FALL 2021 UPDATE for

IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY (9th Edition)

Aleinikoff, Martin, Motomura, Fullerton, Stumpf & Gulasekaram

This Update includes materials on major developments that have occurred since the Ninth Edition of *Immigration and Citizenship: Process and Policy* went to press in late 2020.

We have limited ourselves to developments that may affect teaching from the Ninth Edition, and not included the sort of detailed updates that might be more appropriate for a treatise or practitioner's guide. Edited cases are longer than they might be as incorporated into the next edition of the casebook.

The materials in this Update fall into two broad categories (though there is overlap between them). One consists of summaries of recent developments, to put the casebook materials in up-to-date context. Instructors may wish to assign materials in this category, or alternatively just use them to provide updates more informally in lecture or discussion. The other category consists of new principal cases and longer summaries of recent developments; they may replace or be added to assigned readings from the casebook.

We provide these materials in Word format, so that instructors can select or edit what they find useful.

Users of the casebook have permission to reproduce these materials in whole or part for instructional purposes in their own classes.

Hiroshi Motomura
Maryellen Fullerton
Juliet Stumpf
Pratheepan Gulasekaram

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CHAPTER ONE

FOUNDATIONS OF IMMIGRATION AND CITIZENSHIP LAW

page 65, at the end of note 5, add a new paragraph:

After severe reductions in the number of refugees, capped at the end of the Trump administration at 18,000, President Biden raised the number of refugees admitted to the United States under the annual presidential determination to 62,500 for the 2021 fiscal year. The President also announced that the cap would be 125,000 for the 2022 fiscal year, which starts in October 2021. *See Emergency Presidential Determination on Refugee Admissions for Fiscal Year 2021*, 86 Fed. Reg. 24475 (2021).

page 66, at the end of note 6, add new notes 7 and 8:

7. President Biden issued a Proclamation revoking Executive Order 13780 (Mar. 6, 2017) and Presidential Proclamations 9645 (Sept. 17, 2017), 9723 (April 10, 2018), and 9983 (Jan. 31, 2020: Eritrea, Kyrgyzstan, Myanmar, Nigeria, Sudan, and Tanzania), which together were the foundation for the Muslim ban or "travel ban" that the U.S. Supreme Court upheld in *Trump v. Hawaii*. *See Ending Discriminatory Bans on Entry to the United States*, Pres. Proc. No. 10141, 86 Fed. Reg. 7005 (2021).

On April 21, 2021, the U.S. House of Representatives passed the National Origin-Based Antidiscrimination for Nonimmigrants or NO BAN Act, H.R. 1333, by a 218-208 vote and sent it to the U.S. Senate. This legislation would prohibit religious discrimination in various immigration decisions unless there is a statutory basis for such discrimination. Any temporary entry restrictions must "address specific acts implicating a compelling government interest" in protecting "the security or public safety of the United States or the preservation of human rights, democratic processes or institutions, or international stability." The President, the Secretary of State, and the Secretary of Homeland Security must consult with each other and Congress, then narrowly tailor the suspension to use the least restrictive means to achieve such an interest. The Secretary of State and the Secretary of Homeland Security must report to Congress on the restriction within 48 hours, or else the ban expires. Anyone alleging unlawful harm from such a restriction may sue in federal court.

8. On February 24, 2021, President Biden revoked the suspension of immigrant visa issuance that President Trump had ordered in Proclamation 10014 of April 22, 2020. *See Proclamation on Revoking Proclamation 10014*, 86 Fed. Reg. 11847 (2021); *Biden Proclamation Revokes Suspension of Immigrant Visa Issuance*, 98 Interp. Rel. No. 9 (Mar. 1, 2021). Proclamation 10052, which the Trump administration had issued to suspend the entry of nonimmigrant workers in major nonagricultural categories, remained in effect until it expired by its own terms on March 31, 2021. *See DOS Announces Processing Update in Light of the Expiration of P.P. 10052*, 98 Interp. Rel. No. 14 (Apr. 5, 2021).

On May 14, 2021, President Biden revoked Proclamation 9945, which had required noncitizens to show health insurance or independent financial means. A federal district court had blocked implementation of the proclamation by issuing a preliminary injunction. The

Ninth Circuit had vacated the injunction, see Doe #1 v. Trump, 984 F.3d 848 (9th Cir. 2020), but the Biden administration never implemented the requirement. *See Biden Revokes Health Care Proclamation*, 98 Interp. Rel. No. 21 (May 24, 2021).

page 66, at the end of the second full paragraph, add a new paragraph:

As we complete work on this Update, the Biden administration had modified the Title 42 order to allow unaccompanied noncitizen children to enter the United States. The Biden administration also is reportedly in the later stages of planning how to phase out the general rule based on Title 42 that the federal government had invoked nearly 850,000 times to turn back noncitizens arriving at the southern border without valid travel documents—effectively keeping these migrants from applying for asylum. *See* Eileen Sullivan & Zolan Kanno-Youngs, *Biden Will Reverse a Trump Border Policy Put in Place During the Pandemic*, N.Y. Times, June 28, 2021.

page 68, at the end of the carryover paragraph, add a new paragraph:

The border closures in light of the COVID-19 pandemic imposed by the United States, Canada, and Mexico for non-essential travel by land or ferry have been extended monthly since they first took effect on March 21, 2020. *See Border Closures Extended Through August 21*, 98 Interp. Rel. No. 28 (July 26, 2021); Daniel Slotnick, *The U.S. Reaffirms Its Land Border Restrictions As Canada Relaxes Its Own. Mexico Has None*, N.Y. Times, July 23, 2021).

page 87, at the end of note 1, add a new paragraph:

On March 9, 2021, DHS Secretary Alejandro Mayorkas announced that DHS would no longer defend the public charge rule in court and that DHS would dismiss the federal government's appeals in litigation that had been brought against the federal government to block implementation of the rule. Two days later, DHS submitted a final rule to remove the public charge rule from the Code of Federal Regulations. The federal executive branch will no longer implement the DHS public charge rule, nor a largely parallel rule adopted by the Department of State. Several states responded by moving to intervene in litigation in order to define the public charge rule, but lower courts and then the U.S. Supreme Court denied leave to intervene. *See Supreme Court Refers States Back to District Court to Defend Public Charge Rule*, 98 Interp. Rel. No. 18 (May 3, 2021).

CHAPTER TWO

IMMIGRANTS AND NONIMMIGRANTS: ADMISSION CATEGORIES AND THE UNDOCUMENTED

page 106, after the first full paragraph, add a new paragraph:

As noted in the Update to page 66 in Chapter One, the Biden administration retracted most of the COVID-related limitations on immigrants and nonimmigrants. In April 2021, the State Department announced the resumption of routine consular visa services. As of late July 2021, four geographically-based COVID-19 proclamations continue to restrict visa issuance and entry into the United States for individuals physically present in China, Iran, Brazil, the United Kingdom, Ireland, South Africa, India, and the 26 countries in the Schengen area. *See COVID-19 Travel Restrictions and Exceptions,* Dep't of State (June 24, 2021) (identifying Presidential Proclamation Nos. 9984, 9992, 10143 & 10199). The border closures in light of the COVID-19 pandemic imposed by the United States, Canada, and Mexico for non-essential travel by land or ferry have been extended monthly since they first took effect on March 21, 2020. *See Border Closures Extended Through July 21*, 98 Interp. Rel. No. 25 (June 28, 2021).

page 107, after the carryover paragraph, add new paragraphs:

The Biden administration revoked most of these restrictions on visa issuance and entry into the United States. President Biden issued Proclamation 10141, revoking Executive Order 13780 (Mar. 6, 2017) and Presidential Proclamations 9645 (Sept. 17, 2017), 9723 (Apr. 10, 2018), and 9983 (Jan. 31, 2020: Eritrea, Kyrgyzstan, Myanmar, Nigeria, Sudan, and Tanzania), which together were the foundation for the Muslim ban or "travel ban" that the U.S. Supreme Court upheld in *Trump v. Hawaii*. *See Ending Discriminatory Bans on Entry to the United States*, Proclamation 10141, 86 Fed. Reg. 7005 (2021).

On February 24, 2021, President Biden revoked the suspension of immigrant visa issuance that President Trump had ordered in Proclamation 10014 of April 22, 2020. *See Proclamation on Revoking Proclamation 10014*, 86 Fed. Reg. 11847 (2021); *Biden Proclamation Revokes Suspension of Immigrant Visa Issuance*, 98 Interp. Rel. No. 9 (Mar. 1, 2021). Proclamation 10052, which the Trump administration had issued to suspend the entry of nonimmigrant workers in major nonagricultural categories, remained in effect until it expired by its own terms on March 31, 2021. *See DOS Announces Processing Update in Light of the Expiration of P.P. 10052*, 98 Interp. Rel. No. 14 (Apr. 5, 2021). Finally, on May 14, 2021, President Biden revoked Proclamation 9945, which had required noncitizens to show health insurance or independent financial means. *See Revoking Proclamation 9945*, Proclamation 10209, 86 Fed. Reg. 27015 (2021).

On a larger scale, President Biden's February 2021 executive order established a cross-agency Task Force on New Americans to coordinate the federal government's efforts to welcome and support immigrants. The order also directed the Secretary of State, the Attorney General, and the Secretary of Homeland Security to identify agency policies and actions that impeded access to immigration benefits or failed to promote access to the legal immigration system, and to recommend steps to revise or rescind those agency policies and actions. *See*

Exec. Order 14012*, Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans*, 86 Fed. Reg. 8277 (2021).

page 115, in the third full paragraph, at the end of the third sentence, add:

although this number has risen as a result of the Biden administration's decision in 2021 to reinstate a higher level of refugee admissions.

page 123, at the end of the carryover paragraph, add:

The Biden administration's retractions or modifications of most of these restrictions are described in the Updates to page 66 in Chapter One.

page 132, in the first paragraph, after the third sentence ending "and Vietnam," add:

For the FY 2022 lottery, the State Department added Honduras to the list of disqualified countries, and included Hong Kong SAR in the disqualification of mainland China. *See* Dep't of State, Instructions for the 2022 Diversity Immigrant Visa Program (DV-2022).

page 153, at the end of the carryover paragraph, add a new paragraph:

By the beginning of 2021, the combination of administrative delays, Trump-era restrictions, and COVID impacts meant that the Biden administration inherited a near-shutdown of marriage-based visa applications. *See* Nisha Venkat, *Trump Policies and COVID Have Left Immigrant Couples Trying to Get Marriage-Based Visas in Limbo,* BuzzFeed, May 7, 2021.

page 183, at the end of the carryover paragraph, add:

In May 2021, the Biden administration withdrew the 2018 proposed rule that would have eliminated the International Entrepreneur Parole Program. *See Removal of International Entrepreneur Parole Program*, 86 Fed. Reg. 25809 (2021).

page 187, at the end of the carryover paragraph, add a new paragraph:

In January 2021, President Biden revoked Executive Order 13768, which had restricted visa issuance based on failure to cooperate in the return of a country's nationals. *See* Exec. Order 13993, *Revision of Civil Immigration Enforcement Policies and Priorities*, 86 Fed. Reg. 7051 (2021). In contrast, Proclamation 10052, which the Trump administration had issued to suspend the entry of nonimmigrant workers in major nonagricultural categories, remained in effect until it expired by its own terms on March 31, 2021. *See DOS Announces Processing Update in Light of the Expiration of P.P. 10052*, 98 Interp. Rel. No. 14 (Apr. 5, 2021).

page 192, at the end of the second full paragraph, add:

In January 2021, President Biden revoked Executive Order 13768, which had incorporated this policy. *See* Exec. Order 13993, *Revision of Civil Immigration Enforcement Policies and Priorities*, 86 Fed. Reg. 7051 (2021).

page 194, at the end of the first full paragraph, add:

The proclamation that blocked spouses and children of H-1B visa holders from entering the United States and working expired by its own terms on March 31, 2021. *See DOS Announces Processing Update in Light of the Expiration of P.P. 10052*, 98 Interp. Rel. No. 14 (Apr. 5, 2021).

page 195, in the last paragraph, after the words "March 31, 2017," add:

The Ninth Circuit struck down the Trump administration's narrower computer programmer standard for the H-1B specialty occupation visa, on the grounds that it was arbitrary and capricious and violated the Administrative Procedure Act. *See Innova Solutions, Inc. v. Baran*, 983 F.3d 428 (9th Cir. 2020).

page 196, at the end of the carryover paragraph, add new paragraphs:

These measures imposing more stringent H-1B standards took the form of proclamations and regulations. On June 22, 2020, President Trump issued Proclamation 10052, suspending entry of nonimmigrant employees in nonagricultural categories. *See Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak*, Proclamation 10052, 85 Fed. Reg. 38263 (2020). New DHS regulations would have narrowed the definition of H-1B specialty occupations, replaced the randomized lottery system with a selection process based on wage level, and changed the definition of the employer-employee relationship to limit placements to third-party job sites. The Department of Labor proposed a regulation that would have increased the prevailing wages for H-1B occupations and imposed other restrictions.

Litigation blocked or delayed some of these reforms before the change in presidential administrations. *See Chamber of Com. of United States v. United States Dep't of Homeland Sec.*, 504 F. Supp. 3d 1077, 1092, 1094 (N.D. Cal. 2020). The Biden administration withdrew the rule narrowing the H-1B criteria and changing the employer-employee relationship. It delayed implementation of both the DOL's new prevailing wage calculation and USCIS's switch from a lottery to a wage-based H-1B selection system. *See Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions; Delay of Effective Date*, 86 Fed. Reg. 8543 (2021); *Strengthening the H-1B Nonimmigrant Visa Classification, Implementation of Vacatur*, 86 Fed. Reg. 27,027 (2021); *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Immigrants and Non-Immigrants in the United States: Delay of Effective and Transition Dates*, 86 Fed. Reg. 26164 (2021).

page 204, at the end of the second full paragraph, add:

In October 2020, the State Department imposed a moratorium on new au pair sponsors and placed caps on the admission of au pairs. *See Exchange Visitor Program—Moratorium on Growth in the Au Pair Program*, 85 Fed. Reg. 64213 (2020).

page 205, at the end of the carryover paragraph, add:

The proclamation remained in effect until it expired by its own terms on March 31, 2021. *See DOS Announces Processing Update in Light of the Expiration of P.P. 10052*, 98 Interp. Rel. No. 14 (Apr. 5, 2021).

page 206, at the end of the second full paragraph, add:

In January 2021, President Biden introduced in Congress the proposed U.S. Citizenship Act, which would do away with the current per-country caps for employment-based admissions, encourage admission of those holding advanced STEM degrees from U.S. institutions, and allow for work authorization for spouses and children of H-1B visa holders. *See Biden-Supported Citizenship Act Introduced in Congress*, 98 Interp. Rel. No. 8 (Feb. 22, 2021).

page 214, in note 2, after the citation, add:

The New York Times reported similar results:

> Interviews with immigration lawyers and H-1B visa applicants suggest that when the Trump administration introduced additional scrutiny of H-1B applications, companies often shifted workers or hired elsewhere instead of filling the roles with American workers. This is consistent with research by Britta Glennon, an assistant professor at the Wharton School of the University of Pennsylvania. In a working paper last year, she analyzed the data on U.S.-based multinational companies between 2004 and 2014 and found that those dependent on H-1B visas were more likely to expand overseas when facing immigration restrictions, like when the cap on visas was lowered in 2004.

Youyou Zhou, *Do Restrictions on H-1B Visas Create American Jobs?*, N.Y. Times, May 8, 2021.

page 218, at the end of the last full paragraph, replace the last sentence with:

In January 2021, the Department of Labor withdrew the proposed regulation for further review.

page 219, at the end of the last paragraph, add a new paragraph:

In May 2021, USCIS designated 22,000 additional H-2B visas for returning temporary nonagricultural workers and nationals of the Northern Triangle (Honduras, Guatemala, and El Salvador). Within the first five business days of filing, USCIS received enough petitions to fill all of the additional visas made available for H-2B returning workers. *See USCIS H-2B Visas for FY 2021 Reached for Additional Returning Workers*, 98 Interp. Rel. No. 22 (June 7, 2021).

page 221, at the end of the third full paragraph, add:

The proclamation remained in effect until it expired by its own terms on March 31, 2021. *See DOS Announces Processing Update in Light of the Expiration of P.P. 10052*, 98 Interp. Rel. No. 14 (Apr. 5, 2021).

page 231, at the end of note 7, add:

The Wall Street Journal reported that despite the pandemic-inspired economic crisis, employers were unable to hire the workers they needed and so "scaled back production, cut hours or sent jobs overseas." Alicia A. Caldwell, *Ban on New Foreign Workers Left U.S. Jobs Unfilled, Even in Covid Downturn*, Wall St. J., Feb. 15, 2021.

page 234, at the end of note 4, add a new paragraph:

In 2020, international student visas saw an 18 percent decrease from 2019. International student enrollment in K-12 programs dropped nearly 25 percent, and student grants of work authorization for optional practical training dropped by 12 percent. Visas for Asian students saw the greatest impact, with grants of F-1 visas for mainland Chinese students plummeting by 99 percent, visas granted to students in India dropping by 88 percent, to Japanese students dropping by 87 percent, and South Korean student visas down by 87 percent. F-1 visa grants to Mexican students sunk by 60 percent. *See SEVIS 2020 Annual Report Shows 18% Drop in Foreign Students,* 98 Interp. Rel. No. 13 (Mar. 29, 2021).

page 256, after the second full paragraph, add a new paragraph:

In February 2021, President Biden introduced in Congress the proposed U.S. Citizenship Act. The Act would create an eight-year path to citizenship for most unlawfully present noncitizens and a three-year path for DACA recipients and some agricultural workers. The bill would expand family-based immigration and allow temporary admission for family members eligible for immigrant visas. It would eliminate the per-country caps on employment-based immigration, facilitate admission for those with advanced STEM degrees from a U.S. institution, and provide work authorization for spouses and children of H-1B visa holders. *See Biden-Supported Citizenship Act Introduced in Congress*, 98 Interp. Rel. No. 8 (Feb. 22, 2021). As of late July 2021, the bill has not received a Senate vote.

page 268, at the end of the second full paragraph, add a new paragraph:

In spring of 2021, the Biden administration directed immigration agencies to use the terms "noncitizen" or "migrant" instead of "alien" and "illegal alien," and "integration" rather than "assimilation." *See* Memorandum from Tae Johnson, Acting Dir., U.S. Immigration & Customs Enf't, to U.S. Immigration & Customs Enf't Leadership, *Updated Terminology for Communications and Materials* (Apr. 19, 2021); Memorandum from Troy A. Miller, Acting Comm'r, U.S. Customs & Border Protection, to U.S. Customs & Border Protection Leadership, *Updated Terminology for CBP Communications and Materials* (Apr. 19, 2021); *Technical Update—Replacing the Term "Alien,"* U.S. Citizenship & Immigration Servs. Policy Manual: Updates (May 11, 2021); Memorandum from Jean King, Acting Director, Executive Office for Immigration Review, U.S. Dep't of Justice to All of Executive Office for Immigration Review, *Purpose: Clarify the Agency's Use of Terminology Regarding Noncitizens* (July 23, 2021). *See also* Maria Sacchetti, *ICE, CBP to Stop Using "Illegal Alien" and "Assimilation" under New Biden Administration Order*, Wash. Post, Apr. 19, 2021.

page 287, in note 3, after "insights?," add:

Does the Biden administration's approach—continuing some border control measures such as excluding unauthorized migrants traveling through Canada or Mexico if they originate from countries where COVID-19 is present, while at the same time increasing support for Northern Triangle countries—address Motomura's critiques?

CHAPTER THREE

ADMISSION PROCEDURES

page 292, at the end of the carryover paragraph, add:

President Biden issued an executive order in February 2021 that revoked the Trump administration's "extreme vetting" requirements. *See* Exec. Order, 14013, *Rebuilding and Enhancing Programs to Resettle Refugees and Planning for the Impact of Climate Change on Migration*, 86 Fed. Reg. 8839 (2021).

page 297, at the end of the second full paragraph, before subsection b, add a new paragraph:

The Biden administration has taken measures to reverse some of the USCIS policies and practices adopted during the Trump administration. USCIS formally announced in January 2021 that it would not implement filing fee increases that the Trump administration had adopted (but courts had enjoined). *See U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements*, 86 Fed. Reg. 7493 (2021). In April 2021, USCIS announced the end of its "no blank space" policy that had led to automatic rejection of applications that did not have an entry in every blank (even when no relevant information was required). *See* U.S. Citizenship & Immigration Servs., *USCIS Confirms Elimination of 'Blank Space' Criteria*, April 1, 2021. Also in April 2021, USCIS revoked the Trump administration policy that required adjudicators, when deciding an applicant's request for renewal or extension of status, to ignore prior determinations of an applicant's eligibility. *See* U.S. Citizenship & Immigration Servs., *Policy Alert, Deference to Prior Determinations of Eligibility in Requests for Extensions of Petition Validity*, April 27, 2021, President Biden's FY 2022 budget request included $345 million for USCIS to resolve processing backlogs. *See* Executive Office of the President, Office of Management and Budget, *FY 2022 Discretionary Request*, April 9, 2021. *See generally* Michael D. Shear & Zolan Kanno-Youngs, *Biden Aims to Rebuild and Expand Legal Immigration*, N.Y. Times, May 31, 2021.

page 301, at the end of the first full paragraph, before subsection 4, add a new paragraph:

In May 2021, the Biden administration withdrew the 2018 proposed rule that would have eliminated the International Entrepreneur Parole Program. *See Removal of International Entrepreneur Parole Program*, 86 Fed. Reg. 25809 (2021). For a general discussion of parole, see Andorra Bruno, *Immigration Parole* (Cong. Res. Serv. 2020). The Biden Administration re-started the Central American Minors (CAM) refugee and parole program to reunite children from El Salvador, Guatemala, and Honduras with their parents who are legally present in the United States. *See* U.S. Citizenship & Immigration Servs., *Central American Minors (CAM) Refugee and Parole Program*.

page 304, at the end of the first paragraph in subsection a, add a new paragraph:

In *Sanchez v. Mayorkas*, 141 S. Ct. 1809 (2021), the U.S. Supreme Court held unanimously that a noncitizen who had entered without inspection and later received Temporary Protected Status (TPS) has not been "inspected and admitted" as INA § 245(a) requires for adjustment eligibility. The Court also held that because Mr. Sanchez had worked unlawfully, he could not satisfy INA § 245(k)(1), which bars employment-based adjustment for noncitizens who have worked unlawfully. According to the Court, a TPS grant is not an admission. And although INA § 244(f)(4), 8 U.S.C. § 1254a(f)(4), provides that for purposes of adjustment under § 245, a TPS grantee "shall be considered as being in, and maintaining, lawful status as a nonimmigrant," lawful nonimmigrant status is distinct from admission. The Court noted it was not addressing whether TPS holders who had entered without inspection, later left the United States, and returned on advance parole might meet the requirement that adjustment applicants must have been "inspected and admitted or paroled into the United States." 141 S. Ct. 1813 n.4.

page 327, at the end of first full paragraph, add a new paragraph:

On February 2, 2021, President Joe Biden signed an Executive Order that, among other things, ordered the Secretary of Homeland Security to review expedited removal procedures and submit a report to the President within 120 days. The Executive Order calls on the Secretary to "consider whether to whether to modify, revoke, or rescind" the Trump Administration's July 2019 extension of expedited removal further into the U.S. interior. *See* Exec. Order 14010, *Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, § 4(b), 86 Fed. Reg. 8267 (2021).

page 348, at the end of third full paragraph, after the citation to *Padilla*, add:

In January 2021, the U.S. Supreme Court granted the government's petition for review in *Padilla*, vacated the Ninth Circuit's decision, and remanded to the Ninth Circuit to consider whether the U.S. Constitution requires bond hearings in light of *Dep't of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959, 207 L. Ed. 2d 427 (2020).

page 351, at the end of second full paragraph, add a new paragraph:

On January 26, 2021, Acting Attorney General Monty Wilkinson issued a Department of Justice memorandum formally rescinding the zero tolerance policy. *See* U.S. Department of Justice, Office of the Attorney General, *Memorandum for all Federal Prosecutors, Rescinding the Zero-Tolerance Policy for Offenses Under 8 U.S.C. § 1325(a)*, Jan. 26, 2021. On the Trump administration's zero tolerance policy, see William A. Kandel, *The Trump Administration's "Zero Tolerance" Immigration Enforcement Policy* (Cong. Res. Serv. 2021). On the number of people held in immigration detention in the first month of the Biden administration, see *Immigrant Detention Numbers Fall Under Biden, But Border Book-Ins Rise*, TRAC Immigration (2021).

page 352, at the end of second full paragraph, add a new paragraph:

As the detained population increased in mid-2021 in the direction of prepandemic levels, from 14,000 in April 2021 to 26,000 in mid-July 2021, the number of COVID-19 infections among detainees also rose dramatically. The vaccination rate remained low as of mid-July 2021 at about 20 percent of detainees passing through immigration detention centers. *See* Maura Turcotte, *Virus Cases Are Surging at Crowded Immigration Detention Centers in the U.S.*, N.Y. Times, July 6, 2021.

page 353, at the end of first full paragraph, add new paragraphs:

Presidential candidate Biden promised to end "the federal government's use of private prisons" and "make clear that the federal government should not use private facilities for any detention, including detention of undocumented immigrants." In January 2021, the Biden administration issued an executive order to end the use of private prisons by the Department of Justice, but the order did not extend to the Department of Homeland Security, which has authority over immigration detention. As of late July 2021, the administration has taken no action to end immigration detention in private facilities. *See* Laura Barrón-López, Tyler Pager & Sam Stein, *Biden Weighs Putting an End to Private Immigration Detention Facilities*, Politico, Jan. 26, 2021.

Some states have enacted legislation that would limit or eliminate the operation of private detention facilities in that state. California AB 32 bans private prisons and detention centers, requiring the phase-out of five immigration detention centers in the state. A federal district court sustained AB 32 against legal challenge by GEO Group, a major private prison contractor, and by the federal government. *See GEO Group, Inc. v. Newsom*, 493 F. Supp. 3d 905 (2020). As of late July 2021, an appeal is pending in the Ninth Circuit.

New legislation in the state of Washington bans for-profit detention facilities in the state as of the year 2025. *See* Rachel La Corte, *Washington State Governor OKs Bill Banning For-profit Jails*, Assoc. Press, Apr. 14, 2021. Legislation passed by the New Jersey State Legislature, and awaiting action by the Governor Murphy as of late July 2021, would prohibit state and local entities in New Jersey and private detention facilities from entering into agreement to detain noncitizens. The Maryland legislature passed a similar ban on private immigration detention, but Governor Hogan vetoed the measure, citing another provision in the bill that would have prohibited police officers from asking about a person's immigration status during a stop, search or arrest. *See* Steve Thompson, *Slew of Hogan Vetoes Includes Bills on Parole, Procurements, Immigrant Protections*, Wash. Post, May 28, 2021.

page 386, after note 7, add new note 8:

8. In *Johnson v. Guzman Chavez*, 141 S. Ct. 2271 (2021), the U.S. Supreme Court addressed the detention of noncitizens who had been removed from the United States and later reentered without authorization. The noncitizens were subject to reinstated orders of removal but sought withholding of removal based on fear of persecution in the countries designated in their removal orders. The central question in the case was whether their

detention was governed by INA § 236, which applies "pending a decision on whether the alien is to be removed from the United States," or instead by INA § 241, which applies after a noncitizen is "ordered removed." If INA § 236 governs, regulations provide that the noncitizen may receive a bond hearing before an immigration judge shortly after their arrest. If, however, INA § 241 governs, then nothing in the governing regulations expressly provides for a bond hearing.

The Court held that INA § 241 governs, and that these noncitizens are not entitled to a bond hearing. Justice Alito wrote an opinion joined in full by three other Justices. Justices Thomas and Gorsuch concurred in the judgment but would have dismissed for lack of jurisdiction, because they found the detention-related claim in the case arose from the removal proceedings, and therefore had to be raised as part of a petition for review of a final removal order under INA § 242(b)(9). Writing for the Court, Justice Alito reasoned that respondents had been "ordered removed" and that their reinstated removal orders were "administratively final." These are the two statutory prerequisites that trigger application of the detention regime governed by INA § 241, which does not provide the noncitizen with a bond hearing. Alito further reasoned that this reading of the relevant statutory text continues to apply even if the noncitizen seeks withholding of removal because withholding, even though it prevents removal to specific countries, does not preclude removal as a general matter and thus does not set aside an order of removal.

Justice Breyer dissented, joined by Justices Kagan and Sotomayor. They emphasized that withholding claims typically require lengthy proceedings, and that removal orders are not administratively final until the withholding claim is decided. Accordingly, they would have held that INA § 236, not § 241, governs.

CHAPTER FOUR

CITIZENSHIP AND ITS SIGNIFICANCE

page 405, at the end of note 6, add a new paragraph:

In May 2021, the State Department broadened birthright citizenship for children born abroad through assisted reproduction, and to same-sex married fathers. The agency declared it would interpret INA § 301(c) and (g) to mean that children born abroad to parents, at least one of whom is a U.S. citizen and who are married to each other at the time of the birth, will be U.S. citizens from birth if they have a genetic or gestational tie to at least one of their parents (and meet the INA's other requirements). This departed from the previous interpretation which required a genetic link to both the U.S.-citizen parent and his or her spouse. This change opened the way for acquisition of birthright citizenship for children born to married parents through assisted reproduction methods such as gestational surrogacy. It also reversed the agency's previous conclusion that a foreign-born child of two married men could not qualify as a child born in wedlock for purposes of § 301. *See* Dep't of State Press Release: U.S. Citizenship Transmission and Assisted Reproductive Technology, May 18, 2021.

page 414, replace the last sentence of note 4 with:

The Tenth Circuit reversed, holding that the Citizenship Clause of the Fourteenth Amendment did not confer birthright U.S. citizenship on American Samoans, and distinguishing *Wong Kim Ark* as inapplicable to unincorporated territories. *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021).

page 441, at the end of the second paragraph, add a new paragraph:

On February 2, 2021, President Biden created an interagency task force and a working group composed of agencies that implement policies that impact immigrant communities, and directed them to take action to promote naturalization. The executive order charged the agencies with reviewing application requirements, background checks, the interview process, the civics and English tests, and the oath of allegiance. The order directed officials to decrease processing times for naturalization applicants, consider reducing or waiving processing fees, facilitate naturalization for military members and candidates, and address excessive use of denaturalization and passport revocation. *See* Exec. Order 14012, *Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans*, 86 Fed. Reg. 8277 (2021).

page 450, at the end of the first paragraph, add a new paragraph:

On February 22, 2021, USCIS announced that it was reverting from the civics test implemented in 2020 to the test that had been in place since 2008. USCIS made this decision after reviewing comments that the agency had implemented the 2020 civics test without enough advance notice to provide sufficient time for study and preparation of training materials and resources. USCIS determined that the 2020 civics test development process, content, testing procedures, and implementation schedule had the potential to burden the

naturalization process, and was therefore inconsistent with Executive Order 14012 on *Restoring Faith in Our Legal Immigration Systems* requiring the agency to promote naturalization and streamline the naturalization process. *See USCIS Civics Test*, 98 Interp. Rel. No. 9 (Mar. 1, 2021).

page 468, at the end of the first full paragraph, add a new paragraph:

In a February 2021 executive order, President Biden mandated a review of "policies and practices regarding denaturalization and passport revocation to ensure that these authorities are not used excessively or inappropriately." *See* Exec. Order 14012, *Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans*, 86 Fed. Reg. 8277 (2021).

page 512, at the end of the first full paragraph, add:

In April 2021, the Biden administration withdrew the proposed rule. *See Housing and Community Development Act of 1980: Verification of Eligible Status; Withdrawal; Regulatory Review*, 86 Fed. Reg. 17346 (2021).

page 512, at the end of the second full paragraph, add:

As noted in the Update to page 66 in Chapter One, both the public charge and health insurance bars were rescinded after President Biden took office.

page 513, at the end of the last paragraph, add:

As described in the Update to page 66 in Chapter One, President Biden revoked the admissions restrictions based on health insurance.

CHAPTER FIVE

INADMISSIBILITY AND DEPORTABILITY

page 518, at end of the carryover paragraph, add:

Soon after Alejandro Mayorkas was confirmed as DHS Secretary, the agency rescinded ICE's authority to impose civil financial penalties on noncitizens who fail to leave the country. Dep't of Homeland Security, *DHS Announces Rescission of Civil Penalties for Failure-to-Depart*, Press Release, Apr. 23, 2021. In addition, DHS jointly agreed with plaintiffs to suspend litigation over the fines for 60 days, until Aug. 9, 2021. *Austin Sanctuary Network v. Mayorkas*, Joint Motion to Stay Case for Sixty Days, 1:21-CV-00164-ZMF (D.D.C. June 5, 2021).

page 542, at the end of the third full paragraph, add:

As noted in the Update to page 87 in Chapter One, DHS announced that it would no longer defend the public charge rule in court. In addition, the agency submitted a new final rule to remove the Trump Administration's changes to the public charge regulations from the CFR.

page 545, at the end of the carryover paragraph, add a new paragraph:

The Centers for Disease Control, exercising authority under Title 42 of the U.S. Code, implemented a requirement of a negative COVID-19 test or other attestation for air travelers entering U.S. from a foreign country. Centers for Disease Control and Prevention and Department of Health and Human Services, *Requirement for Negative Pre-Departure COVID-19 Test Result or Documentation of Recovery From COVID-19 for all Airline or Other Aircraft Passengers Arriving into the United States from Any Foreign Country*, 86 Fed. Reg. 7387 (2021).

page 545, at the end of the first full paragraph, add:

President Biden revoked Proclamation 9945, which had required noncitizens to show proof of health insurance. *Revoking Proclamation 9945*, Proclamation 10209, 86 Fed. Reg. 27015 (2021).

page 608, at the end of the third full paragraph, add:

The Eleventh Circuit ruled that a conviction that occurred when an individual was a naturalized citizen cannot serve as basis for deportation once the individual is denaturalized. *Hylton v. U.S. Attorney General,* 992 F.3d 1154 (11th Cir. 2021).

page 611, after the fourth sentence of the second full paragraph, add:

The Ninth Circuit ruled that the BIA was entitled to *Chevron* deference on its view that if a noncitizen has been admitted into the U.S. more than once, and the most recent admission accounts for the noncitizen's presence in the country at the time of the crime, that more recent admission restarts the five-year clock under § 237(a)(2)(A)(i). *Route v. Garland*, 996 F.3d 968 (9th Cir. 2021) (reaffirming *Matter of Alyazji*). In *Route*, the circuit court declined to overturn the BIA's decision to remove a nonimmigrant who was admitted initially in 2005, but was

later readmitted as a nonimmigrant in 2015 after a brief vacation, and convicted of a crime involving moral turpitude three years after that second admission.

CHAPTER SIX

RELIEF FROM REMOVAL

page 659, at the end of the first full paragraph, add:

As noted in the Update to page 304 in Chapter Three, the Supreme Court limited the ability of certain TPS holders who entered unlawfully from adjusting status under § 245. *Mayorkas v. Sanchez*, 141 S. Ct. 1460 (2021).

page 660, after the end of the second full paragraph, add a new paragraph:

Reversing the Fifth and Sixth Circuits, the Supreme Court clarified that an NTA must provide all statutorily required information in a single document to trigger the stop-time rule that prevents noncitizens from accruing continuous presence for the purpose of establishing eligibility for cancellation of removal *See Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021) (addressing DHS practice of serving an NTA with missing information and later supplying missing information in subsequent filings to stop time). The ruling extends the principles underlying *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), discussed on page 666 of the casebook. As a result of both *Niz-Chavez* and *Pereira*, a noncitizen will begin to accrue physical presence and continuous residence for purposes of satisfying §240A requirements until DHS serves the noncitizen with a single document (the NTA) containing all information required by INA § 239.

page 666, for the carryover paragraph, note the extension of *Pereira v. Sessions* by *Niz-Chavez v. Garland*, referenced in the Update to page 660, above.

page 705, at the end of the second full paragraph, add:

Following the Fourth and Seventh Circuits, the Third Circuit also declined to follow *Castro-Tum*. *See Sanchez v. U.S. Attorney General*, 997 F.3d 113 (3d Cir. 2021) (allowing noncitizen to seek administrative closure while awaiting DACA renewal).

Citing the decisions of the Third, Fourth, and Seventh Circuits, on July 15, 2021, U.S. Attorney General Merrick Garland overruled *Matter of Castro-Tum* in its entirety. *Matter of Cruz-Valdez*, 28 I & N Dec. 326 (AG 2021). *Cruz-Valdez* restored the authority of IJs to grant administrative closure consistent with the legal standards in place prior to *Castro-Tum*. The opinion also noted that the DOJ, in the last weeks of the Trump administration, had attempted to promulgate rules to codify *Castro-Tum*, but were enjoined from doing so by a district court. See *Centro Legal de La Raza v. Exec. Office for Immigration Review*, 2021 WL 916804 (N.D. Cal. Mar. 10, 2021) (preliminarily enjoining, for failure to comply with the APA, the final rule on administration closure); *see* Dep't of Justice, *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 Fed. Reg. 81588 (2020). Referencing that litigation, Attorney General Garland further noted that the DOJ currently is considering promulgating new regulations to more permanently moot the Trump administration's attempt to limit IJ discretion over their dockets.

In accord with these appellate court rulings and the Attorney General opinion, the EOIR issued a memorandum encouraging immigration judges "to use all docketing tools available to them to ensure fair and timely resolution of cases before them." Acting Director of Executive Office of Immigration Review Jean King, Policy Memorandum 21-25, *Effect of Department of Homeland Security Enforcement Priorities*, June 11, 2021.

page 709, after the first full paragraph, add a new paragraph:

Immediately upon taking office, President Biden revoked President Trump's executive order on interior enforcement and directed the Department of Homeland Security to revise its civil immigration enforcement priorities. Exec. Order 13993, *Revision of Civil Immigration Enforcement Policies and Priorities*, 86 Fed. Reg. 7051 (2021) (revoking Executive Order 13768 of Jan. 25, 2017). Concurrently, Biden's Acting Secretary of DHS issued new interim enforcement priorities. *See* Memorandum from Acting Secretary of Homeland Security David Pekoske, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Jan. 20, 2021). The new interim priorities signaled a return to the priorities of the Obama administration, and a rejection of the Trump administration's approach. As part of the new directive, DHS had planned to implement a "100-day Pause on Removals." That moratorium on removals was challenged by a group of states and enjoined by a federal district court. *Texas v. United States*, 2021 WL 2096669 (S.D. Tex. May 24, 2021) (holding state had standing to challenge federal policy and issuing nationwide injunction).

page 727, at the end of note 1, add new paragraphs:

In subsequent phases of *Batalla v. Wolf*, the district court ruled that Wolf was not lawfully serving as the Acting Secretary of Homeland Security, and vacated his Memorandum purporting to modify and limit DACA eligibility. *See Batalla Vidal v. Wolf*, Order, 1:16-CV-04756-NGG-VMS (E.D.N.Y. Dec. 4, 2020).

In addition, upon taking office, President Biden issued a memorandum directing both the Secretary of DHS and Attorney General to "take all actions . . . to preserve and fortify DACA." Memorandum from President Joseph R. Biden, Jr., *Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA)*, 86 Fed. Reg. 7053 (2021). In accordance with that mandate, DHS Secretary Alejandro Mayorkas announced that DHS was in the midst of promulgating rules to preserve DACA. *See* Press Release, *Statement by Homeland Security Mayorkas on DACA*, Mar. 26, 2021.

On July 16, 2021, however, District Judge Andrew Hanen, who had previously enjoined the Deferred Action for Parents of Americans (DAPA) program, held that the creation and continued operation of DACA violated the APA. *Texas v. United States*, 2021 WL 3025857 (S.D. Tex. Jul. 16, 2021). The court held that DACA violated the procedural dictates of the APA as it was not promulgated with notice-and-comment rulemaking. Judge Hanen proceeded to opine that any rules authorizing DACA in its current form would likely violate the APA because they would run counter to the substantive provisions of the INA. The court order, however, only enjoined DHS's ability to approve applications from those who

had not previously obtained DACA. Citing the reliance interests of the hundreds of thousands of current DACA recipients, Hanen stayed his injunction as it pertained to current holders.

page 728, at the end of note 7, add a new paragraph:

On March 18, 2021, the U.S. House of Representatives passed a new version of the American Dream and Promise Act. H.R. 6, 117th Cong. (2021). The bill would have legalized a significant portion of individuals without stable immigration status, including those covered by the DACA program. In addition, the bill included a path to regularized status for TPS holders. The House also passed an accompanying bill to regularize the status of undocumented farmworkers, and modify the H-2A nonimmigrant visa program. See Farm Workforce Modernization Act of 2021, H.R. 1603, 117th Cong. (2021). As of late July 2021, neither bill has received a Senate vote.

CHAPTER SEVEN

ASYLUM AND OTHER HUMANITARIAN PROTECTIONS

page 730, after the second paragraph, add a new paragraph:

As noted in the Update to page 65 in Chapter One, the Biden administration has changed course on refugee resettlement. The total number of refugees resettled in the United States under the Trump administration in FY 2020 was 11,800, the lowest annual number admitted since the start of the refugee resettlement program in 1980. It was 60 percent lower than the 30,000 refugees President Trump authorized for admission in FY 2019, and substantially lower than the 18,000 refugees he authorized for resettlement in FY 2020. Kira Monin, Jeanne Batalova & Tianjian Lai, *Spotlight: Refugees and Asylees in the United States*, (Migration Policy Inst. 2021). President Biden increased the refugee admissions authorization to 62,500 for FY 2021 and 125,000 for FY 2022. *See Emergency Presidential Determination on Refugee Admissions for Fiscal Year 2021*, 86 Fed. Reg. 24475 (2021). As noted in the Update to page 301 in Chapter Three, the Biden Administration also re-started the Central American Minors (CAM) refugee and parole program to reunite children from El Salvador, Guatemala, and Honduras with their parents who are legally present in the United States. *See* U.S. Citizenship & Immigration Servs., *Central American Minors (CAM) Refugee and Parole Program*.

page 736, at the end of the carryover paragraph, add a new sentence:

This litigation about work authorization continues under the name *Casa de Maryland, Inc. v. Mayorkas,* Case 8:20CV02118 (D. Md. July 13, 2021).

page 736, at the end of the first full paragraph. add a new sentence:

As noted in the Update to page 66 in Chapter One, in mid-summer 2021 the Biden administration is reportedly in the late stages of planning how to phase out the rule based on Title 42 that the federal government had invoked nearly 850,000 times to turn back noncitizens arriving at the southern border without valid travel documents—effectively keeping these migrants from applying for asylum. *See* Eileen Sullivan & Zolan Kanno-Youngs, *Biden Will Reverse a Trump Border Policy Put in Place During the Pandemic*, N.Y. Times, June 28, 2021.

page 736, at the end of the second full paragraph, add:

The backlog has continued to worsen. EOIR reported 1,258,000 pending cases at the end of FY 2020. During that year EOIR received 368,000 new cases and completed 230,000. *See* EOIR, *Workload and Adjudication Statistics: Pending Cases* (Apr. 19, 2021.)

page 739, at the end of the second paragraph, add:

The most recent data available show that a total of 46,500 individuals were granted asylum in FY 2019. Of these, 27,600 individuals (approximately 60 percent) received asylum in the affirmative procedure, and 18,900 (40 percent) were granted asylum defensively. Kira Monin,

Jeanne Batalova & Tianjian Lai, *Spotlight: Refugees and Asylees in the United States*, (Migration Policy Inst. 2021).

page 741: at the end of the first full paragraph, add a new paragraph:

As noted in the Update to page 327 in Chapter Three, on February 2, 2021, President Biden signed an executive order that, among other things, ordered the Secretary of Homeland Security to review expedited removal procedures and submit a report to the President within 120 days. The executive order calls on the Secretary to "consider whether to whether to modify, revoke, or rescind" the Trump administration's July 2019 extension of expedited removal further into the U.S. interior. *See* Exec. Order 14010, *Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, § 4(b), 86 Fed. Reg. 8267 (2021).

pages 742-43: at the end of the carryover paragraph, delete the words "the casebook goes to press in early fall 2020," and replace with the following words followed by a new paragraph:

we prepare the Update in late July 2021.

On February 2, 2021, President Biden signed an executive order that, among other things, ordered the Attorney General and the Secretary of Homeland Security to review the port-of-entry requirements. The executive order calls on them to "review and determine whether to rescind" the Trump administration's November 2018 interim final rule making noncitizens ineligible for asylum if they entered in violation of a presidential proclamation barring their entry. *See* Exec. Order 14010, *Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, § 4(a)(ii)(C), 86 Fed. Reg. 8267 (2021).

page 743, at the end of the first full paragraph, delete the last sentence and add a new paragraph:

"Metering" continued at the United States-Mexico border until March 20, 2020, when U.S. authorities relied on the COVID-19 pandemic to halt the entry of asylum seekers at land borders. See discussion on p. 746 of the casebook. It appears that most "metering" lists stopped accepting new entries after that date, so that asylum seekers arriving at the border throughout the rest of 2020 and 2021 had no option other than waiting for the border to reopen. *See Metering and Asylum Turnbacks*, American Immigration Council, Mar. 8, 2021. By late 2020, the "metering" lists contained 15,690 individuals who continued to wait in Mexico. After President Biden took office in January 2021, the general COVID-19 suspension remained in effect. *Id.* In July 2021 the Centers for Disease Control and Prevention (CDC) modified the COVID-19 public health order to allow unaccompanied noncitizen children to enter the United States, *Public Health Determination Regarding an Exception for Unaccompanied Noncitizen Children from the Order Suspending the Right to Introduce*

Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 86 Fed. Reg. 38717 (2021), but the general COVID-19 suspension was still in force. *See* Daniel Slotnick, Vijosa Isai & Maria Abi-Habib, *U.S. Reaffirms Its Land Border Restrictions as Canada Relaxes Its Own*, N.Y. Times, July 21, 2021.

page 744, at end of the first full paragraph, add two new paragraphs:

On the day that President Biden took office in January 2021, DHS announced it would suspend new enrollments in the MPP pending a review of the policy. In February 2021, DHS began processing asylum seekers with pending cases under the MPP, setting up a website to allow these individuals to register online to enter the United States for their asylum procedures. By May 2021, 10,000 MPP asylum seekers had been admitted to the United States. *See* Camilo Montoya-Galvez & Sean Gallitz, *Family Reunites Under Biden Program That Has Let 10,000 Asylum Seekers Enter U.S.*, CBS News, May 10, 2021.

On June 1, 2021, DHS announced the termination of the MPP program, and simultaneously stated that MPP asylum seekers whose cases had been terminated could file a motion to reopen their cases. *See* Dep't of Homeland Security, *DHS Terminates MPP and Continues to Process Individuals Who Were Enrolled in MPP into the United States to Complete their Immigration Proceedings*. The Supreme Court had granted certiorari to consider the MPP program in October 2020, and the Biden administration asked the Supreme Court to hold further briefing in abeyance and remove the case from the argument calendar, *Mayorkas v. Innovation Law Lab,* 141 S. Ct. 1289 (Mem), (Feb. 3, 2021). Subsequently, the government filed a motion to vacate the judgment below as moot, which the Supreme Court granted. *Mayorkas v. Innovation Law Lab,* __S.Ct.__, 2021 WL 2520313 (Mem), (June 21, 2021).

page 744, directly below the heading [d. Third-Country Asylum Provisions], insert a new paragraph:

In early February 2021 the State Department announced the immediate suspension of the Asylum Cooperative Agreements that the Trump administration had signed with El Salvador, Guatemala, and Honduras in 2019. The United States simultaneously began the process of formally terminating these agreements. *See* Dep't of State, *Suspending and Terminating the Asylum Cooperative Agreements with the Governments of El Salvador, Guatemala, and Honduras* (Feb. 6. 2021). A congressional report found that not one person of the 945 asylum seekers transferred pursuant to these agreements had been granted asylum. *See* Democratic Staff Report Prepared for the U.S. Senate Committee on Foreign Relations, *Cruelty, Coercion, and Legal Contortions: The Trump Administration's Unsafe Asylum Cooperative Agreements* (Jan. 19, 2021). A short history of these agreements to divert asylum seekers from the United States to El Salvador, Guatemala, and Honduras appears in the casebook on pages 744-46.

page 746, after the second full paragraph, insert a new paragraph:

As noted in the Update to page 66 in Chapter One, by mid-summer 2021 the Biden administration was reportedly in the late stages of planning how to phase out the rule based on Title 42 that the federal government had invoked nearly 850,000 times to turn back noncitizens arriving at the southern border without valid travel documents—effectively keeping these migrants from applying for asylum. *See* Eileen Sullivan & Zolan Kanno-Youngs, *Biden Will Reverse a Trump Border Policy Put in Place During the Pandemic*, N.Y. Times, June 28, 2021. Nonetheless, the public health suspension of land crossings at the U.S. borders with Mexico and Canada was scheduled to remain in effect at least through August 21, 2021. *See* Daniel Slotnick, Vijosa Isai & Maria Abi-Habib, *U.S. Reaffirms Its Land Border Restrictions as Canada Relaxes Its Own*, N.Y. Times, July 21, 2021. The Centers for Disease Control and Prevention (CDC) did, however, modify the COVID-19 public health order on July 16, 2021 to allow unaccompanied noncitizen children to enter the United States, *see Public Health Determination Regarding an Exception for Unaccompanied Noncitizen Children from the Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists*, 86 Fed. Reg. 38717 (2021),

Page 748, at the end of the first full paragraph, add:

As noted in the Update to page 351 in Chapter Three, on January 26, 2021, Acting Attorney General Monty Wilkinson issued a Department of Justice memorandum formally rescinding the zero tolerance policy. *See* U.S. Department of Justice, Office of the Attorney General, *Memorandum for all Federal Prosecutors, Rescinding the Zero-Tolerance Policy for Offenses Under 8 U.S.C. § 1325(a)*, Jan. 26, 2021.

page 757, replace the first paragraph with a new paragraph:

The infliction of harm by non-state actors arises in many gender-related claims for asylum. Cases based on claims of female genital mutilation generally focus on family members who insist on compliance with the custom. Many cases raising claims of domestic violence allege that the spouse or intimate partner inflicted the harm, and frequently note that the police do not respond to reports of domestic violence. As described in this Update regarding Note 1 on page 801, in 2018 then-Attorney General Jeff Sessions issued a lengthy opinion casting doubt on asylum claims based on persecution by nongovernment actors. *Matter of A-B-,* 27 I & N Dec. 316 (AG 2018). After the Biden administration took office in 2021, Attorney General Merrick Garland vacated *Matter of A-B-*, pending rulemaking, in order to provide "all interested parties a full and fair opportunity to participate" in assessing the settings in which private violence qualifies as persecution and the circumstances in which individuals should be considered as members of a particular social group. *See Matter of A-B-,* 28 I & N Dec. 307, 308 (AG 2021). In the interim, Garland directed immigration judges and the BIA to follow pre-*Matter of A-B-* precedent. *Id*. at 309.

page 779, note 4, replace the last sentence with new sentences:

After the Biden administration took office in 2021, Attorney General Merrick Garland vacated *Matter of A-B-* and *Matter of L-E-A-,* pending rulemaking, in order to provide "all interested parties a full and fair opportunity to participate" in assessing the circumstances in which individuals should be considered as members of a particular social group. *See Matter of A-B-,* 28 I & N Dec. 307, 308 (AG 2021); *Matter of L-E-A-,* 28 I & N Dec. 304 (AG 2021). In the interim, Garland directed immigration judges and the BIA to follow pre-*Matter of A-B-* precedent. *Id*. at 309. Section F will examine these issues in greater detail.

pages 780-81, replace the carryover paragraph (which begins "In recent years" and ends with the block quote and the citation to 27 I & N Dec.) with new text:

The Trump administration placed increasing emphasis on the negative use of discretion to deny asylum applications. In *Matter of A-B-,* 27 I & N Dec. 316 (AG 2018), Attorney General Jeff Sessions described a wide variety of circumstances in which the exercise of discretion "should not be presumed or glossed over solely because an applicant otherwise meets the burden of proof for asylum." *Id.* at 345 n.12. After President Biden took office, Attorney General Merrick Garland vacated the 2018 decision by Sessions*, see Matter of A-B-,* 28 I & N Dec. 307 (AG 2021).

pages 788, replace the last sentence of the first full paragraph with new text:

In November 2020 then-Attorney General William Barr issued an opinion concluding that there is no duress exception to the persecutor bar. *See Matter of Negusie*, 28 I & N Dec. 120 (AG 2020). Acknowledging that "some of these applicants have endured unimaginable harm" at the hands of persecutors, Barr asserted that "the absence of a duress exception . . . does not mean that [a noncitizen] who assisted in persecution under duress will necessarily lack protection." *Id*. at 152. "[The noncitizen] may still obtain deferral of removal under the CAT." *Id.*

page 791, replace the third paragraph with a new paragraph:

As discussed in Section C3 of this Chapter, the three-part analysis set forth in *Matter of M-E-V-G-*, 26 I & N Dec. 227 (BIA 2014), has become the touchstone for "particular social group" claims. Shortly after that decision, the BIA addressed multiple thorny legal issues in an asylum case filed by a Guatemalan survivor of domestic violence.

pages 791-801, replace the *Matter of A-B-* excerpt with the following excerpt:

MATTER OF A-R-C-G-

Board of Immigration Appeals, 2014.
26 I. & N. Dec. 388.

ADKINS-BLANCH, VICE CHAIRMAN:

In a decision dated October 14, 2009, an Immigration Judge found the respondents removable and denied their applications for asylum and withholding of removal under [INA] sections 208(a) and 241(b)(3). The respondents have appealed from that decision, contesting

only the denial of their applications for relief from removal. We find that the lead 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." The record will be remanded to the Immigration Judge for further proceedings.

I. FACTUAL AND PROCEDURAL HISTORY

The lead respondent is the mother of the three minor respondents. The respondents are natives and citizens of Guatemala who entered the United States without inspection on December 25, 2005. The respondent filed a timely application for asylum and withholding of removal under the Act.

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.[9] 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. * * *

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." However, the DHS seeks remand,

[9] This child was born in 1994 and was residing in Guatemala at the time of the proceedings.

arguing that "further factual development of the record and related findings by the Immigration Judge are necessary on several issues" before the asylum claim can be properly resolved. The respondent opposes remand and maintains that she has met her burden of proof regarding all aspects of her asylum claim. We accept the parties' position on the existence of harm rising to the level of past persecution, the existence of a valid particular social group, and the issue of nexus under the particular facts of this case. We will remand the record for further proceedings.

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.

* * *

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 W-G-R-* and *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. The "common immutable characteristic" requirement incorporates the standard set forth in *Matter of Acosta*. The "particularity" requirement addresses "the question of delineation." That is, it clarifies the point that "not every 'immutable characteristic' is sufficiently precise to define a particular social group." The "social distinction" requirement renames the former concept of "social visibility" and clarifies "the importance of "perception' or 'recognition' to the concept of the particular social group."

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) ("*Country Reports*") (discussing sexual offenses against women as a serious societal problem in Guatemala); Bureau of Human Rights, Democracy, and Labor, U.S. Dep't of State, *Guatemala Country Reports on Human Rights Practices—2008* (Feb. 25, 2009).[14] 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. 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."[15]

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." *See Guatemala Failing Its*

[14] 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").

[15] 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. *See Matter of M-E-V-G-,* 26 I&N Dec. at 242; *Matter of W-G-R-*, 26 I&N Dec. at 218.

Murdered Women: Report, Canadian Broad. Corp. (July 18, 2006). Sexual offenses, including spousal rape, remain a serious problem. *See Country Reports, supra*, at 2608. 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." *Id.* at 2609.

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

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. Alternatively, the DHS would bear the burden of showing that internal relocation is possible and is not unreasonable. The Immigration Judge may also consider, if appropriate, whether the respondent is eligible for humanitarian asylum.[a]

* * *

page 801, after the end of second full paragraph, replace the heading [*MATTER OF A-B-*] with NOTES AND QUESTIONS ON ASYLUM CLAIMS BASED ON DOMESTIC VIOLENCE.

page 801, insert new note 1:

1. Four years after *Matter of A-R-C-G-*, then-Attorney General Jeff Sessions referred an unpublished BIA decision to himself for decision in order to reverse the grant of protection

[a] See p. 757, *supra,* for a discussion of discretionary grants of asylum based on past persecution despite the absence of threats of future persecution.—eds.

to an El Salvadoran woman who had suffered, in his words, "vile abuse" from her husband. *See Matter of A-B-,* 27 I & N Dec. 316 (AG 2018). In his lengthy opinion, Sessions expressly overruled *Matter of A-R-C-G-* and cases that had followed its reasoning. *Id*. at 346. Employing broad dictum, Sessions further stated that asylum claims pertaining to domestic violence or gang violence generally would not qualify for protection, nor would most other claims based on persecution inflicted by private non-government actors. *Id*. at 320. After the Biden administration took charge in 2021, Attorney General Merrick Garland vacated *Matter of A-B-* pending rulemaking in order to provide "all interested parties a full and fair opportunity to participate" in assessing the circumstances in which individuals should be considered as members of a particular social group. *See Matter of A-B-,* 28 I & N Dec. 307, 308 (AG 2021). In the interim, Garland directed immigration judges and the BIA to follow *Matter of A-R-C-G-* and other pre-*Matter of A-B-* precedent. *Id*. at 309.

page 801, renumber note 1 as note 2, and in the first sentence replace the words "As noted in *Matter of A-B-*, the" with the following text:

2. The

page 801, renumber note 2 as note 4, and in the first sentence replace the words "*Matter of A-B-* cites with approval" with the following text:

4. *Matter of A-R-C-G-* cites

page 802, delete note 3.

page 802, renumber note 4 as note 3, and in the first sentence replace the words "As noted in *Matter of A-B-*, the BIA held earlier in 2018" with the following text:

3. The BIA has held

pages 802-03, delete note 5.

pages 809-10, replace note 4 with the following text:

4. **Timing of agency decisions.** The U.S. Supreme Court held in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005), that *Chevron* deference is due even when the agency interpretation postdates the court of appeals decision. *See* Chapter One, Section B2c. To what extent will the Ninth Circuit defer to *Matter of M-E-V-G-,* 26 I & N Dec.227 (BIA 2014), discussed in Section C3 of this Chapter, rather than follow the *Henriquez-Rivas* analysis regarding the "social visibility" of witnesses who testify in court against drug cartels and gangs? Since *M-E-V-G-* did not concern witnesses who testify publicly at criminal trials of gang defendants, may the Ninth Circuit avoid giving that decision weight in the future?

page 810, delete the last two sentences of the second full paragraph and replace them with the following text:

In 2015, one year after *Matter of M-E-V-G-*, 26 I & N Dec.227 (BIA 2014), rejected a particular social group composed of Honduran youth who resisted gang recruitment, the Fourth Circuit

considered the asylum claim of a mother threatened by gang members for her opposition to their recruitment of her son.

pages. 810-18, delete *Matter of L-E-A-*, and replace it with the following excerpt:

HERNANDEZ-AVALOS V. LYNCH

United States Court of Appeals for the Fourth Circuit, 2015.
784 F.3d 944.

SHEDD, CIRCUIT JUDGE:

[Maydai Hernandez-Avalos and her minor son, citizens of El Salvador, requested asylum in the United States. In testimony deemed credible by the Immigration Judge, Hernandez-Avalos testified that heavily armed members of the Mara 18 gang came to her house and threatened to kill her on three different occasions. Twice gang members put a gun to her head and said they would kill her if she prevented her twelve year old son from joining the gang; the evening before she fled the gang members threatened to kill her the next day if she interfered with their forced recruitment of her son. The Immigration Judge ruled that she had not shown she was likely to suffer future persecution based on membership in a particular social group, denied relief, and ordered her removed to El Salvador. The BIA affirmed.]

* * * Hernandez claims, and the government correctly acknowledges, that membership in a nuclear family qualifies as a protected ground for asylum purposes.

The government argues, however, that the BIA was correct in holding that Hernandez's persecution was not "on account of" her family ties. * * *

The BIA * * * reasoned that "[s]he was not threatened because of her relationship to her son (i.e. family), but rather because she would not consent to her son engaging in a criminal activity." The government argues that * * * the fact that the person blocking the gang members' recruitment effort was their membership target's mother was merely incidental to the recruitment aim.

We believe that this is an excessively narrow reading of the requirement that persecution be undertaken "on account of membership in a nuclear family." Hernandez's relationship to her son is why she, and not another person, was threatened with death if she did not allow him to join Mara 18, and the gang members' demands leveraged her maternal authority to control her son's activities.

The BIA's conclusion that these threats were directed at her not because she is his mother but because she exercises control over her son's activities draws a meaningless distinction under these facts. It is therefore unreasonable to assert that the fact that Hernandez is her son's mother is not at least one central reason for her persecution.

* * *

[I]n this case Mara 18 threatened Hernandez in order to recruit her son into their ranks, but they also threatened *Hernandez*, rather than another person, because of her family

connection to her son. Thus, * * * there were multiple central reasons for the threats Hernandez received.

Because any reasonable adjudicator would be compelled to conclude that Hernandez's maternal relationship to her son is at least one central reason for two of the threats she received, we hold that the BIA's conclusion that these threats were not made "on account of" her membership in her nuclear family is manifestly contrary to law and an abuse of discretion. * * *

* * *

[The court also reviewed the evidence concerning whether the Salvadoran government was unable or unwilling to protect Hernandez-Avalos from the gang members, concluded that the evidence relied on by the immigration judge to discredit the testimony of Hernandez-Avalos was legally deficient, and held that she had established her eligibility for asylum.]

For the foregoing reasons, we grant Hernandez's petition for review and remand the case to the BIA for further proceedings consistent with this opinion.

page 818, after the end of the second full paragraph, replace the heading [*MATTER OF L-E-A-*] with NOTES AND QUESTIONS ON ASYLUM CLAIMS BASED ON FAMILY MEMBERSHIP.

page 818, delete the heading and text of note 1 and replace it with the following heading and text:

1. **Mothers versus youth**. The BIA concluded in *Matter of M-E-V-G-*, 26 I & N Dec. 227 (BIA 2014), that young men who resist recruitment by Honduran gangs do not constitute a particular social group. One year later the Fourth Circuit upheld the particular social group claim made by the mother of a youth resisting gang recruitment in El Salvador. *See Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015). Can these results be reconciled? Are *mothers* (or *families*) more socially distinct than *youth*? Is it sensible to deny protection to the recruit, but to grant protection to the person who is threatened on account of the recruit?

page 818, delete the heading and text of note 2 and replace it with the following heading and text:

2. **Circuit split**. Federal courts have split on whether persecution of a family member constitutes a particular social group claim. *Compare W.G.A. v. Sessions*, 900 F.3d 957 (7th Cir. 2018) (applicant's nuclear family constitutes a particular social group), *Flores-Rios v. Lynch*, 807 F.3d 1123 (9th Cir. 2015) (applicant's family constitutes particular social group when applicant's father was killed by gangs) and *Hernandez-Avalos v. Lynch*, 784 F. 3d 944 (4th Cir. 2015) (upholding a particular social group claim made by the mother of a youth resisting gang recruitment in El Salvador), *with Ramirez-Mejia v. Lynch*, 794 F.3d 485 (5th Cir. 2015) (brother's murder by rival gang does not constitute persecution based on particular social group) and *Malonga v. Holder*, 621 F.3d 757 (8th Cir. 2010) (father's death during civil war does not support particular social group claim).

page 818, delete the heading and text of note 3 and replace it with the following heading and text:

3. **Actions by the Attorneys General**. In 2016 the BIA invited supplemental briefing and amicus briefs on the circumstances in which persecution of a family member supports the applicant's particular social group claim. DHS filed a supplemental brief contending that it would be sufficient for an applicant to provide evidence that her membership in her immediate family was a central reason for the persecution she feared, and that the applicant would not need to furnish additional evidence that the persecutor targeted the initial family member on account of one of the five grounds. DHS Supplemental Brief, *In the Matter of Luis Enrique Alba*, April 21, 2016. The BIA ruled that families may constitute a particular social group, but concluded that the applicant had not shown he was targeted on account of his family membership. *See Matter of L-E-A-,* 27 I & N Dec. 40 (BIA 2017) [*L-E-A- I*]. Acting Attorney General Matthew Whittaker referred the BIA's decision to himself for decision, and in 2019 then-Attorney General William Barr repudiated the BIA's discussion of particular social groups. *See Matter of L-E-A-*, 27 I & N Dec. 581 (AG 2019) [*L-E-A- II*]. Asserting his reliance on the congressional delegation "to the Attorney General [of] the discretion to reasonably interpret the meaning of 'membership in a particular social group,'" *id*. at 592, Barr issued a lengthy and wide-ranging opinion directing adjudicators to assess whether the applicant's "specific family is 'set apart, or distinct, from other persons within the society in some significant way.'" *Id* at 594. He added, "Moreover, adjudicators should be skeptical of social groups that appear to be 'defined principally, if not exclusively, for the purposes of [litigation] . . . without regard to the question of whether anyone in [a given country] perceives [those] group[s] to exist in any form whatsoever.'" *Id*. at 595-96.

After the Biden administration took office in 2021, Attorney General Merrick Garland vacated *Matter of L-E-A-,* pending rulemaking, in order to provide "all interested parties a full and fair opportunity to participate" in assessing the circumstances in which individuals should be considered as members of a particular social group. *See Matter of L-E-A-,* 28 I & N Dec. 304, 305 (AG 2021). In the interim, Garland directed immigration judges and the BIA to no longer follow *L-E-A- II*. *Id*. at 305.

page 819, delete note 4.

page 819, renumber note 5 as note 4.

page 822, at the end of the first full paragraph, add:

In 2018, only 1,334 of 70,000 claims for protection under the CAT were successful. *See* EOIR *Statistics Yearbook*, tbl. 16 (FY 2018).

page 828, replace the last paragraph with the following text:

After President Biden took office in 2021, he reinstated Deferred Enforced Departure (DED) to Liberians through June 2022. He granted TPS status to citizens of Venezuela (estimated 300,000 eligible in the United States) and citizens of Myanmar/Burma (estimated 1,600 eligible). He extended TPS until October 2021 for the six countries involved in litigation

challenging the Trump administration terminations: El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan. Citizens of the four countries—Somalia, South Sudan, Syria, and Yemen–that had retained TPS protection under Trump continued to be protected. Subsequently, the Biden administration extended TPS until November 2022 for Haiti and until March 2023 for Yemen.

CHAPTER EIGHT

REMOVAL PROCEEDINGS AND JUDICIAL REVIEW

page 832, after the end of the carryover paragraph, add a new paragraph:

A recent media report notes that President Trump filled two-thirds of the 520 IJ positions. *See* Reade Levinson, Kristina Cooke & Mica Rosenberg, *Special Report: How Trump Administration Left Indelible Mark on U.S. Immigration Courts*, Reuters, Mar. 8, 2021. The reports suggests that IJs appointed by Trump have disproportionately issued deportation orders. *Id.* (reporting that judges hired under Trump ordered deportation in 69% of cases, compared to 58% for judges hired by presidents before him, dating back to the Reagan administration).

page 856, at the end of note 6, add a new paragraph:

Other states and localities have recently established legal representation programs for noncitizens in immigration proceedings. Colorado H.R. 21-199, signed into law in 2021, established an immigrant legal defense fund to expand the availability of free legal services and representation to low-income individuals in immigration proceedings, with a priority on noncitizens in immigration detention and on noncitizens who are not detained and are in Colorado but outside the Denver Metro area. *See also San Diego County Will Provide Immigrants With Lawyers*, Assoc. Press, May 4, 2021.

pages 858-59, replace the last paragraph on page 858 and the first paragraph on page 859 with new paragraphs:

As noted in the Update to page 705 in Chapter Six, following the Fourth and Seventh Circuits, the Third Circuit also declined to follow *Castro-Tum*. *See Sanchez v. U.S. Attorney General*, 997 F.3d 113 (3d Cir. 2021) (allowing noncitizen to seek administrative closure while awaiting DACA renewal).

Citing the decisions of the Third, Fourth, and Seventh Circuits, on July 15, 2021, U.S. Attorney General Merrick Garland overruled *Matter of Castro-Tum* in its entirety. *See Matter of Cruz-Valdez*, 28 I & N Dec. 326 (AG 2021). *Cruz-Valdez* restored the authority of IJs to grant closure consistent with the legal standards in place prior to *Castro-Tum*. The opinion also noted that the DOJ, in the last weeks of the Trump administration, had attempted to promulgate rules to codify *Castro-Tum*, but were enjoined from doing so by a district court. *See Centro Legal de La Raza v. Exec. Office for Immigration Review*, 2021 WL 916804 (N.D. Cal. Mar. 10, 2021) (preliminarily enjoining, for failure to comply with the APA, the final rule on administration closure); *see* Dep't of Justice, *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 Fed. Reg. 81588 (2020). Referencing that litigation, Attorney General Garland further noted that the DOJ currently is considering promulgating new regulations to more permanently moot the Trump administration's attempt to limit IJ discretion over their dockets.

In accord with these appellate court rulings and the Attorney General opinion, the EOIR issued a memorandum encouraging immigration judges "to use all docketing tools

available to them to ensure fair and timely resolution of cases before them." Acting Director of Executive Office of Immigration Review Jean King, Policy Memorandum 21-25, *Effect of Department of Homeland Security Enforcement Priorities*, June 11, 2021.

page 861, after the carryover paragraph, add a new paragraph:

In *Pereida v. Wilkinson*, the Supreme Court ruled that because the noncitizen bore the burden of proving eligibility for cancellation of removal, the noncitizen had to prove that the underlying crime was not a disqualifying crime when the record was inconclusive as to the precise statute of conviction. *See Pereida v. Wilkinson*, 141 S. Ct. 754 (2021) (holding that the noncitizen had failed to carry the burden of showing that his crime was not a crime involving moral turpitude where state statute listed multiple offenses, and the record was inconclusive as to which of the offenses formed the basis of the noncitizen's conviction).

page 892, at the conclusion of the excerpt from *Guerrero-Lasprilla v. Barr* and after the bracketed note on the dissenting opinion and horizontal line, add a new paragraph:

On remand, the Fifth Circuit Court of Appeals considered the merits of Ovalles' appeal, but denied his request to equitably toll the deadline for filing his motion to reopen. *Ovalles v. Rosen*, 984 F.3d 1120 (5th Cir. 2021).

page 893, after the carryover sentence from page 892 and before the sentence that starts "We return . . . ," add:

For example, citing *Guerrero-Lasprilla*, the Sixth Circuit recently held that applying the "exceptional and extremely unusual hardship" standard for cancellation of removal to the facts of a noncitizen's claim presented a mixed question of law and fact. *See Singh v. Rosen*, 984 F.3d 1142 (6th Cir. 2021) (holding federal court had power to review hardship appeal, but affirming BIA's denial of the claim on the merits).

CHAPTER NINE

ENFORCEMENT AND BEYOND

page 945, after note 4, add new note 5 and the following excerpt:

5. On January 20, 2021, President Biden terminated the state of emergency on the U.S. southern border that President Trump had declared in Presidential Proclamation 9844, signed on February 19, 2019. Biden's Proclamation stated: "It shall be the policy of my Administration that no more American taxpayer dollars be diverted to construct a border wall" and ordered a pause in construction except for projects already funded by specific congressional appropriates. *See* Proclamation 10142, *Termination of Emergency With Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction*, 86 Fed. Reg. 7225 (2021). In June 2021, the Department of Homeland Security released a plan for spending funds that Congress had appropriated for border wall construction, but without continuing work on the wall. *See DHS Releases Plan to Spend Funds Mandated for Border Wall Construction,* 98 Interp. Rel. No. 24 (June 21, 2021).

The next selection addresses border enforcement in the early Biden administration.

MUZAFFAR CHISHTI & SARAH PIERCE, BORDER DÉJÀ VU: BIDEN CONFRONTS SIMILAR CHALLENGES AS HIS PREDECESSORS

Migration Policy Institute. Apr. 1, 2021.

* * *

The arrival of vulnerable populations, especially children and families from Central America, has been a daunting challenge for close to a decade, with pronounced peaks in 2014 and 2019. But the last three months have seen the fastest rate of increase in arrivals of unaccompanied children on record, with nearly 5,700 arriving in January, just under 9,300 in February, and possibly more than 17,000 in March. This pace of arrivals has created the perception of both an out-of-control border and a heart-wrenching humanitarian emergency.

* * *

The Current Burgeoning Crisis

The number of migrants arriving at the southern border is high, putting this year on pace for perhaps the highest number of "encounters"—a newly coined term including both apprehensions and expulsions by authorities—in the past 20 years. However, unlike prior periods, most encountered individuals are being quickly expelled from the country. This is because the Biden administration has largely kept in place a health-related order issued under Title 42 of the U.S. code by President Donald Trump, mandating the expulsion of unauthorized border arrivals. As a result, most single adults and many families—who comprise more than 90 percent of overall encounters—are quickly returned to Mexico or their home countries. However, the Biden administration has exempted unaccompanied children from the Title 42 order, triggering the current challenge. (The administration has also declined to immediately return some migrant families crossing illegally, potentially due to Mexican authorities' unwillingness to accept them.)

In February, nearly 9,300 unaccompanied minors were apprehended or expelled at the southwest border. This does not surpass prior surges in fiscal years (FYs) 2014 and 2019, which peaked at more than 10,600 in June 2014 and nearly 11,500 in May 2019. But the tally is higher than the numbers of children apprehended during February of those years: 4,800 and 6,800, respectively. According to reports, border officials are estimated to encounter more than 17,000 minors in March, an all-time high for any month. Thus, 2021 is on track to exceed prior interceptions of unaccompanied children.

Under U.S. law, an unaccompanied child is someone who is not yet 18, unauthorized, and is unaccompanied by a parent or legal guardian. Unaccompanied children from noncontiguous countries, including Central America, are automatically permitted to enter the United States, while those from Mexico and Canada are only permitted to enter if U.S. Customs and Border Protection (CBP) determines they are at risk of trafficking or persecution.

After apprehension, unaccompanied children are by law supposed to spend fewer than 72 hours in CBP custody before being transferred to the care of the Office of Refugee Resettlement (ORR) within the U.S. Department of Health and Human Services (HHS). This transfer is particularly important because CBP facilities are ill-equipped to hold children, especially for long periods of time.

However, because of limited capacity in ORR shelters, this transfer may be delayed beyond the legal limit, and many children have been stranded in CBP custody. At one point in March, more than 4,100 children were crowded into one tented CBP structure, according to media reports. This surpasses the nearly 3,000 children held in a single CBP shelter at one time in 2019. But it is difficult to compare these situations, since CBP capacity in 2019 was strained by other populations including single adults, some of whom ought to have been released more quickly using CBP's discretion, a watchdog report later concluded. Today, CBP capacity challenges are largely due to children and some families.

The current rise in the number of unaccompanied child migrant arrivals dates back to August 2020, and accelerated after a court ordered the Trump administration in November to exempt unaccompanied children from the Title 42 expulsion order. Although the arrival of children predictably then rose, the Trump administration did not build the capacity to accommodate them.

Instead, as numbers increased, HHS had fewer than its standard number of available beds for children. In addition, due to the COVID-19 pandemic, available bed space for unaccompanied children had been reduced by 40 percent, leaving thousands of normally available beds offline, and bringing the numbers of available beds down from 13,500 in July 2020 to approximately 7,800 four months later. On March 5, the Biden administration urged shelters to lift these pandemic-related restrictions, but reopening licensed shelter bedspace is hard to do quickly. HHS has also sought to increase its temporary bed capacity by acquiring and building out new influx and emergency intake facilities.

Challenges with Placement

In addition to taking custody of unaccompanied minors, HHS is responsible for reuniting as many children as possible with U.S.-based relatives or close family friends. While it is important that these reunifications occur quickly, HHS is required to carefully vet potential sponsors to ensure the safety and wellbeing of the children.

This vetting process has become more difficult and cumbersome in recent years, as fewer sponsors have been parents, heightening the required reviews. Sixty percent of sponsors in 2014 were parents, but this number went down to 38 percent in 2020. Critics have pressed the need for greater vetting to prevent minors from being put in abusive situations, such as a case in 2014 when eight Guatemalan youths were released to sponsors who forced them to work 12-hour shifts at an Ohio egg farm and threatened them with death if they tried to escape.

The Trump administration increased the vetting and fingerprinting of potential sponsors and their household members, but also shared that information with U.S. Immigration and Customs Enforcement (ICE) for the purpose of immigration status checks. This led ICE to arrest 170 potential sponsors during a five-month period in 2018, 109 of whom had no criminal record. This had a clear chilling effect on sponsorships and the child population in HHS custody grew alarmingly. After it hit a high of almost 15,000 children in December 2018, the administration began to walk back some of its increased vetting measures. But the consequences of that experience seem to have lingered.

Why the Big Numbers Now?

The rising number of children arriving at the border is the result of numerous factors. In addition to the long-standing drivers of migration from Central America, the pandemic prompted a massive economic downturn, and Hurricanes Eta and Iota devastated parts of Guatemala, Honduras, and Nicaragua in late 2020. A high number of children and families had also likely been waiting at the southern border after having been expelled from entering the United States since March 2020, when the Title 42 order went into effect. This year's arrivals could thus possibly suggest a rebound or catch-up from an abnormally low year in 2020 as the pandemic sharply curbed human mobility of all types and led to strict public-health-related border closures.

President Biden is another new factor, and a narrative has persisted that his administration will be less restrictive than Trump's. This narrative first developed during the Democratic Party's presidential primaries, when multiple candidates aggressively sought to distinguish themselves from the Trump administration, especially at the border. Candidate Biden adopted that posture and, after entering office, his administration quickly unwound many of Trump's restrictive southern border policies, including halting construction of the wall and ending the Migrant Protection Protocols (also known as the "Remain in Mexico" policy).

* * *

Biden Administration's Policy Responses

* * *

Like the Obama administration, Biden's team has launched a public relations campaign in Brazil, El Salvador, Guatemala, and Honduras, using social media, television, and radio to spread the message that the border is closed. However, this message has been muddled by the administration's unwinding of MPP and other restrictive policies, which may have spurred hope or signaled that the border was opening, despite the continuing expulsions.

Many of the administration's efforts have focused on managing immediate capacity challenges. On March 13, it announced that the Federal Emergency Management Agency (FEMA) would help "receive, shelter, and transfer" unaccompanied children over the next 90 days. To increase the number of sponsors willing to come forward, the Department of Homeland Security formally terminated its 2018 information-sharing agreement with HHS over sponsors' immigration status. ORR has also taken steps to streamline the release of children whose sponsors are parents or legal guardians.

The administration is in the process of creating joint processing centers so that children can be placed in HHS care immediately after the Border Patrol encounters them. While this is promising, there are concerns about clarifying whether HHS or CBP—a law enforcement agency—has the principal responsibility of caring for the children.

Biden is also re-booting the Obama-era Central American Minors (CAM) program, which allowed Central American children with a parent already lawfully in the United States to be screened for refugee status, and in some cases parole, from their country of origin or a neighboring country. The revival of CAM will take place in two parts: first, applications closed during the Trump administration will be reopened; then new applications will be accepted, although the parameters have not yet been announced.

The Biden administration has indicated it will start similar in-country processing programs for other groups, such as relatives with approved but backlogged green-card petitions. Such programs can be beneficial, especially if admissions criteria are generous and the application process is efficient—two areas where the original CAM program struggled. However robust or successful these programs may be, vulnerable populations and mixed flows of economic and humanitarian migrants will continue to travel to the U.S. southern border, thus requiring an ongoing effective infrastructure and adjudicatory capacity.

Like its predecessors, the Biden administration has sought Mexico's help, asking it to accept more families expelled under the Title 42 order and increase enforcement in order to slow the pace of migrants reaching the U.S.-Mexico border. Mexico recently closed its border with Guatemala to nonessential travel and increased its military presence there. Biden appointed Vice President Kamala Harris to lead efforts to stem migration across the border, and recently sent border coordinator Roberta Jacobson and other officials to Mexico and Guatemala to seek their cooperation.

Finally, the Biden administration has indicated it will soon release a regulation to significantly shorten the time for asylum processing. But it has yet to indicate whether it will follow past examples and accelerate the processing of immigration court dockets.

* * *

page 949, at the end of note 1, add new paragraphs:

On January 26, 2021, Acting Attorney General Monty Wilkinson issued a Department of Justice memorandum formally rescinding the zero tolerance policy. *See* U.S. Department of Justice, Office of the Attorney General, *Memorandum for all Federal Prosecutors, Rescinding the Zero-Tolerance Policy for Offenses Under 8 U.S.C. § 1325(a)*, Jan. 26, 2021. On the Trump administrations' zero tolerance policy, see William A. Kandel, *The Trump Administration's "Zero Tolerance" Immigration Enforcement Policy* (Cong. Res. Serv. 2021).

Government records show that in early 2018, the number of federal prosecution for immigration-related crimes climbed sharply, but that in early 2020 the COVID-19 pandemic led to a sudden decline in federal prosecutions of all types, not just immigration-related prosecutions. But even as non-immigration-related federal prosecutions rebounded in the summer of 2020, the number of immigration-related prosecutions remained low, largely because of CBP's policy to expel migrants to Mexico under border closure based on Title 42, rather than to detain and prosecute them. On these patterns of immigration-related prosecutions during the period from October 2019 through October 2020, see *Major Swings in Immigration Criminal Prosecutions during Trump Administration*, TRAC Immigration (Dec. 18, 2020).

page 949, at the end of note 4, add new note 5:

In *United States v. Palomar-Santiago*, 141 S. Ct. 1615 (2021), the U.S. Supreme Court addressed whether a noncitizen could be prosecuted for illegal reentry under INA § 276(d) if the conviction for which he had earlier been removed had occurred in error because it did not make the noncitizen removable. Under § 276(d), defendants may collaterally challenge the removal order on which the illegal reentry prosecution is based only if they demonstrate that they "exhausted any administrative remedies that may have been available to seek relief against the order"; that the removal proceedings "improperly deprived [them] of the opportunity for judicial review"; and that "entry of the order was fundamentally unfair." The unanimous Court, in an opinion by Justice Sotomayor, concluded that any collateral challenge must satisfy all three requirements, even if a noncitizen's original removal was based on an offense that "did not in fact render him removable." The Court noted but declined to address counsel's separate argument that an invalid removal order cannot serve as the basis for a prosecution under § 276 because the existence of a valid removal order constitutes an element of the offense that the government must prove in its case-in-chief. The Court found that argument had not been preserved below. *See* 141 S. Ct. at 1621 n.2.

page 951, after the second full paragraph, add:

The following selection provides an overview of the significant shift in immigration enforcement priorities in the first few months of the Biden administration.

HILLEL R. SMITH,
THE BIDEN ADMINISTRATION'S IMMIGRATION ENFORCEMENT PRIORITIES: BACKGROUND AND LEGAL CONSIDERATIONS
Cong. Res. Serv. Mar. 9, 2021.

On January 20, 2021, President Biden revoked President Trump's 2017 executive order on immigration enforcement priorities and directed DHS to implement new policies that protect national and border security, address "humanitarian challenges at the southern border," ensure public health and safety, and safeguard the "dignity and well-being of all families and communities." [*See* Exec. Order 13993, *Revision of Civil Immigration Enforcement Policies and Priorities*, 86 Fed. Reg. 7051 (2021).] On that same day, then-Acting DHS Secretary David Pekoske issued a memorandum directing DHS officials to conduct a "Department-wide review" of the agency's immigration enforcement policies, including those relating to detention, prosecutorial discretion, and cooperation with state and local law enforcement. The memorandum also established "interim civil enforcement guidelines" pending DHS's review that generally limited immigration enforcement actions to cover only certain categories of aliens. [*See* David Pekoske, Acting Secretary of Homeland Security, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Jan. 20, 2021).]

On February 18, 2021, DHS's Immigration and Customs Enforcement (ICE) issued guidance implementing the interim enforcement guidelines (the interim guidance is in effect until DHS Secretary Alejandro Mayorkas issues new enforcement guidelines, expected within 90 days of issuance of the ICE guidance). [*See* Tae Johnson, Acting Director, U.S. Immigration & Customs Enf't, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb. 18, 2021); *ICE Memo Identifies Temporary Enforcement Priorities*, 98 Interp. Rel. No. 8 (Feb. 22, 2021).] The ICE guidance memorandum identifies the following categories of aliens as priorities for enforcement and removal:

- individuals who have engaged in or are suspected of terrorism or espionage, or whose apprehension or detention is otherwise necessary to protect the security of the United States;
- individuals apprehended at the border or ports of entry while trying to unlawfully enter the United States on or after November 1, 2020, or who were not physically present in the United States before November 1, 2020; and
- individuals who pose a threat to public safety, and either (1) have been convicted of an aggravated felony, or (2) have been convicted of an offense for which an element was active participation in a criminal street gang, or (if they are not younger than 16 years of age) have participated in an organized criminal gang or transnational criminal organization.

The ICE guidance provides that the priorities are to be applied to a wide range of enforcement decisions, including whether to initiate or pursue removal proceedings; whether to stop, question, or arrest an alien; whether to detain or release an alien; whether to issue a detainer; whether to grant deferred action; and when to execute a final removal order. The ICE guidance permits enforcement actions against aliens who do not meet the criteria for priority cases (taking into account certain aggravating and mitigating factors), but only with advance supervisory approval. If there are exigent circumstances (e.g., the alien poses an imminent threat to life or an imminent substantial threat to property), and securing preapproval is impracticable, the enforcement action is permitted so long as the officer conducting the action requests approval within 24 hours.

In addition to setting interim enforcement guidelines, then-Acting Secretary Pekoske, on January 20, 2021, ordered a "100-day pause" on the removal of any alien with a final order of removal pending DHS's review of its immigration enforcement policies. He claimed that "unique circumstances" resulting from the Coronavirus Disease 2019 (COVID-19) pandemic have created "operational challenges" at the southern border, and that the agency's limited resources should be directed toward its "highest enforcement priorities." The 100-day pause, however, does not apply to (1) an alien whom the ICE Director determines or suspects to have engaged in terrorism or espionage, or who poses a danger to national security; (2) an alien who was not physically present in the United States before November 1, 2020; (3) an alien who has knowingly and voluntarily agreed to waive any rights to remain in the United States; or (4) an alien for whom the ICE Director determines removal is required by law.

In conjunction with this recalibrating of immigration enforcement priorities, President Biden in a January 20, 2021, memorandum instructed the DHS Secretary "to preserve and fortify" DACA, noting that program "reflects a judgment that these immigrants should not be a priority for removal based on humanitarian concerns and other considerations."

Note on Biden Administration Immigration Enforcement Priorities

In litigation challenging the 100-day pause on removals, the district court found that the moratorium violated INA § 241(a)(1)(A), which provides in part that "the Attorney General shall remove the alien from the United States within a period of 90-days." *Texas v. United States*, 2021 WL 2096669 (S.D. Tex. Feb. 23, 2021). The court also found that the plaintiffs would likely succeed in showing that the administration's action in adopting the moratorium was arbitrary and capricious in violation of the Administrative Procedure Act, and that DHS improperly bypassed the APA's notice-and-comment process. The district court first issued a temporary restraining order blocking the moratorium. It then issued a preliminary injunction to apply nationwide. (This Update to page 709, Chapter Six, also addresses the 100-day pause.)

In addition to the changes summarized in the Smith excerpt above, and notwithstanding the preliminary injunction blocking the 100-day pause on removals, the

number of federal immigration arrests declined during the early months of the Biden administration. *See* Nick Miroff, *ICE deportations fell in April to lowest monthly level on record, enforcement data shows*, Wash. Post, May 5, 2021 ("ICE officers have made about 2,500 arrests per month since Biden took office, down from about 6,000 during the final months of Trump's presidency and an average of over 10,000 per month before the pandemic.").

In April 2021, DHS rescinded ICE's authority to impose civil financial penalties on noncitizens who fail to leave the United States. The Trump administration began in 2018 to exercise ICE's authority to impose such penalties. *See DHS Ends Fines as Penalties for Unlawful Presence*, 98 Interp. Rel. No. 8 (May 3, 2021).

In the last weeks of the Trump administration, DHS entered into Memoranda of Understanding with Texas to establish cooperation between Texas and the federal government on immigration law enforcement. Under the agreement, DHS agreed to "consult with Texas before taking any action or making any decision that would reduce immigration enforcement" and DHS had to provide 180 days' notice of any proposed action to reduce immigration, and Texas would have an opportunity to comment on any such proposal. DHS also entered into an agreement on January 19, 2021 (the day before President Biden's inauguration) that seemed to give a union representing ICE deportation officers the ability to delay the implementation of agency policies. The Biden DHS disapproved and effectively terminated the union agreement during a 30-day period for agency review. *See* Nicole Sganga & Camilo Montoya-Galvez, *Homeland Security Officials Scrap Trump-era Union Deal That Could Have Stalled Biden's Immigration Policies*, CBS News, Feb. 16, 2021.

The Biden administration also terminated the office for victims of crimes by foreign nationals — the Victim of Immigration Crime Engagement Office (VOICE) that the Trump administration established in 2017. In June 2021, the Biden administration replaced it with a "streamlined and all-encompassing" telephone service. *See ICE Phone Line Replaces Crime Victims Office*, 98 Interp. Rel. No. 24 (June 21, 2021).

page 975, at the end of the fourth full paragraph, before subsection c, add:

For an overview, see Hillel R. Smith & Kelsey Y. Santamaria, *Searches and Seizures at the Border and the Fourth Amendment* (Cong. Res. Serv. 2021).

page 1020, at the end of the second full paragraph, add a new paragraph:

Presidential candidate Joe Biden's Agenda for the Latino Community pledged to "end all the agreements entered into by the Trump Administration, and aggressively limit the use of 287(g) and similar programs that force local law enforcement to take on the role of immigration enforcement." *The Biden Agenda for the Latino Community*, https://joebiden.com/latino-agenda/. As of June 2021, DHS has terminated one 287(g) agreement. *See* U.S. Immigration & Customs Enf't, *A First Step to Address the Conditions in Detention Facilities*, May 20, 2021. The Administration's proposed FY 2022 budget would not

reduce the 287(g) program budget. *See* U.S. Immigration & Customs Enf't, *Fiscal Year 2022 Budget Overview: Congressional Justification*,.

page 1024, at the end of note 2, add:

For further discussion of *Gonzalez v. U.S. Immigration & Customs Enforcement*, 975 F.3d 788 (9th Cir. 2020); see Hillel R. Smith, *Immigration Detainers: Background and Recent Legal Developments* 3-5 (Cong. Res. Serv. 2020).

page 1089, at the end of note 1, add:

In April 2021, the Department of Justice stopped requiring cooperation with U.S. Immigration and Customs Enforcement as a condition of funding under the Byrne Grant program for local law enforcement agencies. *See* Sarah N. Lynch, *U.S. Justice Department Ends Trump-era Limits on Grants to "Sanctuary Cities,"* Reuters, Apr. 28, 2021. Consistent with this position, earlier the same month the Department of Justice dropped its challenge to a federal court decision that had blocked federal government's efforts to condition federal grants to two cities in Rhode Island on cooperation with federal immigration enforcement. *See Cities Win Immigration Policing Dispute With US Government*, Assoc. Press, Apr. 20, 2021.

page 1102, at the end of note 2, add a new paragraph:

On April 27, 2021, DHS Secretary Mayorkas directed federal immigration agencies to limit civil immigration arrests in or near courthouses to cases involving national security; imminent risk of death, violence, or other physical harm to a person; hot pursuit of a threat to public safety; or imminent risk that material evidence in a criminal case will be destroyed. *See DHS Limits Courthouse Immigration Enforcement*, 98 Interp. Rel. No. 18 (May 3, 2021).

page 1103, at the end of note 3, add:

See generally Presidents' Alliance on Higher Education and Immigration, *FAQs for Campuses on Immigration Enforcement and Site Visits* (Aug. 2020) (addressing immigration enforcement on college and university campuses).

page 1103, at the end of note 4, add a new paragraph:

Other states and localities have recently established legal representation programs for noncitizens in immigration proceedings. On the Equity Corps of Oregon, a statewide representation program, see https://innovationlawlab.org/programs/equity-corps-of-oregon/. Colorado H.R. 21-199, signed into law in 2021, established an immigrant legal defense fund to expand the availability of free legal services and representation to low-income individuals in immigration proceedings, with a priority on noncitizens in immigration detention and on noncitizens who are not detained and are in Colorado but outside the Denver Metro area. *See also San Diego County Will Provide Immigrants With Lawyers*, Assoc. Press, May 4, 2021.

page 1104, at the end of note 5, add a new paragraph:

For an overview of driver's license eligibility by state, see National Immigration Law Center, *State Laws Providing Access to Driver's Licenses or Cards, Regardless of Immigration*

Status (July 2021). For an overview of students with DACA or who are undocumented at colleges and universities, see Presidents' Alliance on Higher Education and Immigration, *Undocumented Students in Higher Education: How Many Students are in U.S. Colleges and Universities, and Who Are They?* (March 2021). For an overview of state laws and policies on tuition, see Presidents' Alliance on Higher Education and Immigration, *Higher Ed Portal: Portal to the States*, https://www.higheredimmigrationportal.org/states/

page 1114, at the end of note 2, add new paragraphs:

Some states have adopted laws and policies that attempt to intensify immigration law enforcement. For example, a law took effect in the state of Montana in 2021 that requires all cities in Montana to comply with federal immigration laws, for example by requiring localities to cooperate with federal immigration enforcement agencies. The Associated Press reported that there are no "sanctuary cities" in Montana. *See* Dominick Mastrangelo, *Montana governor signs bill banning sanctuary cities*, The Hill (Apr. 1, 2021).

Other states have taken steps apparently meant to counter Biden administration policies on immigration enforcement. For example, on July 28, 2021, Texas Governor Greg Abbott signed an executive order barring private transportation — including by companies and nonprofit organizations cooperating with the federal government — of noncitizens who had been detained for an unlawful border crossing or who would have been subject to expulsion from the United States under the border closure based on Title 42. The order cited the risk that such transportation would spread COVID-19, and it authorized the Texas Department of Public Safety to stop and impound any vehicle under "reasonable suspicion" of a violation. Two days later, the federal government sued to block the executive order as unconstitutionally obstructing federal administration of the immigration laws. *See* Katie Benner, *Justice Dept. Sues Texas Governor Over an Executive Order on Migrants*, N.Y. Times, July 30, 2021. On the emergence of Texas as an antagonist of Biden administration immigration policy, see Muzaffar Chishti & Jessica Bolter, *Texas Once Again Tests the Boundaries of State Authority in Immigration Enforcement* (Migration Policy Inst. June 29, 2021).
