by the designated country and records showing continuous physical presence in the United States since the date established in the TPS designation). The statute specifies grounds of inadmissibility that cannot be waived, including those relating to criminal convictions, drug offenses, terrorist activity, and the persecution of others. Foreign nationals outside the United States are not eligible to apply for TPS.

Individuals granted TPS are eligible for employment authorization, cannot be detained on the basis of their immigration status, and are not subject to removal while they retain TPS. They may be deemed ineligible for public assistance by a state; they may travel abroad with the prior consent of the DHS Secretary. TPS does not provide

a path to lawful permanent residence or citizenship, but a TPS recipient is not barred from acquiring nonimmigrant or immigrant status if he or she meets the requirements.˜ DHS has indicated that information it collects when an individual registers for TPS may be used to enforce immigration law or in any criminal proceeding.˜ In addition, withdrawal of an alien's TPS may subject the alien to exclusion or deportation proceedings.˜

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In Sanchez v. Mayorkas, 593 U.S. __ (2021), the Supreme Court held that TPS does not count as a lawful admission that would allow a TPS holder to benefit from adjustment of status within the United States. See section 7.9.

11.40 Test Your Knowledge

Problem 11.1

Alena Aineska is a citizen of Bereznik. Eighteen months ago, she was involuntarily committed to a mental institution after she was found, in a civil proceeding, to be a homosexual. While institutionalized, she was given electroshock treatment and drug protocols aimed at curing her of her mental illness. She was granted a brief home visit to see her dying mother fourteen months ago. Alena's older sister took the opportunity to secret Alena out of the country. Alena then spent one month in a neighboring country, Estrovia, with an ex-girlfriend, Mika Miocic. Alena spent the entire month indoors, curled up on Mika's couch, not speaking. Concerned about her well-being, Mika took steps to move Alena to the U.S. home of Alena's cousins and close friends.

Mika went to a travel agent and purchased a ticket – in Mika's own name – from Estrovia to Seattle. She then gave her passport and the ticket to Alena, drove Alena (still silent and mostly non-responsive) to the airport, and ushered Alena onto the plane. When Alena landed in the United States one year ago, she allowed herself to be carried with the traveling crowds through immigration control. She did not need to present a visa because Estrovia is a visa-waiver country. Alena's cousins were waiting on the other side and took her immediately into their care.

Last month, Alena and her cousins were involved in a car accident. The responding officers asked everyone on the scene for identification. When Alena could not produce any evidence of lawful immigration status, the responding officer contacted ICE and she was taken into custody.

It has now been a little over a year since Alena's initial entry into the United States. Her cousins are asking for advice on how to help Alena. They are concerned about her

return to Bereznik. If returned, Alena will receive advanced mental health treatment, which would include a frontal lobotomy. In Bereznik today, as was common in the United States several decades ago, lobotomies are typically accomplished by inserting rods through the eye socket, using a mallet to drive through the thin layer of bone and into the brain along the plane of the bridge of the nose, and then pivoting the rods to dissect the connection between the prefrontal cortex (the portion of the brain responsible for planning complex cognitive behaviors, personality expression, decision making and moderating correct social behavior) and the thalamus (the portion of the brain relaying sensation, spatial sense and motor signals to the cerebral cortex, along with the regulation of consciousness, sleep and alertness).

What are possible avenues, as well as any hurdles, to relief for Alena?

PROBLEM 11.2

Santiago Sánchez is from Chalatenango, El Salvador, an area in the northern part of the country with about 30,000 inhabitants. He grew up in this area and was raised by his paternal grandfather, Martin Mariel. Because of the size of Chalatenango, many people knew Sánchez lived with his grandfather and continued to live with him after marrying Rosa Renata and even after the arrival of their daughters: Flor Fernanda and Gina Gabriela.

Sánchez knew his grandfather was employed by the National Civil Police of El Salvador, but he didn't know that his grandfather had testified against several gang members until he, Sánchez, started receiving threatening phone calls from the gang Mara Salvatrucha (MS or MS-13). The callers would threaten Sánchez and his grandfather, saying they knew about Mariel's testimony against their friends. The calls arrived two to three times a month.

At one point, when out running errands, Sánchez was surrounded by members of MS-13 who told him that they knew he had a family member that worked for the police. The gang members punched Sánchez several times in the face, breaking his nose. When Sánchez told his grandfather of the encounter, his grandfather made a formal complaint with the local police. However, the phone calls to the house did not stop.

Last month, Rosa Renata was kidnapped while shopping. She was assaulted and murdered, her body dumped on the front steps of the home Sánchez shared with his grandfather.

Fearing for the lives of his daughters, Sánchez fled with them to the United States. Sánchez has since spoken to his grandfather and learned that the threatening telephone calls continue.

How might an attorney use this information to support an asylum claim by Sánchez?

Chapter Twelve: Immigration Detention

Migrants that are physically held by the government during the pendency of their removal hearings are detained pursuant to civil, not criminal, law. See INA §§ 235(b)(1)(B)(IV) & (b)(2), 236(a) & (c); 8 U.S.C. §§ 1225(b)(1)(B)(iii)(IV) & (b)(2), 1226(a) & (c). 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 of only 13,529 in immigration detention during February 2021.

This chapter explores why the government detains noncitizens (section 12.1) as well as the different times when migrants are detained: at admission (section 12.2), during removal (section 12.3-12.4), and post-removal (section 12.5). It concludes with an introduction to the detention conditions faced by noncitizen adults (section 12.9) and children (12.10).

12.1 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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12.2 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" 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 7.7.] 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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12.3 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, 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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12.4 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, 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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12.5 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,˜ 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, 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. __ (2021), the Supreme Court held that the detention of noncitizens subject to reinstatement of removal (see section 10.10) 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 11.37) in the context of reinstatement of removal (see section 10.10). See Johnson v. Arteaga-Martinez, 596 U.S. ___ (2022).

12.6 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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12.7 Case: Jennings v. Rodriguez

Jennings v. Rodriguez
583 U.S. __ (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. ↳Anyone 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."~ Whether respondents are entitled to Joseph hearings is not before this Court.↵

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.~

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.~ 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 KAGAN TOOK NO PART IN THE DECISION OF THIS CASE.

JUSTICE THOMAS, WITH WHOM JUSTICE GORSUCH JOINS EXCEPT FOR FOOTNOTE 6, CONCURRING IN PART I AND PARTS III–VI AND CONCURRING IN THE JUDGMENT.

In my view, no court has jurisdiction over this case.~ But because a majority of the Court believes we have jurisdiction, and I agree with the Court's resolution of the merits, I join Part I and Parts III–VI of the Court's opinion.~

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.

12.8 Case: Neilsen v. Preap

Neilsen v. Preap
586 U.S. __ (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 THOMAS, WITH WHOM JUSTICE GORSUCH JOINS, CONCURRING IN PART AND CONCURRING IN THE JUDGMENT.

I continue to believe that no court has jurisdiction to decide questions concerning the detention of aliens before final orders of removal have been entered.˜

I would have vacated the judgments below and remanded with instructions to dismiss the cases for lack of jurisdiction. But because the Court has held otherwise and I agree with the Court's disposition of the merits, I concur in all but Parts II and III–B–2 of its opinion.

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.

12.9 What Detention Looks Like

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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12.10 The Detention of 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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Chapter Thirteen: Federal Immigration Crimes

Immigration crimes dominate federal criminal prosecutions. Here are just a few statistics from the Federal Justice Statistics, regarding FY 2018, available at https://bjs.ojp.gov/content/pub/pdf/fjs1718.pdf:

- Federal arrests reached their highest level in 25 years: 195,771.
- An immigration offense was the most serious arrest offense in 56% of federal arrests.
- The five federal judicial districts along the U.S.-Mexico border (Arizona, California Southern, New Mexico, Texas Southern, and Texas Western) accounted for 65% of all federal arrests.
- Agencies within the Department of Homeland Security (DHS) referred 59% of the 195,842 suspects in matters sent to U.S. attorneys.
- 99.5% of immigration arrests were prosecuted.
- Forty-five percent of matters concluded by U.S. attorneys in FY 2018 were disposed of by U.S. magistrates. 73% of the offenses disposed of by U.S. magistrates were misdemeanor immigration cases.
- Misdemeanor immigration cases had a 70.7% conviction rate, with 70.1% representing guilty pleas.
- Non-misdemeanor immigration cases had a 97.2% conviction rate, with 96.9% representing guilty pleas.

Immigration crimes include a wide range of conduct, from misuse of a U.S. passport to falsely claiming U.S. citizenship. The two most prosecuted federal crimes, however, are improper entry by an alien, 8 U.S.C. § 1325, and reentry of a removed alien, 8 U.S.C. § 1326. This chapter begins with a thorough discussion of these two common crimes and available defenses (sections 13.1-13.6). What follows is discussion of other

commonly charged crimes including those related to smuggling and transporting (section 13.7) and fraud (section 13.8), among other crimes (sections 13.9-13.10). You'll also find readings regarding unlawful employment of noncitizens without authorization to work, conduct that can have both civil and criminal consequences (section 13.11). Finally, you'll be introduced to the federal sentencing guidelines (section 13.12) and test your ability to predict sentencing outcomes for clients (section 13.13).

13.1 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. Both are crimes with few elements and minimal evidentiary burdens.

CRS, Immigration-Related Criminal Offenses (2020)

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:

- entering or attempting to enter the United States at any time or place other than a designated port of entry;
- eluding examination or inspection by immigration officers; or
- 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.

To establish that an alien unlawfully entered the United States, some reviewing courts have held that the alien must have entered "free 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); see also United States v. Morales-Palacios, 369 F.3d 442 (5th Cir. 2004). But an alien may still be charged with attempting to unlawfully enter (or reenter) the country. See, e.g., United States v. Cabral, 252 F.3d 520 (1st Cir. 2001) (upholding illegal reentry conviction of previously removed alien who was arrested at port of entry for making a false claim of residency in an attempt to reenter the country).

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Kit Johnson, Democrats debate the repeal of Section 1325 – what you need to know about the immigration law that criminalizes unauthorized border crossings, THE CONVERSATION *(2019)*

The United States placed few legal restrictions on crossing borders prior to the 1920s. Even then, entering the U.S. without authorization wasn't a crime. Deportations could be effected through civil legal process.

With [8 U.S.C.] Section 1325, Congress made "improper entry by alien" a crime in 1929 – soon after imposing strict immigration quotas based on national origin.

According to University of California Los Angeles historian Kelly Lytle Hernandez, white supremacist South Carolina Sen. Coleman Livingston Blease was its architect.

Criminal enforcement, however, remained rare for decades – even when the deportation of Mexican Americans surged in the 1930s, 1940s and 1950s. Prosecutions based on Section 1325 only started ramping up in the first decade of this century, during President George W. Bush's administration.

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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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13.2 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. See Chapter 17 for more details regarding the acquisition of U.S. citizenship.

13.3 Defenses to Improper Entry and Unlawful Reentry: Statutes of Limitation

Neither 8 U.S.C. § 1325 and 8 U.S.C. § 1326 reference a specific statute of limitations. 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.

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.

13.4 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).

13.5 Case: United States v. Palomar-Santiago

United States v. Palomar-Santiago, 593 U.S. __ (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.

13.6 Case: United States v. Carrillo-Lopez

United States v. Carrillo-Lopez, __ F.4th __ (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 (S. 2550 and H.R. 5678, respectively).˜ 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.

13.7 Smuggling, Transporting

CRS, Immigration-Related Criminal Offenses (2020)

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. Primarily located in 8 U.S.C. § 1324, these offenses typically constitute felonies and may sometimes carry lengthy prison terms, including an enhanced penalty 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 regardless of whether 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—knowing or in reckless disregard of the fact that an alien was not lawfully in the United States—knowingly transported the alien for the purpose of helping him or her remain in the country unlawfully. A person 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 Statesv. 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. Attempts to engage in the proscribed activity are likewise punishable under the provision. Courts have generally recognized 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, 193F.3d 567 (2d Cir. 1999). Any surreptitious shielding constitutes harboring, 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 279 (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).

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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13.8 Federal Immigration Crimes Related to Fraud

CRS, Immigration-Related Criminal Offenses (2020)

Federal law also penalizes fraudulent conduct that undermines the immigration regulatory scheme.

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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13.9 Other Federal Immigration Crimes

CRS, Immigration-Related Criminal Offenses (2020)

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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13.10 Case: United States v. Rehaif

Rehaif v. United States
88 U.S. __ (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.

13.11 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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13.12 Federal Sentencing

The following provisions come from 2018 Guidelines Manual published by the United States Sentencing Commission. This is the document consulted by federal judges, prosecutors, and defense attorneys to estimate and set criminal sentences.

U.S. SENTENCING GUIDELINES MANUAL § 1.1.3

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.

U.S. SENTENCING GUIDELINES MANUAL § 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.

U.S. SENTENCING GUIDELINES MANUAL § 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.

U.S. SENTENCING GUIDELINES MANUAL § 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.

U.S. SENTENCING GUIDELINES MANUAL § 4A1.1

Criminal History Category

First Sentence

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 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add 1 point for each prior sentence resulting from a conviction of 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.

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). Two points are added if the defendant 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).

5. §4A1.1(e). 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.

U.S. SENTENCING GUIDELINES MANUAL, Chapter 5, Part A

SENTENCING TABLE
(in months of imprisonment)

		Criminal History Category (Criminal History Points)					
	Offense Level	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

13.13 Test Your Knowledge

PROBLEM 13.1

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 13.2

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 Fourteen: State Immigration Crimes

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 do what they believe the federal government has not: get tough on undocumented migrants. The primary stumbling block for these attempts has been federal preemption.

This chapter begins with a few examples of state immigration crimes (section 14.1). Next, it explores the contours of federal preemption (section 14.2). Finally, it brings these two issues together, exploring the preemption of state immigration crimes (sections 14.3-14.4).

14.1 Examples of State Immigration Crimes

The following examples show the myriad ways in which a variety of states have enacted criminal laws aimed at noncitizens and immigration.

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.

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.

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.

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.

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.

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.

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.

14.2 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 (2019)

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.˜

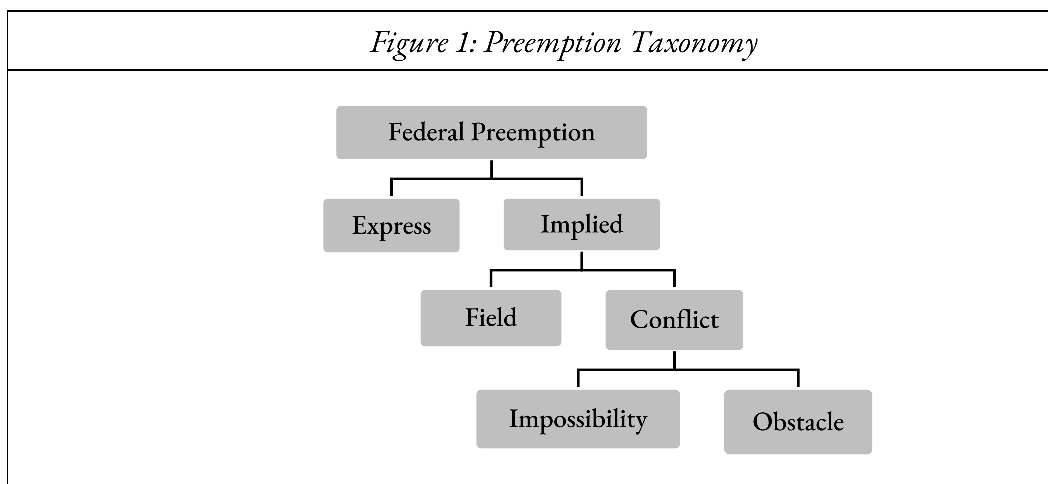
Federal preemption of state law is a ubiquitous feature of the modern regulatory state and "almost certainly the most frequently used doctrine of constitutional law in practice."˜ Indeed, preemptive federal statutes shape the regulatory environment for most major industries˜. As a result, "[d]ebates 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



14.3 Supreme Court Jurisprudence Regarding State Employment Laws

Many of the U.S. Supreme Court cases that have dealt with state immigration crimes and preemption have focused 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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14.4 Revisiting Examples of State Immigration Crimes

Having considered the contours of federal preemption in section 14.2 and seen the U.S. Supreme Court's approach to some preemption issues in section 14.3, consider once again the laws identified in section 14.1 once again. Do you think any could survive a preemption challenge?

14.5 Test Your Knowledge

Problem 14.1

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 Fifteen: Border Enforcement

The United States expends significant effort to prevent and deter unauthorized border crossings of the U.S.-Mexico border. This chapter begins with an introduction to the federal agencies responsible for border enforcement and the different ways in which they police the Southern border (section 15.1). 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 15.2-15.5).

15.1 An Introduction to Border Enforcement

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.

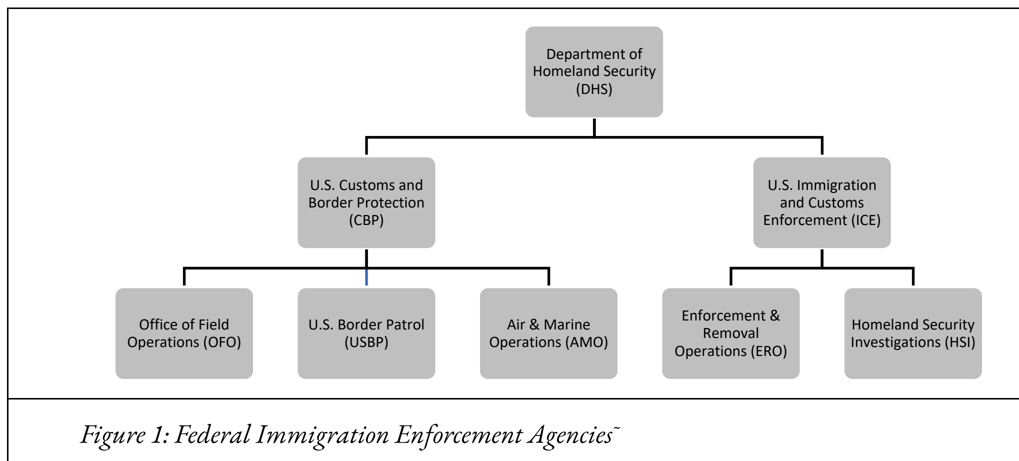

Figure 1: Federal Immigration Enforcement Agencies˜

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 address in Chapter 16.]

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 manner 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.˜

[THE HISTORY OF BORDER ENFORCEMENT]

Federal immigration enforcement began in 1891 with the inspection of migrants seeking admission at the border by a newly-created Immigration Service, a precursor to the OFO.˜ Some three decades later, Congress created the Border Patrol to prevent unlawful entry of migrants by land.˜ Then, in 1933, the Immigration and Naturalization Service (INS) was created;˜ it enforced immigration laws for decades until the agency was subsumed by DHS in 2003.˜

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15.2 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 the questions. The first, United States v. Flores Montano (section 15.3), addresses searches at the border and border equivalents. The second, Almeida-Sanchez v. United States (section 15.4), addresses searches near but not at the border or its functional equivalents. The final case, United States v. Brignoni-Ponce (section 15.5), concerns questioning near but not at the border or its functional equivalents.

15.3 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.

15.4 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.

15.5 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.

15.6 Test Your Knowledge

PROBLEM 15.1

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 Sixteen: 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 16.1). 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 16.2). ICE also partners with state and local law enforcement through agreements made under INA § 287(g) (section 16.3), the Criminal Alien Program (CAP) (section 16.4), and the use of immigration detainers (section 16.5). 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 16.5).

16.1 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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16.2 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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16.3 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 16.4 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.

16.4 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 16.5] 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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16.5 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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16.6 Sanctuary Cities

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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Chapter Seventeen: Citizenship and Naturalization

This chapter explores the concepts of citizenship and naturalization. It begins with an explanation of the rights and benefits of U.S. citizenship (section 17.1). Next, it addresses the various ways in which individuals can acquire U.S. citizenship: by being born in the United States (sections 17.2-17.3), by being born to U.S. citizen parents (section 17.4), and through the process of naturalization (sections 17.5-17.7). It addresses the issue of dual citizenship (section 17.8) and the idea of purchasing citizenship (section 17.9). Finally, this chapter discusses expatriation, which is the knowing relinquishment of citizenship (section 17.10), as well as denaturalization, which is the revocation of naturalization (section 17.11).

17.1 Rights and Benefits of U.S. Citizenship

CRS, U.S. Naturalization Policy (2021)

[O]nly U.S. citizens may

- vote in federal, state, and local elections;˜
- receive U.S. citizenship for their minor children born abroad;
- travel with a U.S. passport and receive diplomatic protection from the U.S. government while abroad;
- meet the citizenship requirement for federal and many state and local civil service employment and certain law enforcement jobs;
- receive the full range of federal public benefits and certain state benefits;
- participate in a jury; and

- run for elective office where citizenship is required.˜

U.S. citizens may also sponsor a broader range of family members living abroad for legal permanent residence (i.e., married minor and adult children, and siblings) than LPRs. [See section 3.1.] U.S. citizens may sponsor certain relatives for legal permanent residence—spouses, minor unmarried children, and parents—regardless of numerical limits established in the INA. [See section 3.1.] As such, their sponsored immediate relatives may immigrate to the United States without having to wait for a numerically limited preference visa to become available. In contrast, LPRs must sponsor relatives for LPR status within numerically limited family preference categories that require waiting for a visa.˜

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17.2 Introductory Concepts

United States citizenship is determined by: (1) birth in the United States, also known as *jus soli*, (2) birth to U.S. citizen parents, 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.

8 FAM 301.1-1

a. U.S. citizenship may be acquired either at birth or through naturalization subsequent to birth. U.S. laws governing the acquisition of citizenship at birth embody two legal principles:

1. Jus soli (the law of the soil) - a rule of common law under which the place of a person's birth determines citizenship. In addition to common law, this principle is embodied in the 14th Amendment to the U.S. Constitution and the various U.S. citizenship and nationality statutes; and
2. Jus sanguinis (the law of the bloodline) - a concept of Roman or civil law under which a person's citizenship is determined by the citizenship of one or both parents. This rule, frequently called "citizenship by descent" or "derivative citizenship", is not embodied in the U.S. Constitution, but such citizenship is granted through statute. As U.S. laws have changed, the requirements for conferring and retaining derivative citizenship have also changed. [For more, see section 17.4]

b. National vs. citizen: While most people and countries use the terms "citizenship" and "nationality" interchangeably, U.S. law differentiates between the two. Under current law all U.S. citizens are also U.S. nationals, but not all U.S. nationals are U.S.

citizens. The term "national of the United States", as defined by statute (INA 101 (a)(22) (8 U.S.C. 1101(a)(22)) includes all citizens of the United States, and other persons who owe allegiance to the United States but who have not been granted the privilege of citizenship:

1. Nationals of the United States who are not citizens owe allegiance to the United States and are entitled to the consular protection of the United States when abroad, and to U.S. documentation, such as U.S. passports with appropriate endorsements. They are not entitled to voting representation in Congress and, under most state laws, are not entitled to vote in Federal, State, or local elections except in their place of birth. (See 7 FAM 012 and 7 FAM 1300 Appendix B Endorsement 09.);
2. Historically, Congress, through statutes, granted U.S. non-citizen nationality to persons born or inhabiting territory acquired by the United States through conquest or treaty. At one time or other natives and certain other residents of Puerto Rico, the U.S. Virgin Islands, the Philippines, Guam, and the Panama Canal Zone were U.S. non-citizen nationals. (See 7 FAM 1120 and 7 FAM 1100 Appendix P.);
3. Under current law, only persons born in American Samoa and Swains Island are U.S. non-citizen nationals (INA 101(a)(29) (8 U.S.C. 1101(a)(29) and INA 308(1) (8 U.S.C. 1408)). (See 7 FAM 1125.); and
4. See 7 FAM 1126 regarding the citizenship/nationality status of persons born on the Commonwealth of the Northern Mariana Islands (CNMI).

c. Naturalization – Acquisition of U.S. Citizenship Subsequent to Birth: Naturalization is "the conferring of nationality of a State upon a person after birth, by any means whatsoever" (INA 101(a)(23) (8 U.S.C. 1101(a)(23)) or conferring of citizenship upon a person (see INA 310, 8 U.S.C. 1421 and INA 311, 8 U.S.C. 1422). Naturalization can be granted automatically or pursuant to an application. (See 7 FAM 1140.) [For more, see section 17.5.]

d. "Subject to the Jurisdiction of the United States": All children born in and subject, at the time of birth, to the jurisdiction of the United States acquire U.S. citizenship at birth even if their parents were in the United States illegally at the time of birth.˜

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8 FAM 301.1-7

b. The Act of June 2, 1924 was the first comprehensive law relating to the citizenship of Native Americans. It provided: That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.

c. Section 201(b) INA, effective January 13, 1941, declared that persons born in the United States to members of an Indian, Eskimo, Aleutian, or other aboriginal tribe were nationals and citizens of the United States at birth.

d. INA 301(b) (8 U.S.C. 1401(b)) (formerly INA 301(a)(2)), in effect from December 24, 1952, restates this provision.

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17.3 Case: United States v. Wong Kim Ark

United States v. Wong Kim Ark
169 U.S. 649 (1898)

MR. JUSTICE GRAY DELIVERED THE OPINION OF THE COURT.

The facts of this case, as agreed by the parties, are as follows: Wong Kim Ark was born in 1873, in the city of San Francisco, in the state of California and United States of America, and was and is a laborer. His father and mother were persons of Chinese descent, and subjects of the emperor of China. They were at the time of his birth domiciled residents of the United States, having previously established and are still enjoying a permanent domicile and residence therein at San Francisco. They continued to reside and remain in the United States until 1890, when they departed for China; and, during all the time of their residence in the United States, they were engaged in business, and were never employed in any diplomatic or official capacity under the emperor of China. Wong Kim Ark, ever since his birth, has had but one residence, to wit, in California, within the United States and has there resided, claiming to be a citizen of the United States, and has never lost or changed that residence, or gained or acquired another residence; and neither he, nor his parents acting for him, ever renounced his allegiance to the United States, or did or committed any act or thing to exclude him therefrom. In 1890 (when he must have been about 17 years of age) he departed for China, on a temporary visit, and with the intention of returning to the United States, and did return thereto by sea in the same year, and was permitted by the collector of

customs to enter the United States, upon the sole ground that he was a native-born citizen of the United States. After such return, he remained in the United States, claiming to be a citizen thereof, until 1894, when he (being about 21 years of age, but whether a little above or a little under that age does not appear) again departed for China on a temporary visit, and with the intention of returning to the United States; and he did return thereto, by sea, in August, 1895, and applied to the collector of customs for permission to land, and was denied such permission, upon the sole ground that he was not a citizen of the United States.

It is conceded that, if he is a citizen of the United States, the acts of congress known as the 'Chinese Exclusion Acts,' prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, do not and cannot apply to him.

The question presented by the record is whether a child born in the United States, of parents of Chinese descent, who at the time of his birth are subjects of the emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the fourteenth amendment of the constitution: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.'

I.˜

The constitution of the United States, as originally adopted, uses the words 'citizen of the United States' and 'natural-born citizen of the United States.' By the original constitution, every representative in congress is required to have been 'seven years a citizen of the United States,' and every senator to have been 'nine years a citizen of the United States'; and 'no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president.' Article 2, § 1. The fourteenth article of amendment, besides declaring that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside,' also declares that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' And the fifteenth article of amendment declares that 'the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude.'

The constitution nowhere defines the meaning of these words, either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.' Amend. art. 14. In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the constitution.˜ The language of the constitution, as has been well said, could not be understood without reference to the common law.˜

II.

The fundamental principle of the common law with regard to English nationality was birth within the allegiance—also called 'ligealty,' 'obedience,' 'faith,' or 'power'—of the king. The principle embraced all persons born within the king's allegiance, and subject to his protection. Such allegiance and protection were mutual,—as expressed in the maxim, 'Protectio trahit subjectionem, et subjectio protectionem,'—and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, so long as they were within the kingdom. Children, born in England, of such aliens, were therefore natural-born subjects. But the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the king's dominions, were not natural-born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction, of the king.˜

[B]y the law of England for the last three centuries, beginning before the settlement of this country, and continuing to the present day, aliens, while residing in the dominions possessed by the crown of England, were within the allegiance, the obedience, the faith or loyalty, the protection, the power, and the jurisdiction of the English sovereign; and therefore every child born in England of alien parents was a natural-born subject, unless the child of an ambassador or other diplomatic agent of a foreign state, or of an alien enemy in hostile occupation of the place where the child was born.

III.

The same rule was in force in all the English colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the constitution as originally established.˜

That all children, born within the dominion of the United States, of foreign parents holding no diplomatic office, became citizens at the time of their birth, does not appear

to have been contested or doubted until more than 50 years after the adoption of the constitution, when the matter was elaborately argued in the court of chancery of New York, and decided upon full consideration˜ in favor of their citizenship.

The same doctrine was repeatedly affirmed in the executive departments, as, for instance, by Mr. Marcy, secretary of state, in 1854˜; by Attorney General Black in 1859˜; and by Attorney General Bates in 1862˜.

IV.

It was contended by one of the learned counsel for the United States that the rule of the Roman law, by which the citizenship of the child followed that of the parent, was the true rule of international law as now recognized in most civilized countries, and had superseded the rule of the common law, depending on birth within the realm, originally founded on feudal considerations.

But at the time of the adoption of the constitution of the United States in 1789, and long before, it would seem to have been the rule in Europe generally, as it certainly was in France, that, as said by Pothier, 'citizens, true and native-born citizens, are those who are born within the extent of the dominion of France,' and 'mere birth within the realm gives the rights of a native-born citizen, independently of the origin of the father or mother, and of their domicile'; and children born in a foreign country, of a French father who had not established his domicile there, nor given up the intention of returning, were also deemed Frenchmen, as Laurent says, by 'a favor, a sort of fiction,' and Calvo, 'by a sort of fiction of exterritoriality, considered as born in France, and therefore invested with French nationality.'˜ The Code Napoleon of 1807 changed the law of France, and adopted, instead of the rule of country of birth, jus soli, the rule of descent or blood, jus sanguinis, as the leading principle; but an eminent commentator has observed that the framers of that code 'appear not to have wholly freed themselves from the ancient rule of France, or rather, indeed, ancient rule of Europe,—'De la vieille règle francaise, ou plutôt même de la vieille règle européenne,'—according to which nationality had always been, in former times, determined by the place of birth.'˜

The later modifications of the rule in Europe rest upon the constitutions, laws, or ordinances of the various countries, and have no important bearing upon the interpretation and effect of the constitution of the United States.˜

There is, therefore, little ground for the theory that at the time of the adoption of the fourteenth amendment of the constitution of the United States there was any settled and definite rule of international law generally recognized by civilized nations, inconsistent with the ancient rule of citizenship by birth within the dominion.

Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship.

Both in England and in the United States, indeed, statutes have been passed at various times enacting that certain issue born abroad of English subjects, or of American citizens, respectively, should inherit, to some extent at least, the rights of their parents. But those statutes applied only to cases coming within their purport, and they have never been considered, in either country, as affecting the citizenship of persons born within its dominion.˜

So far as we are informed, there is no authority, legislative, executive, or judicial, in England or America, which maintains or intimates that the statutes (whether considered as declaratory, or as merely prospective) conferring citizenship on foreign-born children of citizens have superseded or restricted, in any respect, the established rule of citizenship by birth within the dominion.˜

V.

In the forefront, both of the fourteenth amendment of the constitution, and of the civil rights act of 1866, the fundamental principle of citizenship by birth within the dominion was reaffirmed in the most explicit and comprehensive terms.

The civil rights act, passed at the first session of the Thirty-Ninth congress, began by enacting that 'all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every state and territory in the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom, to the contrary notwithstanding.'˜

The same congress, shortly afterwards, evidently thinking it unwise, and perhaps unsafe, to leave so important a declaration of rights to depend upon an ordinary act of legislation, which might be repealed by any subsequent congress, framed the fourteenth amendment of the constitution, and on June 16, 1866, by joint resolution, proposed it to the legislatures of the several states; and on July 28, 1868, the secretary of state issued

a proclamation showing it to have been ratified by the legislatures of the requisite number of states.˜

The first section of the fourteenth amendment of the constitution begins with the words, 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.' As appears upon the face of the amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens by the fact of birth within the United States, who would thereby have become citizens according to the law existing before its adoption. It is declaratory in form, and enabling and extending in effect. Its main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free negroes˜, and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States.˜

The real object of the fourteenth amendment of the constitution, in qualifying the words 'all persons born in the United States' by the addition 'and subject to the jurisdiction thereof,' would appear to have been to exclude, by the fewest and fittest words (besides children of members of the Indian tribes, standing in a peculiar relation to the national government, unknown to the common law), the two classes of cases,—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state,—both of which, as has already been shown, by the law of England and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country.˜

The principles upon which each of those exceptions rests were long ago distinctly stated by this court.˜

By the civil rights act of 1866, 'all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed,' were declared to be citizens of the United States. In the light of the law as previously established, and of the history of the times, it can hardly be doubted that the words of that act, 'not subject to any foreign power,' were not intended to exclude any children born in this country from the citizenship which would theretofore have been their birthright; or, for instance, for the first time in our history, to deny the right of citizenship to native-born children or foreign white parents not in the diplomatic service of their own country, nor in hostile occupation of part of our territory. But any possible doubt in this regard was removed when the negative words of the civil rights act, 'not subject to any foreign power,' gave way, in the fourteenth amendment of the constitution, to the affirmative words, 'subject to the jurisdiction of the United States.'

This sentence of the fourteenth amendment is declaratory of existing rights, and affirmative of existing law, as to each of the qualifications therein expressed,—'born in the United States,' 'naturalized in the United States,' and 'subject to the jurisdiction thereof'; in short, as to everything relating to the acquisition of citizenship by facts occurring within the limits of the United States. But it has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by congress, in the exercise of the power conferred by the constitution to establish a uniform rule of naturalization.

The effect of the enactments conferring citizenship on foreign-born children of American parents has been defined, and the fundamental rule of citizenship by birth within the dominion of the United States, notwithstanding alienage of parents, has been affirmed, in well-considered opinions of the executive departments of the government, since the adoption of the fourteenth amendment of the constitution.˜

The foregoing considerations and authorities irresistibly lead us to these conclusions: The fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The amendment, in clear words and in manifest intent, includes the children born within the territory of the United States of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. His allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory, is yet, in the words of Lord Coke in Calvin's Case, 7 Coke, 6a, 'strong enough to make a natural subject, for, if he hath issue here, that issue is a natural-born subject'; and his child, as said by Mr. Binney in his essay before quoted, 'If born in the country, is as much a citizen as the natural-born child of a citizen, and by operation of the same principle.' It can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides, seeing that, as said by Mr. Webster, when secretary of state, in his report to the president on Thrasher's case in 1851, and since repeated by this court: 'Independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance, or of renouncing any former allegiance,—it is well known that by the

public law an alien, or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason or other crimes as a native-born subject might be, unless his case is varied by some treaty stipulations.'˜

To hold that the fourteenth amendment of the constitution excludes from citizenship the children born in the United States of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States.

VI.

Whatever considerations, in the absence of a controlling provision of the constitution, might influence the legislative or the executive branch of the government to decline to admit persons of the Chinese race to the status of citizens of the United States, there are none that can constrain or permit the judiciary to refuse to give full effect to the peremptory and explicit language of the fourteenth amendment, which declares and ordains that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.'

Chinese persons, born out of the United States, remaining subjects of the emperor of China, and not having become citizens of the United States, are entitled to the protection of and owe allegiance to the United States, so long as they are permitted by the United States to reside here; and are 'subject to the jurisdiction thereof,' in the same sense as all other aliens residing in the United States.˜

The fact˜ that acts of congress or treaties have not permitted Chinese persons born out of this country to become citizens by naturalization, cannot exclude Chinese persons born in this country from the operation of the broad and clear words of the constitution: 'All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States.'

VII.

Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth. No doubt he might himself, after coming of age, renounce this citizenship, and become a citizen of the country of his parents, or of any other country; for by our law, as solemnly declared by congress, 'the right of expatriation is a natural and inherent right of all people,' and 'any declaration, instruction, opinion, order or direction of any officer of the United States, which denies, restricts, impairs or

questions the right of expatriation, is declared inconsistent with the fundamental principles of the republic.'˜ Whether any act of himself, or of his parents, during his minority, could have the same effect, is at least doubtful. But it would be out of place to pursue that inquiry, inasmuch as it is expressly agreed that his residence has always been in the United States, and not elsewhere; that each of his temporary visits to China, the one for some months when he was about 17 years old, and the other for something like a year about the time of his coming of age, was made with the intention of returning, and was followed by his actual return, to the United States; and 'that said Wong Kim Ark has not, either by himself or his parents acting for him, ever renounced his allegiance to the United States, and that he has never done or committed any act or thing to exclude him therefrom.'

The evident intention, and the necessary effect, of the submission of this case to the decision of the court upon the facts agreed by the parties, were to present for determination the single question, stated at the beginning of this opinion, namely, whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States. For the reasons above stated, this court is of opinion that the question must be answered in the affirmative.

Order affirmed.

17.4 Citizenship by Descent

U.S. citizenship can also be conferred at birth to a child born outside of the United States depending on the parents' citizenship. Determining whether citizenship has been conferred at birth requires investigating: (1) when the child was born, (2) the citizenship status of the child's parents at the time of the birth, and (3) the requirements of the law in place at the time of the child's birth.

EOUSA, OLE, Immigration Law (2005)

The most frequently encountered derivative citizenship scenario occurs when an alien claims citizenship through either a United States-citizen father or mother. If a person is born outside the United States to parents, of whom only one is a citizen, the citizen parent must have been physically present or resided in the United States for a certain period before the birth of that child. Further, a certain portion of that presence or residence must have been while the parent was a teenager or adult. Depending upon when the child was born, the ability to derive citizenship may be governed by the

Nationality Act of 1940, 54 Stat. 1137, the Immigration and Nationality Act of 1952, 66 Stat. 163, or the current statute. Because a person derives citizenship at birth the law in effect at the time of birth controls derivative citizenship. See Minasyan v. Gonzales, 401 F.3d 1069, 1075 (9th Cir. 2005).

The primary statute that addresses derivative citizenship is INA § 301, 8 U.S.C. § 1401.˜

LEGITIMATE CHILDREN (Includes Children Legitimated After Birth)		
DOB	PARENTS	USC PARENT RESIDENCY
Between 1/13/41 and 12/24/52	One citizen and one alien parent	Citizen resided in the U.S. or outlying possessions ten years, at least five of which were after age sixteen. Retention requirements exist for children born between 5/24/34 and 10/11/52. To retain US citizenship, the child must have: A. Five years' residence in the US or possessions between thirteen and twenty-one; OR B. Two years' continuous physical presence in the US between fourteen and twenty-eight; OR C. No specific period of residence if alien parent naturalized before child reached eighteen and child began to reside permanently in US prior to eighteen.
Between 1/13/41 and 12/24/52	Both parents citizens	One parent resided in the U.S. or its possessions.

Between 12/24/52 and 11/14/86	One citizen and one alien parent	Citizen parent physically present in the U.S. or possessions ten years prior to the birth of the child, at least five of which were after the age of fourteen.
Born between 12/24/52 and 11/14/86	Both parents citizens	One resided in the U.S. or its outlying possessions.

ILLIGITIMATE CHILD		
DOB	PARENTS	USC PARENT RESIDENCY
Prior to 12/24/52	Mother a citizen, not legitimated by citizen father	Mother a citizen with prior U.S. residence
Prior to 12/24/52	Mother a citizen, legitimated by father	(By alien father): No effect (By citizen father): Treat as though legitimate from birth-see prior chart
[Born between 12/24/52 and 6/12/2017]	Mother a citizen, not legitimated by father	Mother must have one year continuous physical presence in the U.S. prior to birth
On or after 12/24/52	Mother a citizen, legitimated by father	(By alien father) No effect (By citizen father) Treat as though legitimate from birth-see prior chart
[On or after 6/12/2017]	[Mother a citizen, not legitimated by father]	[The child's U.S. citizen mother was physically present in the United States or one of its outlying possessions for at least 5 years prior to the child's birth (at least 2 years of which were after age 14).]

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USCIS Policy Manual, Chapter 3.C.1 (2021)

GENERAL REQUIREMENTS FOR FATHERS OF CHILDREN BORN OUT OF WEDLOCK

The general requirements for acquisition of citizenship at birth˜ for a child born in wedlock also apply to a child born out of wedlock outside of the United States (or one of its outlying possessions) who claims citizenship through a U.S. citizen father. Specifically, the provisions apply in cases where:

- A blood relationship between the child and the father is established by clear and convincing evidence;
- The child's father was a U.S. citizen at the time of the child's birth;
- The child's father (unless deceased) has agreed in writing to provide financial support for the child until the child reaches 18 years of age; and
- One of the following criteria is met before the child reaches 18 years of age:
    - The child is legitimated under the law of his or her residence or domicile;
    - The father acknowledges in writing and under oath the paternity of the child; or
    - The paternity of the child is established by adjudication of a competent court.

In addition, the residence or physical presence requirements contained in the relevant paragraph of INA 301 continue to apply to children born out of wedlock, who are claiming citizenship through their fathers.

WRITTEN AGREEMENT TO PROVIDE FINANCIAL SUPPORT

In order for a child born out of wedlock outside of the United States (or one of its outlying possessions) to acquire U.S. citizenship through his or her father, Congress included a requirement that the father agree in writing to provide financial support for the child until the child reaches the age of 18.˜ Congress included the language to prevent children from becoming public charges.˜ USCIS interprets the phrase in the statute "has agreed in writing to provide financial support"˜ to mean that there must be documentary evidence that supports a finding that the father accepted the legal obligation to support the child until the age of 18.

The written agreement of financial support may be dated at any time before the child's 18th birthday. If the child is under the age of 18 at the time of filing an Application for Certificate of Citizenship, the father may provide the written agreement

of financial support either concurrently with the filing of the application or prior to the adjudication of the application. USCIS may request the written agreement of financial support at the time of issuance of a Request for Evidence or at the time of an interview (unless the interview is waived).

Alternatively, if the applicant is already over the age of 18, he or she may meet the requirement if one or more documents support a finding that the father accepted his legal obligation to support the child. In such cases, the evidence must have existed (and have been finalized) prior to the child's 18th birthday and must have met any applicable foreign law or U.S. law governing the child's or father's residence to establish acceptance of financial responsibility.˜

In all cases, the applicant has the burden of proving the father has met any applicable requirements under the law to make an agreement to provide financial support. A written agreement of financial support is not required if the father died before the child's 18th birthday.˜

WRITTEN AGREEMENT REQUIREMENTS

In order for a document to qualify as a written agreement of financial support under INA 309(a)(3), the document:

- Must be in writing and acknowledged by the father;˜
- Must indicate the father's agreement to provide financial support for the child;˜ and
- Must be dated before the child's 18th birthday.

In addition, USCIS considers whether the agreement was voluntary.

OTHER ACCEPTABLE DOCUMENTATION

A written agreement of financial support may come in different forms and documents. USCIS may consider other similar documentation in which the father accepts financial responsibility of the child until the age of 18. Some examples of documents USCIS may consider include:

- A previously submitted Affidavit of Support (Form I-134) or Affidavit of Support Under Section 213A of the INA (Form I-864);
- Military Defense Enrollment Eligibility Reporting System (DEERS) enrollment;

- Written voluntary acknowledgement of a child in a jurisdiction where there is a legal requirement that the father provide financial support;˜
- Documentation establishing paternity by a court or administrative agency with jurisdiction over the child's personal status, if accompanied by evidence from the record of proceeding establishing the father initiated the paternity proceeding and the jurisdiction legally requires the father to provide financial support; or
- A petition by the father seeking child custody or visitation with the court of jurisdiction with an agreement to provide financial support and the jurisdiction legally requires the father to provide financial support.

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CRS, U.S. Naturalization Policy (2021)

Table 1. Requirements for U.S. Citizenship Acquisition for Children Born Outside the United States

Circumstances	**Timing of Citizenship Acquisition**	**Requirements**	**Relevant Section of INA**
Children born to two U.S. citizen parents˜	At birth	Child acquires automatic citizenship at birth if at least one of the parents resided in the United States or one of its outlying possessions˜ prior to the birth.	INA § 301(c)
Children born to one U.S. citizen parent and one U.S. national parent˜	At birth	Child acquires automatic citizenship at birth if the U.S. citizen parent was physically present in the United States or one of its outlying possessions for a continuous period of at least one year prior to the child's birth	INA § 301(d)

Children born to one U.S. citizen parent and one noncitizen parent	At birth	Child acquires automatic citizenship at birth if the U.S. citizen parent was physically present in the United States or one of its outlying possessions for five years prior to the child's birth and at least two years after the parent's 14th birthday.	INA § 301(g)
Children lawfully admitted for permanent residence and residing in the United States˜	After birth; before age 18	Child acquires automatic citizenship if the following conditions are met: (1) at least one parent, including an adoptive parent, is a U.S. citizen by birth or naturalization; (2) the child is under 18 years of age; (3) the child is an LPR; and (4) the child is residing in the United States in the legal and physical custody of the citizen parent.˜	INA § 320(a)
Children residing outside the United States	After birth; before age 18	Child may become a citizen if the following conditions are met: (1) at least one parent, including an adoptive parent, is a U.S. citizen by birth or naturalization; (2) the U.S. citizen parent has resided for at least five years in the United States, of which at least two years were after the parent's14th birthday; (3) the child is under 18 years of age; (4) the child is residing outside of the United States in the legal and physical custody of the citizen parent; and (5) the child has been lawfully admitted temporarily to the United States and remains in lawful status.	INA § 322(a)

17.5 Naturalization

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.

USCIS is responsible for reviewing all naturalization applications to ensure applicants meet U.S. citizenship eligibility requirements.˜ This assessment includes security and criminal background checks, a review of the applicant's entire immigration history, an in-person interview, and English language and civics exams. Applicants bear the burden of proof to demonstrate that they entered the United States lawfully.˜ Upon approval, they must take an oath of allegiance to the United States and renounce allegiance to any foreign state.˜ Persons whose naturalization applications have been denied may request a hearing before an immigration officer.˜

CONTINUOUS RESIDENCE

To be naturalized, an applicant generally must have resided continuously for at least five years within the United States after being lawfully admitted for permanent residence and prior to the date he or she filed a naturalization application. For periods totaling at least half of that time, the individual must have been physically present in the United States. The individual also must have lived for at least three months within the State or district in which he or she filed the application.˜

The period of continuous residence required for naturalization is broken by an absence of over a year unless the LPR is employed abroad by the U.S. government, an international organization, an American research institute, or an American company engaged in foreign trade. An absence of between six months and one year presumptively breaks continuous residence unless the applicant can establish that he or she did not abandon U.S. residence during that period.˜

Certain classes of LPRs either are exempt from the residency requirement or are subject to shorter residency periods.˜ Unmarried children under age 18 living with a citizen parent are exempt from any residency requirement.˜ The residency requirement for spouses of American citizens is three years instead of five years, and the physical presence requirement is one and a half years.˜ Residency requirements also are modified for other special classes.˜

Good Moral Character

To be eligible for naturalization, applicants must demonstrate that they have been persons of good moral character during the applicable statutory period (five years in most cases) preceding the filing of their naturalization application.˜ [INA § 101(f), 8 U.S.C. § 1101(f) defines "good moral character" in the negative, listing circumstances that would lead a court to conclude a noncitizen does not have good moral character.]

English Language Proficiency and Civics Knowledge

During applicants' eligibility interviews for naturalization, they must pass English language and civics tests. The law requires that persons wishing to be naturalized demonstrate an understanding of English, specifically an ability to read, write, and speak words in ordinary usage in the English language.˜ The language requirement is waived for those who are at least 50 years old and have lived in the United States as an LPR at least 20 years, or who are at least 55 years old and have lived in the United States as an LPR for at least 15 years.˜ Individuals for whom the language requirement is waived may take the civics test in their native language.˜

The civics test fulfills a statutory requirement for naturalized citizens to demonstrate an understanding of the history, principles, and form of government of the United States.˜ The exam is an oral test administered by a USCIS officer during the eligibility interview. USCIS has discretion over the test questions and periodically makes updates to the test. Applicants have two opportunities to pass the test. They may retake a failed portion of the test between 60 and 90 days from the date of the initial interview.˜ The pass rate for the English and civics components of the naturalization test was 91% as of December 2020.˜ Special consideration on the civics requirement is given to individuals who are over 65 years and have lived in the United States for at least 20 years.˜ These individuals may take a modified, shorter version of the test. Both the language and civics requirements are waived for those unable to comply because of physical or developmental disabilities or mental impairment.˜

MILITARY NATURALIZATIONS

The INA contains several provisions facilitating the application and naturalization process for foreign-born military personnel of most branches of the U.S. Armed Forces and recently discharged members.˜ The Secretary of Defense is required to ensure that LPR members of the Armed Forces are informed of the availability of naturalization through military service and the naturalization process and to ensure resources are available to assist eligible servicemembers to navigate the process.˜ Requirements and qualifications˜ are similar to general naturalization requirements, but military personnel are exempt from residence and physical presence requirements.˜

The INA distinguishes between peacetime and wartime service.˜ For current or past *peacetime* military service, naturalization applicants are not required to meet the naturalization residency requirements if they apply while still in the service or within six months of discharge.˜ The applicant must have served honorably in the U.S. Armed Forces for at least one year and must be LPRs. Military naturalization applicants are exempt from USCIS naturalization fees.˜

For current or past *wartime* military service during periods of designated military hostilities,˜ naturalization applicants are also not required to meet the naturalization residency requirements, but there are no conditions regarding the timing of the applicability of this exemption.˜

During a period of military hostilities, members of the Armed Forces who serve honorably for any period of time may qualify for naturalization. Those who have separated from military service must have been discharged under honorable conditions.˜ Applicants are not required to be LPRs, as long as they were physically present in the United States˜ at the time of their enlistment or reenlistment.˜

As of July 2002, noncitizens serving honorably in the U.S. Armed Forces on or after September 11, 2001, may file for citizenship under wartime conditions.˜

OATH OF ALLEGIANCE

An individual seeking to become a naturalized citizen must take the Naturalization Oath of Allegiance to the United States of America before citizenship can be granted: “I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by law; that I will perform noncombatant service in the

Armed Forces of the United States when required by law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely, without any mental reservation or purpose of evasion; so help me God."

In addition, naturalization applicants must renounce any hereditary titles or orders of nobility in a foreign state. The oath of allegiance may be modified for conscientious objectors to military service or for individuals preferring to affirm (instead of swear to) the substance of the oath.

Applicants for naturalization may choose to have the oath administered either by USCIS (Department of Homeland Security) or an immigration judge (Department of Justice). They must appear in person in a public ceremony, which must be held as frequently as necessary to ensure timely naturalization.

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17.6 Naturalization of Children

Naturalization of a parent will automatically confer citizenship on their minor child, so long as that child: is living in the United States as an LPR, is under the age of 18, and is residing in the "legal and physical" custody of their naturalizing parent. INA § 320(a), 8 U.S.C. § 1431(a).

17.7 The Naturalization Act of 1790

The very first rules regarding U.S. naturalization were set out in the Naturalization Act of 1790: "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof, on application to any common law court of record, in any one of the States wherein he shall have resided for the term of one year at least, and making proof to the satisfaction of such court, that he is a person of good character, and taking the oath or affirmation prescribed by law, to support the constitution of the United States, which oath or affirmation such court shall administer; and the clerk of such court shall record such application, and the proceedings thereon; and thereupon such person shall be considered as a citizen of the United States. And the children of such person so naturalized, dwelling within the United States, being under the age of twenty-one years at the time of such naturalization, shall also be considered as citizens of the United States. And the children of citizens of the United States that may be born beyond sea, or out of the limits of the United States,

shall be considered as natural born citizens: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States: *Provided also*, That no person heretofore proscribed by any state, shall be admitted a citizen as aforesaid, except by an act of the legislature of the state in which such person was proscribed."

17.8 Dual Citizenship

CRS, Basic Questions on U.S. Citizenship and Naturalization (1992)

The United States does not categorically forbid its citizens from holding dual nationality nor does it expressly require dual nationals to make an election of citizenship as such at any point.˜

Part of the process for becoming a United States citizen is the taking of an oath "absolutely and entirely" renouncing any allegiance or fidelity to any other country. United States naturalization, in combination with the oath of absolute allegiance, may result in loss of foreign nationality under the pertinent foreign laws.

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17.9 Citizenship for Sale

Kit Johnson, A Citizenship Market, 2018 U. Ill. L. Rev. 969

[C]itizenship is for sale around the globe, although it is commonly phrased in terms of "investment" in the receiving country.˜ That investment may take the form of financing private-sector assets or a direct payment to the government.˜ Terms of investment vary widely from method to timing, as well as in the quantity of cash required.

The small Caribbean country of Dominica, for example, offers citizenship after an investment of $100,000 USD plus fees.˜ This can be a good deal since Dominica is a member of the Commonwealth of Nations, a group of fifty-three states that includes the United Kingdom, Canada, Australia, and other countries formerly connected through the British Empire.˜ Citizens of the Commonwealth of Nations share special privileges, such as travel, throughout the Commonwealth.˜ Potential citizens of Dominica wait between four and fourteen months for a passport,˜ which they can obtain without ever stepping foot on the island nation.˜

The Mediterranean island nation of Malta also offers citizenship in exchange for cash, requiring an investment of at least €650,000 ($689,000 USD) in the country.˜

Maltese citizenship has great value not so much because of the beautiful beaches along the archipelago that makes up the country, but because the nation is a member of the European Union˜ and part of the Schengen Visa zone.˜ As a result, Maltese citizenship opens the door to unrestricted travel throughout much of Europe.˜

Other countries offering citizenship in return for an investment include Antigua and Barbuda, Comoros, Cyprus, Grenada, Macedonia, St. Kitts and Nevis, and St. Lucia.˜

The monies flowing into these nations as a result of passport sales have been significant; the prime minister of Antigua and Barbuda credits passport sales with turning his country's economy around.˜ In St. Kitts and Nevis, passport sales accounted for 40% of the country's revenue in 2014.˜ But participating countries have also experienced problems with corruption, reflected in missing passport revenues.˜

Some countries do not offer straight cash-for-passport options, but they do offer a fast-track path to citizenship for investors. For example, since 1990, the United States has granted EB-5 immigrant visas [discussed in section 3.17].˜ Programs similar to the EB-5 visa exist in other countries as well.˜ Although the required investment amounts vary, the United Kingdom, Canada, Australia, and New Zealand all have investor visas that share the same basic character as the EB-5.˜

These examples—from Dominica to New Zealand—are all instances of countries that are, in essence, offering citizenship for sale.˜ There are differences in whether that sale is immediate or delayed, how long the process of obtaining citizenship can take, and the level of financial investment required. But in every case, the economic reality undeniably is that citizenship is being sold.˜

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17.10 Expatriation

CRS, Basic Questions on U.S. Citizenship and Naturalization (1992)

A United States citizen may lose that citizenship through expatriation. Expatriating acts are set forth in the INA. These acts include: (1) voluntary naturalization in a foreign country after the age of 18; (2) making a formal declaration of allegiance to a foreign country after the age of 18; (3) serving in the armed forces of a foreign country that is engaged in hostilities against the United States; (4) serving in the armed forces of a foreign country as a commissioned or non-commissioned officer; (5) holding an office under the government of a foreign country if foreign nationality is acquired or if a declaration of allegiance is required; (6) formal renunciation of citizenship before a U.S.

diplomatic or consular officer abroad; (7) formal written renunciation of citizenship during a state of war if the Attorney General approves the renunciation as not contrary to the national defense; and (8) conviction of treason, seditious conspiracy, or advocating violent overthrow of the government.˜ [INA § 349(a), 8 U.S.C. § 1481(a)]. The Supreme Court has held that performing an expatriating act alone is an insufficient basis for revoking citizenship. Rather, according to the Court, the Constitution requires that an expatriation act be undertaken with an intent to relinquish U.S. citizenship.˜[Vanee v. Terrazas, 44 U.S. 252 (1980)]. This restriction also has been enacted in statute.˜

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17.11 Denaturalization

CRS, U.S. Naturalization Policy (2021)

A naturalized citizen may be "denaturalized" (i.e., have his or her citizenship revoked) on the basis that the citizenship was procured illegally, by concealment of material fact, or by willful misrepresentation.˜ Various acts occurring after naturalization are considered evidence of misrepresentation or suppression at the time of naturalization. For example, if a naturalized citizen joins certain political or terrorist organizations within five years of becoming a citizen, and membership in that group would have precluded eligibility for naturalization under the INA, then the joining of the organization is held to be prima facie evidence raising a rebuttable presumption˜ that naturalization was obtained by concealing or misrepresenting how attached to the United States the citizen was when naturalized.˜ Naturalized citizens may have their citizenship revoked because of less than honorable discharge from the U.S. armed services.˜

Citizenship revocation must be initiated by a U.S. district attorney and must occur in the district where the naturalized citizen resides.˜ If a naturalized citizen is convicted of knowingly procuring naturalization in violation of law, the court in which that conviction is obtained has jurisdiction to revoke that person's citizenship.˜ In both cases, the court in which the revocation occurs must cancel the certificate of naturalization and notify the Attorney General of that action. The holder of the certificate of naturalization must return it to the Attorney General.˜

The effect of denaturalization is to divest a person of their status as a U.S. citizen and to return them to their former immigration status as a noncitizen. Once final, the denaturalization is effective as of the original date of the certificate of naturalization.˜

Derivative citizens also lose their citizenship under these circumstances. If a principal immigrant's citizenship is revoked based on "procurement by concealment of a material fact or by willful misrepresentation," derivative citizens (i.e., their naturalized family members) also lose their citizenship regardless of where they are living.˜ If citizenship is revoked because of membership in a subversive organization˜ or less than honorable discharge from the Armed Forces,˜ derivative citizens lose their citizenship only if they are living abroad.˜

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17.12 Test Your Knowledge

PROBLEM 17.1

Laci Lemire turned 18 in September. She is from Haiti. She and her parents came to the United States without authorization when Laci was only six months old. Laci has no idea that she is undocumented. Her parents recently paid to obtain a false U.S. passport for Laci to help her get into college and secure future jobs. But they know this "passport" will never stand up to official scrutiny, which is why they have never allowed Laci to travel out of the country, even to visit her grandparents in Haiti. Instead, her maternal and paternal grandfathers have traveled to New York to visit Laci in person every year on her birthday. Laci's grandfathers were good friends, having been born and raised in the same Brooklyn, NY neighborhood and moved together to Haiti after falling in love with Brooklyn-born cousins who preferred the sea life of Les Cayes to the hustle and bustle of the Big Apple.

Laci has been served with an NTA identifying her for removal under INA § 212(a)(6). You represent Laci. How would you assess her case?

PROBLEM 17.2

Reconsider Problem 3.1. When, if ever, would Diego's sister, brother-in-law, and nieces be eligible for U.S. citizenship?

PROBLEM 17.3

Reconsider Problem 3.2. When, if ever, would Olga Ostøyan be eligible for U.S. citizenship? What about Persa Persgard?

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) is 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) is 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 the 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) is 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 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) is 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) is a division of CBP. It is the government agency that enforces immigration laws at ports of entry.

Office of Immigration Litigation (OIL) is 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) is 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 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) is 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) is a division within DHS. USCIS is the government agency that oversees lawful immigration to the United States.

U.S. Customs and Border Protection (CBP) is a division within DHS that is focused on border security, including immigration enforcement.

U.S. Immigration and Customs Enforcement (ICE) is 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. As will be discussed in Chapters 3 and 4, 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
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
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
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
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
INA § 233	8 U.S.C. § 1223	Entry through or from foreign territory and adjacent islands
INA § 234	8 U.S.C. § 1224	Designation of ports of entry for aliens arriving by aircraft
INA § 235	8 U.S.C. § 1225	Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing
INA § 235A	8 U.S.C. § 1225a	Preinspection at foreign airports
INA § 236	8 U.S.C. § 1226	Apprehension and detention of aliens
INA § 236A	8 U.S.C. § 1226a	Mandatory detention of suspected terrorists; habeas corpus; judicial review
INA § 237	8 U.S.C. § 1227	Deportable aliens
INA § 238	8 U.S.C. § 1228	Expedited removal of aliens convicted of committing aggravated felonies
INA § 239	8 U.S.C. § 1229	Initiation of removal proceedings
INA § 240	8 U.S.C. § 1229a	Removal proceedings
INA § 240A	8 U.S.C. § 1229b	Cancellation of removal; adjustment of status
INA § 240B	8 U.S.C. § 1229c	Voluntary departure
INA § 240C	8 U.S.C. § 1230	Records of admission
INA § 241	8 U.S.C. § 1231	Detention and removal of aliens ordered removed
INA § 242	8 U.S.C. § 1252	Judicial review of orders of removal
INA § 243	8 U.S.C. § 1253	Penalties related to removal
INA § 244	8 U.S.C. § 1254a	Temporary protected status
INA § 245	8 U.S.C. § 1255	Adjustment of status of nonimmigrant to that of person admitted for permanent residence
INA § 245A	8 U.S.C. § 1255a	Adjustment of status of certain entrants before January 1, 1982, to that of person admitted for lawful residence
INA § 246	8 U.S.C. § 1256	Rescission of adjustment of status; effect upon naturalized citizen
INA § 247	8 U.S.C. § 1257	Adjustment of status of certain resident aliens to nonimmigrant status; exceptions
INA § 248	8 U.S.C. § 1258	Change of nonimmigrant classification
INA § 249	8 U.S.C. § 1259	Record of admission for permanent residence in the case of certain aliens who entered the United States prior to January 1, 1972
INA § 250	8 U.S.C. § 1260	Removal of aliens falling into distress
INA § 251	8 U.S.C. § 1281	Alien crewmen
INA § 252	8 U.S.C. § 1282	Conditional permits to land temporarily
INA § 253	8 U.S.C. § 1283	Hospital treatment of alien crewmen afflicted with certain diseases
INA § 254	8 U.S.C. § 1284	Control of alien crewmen
INA § 255	8 U.S.C. § 1285	Employment on passenger vessels of aliens afflicted with certain disabilities
INA § 256	8 U.S.C. § 1286	Discharge of alien crewmen; penalties
INA § 257	8 U.S.C. § 1287	Alien crewmen brought into the United States with intent to evade immigration laws; penalties
INA § 258	8 U.S.C. § 1288	Limitations on performance of longshore work by alien crewmen
INA § 261	8 U.S.C. § 1301	Alien seeking entry; contents

INA § 262	8 U.S.C. § 1302	Registration of aliens
INA § 263	8 U.S.C. § 1303	Registration of special groups
INA § 264	8 U.S.C. § 1304	Forms for registration and fingerprinting
INA § 265	8 U.S.C. § 1305	Notices of change of address
INA § 266	8 U.S.C. § 1306	Penalties
INA § 271	8 U.S.C. § 1321	Prevention of unauthorized landing of aliens
INA § 272	8 U.S.C. § 1322	Bringing in aliens subject to denial of admission on a health-related ground; persons liable; clearance papers; exceptions; "person" defined
INA § 273	8 U.S.C. § 1323	Unlawful bringing of aliens into United States
INA § 274	8 U.S.C. § 1324	Bringing in and harboring certain aliens
INA § 274A	8 U.S.C. § 1324a	Unlawful employment of aliens
INA § 274B	8 U.S.C. § 1324b	Unfair immigration-related employment practices
INA § 274C	8 U.S.C. § 1324c	Penalties for document fraud
INA § 274D	8 U.S.C. § 1324d	Civil penalties for failure to depart
INA § 275	8 U.S.C. § 1325	Improper entry by alien
INA § 276	8 U.S.C. § 1326	Reentry of removed aliens
INA § 277	8 U.S.C. § 1327	Aiding or assisting certain aliens to enter
INA § 278	8 U.S.C. § 1328	Importation of alien for immoral purpose
INA § 279	8 U.S.C. § 1329	Jurisdiction of district courts
INA § 280	8 U.S.C. § 1330	Collection of penalties and expenses
INA § 281	8 U.S.C. § 1351	Nonimmigrant visa fees
INA § 282	8 U.S.C. § 1352	Printing of reentry permits and blank forms of manifest and crew lists; sale to public
INA § 283	8 U.S.C. § 1353	Travel expenses and expense of transporting remains of officers and employees dying outside of United States
INA § 284	8 U.S.C. § 1354	Applicability to members of the Armed Forces
INA § 285	8 U.S.C. § 1355	Disposal of privileges at immigrant stations; rentals; retail sale; disposition of receipts
INA § 286	8 U.S.C. § 1356	Disposition of moneys collected under the provisions of this subchapter
INA § 287	8 U.S.C. § 1357	Powers of immigration officers and employees
INA § 288	8 U.S.C. § 1358	Local jurisdiction over immigrant stations
INA § 289	8 U.S.C. § 1359	Application to American Indians born in Canada
INA § 290	8 U.S.C. § 1360	Establishment of central file; information from other departments and agencies
INA § 291	8 U.S.C. § 1361	Burden of proof upon alien
INA § 292	8 U.S.C. § 1362	Right to counsel
INA § 293	8 U.S.C. § 1363	Deposit of and interest on cash received to secure immigration bonds
INA § 294	8 U.S.C. § 1363a	Undercover investigation authority
Title III: Nationality and Naturalization		
INA § 301	8 U.S.C. § 1401	Nationals and citizens of United States at birth
INA § 302	8 U.S.C. § 1402	Persons born in Puerto Rico on or after April 11, 1899
INA § 303	8 U.S.C. § 1403	Persons born in the Canal Zone or Republic of Panama on or after February 26, 1904

INA § 304	8 U.S.C. § 1404	Persons born in Alaska on or after March 30, 1867
INA § 305	8 U.S.C. § 1405	Persons born in Hawaii
INA § 306	8 U.S.C. § 1406	Persons living in and born in the Virgin Islands
INA § 307	8 U.S.C. § 1407	Persons living in and born in Guam
INA § 308	8 U.S.C. § 1408	Nationals but not citizens of the United States at birth
INA § 309	8 U.S.C. § 1409	Children born out of wedlock
INA § 310	8 U.S.C. § 1421	Naturalization authority
INA § 311	8 U.S.C. § 1422	Eligibility for naturalization
INA § 312	8 U.S.C. § 1423	Requirements as to understanding the English language, history, principles and form of government of the United States
INA § 313	8 U.S.C. § 1424	Prohibition upon the naturalization of persons opposed to government or law, or who favor totalitarian forms of government
INA § 314	8 U.S.C. § 1425	Ineligibility to naturalization of deserters from the Armed Forces
INA § 315	8 U.S.C. § 1426	Citizenship denied alien relieved of service in Armed Forces because of alienage
INA § 316	8 U.S.C. § 1427	Requirements of naturalization
INA § 317	8 U.S.C. § 1428	Temporary absence of persons performing religious duties
INA § 318	8 U.S.C. § 1429	Prerequisite to naturalization; burden of proof
INA § 319	8 U.S.C. § 1430	Married persons and employees of certain nonprofit organizations
INA § 320	8 U.S.C. § 1431	Children born outside the United States and residing permanently in the United States; conditions under which citizenship automatically acquired; determinations of name and birth date
INA § 322	8 U.S.C. § 1433	Children born and residing outside the United States; conditions for acquiring certificate of citizenship
INA § 324	8 U.S.C. § 1435	Former citizens regaining citizenship
INA § 325	8 U.S.C. § 1436	Nationals but not citizens; residence within outlying possessions
INA § 326	8 U.S.C. § 1437	Resident Philippine citizens excepted from certain requirements
INA § 327	8 U.S.C. § 1438	Former citizens losing citizenship by entering armed forces of foreign countries during World War II
INA § 328	8 U.S.C. § 1439	Naturalization through service in the armed forces
INA § 329	8 U.S.C. § 1440	Naturalization through active-duty service in the Armed Forces during World War I, World War II, Korean hostilities, Vietnam hostilities, or other periods of military hostilities
INA § 329A	8 U.S.C. § 1440-1	Posthumous citizenship through death while on active-duty service in armed forces during World War I, World War II, the Korean hostilities, the Vietnam hostilities, or in other periods of military hostilities
INA § 330	8 U.S.C. § 1441	Constructive residence through service on certain United States vessels
INA § 331	8 U.S.C. § 1442	Alien enemies

INA § 332	8 U.S.C. § 1443	Administration
INA § 333	8 U.S.C. § 1444	Photographs; number
INA § 334	8 U.S.C. § 1445	Application for naturalization; declaration of intention
INA § 335	8 U.S.C. § 1446	Investigation of applicants; examination of applications
INA § 336	8 U.S.C. § 1447	Hearings on denials of applications for naturalization
INA § 337	8 U.S.C. § 1448	Oath of renunciation and allegiance
INA § 338	8 U.S.C. § 1449	Certificate of naturalization; contents
INA § 339	8 U.S.C. § 1450	Functions and duties of clerks and records of declarations of intention and applications for naturalization
INA § 340	8 U.S.C. § 1451	Revocation of naturalization
INA § 341	8 U.S.C. § 1452	Certificates of citizenship or U.S. noncitizen national status; procedure
INA § 342	8 U.S.C. § 1453	Cancellation of certificates issued by Attorney General, the Commissioner or a Deputy Commissioner; action not to affect citizenship status
INA § 343	8 U.S.C. § 1454	Documents and copies issued by Attorney General
INA § 344	8 U.S.C. § 1455	Fiscal provisions
INA § 346	8 U.S.C. § 1457	Publication and distribution of citizenship textbooks; use of naturalization fees
INA § 347	8 U.S.C. § 1458	Compilation of naturalization statistics and payment for equipment
INA § 349	8 U.S.C. § 1481	Loss of nationality by native-born or naturalized citizen; voluntary action; burden of proof; presumptions
INA § 351	8 U.S.C. § 1483	Restrictions on loss of nationality
INA § 356	8 U.S.C. § 1488	Nationality lost solely from performance of acts or fulfillment of conditions
INA § 357	8 U.S.C. § 1489	Application of treaties; exceptions
INA § 358	8 U.S.C. § 1501	Certificate of diplomatic or consular officer of United States as to loss of American nationality.
INA § 359	8 U.S.C. § 1502	Certificate of nationality issued by Secretary of State for person not a naturalized citizen of United States for use in proceedings of a foreign state
INA § 360	8 U.S.C. § 1503	Denial of rights and privileges as national
INA § 361	8 U.S.C. § 1504	Cancellation of United States passports and Consular Reports of Birth
Title IV: Refugee Assistance		
INA § 404	8 U.S.C. § 1101, note	Authorization of Appropriations
INA § 405	8 U.S.C. § 1101, note	Savings Clauses
INA § 406	8 U.S.C. § 1101, note	Separability
INA § 411	8 U.S.C. § 1521	Office of Refugee Resettlement; establishment; appointment of Director; functions
INA § 412	8 U.S.C. § 1522	Authorization for programs for domestic resettlement of and assistance to refugees
INA § 413	8 U.S.C. § 1523	Congressional reports

INA § 414	8 U.S.C. § 1524	Authorization of appropriations
Title V: Alien Terrorist Removal Procedures		
INA § 501	8 U.S.C. § 1531	Definitions
INA § 502	8 U.S.C. § 1532	Establishment of removal court
INA § 503	8 U.S.C. § 1533	Removal court procedure
INA § 504	8 U.S.C. § 1534	Removal hearing
INA § 505	8 U.S.C. § 1535	Appeals
INA § 506	8 U.S.C. § 1536	Custody and release pending removal hearing
INA § 507	8 U.S.C. § 1537	Custody and release after removal hearing

Further Editing Notes

Idiosyncratic unmarked edits were made as follows:

Section 1.1: In the *Lozano* opinion, paragraphs have been added and the order of some material has been switched.

Section 1.4: The order of material has been altered and headings have been added.

Section 11.1: The word antiSemitism has been replaced with antisemitism.

Section 11.11: The court's formatting of text has been simplified