FALL 2023 UPDATE for

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

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This Update includes materials on major developments since the Ninth Edition of *Immigration and Citizenship: Process and Policy* went to press in late 2020. This Update is cumulative, including any material in the 2021 and 2022 Updates that remains current.

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 a PDF file, and also in Word format so that instructors can select or edit what they find useful.

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CHAPTER ONE

FOUNDATIONS OF IMMIGRATION AND CITIZENSHIP LAW

page 65, at the end of note 5, add two new paragraphs:

The annual target for resettling refugees in the United States fluctuated between 70,000 and 100,000 for much of the past three decades, but the number plummeted soon after the Trump administration took office in 2017. It cut in half the resettlement goal of 110,000 that President Obama had set for Fiscal Year (FY) 2017. By FY 2020, the Trump administration had reduced the annual resettlement authorization to 18,000 refugees. Fewer refugees, approximately 11,800, actually resettled in FY 2020.

The Biden administration changed course and increased the refugee admissions authorization to 62,500 for FY 2021, 125,000 for FY 2022, and 125,000 for FY 2023. *See Emergency Presidential Determination on Refugee Admissions for Fiscal Year 2021*, 86 Fed. Reg. 24475 (2021); *Presidential Determination on Refugee Admissions for Fiscal Year 2022*, 86 Fed. Reg. 57527 (Oct. 18, 2021); *Presidential Determination on Refugee Admissions for Fiscal Year 2023*, 87 Fed. Reg. 60547 (Oct. 6, 2022). But many fewer refugees than the number authorized have been admitted each year: 11,411 in FY 2021, 25,465 in FY 2022, and 38,653 in the first nine months of FY 2023. *See* Data Hub, *U.S. Annual Refugee Resettlement Ceilings and Number of Refugees Admitted, 1980 to Present* (Migration Pol'y Inst. 2023); U.S. Dep't of State, Refugee Processing Center, *Refugee Admissions Report*, June 30, 2023.

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, which took no action. This legislation would have prohibited religious discrimination in various immigration decisions unless such discrimination has a statutory basis. Any temporary entry restrictions would have to "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 would have to consult with each other and Congress, then narrowly tailor the suspension to use the least restrictive means to pursue such an interest. The Secretary of State and the Secretary of Homeland Security would have to report to Congress on the restriction within 48 hours, or else the ban would expire. Anyone alleging unlawful harm from such a restriction could sue in federal court.

8. On February 24, 2021, President Biden revoked the Trump administration's suspension of immigrant visa issuance set forth in Proclamation 10014 of April 22, 2020. *See Proclamation on Revoking Proclamation 10014*, 86 Fed. Reg. 11847 (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).

The Trump administration's Proclamation 9945 had required immigrants to show health insurance or independent financial means as a condition of entry. In 2020, a federal district court issued a preliminary injunction blocking implementation of the proclamation. The Ninth Circuit then vacated the injunction, but the Biden administration never implemented the requirement. On May 14, 2021, President Biden revoked Proclamation 9945, and the Ninth Circuit ordered the district court to dismiss the injunction as moot. *See Doe #1 v. Trump*, 2 F.4th 1284 (9th Cir. 2021).

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

Title 42

In March 2020, the Trump administration issued an order providing for the summary (and usually quick) expulsions of noncitizens who arrive at a U.S. border or port of entry without proper documentation and papers. *See* Centers for Disease Control & Prevention, U.S. Dep't of Health & Human Servs., *Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists*, 85 Fed. Reg. 65806 (2020). The Trump administration cited as authority § 265 of Title 42 of the U.S. Code. Enacted in 1944, § 265 allows the federal government to curtail or block entry into the United States during a declared public health emergency. The Trump administration's order was the first use of Title 42 for border closure of this sort. The text of § 265 is as follows:

> Whenever the Surgeon General determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States, and that this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce such persons and property is required in the interest of the public health, the Surgeon General, in accordance with regulations approved by the President, shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger, and for such period of time as he may deem necessary for such purpose.

In 1966, this authority moved to the Department of Health and Human Services, which in turn delegated it to the Director of the Centers for Disease Control and Prevention (CDC).

The Trump administration presented the Title 42 order as a public health measure during the COVID-19 pandemic, but critics argued forcefully that its purpose and effect were

to block access to asylum in the United States, both because the order did not apply to other people coming to the United States from abroad (who were just as likely to carry COVID-19), and because the Trump administration had been attempting to block operation of the asylum system for nearly three years prior to the pandemic. The effect of the Title 42 order was to dispense with ordinary procedures for accepting and deciding applications for asylum and withholding of removal, even in the truncated form that they took in expedited removal proceedings under INA § 235.

The Title 42 order remained in effect for two years and two months, until the official expiration of the COVID-19 public health emergency in May 2023. In that time, Title 42 accounted for about 2.8 million expulsions at the U.S. border. *See* Muzaffar Chishti & Kathleen Bush-Joseph, *U.S. Border Asylum Policy Enters New Territory Post-Title 42* (Migration Pol'y Inst. May 25, 2023).

This number — 2.8 million — is no doubt large, but the same authors also observed:

> While Title 42 has received huge attention from immigrant-rights activists and the media, its impact has been somewhat exaggerated. Its use has steadily declined since enacted by the Trump administration in March 2020, used for just 20 percent of all migrants processed in December 2022, a new low. By comparison, 80 percent of migrants in December were processed under the traditional immigration code (Title 8). Exceptions for children, particular nationalities, and people with certain vulnerabilities meant that for all of FY 2022, most migrants halted at the border were processed via Title 8, not expelled under Title 42.

Muzaffar Chishti & Kathleen Bush-Joseph, *Biden at the Two-Year Mark: Significant Immigration Actions Eclipsed by Record Border Numbers* (Migration Pol'y Inst. Jan. 26, 2023).

Court challenges to the Title 42 order argued that the order, though nominally a public health measure, was a pretext to cut off access to protections for forced migrants as provided by federal statutes and regulations, among them INA § 208 on asylum, § 235 on hearing claims for protection in expedited removal proceedings, § 241(b)(3)) on withholding of removal, the Convention Against Torture, and the Trafficking Victims Protection Reauthorization Act. *See* Lucas Guttentag, *COVID-19 and Immigration Border Enforcement: Understanding CDC "Expulsions" of Asylum Seekers and Unaccompanied Minors*, 25 Bender's Immigr. Bull. 815 (2020).

In January 2021, the Biden administration took office. It chose to maintain the Title 42 order, much to the disappointment of those who had expected Biden to reverse this key feature of Trump immigration policy.

On April 1, 2022, the CDC announced that the availability of vaccines and rapid tests to detect COVID-19 had eliminated the need for the Title 42 order. The CDC declared that the border restrictions would end on May 23, 2022. *See* Centers for Disease Control &

Prevention, U.S. Dep't of Health & Human Servs., *Public Health Determination and Order Regarding the Right to Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists* (2022). On July 25, 2023, the federal district court for the Northern District of California vacated the new regulation, though it stayed its ruling for two weeks, allowing the federal government to seek review in the Ninth Circuit.

Shortly after this CDC announcement, several Republican-led states sued to force the Biden administration to maintain the Title 42 order. A federal district judge in Louisiana ruled that the CDC's decision violated the Administrative Procedure Act, for failure to seek notice and comment. The court issued a nationwide preliminary injunction keeping the order in place. *See Louisiana v. Centers for Disease Control*, 603 F. Supp. 3d 406 (W.D. La. 2022). The Biden administration appealed this order, but not as to its nationwide scope, and the administration did not seek a stay of the decision.

The court challenges to the Title 42 order itself also continued. In November 2022, the federal district court for the District of Columbia ruled that the Title 42 order was "arbitrary and capricious in violation of the Administrative Procedure Act." *See Huisha-Huisha v. Mayorkas*, 2022 WL 16948610 (D.D.C. Nov. 2022).

At this point, nineteen states sought to intervene on appeal. The states argued that the ruling of the federal district court in the District of Columbia to terminate the Title 42 order, if allowed to stand, would have the practical effect of nullifying the preliminary injunction maintaining the Title 42 order in *Louisiana v. Centers for Disease Control*. The D.C. Circuit Court of Appeals declined to allow the states to intervene. The states asked the U.S. Supreme Court to stay the D.C. district court ruling in *Arizona v. Mayorkas* (originally *Huisha-Huisha v. Mayorkas*) to terminate the Title 42 expulsions. By a 5-4 vote, on December 27, 2022, the U.S. Supreme Court treated the application as a petition for writ of certiorari and granted the petition to decide if the states would be allowed to intervene. *See* 143 S. Ct. 478 (2022). The Court scheduled oral argument for March 1, 2023. Even though the Court granted certiorari only on the intervention question, in that same order the Court stayed the district court's order setting aside the Title 42 expulsion order itself, thus effectively ensuring that it would continue for some further period of at least several months.

In January 2023, the Biden administration announced that the declared COVID-19 public health emergency would end on May 11, 2023. *See* Sharon LaFraniere and Noah Weiland, *U.S. Plans to End Public Health Emergency for Covid in May*, N.Y. Times, Feb. 3, 2023. The administration then filed a brief in the U.S. Supreme Court, saying that the end of the emergency — and thus the end of the statutory basis for the Title 42 expulsion order — rendered moot the lawsuits challenging the original order and also rendered moot the lawsuits challenging the termination of that order. On February 16, the Supreme Court canceled the oral argument that it had scheduled for March 1.

On May 11, 2023, border restrictions based on the Title 42 order lapsed, and pre-pandemic border procedures came back into effect. On May 18, the Supreme Court dismissed as moot the challenge to the order in the district court for the District of Columbia. *See* 143

S. Ct. 1312 (May 18, 2023) (vacating and remanding with instructions to dismiss the case as moot). With the end of the declared public health emergency having withdrawn its statutory foundation, the Title 42 order expired. *See* U.S. Dep't of Homeland Security, *Fact Sheet: U.S Government Announces Sweeping New Actions to Manage Regional Migration*, Apr. 27, 2023.

With the Title 42 order no longer in effect, border processing returned to the basic framework set out in the Immigration and Nationality Act in Title 8 of the U.S. Code. But a final regulation effective on May 11, 2023, significantly modified the asylum application process on the southern border. The regulation creates a rebuttable presumption of ineligibility for asylum for migrants who "neither avail themselves of a lawful, safe, and orderly pathway to the United States nor seek asylum or other protection in a country through which they travel." But the regulation also provides that migrants who use the "CBP One" mobile app to schedule an appointment at a port of entry "can make claims for asylum and other forms of protection and are exempted from this rule's rebuttable presumption on asylum eligibility. They are vetted and screened, and assuming no public safety or national security concerns, may be eligible to apply for employment authorization as they await resolution of their cases." *See* U.S. Dep't of Homeland Security, *Circumvention of Lawful Pathways*, 88 Fed. Reg. 31314 (May 16, 2023).

The changes have prompted substantial criticism, including the claim that the new regulation replicates Trump-era policies, contravenes federal law, and effectively forecloses asylum for many forced migrants. *See, e.g.,* Miriam Jordan, *Biden Administration Announces New Border Crackdown*, N.Y. Times, Feb. 21, 2023. Immigrant advocacy groups sued to block its implementation, arguing that it unlawfully restricts asylum availability in contravention of the INA. *East Bay Sanctuary Covenant, et. al. v. Biden,* Amended and Supplemental Complaint for Declaratory Relief, 18-CV-06810-JST (N.D. Cal. May 11, 2023). On July 25, 2023, the federal district court for the Northern District of California vacated the new regulation, though it stayed its ruling for two weeks, allowing the federal government to seek review in the Ninth Circuit. At the same time, the state of Texas sued to block implementation of the regulation for a very different reason: that it encourages unlawful migration in contravention of the statutory authority of the Secretary of Homeland Security. *See Texas v. Mayorkas*, Complaint, 2:23-CV-00024 (W.D. Tex. May 23, 2023). The district courts in the Texas case has yet to issue any ruling as of this Update.

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

Presidential Proclamation 10294, *Advancing the Safe Resumption of Global Travel During the COVID-19 Pandemic*, 86 Fed. Reg. 59603 (Oct. 28, 2021),[a] revoked four prior geographic travel bans that had limited admission from certain specific countries and replaced them with a global requirement. "Noncitizens who are nonimmigrants" arriving by air still had to show proof of full vaccination against COVID-19, with limited exceptions. This vaccination requirement did not apply to U.S. citizens, nationals, green card holders, and immigrant visa holders. This requirement was subject to limited exceptions, including for

[a] This memorandum is reprinted in the 2022 edition of the statutory supplement.—eds.

admission in the national interest, citizens of a country with limited vaccine availability, noncitizens under 18, noncitizens for who vaccination is contraindicated or inappropriate, and nonimmigrants physically present in Ukraine as of February 10, 2022. Exempted individuals had to take a test within 3-5 days of entry to the United States, quarantine until the test was negative, and be fully vaccinated against COVID-19 within 60 days of arrival.

The Biden administration declared an end to the COVID-19 public emergency effective May 11, 2023, and it revoked the vaccination requirement for arriving noncitizens. *Revoking the Air Travel COVID-19 Vaccination Requirement*, Proclamation 10575, 88 Fed. Reg. 30889 (May 9, 2023). Other orders from the administration ended the requirement for land and ferry entries. U.S. Dep't of Homeland Security, *Notification of Termination of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Between the United States and Mexico*, 88 Fed. Reg. 30035 (May 10, 2023); *Notification of Termination of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Between the United States and Canada*, 88 Fed. Reg. 30033 (May 10, 2023). Noncitizens seeking admission on immigrant visas must still meet medical examination requirements, including COVID-19 vaccination.

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

After President Biden took office in January 2021, DHS Secretary Alejandro Mayorkas announced in March that DHS would no longer defend the Trump administration's public charge rule in court. Mayorkas also announced that DHS would dismiss appeals that it had filed to seek implementation of the rule. Two days later, DHS submitted a final regulation to remove the Trump administration's public charge rule from the Code of Federal Regulations. The federal executive branch stopped implementing the DHS public charge regulation and a largely parallel State Department regulation.

Thirteen states sought to defend the Trump public charge regulation by moving to intervene in court challenges to the regulation that DHS was no longer defending. The U.S. Supreme Court granted certiorari, see *Arizona v. City & County of San Francisco*, 142 S. Ct. 417 (2021), to decide if the states could intervene. In February 2022, DHS published a Notice of Proposed Rulemaking as a step toward a new regulation that would largely return to the pre-Trump interpretation of the public charge rule. *See* 87 Fed. Reg. 10570 (2022). In June 2022, the Court unanimously dismissed certiorari as improvidently granted, see *Arizona v. City and County of San Francisco*, 142 S. Ct. 1926 (2022). The new regulation became final on September 9, 2022, 87 Fed. Reg. 10570 (2022), and took effect on December 23, 2022, to apply to all applications postmarked on or after that date.

The new rule codifies, in many respects, the 1999 field guidance that governed public charge determinations until the Trump administration attempted to redefine it. Under the new rule, the government will not consider receipt of noncash benefits and healthcare benefits other than long-term institutionalization at government expense in making its determination. In addition, the new rule narrows its application only to those likely to become "primarily"

dependent on the covered benefits. See U.S. Dep't of Homeland Security, *Public Charge Ground of Inadmissibility Final Rule*, 87 Fed. Reg. 55472-01 (Sep. 9, 2022).

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 Updates to pages 66 and 68 in Chapter One and to page 945 in Chapter Nine, the Biden administration retracted most of the COVID-related bans on entry of immigrants and nonimmigrants. Routine consular visa services resumed in April 2021, and that October the Biden administration rescinded the location-based entry bans on nonimmigrants physically present in China, Iran, Brazil, the United Kingdom, Ireland, South Africa, India, and the 26 countries in the Schengen area. In May 2023, the administration rescinded the COVID-19 vaccine requirement for nonimmigrants entering the United States. Proof of COVID-19 vaccination remains a requirement for adjustment of status and immigrant visa applicants. *See Notice of End to Requirement for Air Passengers to Provide Proof of COVID-19 Vaccination Before Boarding a Flight to the United States*, 88 Fed. Reg. 30749 (2023); *Notification of Termination of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Canada*, 88 Fed. Reg. 30033 (2023); *Notification of Termination of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico*, 88 Fed. Reg. 30036 (2023).

In early November 2021, the United States also lifted COVID-justified border closures under Title 42 along the Canadian and Mexican border. *See Notification of Temporary Travel Restrictions Applicable to Ports of Entry and Ferries Service Between the United States and Mexico*, 87 Fed. Reg. 24041 (2022); *Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Canada*, 87 Fed. Reg. 24048 (2022). However, litigation kept the border closures in place until May 11, 2023, when the Biden administration officially terminated the COVID-19 public health emergency. *See Louisiana v. Centers for Disease Control & Prevention*, 2022 WL 1604901 (W.D. La. May 20, 2022); *Administration Announces Measures for End of COVID-19 Public Health Exclusion*, 100 Interp. Rel. 18 (May 1, 2023). The U.S. Supreme Court dismissed as moot an effort to keep the Title 42 border closures in place. *Arizona v. Mayorkas*, 143 S. Ct. 478 (2022); *see* Adam Liptak, *Supreme Court Dismisses Case on Pandemic-Era Immigration Measure*, N.Y. Times, May 18, 2023.

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), 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. 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. 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).

Despite the lifting of travel and visa restrictions, nonimmigrant admissions fell. In 2021, nonimmigrant admissions were down 59% from 2020, and down 80% from the average number of annual admissions between 2009 and 2019. *See* Office of Immigration Statistics, U.S. Dep't of Homeland Security, *Annual Flow Report: July 2022*; *DHS Posts 2021 Annual Flow Reports on Naturalization, Nonimmigrant Visas*, 99 Interp. Rel. 29 (Aug. 1, 2022). A rise in the numbers of visas issued for nonimmigrant categories suggests that nonimmigrant admissions are rebounding, with the State Department issuing over 6.8 million nonimmigrant visas in 2022 compared with fewer than three million in 2021. *See* U.S. Dep't of State, *Nonimmigrant Visa Statistics, Table XV(A): Classes of Nonimmigrants Issued Visas (Including Border Crossing Cards) Fiscal Years 2018-2022.*

Page 115, in the fourth full paragraph, at the end of the second sentence, add:

although this number has risen as a result of the Biden administration's reinstatement of higher caps on refugee admissions starting in 2021. *See Refugee Ceiling Set at 125,000 for Fiscal Year 2022*, 98 Interp. Rel. 40 (Oct. 18, 2021); *Presidential Determination on Refugee Admissions for Fiscal Year 2023*, 87 Fed. Reg. 60547 (2022). Despite this, the United States still admitted fewer than 26,000 refugees in FY 2022. *See* Migration Policy Institute Data Hub, *U.S. Refugee Resettlement Ceiling and Annual Number of Admitted Refugees Fiscal Years 1975–2023 YTD.*

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* U.S. Dep't of State, Instructions for the 2022 Diversity Immigrant Visa Program (DV-2022). Guatemalans became eligible for the 2023 lottery, while Venezuelans were disqualified. *See* U.S. Dep't of State, Instructions for the 2023 Diversity Immigrant Visa Program (DV-2023). The list remained unchanged for the 2024 lottery. *See* U.S. Dep't of State, Instructions for the 2024 Diversity Immigrant Visa Program (DV-2024).

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. As of June 2023, consular backlogs persist. According to the Department of State, there were 351,337 backlogged immigrant visa applicants at U.S. consular locations globally. Compare with 2019, when 60,866 applicants were pending on average each month. *See* National Visa Center (NVC) Immigrant Visa Backlog Report (June 2023).

Page 181, after the last sentence on the page, add:

After the EB-5 Immigrant Investor Regional Center Program lapsed in 2021, Congress reauthorized and reformed it in 2022, allowing processing of EB-5 visa applications to resume. *See EB-5 Reform and Integrity Act of 2022,* Pub. L. No. 117-103, Div. BB, § 101, 136 Stat. 1070 (2022); U.S. Dep't of State, Visa Bulletin No. 65, Volume X (April 2022).

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). 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. 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 Revision of Civil Immigration Enforcement Policies and Priorities*, Exec. Order 13993, 86 Fed. Reg. 7051 (2021).

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

The Biden administration withdrew the proposed rescission of the rule on January 25, 2021, pursuant to a memo freezing most pending agency rules. *See* Ronald A. Klain, Assistant to the President & Chief of Staff, Memorandum for the Heads of Executive Departments and Agencies, 86 Fed. Reg. 7424 (2021). *See also Practice Alert: Proposed H-4 EAD Rescission Rule Withdrawn from Review at OMB*, American Immigration Lawyers Association, Jan. 28, 2021. Separately, in April 2023, a federal district court dismissed a long-running lawsuit challenging the rule allowing for H-4 work authorization, leaving the rule in place. *See Save Jobs USA v. U.S. Dep't of Homeland Security*, 2023 WL 2663005 (D.D.C. Mar. 28, 2023); *District Court Preserves Work Authorization for H-4 Spouses*, 100 Interp. Rel. 17 (Apr. 24, 2023). The proclamation that had 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. 14 (Apr. 5, 2021).

Page 194, end of second full paragraph, add:

Demand for H-1B visas has remained high, far exceeding the statutory caps. The number of H-1B registrations has climbed since 2021. For 2024, USCIS received a record 780,884 H-1B lottery registrations, up by nearly 300,000 from the 483,927 lottery registrations in 2023. *See H-1B Electronic Registration Process*, U.S. Citizenship & Immigr. Servs. (last updated Apr. 28, 2023). USCIS attributed some of the increase in registrations for 2024 to multiple registrations submitted for one individual. *See* Stuart Anderson, *Immigration Service Likely to Change H-1B Visa Lottery*, Forbes, May 1, 2023.

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

In 2020, 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 a presidential proclamation and proposed 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). DHS proposed regulations that 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 the United States v. United States Dep't of Homeland Sec.*, 504 F. Supp. 3d 1077, 1092, 1094 (N.D. Cal. 2020). Proclamation 10052 expired by its own terms in 2021, and the Biden administration withdrew the proposed regulations. *See 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, Implementation of Vacatur,* 86 Fed. Reg. 70729 (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). The moratorium remains in place as of June 2023.

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. 14 (Apr. 5, 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. The following year, the agency finalized a regulation that did not implement the proposed wage cuts. Instead, it imposed safety and health protections for workers in rental

housing, updated the methodology for prevailing wage determinations, sought to improve meal quality, and expanded liability for violations of the H-2A regulatory scheme, among other changes. *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States,* 87 Fed. Reg. 61660 (2022).

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

Since 2021, the federal government has issued several additional allotments of H-2B visas, with each allotment snapped up quickly. 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. 22 (June 7, 2021). In December 2021, DHS and DOL made 20,000 additional H-2B visas available for the first half of FY 2022, the first time ever that additional H-2B visas were made available in the first half of the fiscal year. Most of the additional visas were made available to returning workers, with a portion of the remaining additional visas reserved for nationals of Haiti, Honduras, Guatemala, and El Salvador. *See DHS to Supplement H-2B Cap with Additional Visas*, 99 Interp. Rel. 1 (Jan. 4, 2022).

In May 2022, after an additional allotment of 35,000 H-2B visas for the second half of FY 2022, USCIS again received more petitions than the number of H-2B visas available. *See Additional Returning Worker H-2B Visas Cap Reached*, 99 Interp. Rel. 22 (June 6, 2022). For 2023, DHS again made additional H-2B visas available, this time almost doubling the number of available H-2B visas. Of the nearly 65,000 supplemental visas, DHS reserved 20,000 for workers from El Salvador, Guatemala, Haiti, and Honduras. DHS allocated the remaining visas to workers who had held H-2B status in the prior three fiscal years. *See* U.S. Dep't of Homeland Security, *DHS to Supplement H-2B Cap with Nearly 65,000 Additional Visas for Fiscal Year 2023,* Press Release, October 12, 2022.

Page 220, at the end of the first paragraph, add:

For 2023, DHS identified 86 countries that are eligible for H-2B visa programs. *See Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H-2A and H-2B Nonimmigrant Worker Programs*, 87 Fed. Reg. 67930 (2022).

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. 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. The *Journal* affirmed in early 2022 that the slowdown in immigration continued to impact the U.S. labor market, as job openings continued to outstrip available workers. *See* Michelle Hackman, *Add Declining Immigration to Problems Weighing on the Labor Market*, Wall St. J., Apr. 5, 2022. By 2023, foreign-born workers' share of the labor market had increased despite the pandemic slowdown in immigration. *See* Gabriel T. Rubin & Rosie Ettenheim, *Immigrants' Share of the U.S. Labor Force Grows to a New High*, Wall St. J., May 22, 2023.

Page 232, at the end of note 1, 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 the number of students obtaining work authorization for optional practical training dropped by 12 percent. Visas for Asian students saw the greatest decrease, with enrollments of mainland Chinese students plummeting by 99 percent, those of students in India dropping by 88 percent, and Japanese and South Korean student visas dropping by 87 percent. Enrollments of Mexican students sunk by 60 percent. The decrease slowed in 2021, though the total number of F-1 and M-1 students dropped another 1.2 percent from 2020. International students enrolled in K-12 programs decreased 16 percent from 2020 to 2021. The rates of Asian, Australian, and Pacific Islanders again experienced the greatest impact in 2021, with the highest overall decline in students from those areas. *See* U.S. Immigration & Customs Enf't, *SEVIS by the Numbers: Annual Report on International Student Trends* (2021).

All other continents (other than Antarctica), however, saw an increase in 2021. Data from 2022 showed that the downward trend in student admissions to the U.S. was reversing. The number of international students in the U.S. in 2022 increased by 10% from 2021. All U.S. regions saw an increase in international students, with California hosting the largest proportion. Most international students in 2022 came from Asian countries, although the number of Chinese students continued to drop from 2021 levels. *See* U.S. Immigration & Customs Enf't, *SEVIS by the Numbers: Annual Report on International Student Trends* (2022).

Page 233, at the end of note 3, replace the material starting with "A second lawsuit" with the following:

In 2022, the D.C. Circuit rejected a challenge to the OPT program as a whole, holding that DHS had statutory authority to issue the regulation. *See Wash. Alliance of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 50 F.4th 164, 177 (D.C. Cir. 2022).

Page 234, at the end of note 5, add:

Although Proclamation 10053, suspending entry to nonimmigrant categories that included J visas, expired in March 2021, the Biden administration has not terminated Proclamation 10043, which remained in effect as of June 2023. *See* Stuart Anderson, *Chinese Students Still Denied Visas Under Trump Immigration Order*, Forbes, Apr. 11, 2023.

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. U.S. Citizenship Act, S. 348, 117th Cong. (1st Sess. 2021). *See also Biden-Supported Citizenship Act Introduced in Congress*, 98 Interp. Rel. 8 (Feb. 22, 2021). As of mid-July 2023, the bill had not been voted on.

In early 2023, several comprehensive immigration reform bills were introduced in Congress. The House of Representatives passed a bill that would codify border wall construction, mandate employer use of E-Verify, require noncitizens seeking asylum either to be detained or in Mexico, and apply expedited deportation to unaccompanied minors. *See* Secure the Border Act of 2023, H.R. 2, 118th Cong. (2023). The bill had little chance of approval in the Senate and President Biden threatened to veto the legislation. *See* Karoun Demirjian, *House Approves Stringent G.O.P. Border Bill, Attacking Biden on Immigration*, N.Y. Times, May 11, 2023. Separately, a bipartisan bill introduced in the House would, among other things, provide a pathway to permanent residency and citizenship for undocumented children and others living in the U.S. without status while increasing funding for CBP and taking other measures to address unauthorized entries to the U.S. This bill also faced steep odds. *See* Dignity Act of 2023, H.R. 3599 (2023); Camilo Montoya-Galvez, *Bipartisan Immigration Bill Would Boost Border Funds, Expand Lawful Migration and Legalize Some Immigrants*, CBS News, May 23, 2023.

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, while at the same time expanding access to temporary work visas and 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 293, at the end of the carryover paragraph, add:

In September 2021, Croatia became the 40th country in the Visa Waiver Program.

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. *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:

Parole in the Biden Administration

Consistent with the practices of some prior presidential administrations, the Biden administration has used its parole authority in several settings, some of which allow significant numbers of noncitizens to enter the United States.

Several instances have been modest in scope. 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). The Biden administration re-started the Central American Minors (CAM) refugee and parole program with expanded eligibility to reunite children from El Salvador, Guatemala, and Honduras with their parents legally present in the United States. *See* 88

Fed. Reg. 21694 (2023); Mark Greenberg, Stephanie Heredia, *et al.*, *Relaunching the Central American Minors Program: Opportunities to Enhance Child Safety and Family Reunification* (Migration Pol'y Inst. 2021).

The revival and expansion of the CAM program seems part of an overall effort by the Biden administration to use its parole authority to offer migrants an alternative to traveling to the U.S. southern border to apply for asylum. This expanded use of parole reflects a political effort to avoid the perception of a border unable to process the number of asylum seekers; a humanitarian impulse to make sure that asylum isn't limited to migrants who can make dangerous and expensive land or sea journeys; and an administrative decision to relieve congestion at the border by having many different U.S. government offices assume a decisionmaking role.

The Biden administration established new parole programs in 2022 for nationals of Afghanistan and Ukraine. These programs responded to large numbers of people fleeing Afghanistan because of the Taliban takeover in 2021, and Ukraine after the Russian invasion in February 2022. Like the use of parole in prior presidential administrations, both programs responded to the perceived inadequacies (including long waiting periods) associated with existing admission avenues. Parole allows entry and permission to work.

The parole programs for these two countries may seem similar, but the program for Ukraine has been more welcoming in many respects. One difference between the two programs as first implemented was the requirement for Afghans seeking parole to show they were fleeing targeted, individualized harm. In contrast, Ukrainians who reached the U.S. border — often by traveling to Mexico without the need for a visa to enter Mexico — benefited from a U.S. Customs and Border Protection policy of paroling them into the United States to apply for asylum without having to show individualized threat of harm. In the same time period, CBP applied Title 42 and other border restrictions to turn back the vast majority of asylum seekers from other countries, including the Northern Triangle countries of El Salvador, Guatemala, and Honduras, which many migrants had left to come to the United States.

In April 2022, the Biden administration initiated the Uniting for Ukraine parole program. Largely replacing the streamlined practice for paroling in Ukrainians at the U.S. southern border, it set favorable conditions for all Ukrainians seeking parole. Sponsors in the United States who committed to financial and other support could file petitions for Ukrainians through an online process. The number of Ukrainians paroled into the United States through this program was many times the number of Afghans in the same time period. Ukrainians had the $575 application fee and consular interview requirement waived, and they could submit one application for a whole family. None of these favorable provisions applied to Afghans seeking parole. The combined effect of these differences was that the number of Ukrainians paroled into the United States through this program was many times the number of Afghans in the same time period. *See* U.S. Dep't of Homeland Security, *DHS Announces Upcoming Re-parole Process for Afghan Nationals*, May 5, 2023; *Implementation of the Uniting for Ukraine Parole Process*, 87 Fed. Reg. 25,040 (2022); Muzaffar Chishti &

Jessica Bolter, *Welcoming Afghans and Ukrainians to the United States: A Case in Similarities and Contrasts* (Migration Pol'y Inst. 2022).

The use of parole in response to forced migration from Afghanistan and Ukraine became a key element of the Biden administration's response to the large number of migrants who arrive on the U.S.-Mexico border and try to apply for asylum there. In October 2022, the administration launched a parole program for Venezuela, and in January 2023, the administration consolidated that program into a parole program for up to 30,000 people per month from Cuba, Haiti, Nicaragua, and Venezuela combined (the "CHNV" program).

The CHNV program shares many of the features first used in the Ukrainian program. People in the United States who are willing to commit financial support may sponsor a parolee. The application process operates online, and there is no fee. Approved parolees must have a valid passport and travel by air to the United States. They must come from one of the four listed countries, which combined to account for the majority of arrivals on the U.S.-Mexico border in the period immediately before the programs were announced. Once in the United States, noncitizens who enter on parole may work. The Federal Register notices for Cuba, Haiti, Nicaragua, and Venezuela are at 88 Fed. Reg. 26,329 (2023) (Cuba); 88 Fed. Reg. 1243 (2023) (Haiti); 88 Fed. Reg. 1255 (2023) (Nicaragua); and 87 Fed. Reg. 63,507 (2022) (Venezuela).

These eligibility rules for the CHNV program should be assessed alongside the modifications, effective May 11, 2023, that make access to the asylum process more difficult on the southern border if noncitizens don't use the CHNV program. As explained in the excerpt on Title 42 in this Update to page 66, there is now a rebuttable presumption of ineligibility for asylum for migrants who "neither avail themselves of a lawful, safe, and orderly pathway to the United States nor seek asylum or other protection in a country through which they travel." But the regulation also provides that migrants who use the "CBP One" mobile app to schedule an appointment at a port of entry "can make claims for asylum and other forms of protection and are exempted from this rule's rebuttable presumption on asylum eligibility."

Several Republican-led states filed a court challenge to the legality of these parole programs for Cuba, Haiti, Nicaragua, and Venezuela, arguing that this use of parole exceeded executive branch authority under INA § 212(d)(5), and that arrival of new migrants would impose on states new fiscal burdens for health care, education, and law enforcement. *See* Miriam Jordan, *Biden Opens a New Back Door on Immigration*, N.Y. Times, Apr. 23, 2023. As of the time of this writing, the district court has not ruled on the merits of that challenge.

Program capacity quickly became an issue. In the first several months, the federal government received more than 1.5 million applications from would-be sponsors. *See* Camilo Montoya-Galvez, *1.5 Million Apply for U.S. Migrant Sponsorship Program With 30,000 Monthly Cap*, CBS News, May 22, 2023. *See also Processes for Cubans, Haitians, Nicaraguans, and Venezuelans Updated*, 100 Interp. Rel. No. 21 (May 22, 2023). At the same time, the program appears to have greatly reduced the number of asylum seekers arriving at

the U.S. southern border. *See* Edward Alden, *Biden's New Southern Border Plan Might Just Work*, Foreign Policy, Apr. 5, 2023; Stuart Anderson, *GOP State Lawsuit Could Stop Sound Way to Reduce Illegal Immigration*, Forbes, Mar. 21, 2023.

Parole under these programs has a limited duration — two years — so a big question is what happens next. Some noncitizens who enter on parole may be able to find a more durable immigration status on some other basis such as family ties or employment. For those who don't, the possibilities after the two years include extensions of parole, legislation to offer a path to a more durable status such as lawful permanent resident, or falling out of status.

In July 2023, the Biden administration announced another, more limited parole program, this time for some noncitizens from Colombia, El Salvador, Guatemala, and Honduras. Applicants must already be beneficiaries of approved petitions that qualify them for immigrant visas based on a family relationship to a U.S. citizen or lawful permanent resident. Nationals of these countries can be considered for parole on a case-by-case basis for a period of up to three years. The following explanation in the Federal Register notice for the Guatemala program is repeated in substance for the other three countries:

> This process will allow family members to reunite in the United States while they wait for their immigrant visas to become available. This process is voluntary and intended to provide an additional lawful, safe, and orderly avenue for migration from Guatemala to the United States as an alternative to irregular migration to help relieve pressure at the Southwest Border (SWB) and reunite families, consistent with U.S. national security interests and foreign policy priorities. The process complements other efforts to collaboratively manage migration in the Western Hemisphere and at the SWB as the U.S. Government (USG) continues to implement its broader, multi-pronged, and regional strategy to address the challenges posed by irregular migration.

Implementation of a Family Reunification Parole Process for Guatemalans, 88 Fed. Reg. 43,581 (July 7, 2023). *See also* U.S. Dep't of Homeland Security, *DHS Announces Family Reunification Parole Processes for Columbia, El Salvador, Guatemala, and Honduras*, July 7, 2023.

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.

On July 1, 2022, USCIS clarified that if a TPS holder is inspected and admitted into the United States as a TPS holder upon return from authorized travel, then the TPS holder meets the "inspected and admitted or paroled" requirement in INA § 245(a) and § 245(k) for eligibility to adjust status. This updated guidance applies even if the TPS holder was originally granted TPS while present in the United States without admission or parole. USCIS also announced that travel in the past under advance parole may in some cases qualify as an admission into TPS. *See* U.S. Citizenship & Immigr. Servs., Policy Alert, *Temporary Protected Status and Eligibility for Adjustment of Status under Section 245(a) of the Immigration and Nationality Act*, July 1, 2022. For estimates of the many hundreds of thousands of noncitizens who are eligible for TPS and thus potentially eligible for adjustment of status, see the Update to page 828 in Chapter Seven.

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

On February 2, 2021, President Biden signed an Executive Order that, among other things, suspended the 2019 expansion and ordered the Secretary of Homeland Security to report on whether to modify or revoke the Trump administration's extension of expedited removal throughout 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). On March 21, 2022, DHS formally rescinded the July 2019 expansion of expedited removal. *Rescission of the Notice of July 23, 2019, Designating Aliens for Expedited Removal*, 87 Fed. Reg. 16022 (2022).

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. Dep't 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. *See also* Maria Sacchetti, *Covid Infections Surge in Immigration Detention Facilities*, Wash. Post, Feb. 1, 2022. As of June 2023, the number of detainees was 29,613. Transactional Records Access Clearinghouse (TRAC), Immigration Detention Quick Facts (2023).

Page 353, at the end of the carryover paragraph, add new paragraph:

According to a February 2022 report by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, the number of noncitizens monitored by ICE's Alternatives to Detention (ATD) program had more than doubled since the start of the Biden administration. The number was about 87,000 in January 2021 and almost 183,000 in February 2022. TRAC reported that all of the growth was attributable to the use of SmartLINK technology, which uses facial recognition and other technologies to confirm the identity and location of the noncitizens in the program. *See* TRAC, *Over 180,000 Immigrants Now Monitored by ICE's Alternatives to Detention Program* (Feb. 28, 2022). The number of noncitizens monitored through ATD programs was 215,967 in June 2023. *See* TRAC, Immigration Detention Quick Facts (2023). *See also* U.S. Gov't Accountability Office, *Alternatives to Detention: ICE Needs to Better Assess Program Performance and Improve Contract Oversight* (June 2022).

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 2023, the administration has taken no action to end immigration detention in private facilities. For critiques, see César Cuauhtémoc García Hernández, *Migrant Detention, Corporate Profit* (Am. Bar Ass'n, April 12, 2023); Editorial Board, *Biden's Pledge to Close Private Migrant Prisons Remains Unfulfilled*, Wash. Post, Nov. 29, 2022.

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.

Legislation adopted in 2021 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. In New Jersey, legislation signed by Governor Murphy in August 2021 prohibits state and local entities in New Jersey and private detention facilities from entering into new contracts to detain noncitizens. *See* Patrick Reilly, *NJ Bans Jails From Contracting with ICE to Hold Immigration Detainees*, N.Y. Post, Aug. 21, 2021. The Maryland legislature passed a similar ban on private immigration detention, which became law after the legislature overrode Governor Hogan's veto. *See* Brian Witte, *Maryland Lawmakers Override Immigrant Detention Bill Veto*, Assoc. Press, Dec. 7, 2021.

The fate of these state measures is uncertain. The GEO Group, a major private prison contractor, and the federal government filed a legal challenge in federal court to California's AB 32. A federal district court rejected the challenge, but a divided three-judge panel of the Ninth Circuit reversed, and then a divided Ninth Circuit, hearing the case en banc, reached the same conclusion — that the California law is invalid because it is conflict preempted by federal law and because it violates the doctrine of intergovernmental immunity by offering exemptions to state agencies that are unavailable to the federal government. *See GEO Group, Inc. v. Newsom*, 50 F.4th 745 (9th Cir. 2022 en banc). It remains to be seen if similar challenges to other state restrictions on private immigration prisons might succeed.

Lawsuits by detainees and the state of Washington led to awards in 2021 totaling $23.2 million against the GEO Group because it had not paid the detainees the local minimum wage for work in the facility. The GEO Group appealed, and the Ninth Circuit heard oral argument in the case in October 2022. *See* Alanna Madden, *Ninth Circuit Takes up GEO Group Appeal Over Underpaid Detainees*, Courthouse News Service, Oct. 6, 2022.

Page 354, at the end of the second full paragraph, add new paragraph:

In February 2021, President Biden signed an Executive Order establishing an Interagency Task Force on Reunification of Families to identify and reunite children separated from the families by the Trump administration. By June 2021, the task force identified 3,913 children who had been separated from their families and reunified 1,786 of them. The task force reported in November 2021 that the number of reunited children had risen to 2,248. In the meantime, several media outlets reported that the Biden administration was considering compensation of up to $450,000 for families who had been separated at the border. But in December 2021, the administration shut down settlement talks to end lawsuits filed on behalf of families seeking compensation for separations. *See* Ben Fox, *US Pulls out of Settlement Talks in Family Separation Suits*, Assoc. Press, Dec. 16, 2021; Caroline Simon, *Government Talks on Migrant Family Settlements Break Down*, Roll Call, Dec. 16, 2021.

Biden administration efforts to reunite families have had some success, but nearly 1000 children remained separated from their parents as of February 2023. *See* Rebecca Santana, *US Reunites Nearly 700 Kids Taken From Parents Under Trump*, Assoc. Press, Feb. 2, 2023. On the Trump family separation policy, see Caitlin Dickerson, *The Secret History of the U.S. Government's Family-Separation Policy*, The Atlantic, Aug. 7, 2022.

Page 355, at the end of the second full paragraph, add new paragraph:

In December 2021, the Biden administration abandoned plans to implement regulations proposed during the Trump administration to replace the *Flores* settlement. For a summary of key developments, see Camilo Montoya-Galvez, *Biden Administration Discards Trump-Era Plan to End Legal Agreement Protecting Migrant Children*, CBS News, Dec. 11, 2021. *See also* American Immigr. Lawyers Ass'n, *Documents Relating to* Flores v. Reno *Settlement Agreement on Minors in Immigration Custody*, June 22, 2022 (summarizing recent settlement negotiations).

Page 386, after note 7, add new notes 8 and 9:

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.

9. In *Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827 (2022), the U.S. Supreme Court found that INA § 241(a)(6) does not provide a bond hearing to a noncitizen held under § 241(a) who has been ordered removed but whose application for withholding of removal is pending in

immigration court. Writing for a majority of eight, Justice Sotomayor found the statutory text clear enough that the canon of constitutional avoidance did not allow reading a limit on detention into the statute, citing *Jennings v. Rodriguez*, 138 S. Ct. 830, 200 L. Ed. 2d 122 (2018), and declining to apply *Zadvydas v. Davis*, 533 U.S. 678, 212 S. Ct. 2491, 150 L. Ed. 2d 653 (2001), The Court did not decide whether prolonged detention in such a case would violate the U.S. Constitution, instead remanding to the lower courts to consider this issue.

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* U.S. 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). *See also* Natasha Frost, *The Only U.S. Territory Without U.S. Birthright Citizenship,* N.Y. Times, Nov. 25, 2022.

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

On February 2, 2021, President Biden created via executive order the Interagency Taskforce to Promote Naturalization 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).

Between 2021 and 2022, the Interagency Taskforce to Promote Naturalization doubled its outreach budget from $10 million to $20 million in grant money for citizenship preparation programs, public education and awareness campaigns, and recognition of outstanding new citizens. *See DHS Announces Expansion of Citizenship and Integration Grant Program and Open Application Period*, USCIS (June 27, 2022). In 2023, USCIS

released an interagency strategy that seeks to promote naturalization through citizenship education and awareness among other steps to reduce barriers to citizenship. *See* U.S. Citizenship & Immigr. Servs., *Interagency Strategy for Promoting Naturalization* (2023).

In 2022, USCIS naturalized 974,000 individuals and was on track to exceed that number in 2023. By June 2023, the agency had naturalized nearly 589,000 new U.S. citizens, and announced that it had made progress in reducing the naturalization backlogs. U.S. Citizenship & Immigr. Servs., Press Release, *USCIS Celebrates Independence Day 2023 and Continues its Commitment to Naturalization*, June 30, 2023.

Page 446, at the end of the first paragraph after the Problems, add the following:

Naturalization applicants with a disability that precludes them from fulfilling the English language or civics testing requirements or from taking the oath may request an exception to those requirements from USCIS. *See* U.S. Citizenship & Immigr. Servs., *N-648, Medical Certification for Disability Exceptions* (revised 2022).

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

In 2021, USCIS rolled back a 2020 revision of the civics test in response to critique that USICS had implemented the revised 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 and streamline naturalization. *See USCIS Civics Test*, 98 Interp. Rel. 9 (Mar. 1, 2021). The agency reverted to the test that had been in place since 2008. In 2023, USCIS began a five-month nationwide trial of proposed changes to the current naturalization test. The changes would revise the English-speaking portion and the content and format of the civics portion of the naturalization test. *See* U.S. Citizenship & Immigr. Servs., *Naturalization Test Redesign Development 2022*; *Trial Testing of Redesigned Naturalization Test for Naturalization Applications*, 87 Fed. Reg. 76634 (2022).

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 489, note 2, at the end of the first paragraph, add the following:

In 2021, two jurisdictions in Vermont authorized noncitizen voting in city elections, and Oakland, California allowed noncitizen voting for the office of school board director. As of June 2023, the District of Columbia and municipalities in California, Maryland, and Vermont had authorized noncitizens to vote in certain local elections. In 2023, Congress approved the District of Columbia's decision to authorize noncitizen voting in local elections.

Page 489, note 2, replace the first two sentences of the last paragraph with:

In 2022, New York City passed a law allowing lawful permanent residents and work-authorized noncitizens, dubbed "municipal voters," to vote in municipal elections. The law also conferred eligibility to enroll in political parties. A state court judge ruled that the law violated New York's constitution and enjoined it. *See Fossella v. Adams*, No. 172, slip op. 85007/2022 (N.Y. S.Ct., June 27, 2022). The City filed an appeal in July 2022.

Page 497, at the end of the first full paragraph, add the following:

The Supreme Court dismissed the case on ripeness and standing grounds without reaching the merits. *Trump v. New York*, 141 S. Ct. 530, 537 (2020). In January 2021, President Biden issued an executive order reversing his predecessor's order to exclude undocumented immigrants. Exec. Order 13986, *Ensuring a Lawful and Accurate Enumeration and Apportionment Pursuant to the Decennial Census*, 86 Fed. Reg. 7015 (2021).

Page 511, replace the last sentence before the citation in the second full paragraph with:

Qualified aliens included permanent residents and noncitizens paroled into the United States, as well as others. Asylees and refugees were not subjected to the five-year bar to eligibility.

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. An attempt by thirteen states to reinstate the Trump-era public charge rule failed. *City & Cnty. Of San Francisco v. United States Citizenship & Immigr. Servs.*, 992 F.3d 742 (9th Cir. 2021). In September 2022, the Biden administration issued a replacement public charge rule, which essentially reverts to the pre-2019 public charge criteria that required receipt of government cash benefits for income or long-term institutionalization at government expense. *See Public Charge Ground of Inadmissibility*, 87 Fed. Reg. 55472 (2022). As before, relatively few immigrants would be subject to the proposed public charge rule. *See Public Charge Resources*, USCIS (April 6, 2023).

Page 512, replace the last two sentences of the third full paragraph with:

As of June 2023, 35 states have done so. As a result, some noncitizen children became eligible for both Medicaid and CHIP as long as they are "lawfully residing in the United States." *See* Kaiser Family Found., *Medicaid/CHIP Coverage of Lawfully-Residing Immigrant Children and Pregnant Women*, Jan. 1, 2023.

Page 513, replace the second sentence of the first paragraph with:

Now, as before, "qualified aliens" (most lawful permanent residents and several other categories of lawfully present noncitizens) are eligible for Medicaid only after a five-year waiting period. Refugees, asylees, and trafficking victims are among noncitizen groups who are eligible for Medicaid, CHIP, and the ACA immediately without the five-year waiting period. 8 U.S.C. § 1612(2)(A). *See also Immigration Status and the Marketplace*, https://www.healthcare.gov/immigrants/immigration-status; *Coverage for Lawfully Present Immigrants*, https://www.healthcare.gov/immigrants/lawfully-present-immigrants.

Page 513, at the end of the second paragraph, add:

In April 2023, the Department of Health and Human Services proposed a regulation that would revise the definition of "lawful presence" to allow recipients of Deferred Action for Childhood Arrivals (DACA) to obtain health insurance through Medicaid or a Patient Protection and Affordable Care Act marketplace. *See Clarifying Eligibility for a Qualified Health Plan Through an Exchange, Advance Payments of the Premium Tax Credit, Cost-Sharing Reductions, a Basic Health Program, and for Some Medicaid and Children's Health Insurance Programs,* 88 Fed. Reg. 25313 (2023).

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. U.S. 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. 2021). Subsequent motions have continued to stay the litigation.

Page 533, at the end of first full paragraph, add:

In June 2022, USCIS issued policy guidance clarifying that a noncitizen's presence in the United States after triggering the three- or ten-year bars would not render the noncitizen inadmissible under INA § 212(a)(9)(B). U.S. Dep't of Homeland Security, *Effect of Seeking Admission Following Accrual of Unlawful Presence*, USCIS Policy Manual, Vol. 8, Part O, Chapter 6 (June 24, 2022). In other words, a noncitizen is not required to remain outside the United States during the period of inadmissibility triggered under § 212(a)(9)(B). The BIA issued a decision to the same effect on February 14, 2023. *Matter of Duarte-Gonzalez*, 28 I. & N. Dec. 688, 688 (BIA 2023).

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 not defend the Trump-era public charge rule in court. Citing the Biden administration's decision, thirteen states sued to defend the Trump-era rule. After the Ninth Circuit Court of Appeals rejected their attempt to intervene, the Supreme Court granted certiorari and scheduled oral argument on the question whether the states could step in to defend the Trump-era rule. Ultimately, the Supreme Court dismissed the case as improvidently granted. *Arizona v. City & County of San Francisco*, 142 S. Ct. 417 (2022).

While litigation over the Trump-era rule was pending, in February 2022 DHS published a new proposed rule for defining public charge inadmissibility. *See Public Charge Ground of Inadmissibility*, 87 Fed. Reg. 10570 (2022). The rule became final on September 9, 2022, and covers applications postmarked on or after December 23, 2022. The new rule codifies, in many respects, the 1999 field guidance that governed public charge determinations until the Trump administration attempted to redefine it. Under the new rule, the government will not consider receipt of noncash benefits and healthcare benefits other than long-term institutionalization at government expense in making its determination. In addition, the new rule narrows its application only to those likely to become "primarily" dependent on the covered benefits. *See* U.S. Dep't of Homeland Security, *Public Charge Ground of Inadmissibility Final Rule*, 87 Fed. Reg. 55472 (2022).

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

Soon after President Biden took office, the Centers for Disease Control and Prevention (CDC) exercised its authority under Title 42 of the U.S. Code to require a negative COVID-19 test or other attestation one day before departure for air travelers entering the U.S. from a foreign country. The Biden administration, however, declared an end to the COVID-19 public emergency effective May 11, 2023. As the emergency ended, the Biden administration revoked the vaccination requirement for noncitizens arriving by air. Joseph R. Biden, *Revoking the Air Travel COVID-19 Vaccination Requirement*, Proclamation 10575, 88 Fed. Reg. 30889 (2023). Other orders from the administration ended the requirement for land and ferry entries. U.S. Dep't of Homeland Security, *Notification of Termination of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Between the United States and Mexico*, 88 Fed. Reg. 30035-01 (May 10, 2023); *Notification of Termination of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Between the United States and Canada*, 88 Fed. Reg. 30033-01 (May 10, 2023).

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).

As noted in the Updates to pages 66 in Chapter One and pages 736 and 747 in Chapter Seven, the Trump administration also used Title 42 orders as a general border regulation tool, using the COVID-19 pandemic as the basis for a wide-ranging deterrent to asylum claimants and other would-be entrants at the southern border. *See* Centers for Disease Control & Prevention, U.S. Dep't of Health & Human Servs., *Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists*, 85 Fed. Reg. 65806 (2020).

The Biden administration kept the order in place initially, but in April 2022, attempted to terminate the Title 42 orders. Centers for Disease Control & Prevention, U.S. Dep't of Health & Human Servs., *Public Health Determination and Order Regarding the Right to Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists* (2022). Subsequent litigation prevented the administration from implementing its termination of the Title 42 orders. See, e.g., *Louisiana v. Centers for Disease Control & Prevention*, 2022 WL 1604901 (W.D. La. 2022). While a case addressing the legality of the termination was pending before the Supreme Court, however, the Biden administration announced that the public-health emergency for COVID-19 would end on May 11, 2023. Sharon LaFraniere & Noah Weiland, *U.S. Plans to end Public Health Emergency for Covid in May*, N.Y. Times, Feb. 3, 2023. In light of that development the Court cancelled oral argument and later dismissed the case. See *Arizona v. Mayorkas,* 143 S.Ct. 1312 (May 18, 2023) (vacating and remanding with instructions to dismiss the case as moot); Amy Howe, *Court Dismisses Title 42 Case*, SCOTUSBlog, May 18, 2023. Without an ongoing, declared public-health emergency, the statutory prerequisite for Title 42 orders ceased to exist, and

thus the orders expired on the same day as the emergency declaration was lifted. U.S. Dep't of Homeland Security, *Fact Sheet: U.S Government Announces Sweeping New Actions to Manage Regional Migration*, April 27, 2023.

With Title 42 orders no longer applicable, migrant processing at the border returned to the rules and procedures generally used for immigration control in Title 8. Recent regulations proposed by the Biden administration, however, would change significantly the Title 8 asylum process at the border from that which governed previously. See U.S. Dep't of Homeland Security, Notice of Proposed Rulemaking, *Circumvention of Lawful Pathways*, 88 Fed. Reg. 11704 (2023). The proposed rule creates a presumption against eligibility for asylum for migrants who cross the border unlawfully and have not sought asylum in a third country through which they traveled on their way to the United States. In addition, the rule would require migrants to schedule appointments at U.S. Border Patrol sites through an online application available on mobile phones (the "CBP One" app). The proposal has faced substantial criticism, including the claim that it replicates Trump-era policies, contravenes federal law, and effectively forecloses asylum for many asylum-seekers. *See, e.g.*, Miriam Jordan, *Biden Administration Announces New Border Crackdown*, N.Y. Times, Feb. 21, 2023.

On the day it was to go into effect, immigrant advocacy groups sued to enjoin its implementation, arguing that it unlawfully restricts asylum availability in contravention of the INA. *East Bay Sanctuary Covenant, et. Al. v. Biden,* Amended and Supplemental Complaint for Declaratory Relief, 18-CV-06810-JST (N.D. Cal. May 11, 2023). The district court vacated the new regulation, but stayed its ruling for two weeks, allowing the federal government to seek review in the Ninth Circuit. *Id.*, Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment (N.D. Cal. July 25, 2023). Meanwhile, the state of Texas sued the administration in federal court in Texas over aspects of the same proposed rule, arguing that the mobile phone application encourages unlawful migration. *Texas v. Mayorkas*, Complaint, 2:23-CV-00024 (W.D. Tex. May 23, 2023). That district court has yet to issue a decision as of this Update.

Page 564, at the end of second full paragraph entitled "Group-based Exemptions", add:

Following the U.S. military withdrawal from Afghanistan, the Biden administration added exemptions for certain Afghans, including those who supported U.S. military interests against the Taliban, civil servants, and those who provided only de minimis support to a terrorist organization. *See Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act*, 87 Fed. Reg. 37523 (2022).

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.

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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. *Sanchez v. Mayorkas*, 141 S. Ct. 1460 (2021).

As noted in the Updates to pages 304 in Chapter Three and 828 in Chapter Seven, USCIS issued a policy alert clarifying that TPS holders returning from authorized travel will be deemed to have been "inspected and admitted." *See* U.S. Citizenship & Immigr. Servs., Policy Alert, *Temporary Protected Status and the Eligibility for Adjustment of Status under Section 245(a) of the Immigration and Nationality Act* (July 1, 2022); U.S. Citizenship & Immigr. Servs., Policy Memorandum, *Rescission of Matter of Z-R-Z-C- as an Adopted Decision; Agency Interpretation of Authorized Travel by TPS Beneficiaries* (July 1, 2022). This new policy means that certain TPS holders who return from authorized travel would meet the threshold requirement of INA § 245 and might be eligible to adjust status even if they were in the U.S. without admission or parole when they initially received TPS.

Page 660, after the end of the second full paragraph, add new paragraphs:

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 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.

Subsequent BIA rulings have qualified the scope of this "one-document" rule. In *Matter of J-L-L*, 28 I. & N. Dec. 684 (BIA February 10, 2023), the BIA held that *Pereira* and *Niz-Chavez* were inapplicable to removals that occurred before 1996, when the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which first specified the relevant requirements, was enacted. Pre-IIRIRA statutes did not require time-and-place language in charging documents for triggering the stop-time rule. *See also Gutierrez-Alm v. Garland*, 62 F.4th 1186, 1196 (9th Cir. 2023) (*Pereira* does not apply to charging documents issued before IIRIRA "under a separate statutory framework with distinct requirements"). *Matter of Nchifor*, 28 I. & N. Dec. 585 (BIA June 24, 2022), suggests that, with respect to cancellation of removal, a petitioner cannot benefit from the one-document rule if she raises it for the first time on a motion to reopen. There, the petitioner had been served with an NTA

in 2019 and subsequent notices had supplied her hearing dates and times; she appeared for all her hearings and failed to obtain relief from removal. In response to her motion to reopen based on *Niz-Chavez*, the BIA held that *Niz-Chavez* did not warrant terminating removal proceedings in cases where an objection to missing time or place information had not been raised before the immigration judge.

Page 666, for the carryover paragraph from 665, note the modifications to *Pereira v. Sessions* by *Niz-Chavez v. Garland* and subsequent BIA rulings, referenced in the Update to page 660, above.

Page 696, after the first full paragraph, add:

In March 2022, USCIS issued a rule clarifying aspects of SIJS eligibility and facilitating the ability of eligible individuals to obtain work permits (employment authorization documents (EADs)) while awaiting adjustment of status. U.S. Citizenship & Immigr. Servs., *Special Immigrant Juvenile Petitions*, 87 Fed. Reg. 13066 (2022). In addition, USCIS issued a policy alert announcing that it would consider granting deferred action on a case-by-case basis for SIJ-classified individuals who are ineligible to adjust because of the unavailability of visas and resulting backlog. U.S. Citizenship & Immigr. Servs., *Special Immigrant Juvenile Classification and Deferred Action*, PA-2022-10 (Mar. 7, 2022).

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* U.S. 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. Further, as

discussed in the Update to page 858-59, Attorney General Garland stated that the department is considering additional rulemaking that would address the authority of immigration judges to terminate removal proceedings. *See Matter of Coronado Acevedo*, 28 I. & N. Dec. 648 (BIA 2022).

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 Sec. of Homeland Sec. David Pekoske, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Jan. 20, 2021). These 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*, 524 F. Supp. 3d 598 (S.D. Tex. 2021) (finding state had standing to challenge federal policy and issuing nationwide injunction). A subsequent ruling by the same district judge enjoined the enforcement priorities in the interim memo. 555 F. Supp. 3d 351 (S.D. Tex. 2021).

While litigation over the interim priorities was pending, DHS issued new guidance to replace the interim memorandum. Memorandum from Sec. of Homeland Sec. Alejandro Mayorkas to ICE, CBP, USCIS directors, *Guidelines for the Enforcement of Civil Immigration Laws* (Sept. 30, 2021). This new guidance directs enforcement agents to use their discretion to focus on high priority cases, including national security threats, immediate threats to public safety, and threats to border security. It further instructs officers to use a totality of circumstances approach to determining whether to proceed against a particular noncitizen. Drew Tipton, the same federal judge who enjoined the interim priorities, vacated Secretary Mayorkas' guidance memorandum. *Texas v. United States*, 2022 WL 2109204 (S.D. Tex. June 10, 2022).

In late July 2022, the Supreme Court granted certiorari in *United States v. Texas*, and directed the parties to brief three questions: (1) whether state plaintiffs had standing to challenge enforcement guidelines; (2) whether the guidelines violate INA §§ 236(c) or 241(a), or the APA; and (3) whether INA § 242(f)(1) prevents a federal court from stopping the enforcement of enforcement guidelines. The final question for review raised the applicability of *Garland v. Aleman Gonzales,* 142 S.Ct. 2057 (2022) [described in greater detail in the Update to page 992 in Chapter Eight]. *Aleman Gonzales* casts doubt on the availability of injunctive relief as a remedy for violations of immigration enforcement statutes. Whether the ruling similarly applies to vacaturs, which also effectively restrain the federal government's enforcement of the INA, potentially influences the outcome of litigation over the enforcement priority guidelines.

On June 23, 2023, the Supreme Court held on the first question that states lacked standing to challenge the enforcement priorities and therefore federal courts lacked jurisdiction to review the claims. *United Stats v. Texas*, 599 U.S. --, 143 S.Ct. 1964, 1970 (2023) (Kavanaugh, J., joined by Roberts, C.J., Sotomayor, Kagan, Jackson, J.J.) ("The states have not cited any precedent, history, or tradition of courts ordering the Executive Branch to change its arrest or prosecution policies so that the Executive Branch makes more arrests or initiates more prosecutions."). The majority opinion cited to both *Reno v. AADC* [covered in greater detail on pages 647-59 in Chap. 5, and pages 702-04 in Chap. 6] and *Arizona v. United States* [covered in greater detail on pages 1050-65 in Chap. 9] for the proposition that "enforcement discretion over arrests and prosecutions extends to the immigration context." *Id.* at 1971-72. The majority was careful, however, to note that because plaintiffs lacked standing, its ruling expressed no opinion on whether the President and the Executive Branch were complying with removal statutes. *Id.* at 1974-75. Three Justices (Thomas, Gorsuch, Barrett, J.J.) concurred only in judgment. Justice Alito was the sole dissenter, arguing that Texas had standing because the enforcement priorities 'inflict[] substantial harm on the State and its residents by releasing illegal aliens with criminal convictions for serious crimes." *Id.* at 1989.

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 Secretary Mayorkas on DACA*, Mar. 26, 2021.

On July 16, 2021, however, District Judge Andrew Hanen, who 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*, 549 F. Supp. 3d 572 (S.D. Tex. 2021). The court held that DACA violated the procedural dictates of the APA because it was not promulgated with notice-and-comment rulemaking. Further, Judge Hanen opined 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.

While the case was pending appeal at the Fifth Circuit, the Biden administration published a final rule codifying the program created by the 2012 DACA memorandum, including maintaining the program's eligibility criteria. U.S. Dep't of Homeland Security, *Deferred Action for Childhood Arrivals*, 87 Fed. Reg. 53152 (2022). On appeal, the Fifth Circuit kept the district court's stay in place (allowing current DACA recipients to continue and renew their status), but affirmed the district court's ruling that the 2012 DACA memorandum was unlawful. *Texas v. United States*, 50 F.4th 498 (5th Cir. 2022). In addition, the appellate court remanded the legality of the newly promulgated DACA rule back to the district court. The district court heard argument on the case on June 1, 2023, but has not issued a final decision. Because the new rule mostly codified the prior memo, many observers expect Judge Hanen also to hold the rule unlawful.

On April 13, 2023, the Biden administration also announced a forthcoming rule that would amend the Medicaid and ACA definitions of "lawful presence" to make DACA recipients eligible for coverage. *See* White House Press Release, *President Biden Announces Plan to Expand Health Coverage to DACA Recipients*, April 13, 2023.

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). Neither bill received a Senate vote.

CHAPTER SEVEN

ASYLUM AND OTHER HUMANITARIAN PROTECTIONS

page 730, replace the second paragraph, with these three new paragraphs:

The annual target for resettling refugees in the United States fluctuated between 70,000 and 100,000 for much of the past three decades, but plummeted when President Trump took office in 2017. He cut in half the 110,000 resettlement goal President Obama had set for Fiscal Year (FY) 2017, and by FY 2020 the Trump administration had reduced the annual resettlement authorization to 18,000 refugees. The number of refugees actually resettled in FY 2020 was only half that amount, approximately 11,800.

As noted in the Update to page 65 in Chapter One, President Biden changed course and increased the refugee admissions authorization to 62,500 for FY 2021, 125,000 for FY 2022, and 125,000 for FY 2023. *See Emergency Presidential Determination on Refugee Admissions for Fiscal Year 2021*, 86 Fed. Reg. 24475 (2021); *Presidential Determination on Refugee Admissions for Fiscal Year 2022*, 86 Fed. Reg. 57527 (2021); *Presidential Determination on Refugee Admissions for Fiscal Year 2023*, 87 Fed. Reg. 60547 (2022). The numbers of refugees actually resettled each year have remained extremely low: 11,411 in FY 2021, 25,500 in FY 2022, and 31,800 in the first eight months of FY 2023. *See* Nicole Ward & Jeanne Batalova, *Refugees and Asylees in the United States* (Migration Pol'y Inst. 2023). Although the numbers of refugees resettled is far below the four-decade annual average of 73,000, more refugees arrived in the first eight months of FY 2023 than have arrived in the United States since FY 2017. Seventy percent of those resettled in FY 2023 came from four countries: Democratic Republic of the Congo, Myanmar, Syria, and Afghanistan. *Id*. *See also* U.S. Dep't of State, Refugee Processing Center, *Refugee Admissions Report*, June 30, 2023.

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* 88 Fed. Reg. 21694 (2023); Mark Greenberg, Stephanie Heredia, *et al.*, *Relaunching the Central American Minors Program: Opportunities to Enhance Child Safety and Family Reunification* (Migration Pol'y Inst. 2021). This allows parents in the United States to petition for their children who are at risk in their home countries. Parents in many different circumstances – temporary protected status (TPS), deferred enforced departure, deferred action, withholding of removal, paroled into the United States, or permanent residents – are eligible to participate if they are nationals of El Salvador, Guatemala, or Honduras. *See* U.S. Citizenship & Immigr. Servs., *Central American Minors (CAM) Refugee and Parole Program*. DNA relationship testing is required to verify familial ties. *See* U.S. Dep't of State, *Central American Minors (CAM) Program*. Reliable statistics are difficult to obtain, but there are reports that more than 300 individuals were paroled into the United States via the CAM program in FY 2022. *See* Rachel Schmidtke & Yael Schacher, *Mixed Blessing: Guatemalan Experiences under the New Central American Minors Program*, Refugees International, March 15, 2023.

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

After the 2020 employment authorization regulation was vacated, the district court ruled that the case was moot and dissolved the preliminary injunction. *Casa de Maryland, Inc. v. Mayorkas,* 8:20-CV-02118-PX (D. Md. May 18, 2023).

Moreover, when USCIS announced on February 8, 2022, that it would no longer (1) bar employment authorization for asylum seekers who did not enter at a port of entry or (2) impose a 365-day waiting period on asylum seekers requesting work authorization. These decisions reinstated the earlier practice; asylum seekers can file applications for work authorization 150 days after filing their asylum application and are eligible to work when a total of 180 days have passed since the filing. *See* U.S. Citizenship & Immigr. Servs., *USCIS Stops Applying Certain EAD Provisions for Asylum Applicants.* Furthermore, responding to a backlog in processing applications to renew work authorization, USCIS entered a temporary rule on May 4, 2022. Those who have filed renewal applications will receive an automatic 540-day extension past the expiration date on their employment authorization documents. *See Temporary Increase of the Automatic Extension Period of Employment Authorization and Documentation for Certain Renewal Applicants*, 87 Fed. Reg. 26614 (May 4, 2022).

page 736, replace the first full paragraph with these two paragraphs:

Concurrently with its regulation to ban asylum for all who did not enter at a port of entry, DHS took steps to limit the numbers of individuals who could file asylum applications at ports of entry. The Trump administration also introduced multiple regulations to make it harder to access asylum in the United States. One of the lame duck regulations, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80274 (2020), disqualified from asylum individuals who spent more than 14 days in a transit country enroute to the United States, those who suffered persecution at the hands of nongovernment officials, applicants who based their asylum claim on gender, and many others. Known in the advocacy community as the "Death to Asylum" regulation, a nationwide preliminary injunction prevented it from going into effect. *Pangea Legal Services v. U.S. Dep't of Homeland Security,* 512 F. Supp. 3d 966 (N.D. Cal. 2021). The injunction remains in effect and the case has been administratively closed. *See* Docket Entry #72, Oct. 21, 2021.

Simultaneously with the implementation of regulations and administrative practices restricting access to asylum, the Trump administration relied on the COVID-19 pandemic to suspend indefinitely all asylum applications at the border. From March 2020 through the end of April 2022, the federal government expelled more than 1.8 million individuals under the Title 42 public health rule barring the entry of asylum seekers. *See* Amer. Immigr. Council, *A Guide to Title 42 Expulsions at the Border*, May 25, 2022. As noted in the Update to page 66 in Chapter One and to page 545 in Chapter Five, in April 2022 the Biden administration announced it would revoke the rule based on Title 42. Shortly after the revocation announcement a federal district judge in Louisiana issued a preliminary

injunction against the revocation, *Louisiana v. Centers for Disease Control*, 2022 WL 1604901 (W.D. La. May 20, 2022). The government appealed, but the Title 42 policy remained in effect until May 11, 2023, when the Biden administration ended the public health emergency concerning COVID-19. See Section B2 of this Chapter (pages 742-48) for further discussion of the Title 42 policy change and other recent developments along the U.S.-Mexico border. For an overview of the changes and impact of the Title 42 policy, *see* Muzaffar Chishti & Kathleen Bush-Joseph, *U.S. Border Asylum Policy Enters New Territory Post-Title 42* (Migration Pol'y Inst. 2023).

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

The backlog has continued to worsen. EOIR reported 1,408,669 pending cases at the end of FY 2021. During that year EOIR received 244,123 new cases and completed 115,885. In FY 2022, the volume of pending cases grew to 1,791,832. *See* EOIR, *Workload and Adjudication Statistics: Pending Cases* (Apr. 21, 2023.) In April 2023, immigration courts had 1,979,313 pending cases. *Id.* The backlog of asylum cases totaled 1,565,966, with 787,882 claims pending immigration court hearings and 778,084 claims pending hearings before USCIS asylum officers. *See A Sober Assessment of the Growing U.S. Asylum Backlog*, TRAC Immigration Report (Dec. 22, 2022). To put the backlog in context, asylum applicants on average wait four years for their initial asylum hearing, with a final decision frequently taking several more years. *See* Muzaffar Chishti, Doris Meissner, Stephen Yale-Loehr, Kathleen Bush-Joseph, & Christopher Levesque*, At the Breaking Point: Rethinking the U.S. Immigration Court System* (Migration Pol'y Inst. July 2023).

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

The most recent data available show that 17,700 individuals were granted asylum in FY 2021, a marked decrease from 31,000 asylum grants in FY 2020 and 46,000 asylum grants in FY 2019. In FY 2021, roughly 60 percent received asylum in the affirmative procedure, compared to 40 percent in the defensive process. *See* Nicole Ward & Jeanne Batalova, *Refugees and Asylees in the United States* 10 (Migration Pol'y Inst. 2023).

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, suspended the 2019 expansion and ordered the Secretary of Homeland Security to report on whether to modify or revoke the Trump administration's extension of expedited removal throughout 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). On March 21, 2022, DHS formally rescinded the July 2019 expansion of expedited removal. *See Recission of the Notice of July 23, 2019 Designating Aliens for Expedited Removal*, 87 Fed. Reg. 16022 (2022).

page 741: in the second full paragraph, replace the last sentence, as follows:

In the past those found to have a credible fear have been detained and scheduled for a full removal hearing in immigration court, where they can raise their claim for protection defensively. The new asylum regulation, *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers* (Asylum Processing Rule or APR), 87 Fed. Reg. 18078 (2022), authorizes asylum officers to provide nonadversarial asylum interviews to those determined to have a credible fear. 8 CFR § 208.16(a). Asylum officers can grant asylum; if they do not grant asylum, they can assess whether the asylum seeker is eligible for withholding of removal under INA § 241(b)(3) or under the Convention Against Torture. *Id.* Asylum officers refer all cases in which they do not grant asylum to immigration court, including those where they have determined eligibility for withholding. *See* 8 CFR § 208.14(c)(1). The removal hearings in immigration court proceed under an accelerated timeline. *See* 8 CFR § 1240.17.

DHS and EOIR planned to implement the APR gradually, as they slowly increased capacity. As of February 2023, 4,760 applications had been processed under the APR. Of these, 1,860 had established credible fear and 233 were granted asylum. *See* U.S. Dep't of Homeland Security, Office of the Citizenship and Immigration Services Ombudsman, *2023 Annual Report to Congress*. The APR remains in effect, but in April 2023 DHS paused referring asylum seekers to asylum officers for asylum merits interviews under the rule as the agency diverted asylum officers away from full asylum adjudications in order to conduct credible fear interviews. *See* Hamed Aleaziz. *Signature Biden Asylum Reform Policy Is Now On Hold,* L.A. Times, Apr. 12, 2023; Human Rights First, *Asylum Processing Rule At One Year* (June 2023).

page 742: in the last sentence of the first full paragraph, delete the word "has" from "has shifted" and add a new last sentence, as follows:

As noted above, the new asylum regulation, *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, 87 Fed. Reg. 18078 (2022), enhances the responsibilities of asylum officers in credible fear hearings. It does not rely on Border Patrol agents, but instead authorizes asylum officers both to carry out credible fear hearings and subsequently to provide nonadversarial asylum interviews to those determined to have a credible fear. 8 CFR § 208.16(a).

pages 742-43: at the end of the carryover paragraph, replace the last sentence with the following sentence followed by two new paragraphs:

After the Ninth Circuit affirmed the preliminary injunction, 950 F.3d 1242 (9th Cir. 2020), *amended and superseded on denial of rehearing en banc*, *East Bay Sanctuary Covenant v. Biden,* 993 F. 3d 640 (9th Cir. 2021), the rule was amended, rendering the preliminary injunction moot.

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). One year later, USCIS announced that it no longer considered manner of entry into the United States in adjudication of asylum applications and requests for employment authorization. *See* U.S. Dep't of Homeland Security, *USCIS Stops Applying Certain EAD Provisions for Asylum Applicants*, Feb. 8, 2022.

As noted in the Update to page 545 in Chapter Five, recent regulations proposed by the Biden administration create a presumption against eligibility for asylum for migrants who cross the border unlawfully and have not sought asylum in a third country through which they traveled on their way to the United States. *See* U.S. Dep't of Homeland Security, Notice of Proposed Rulemaking, *Circumvention of Lawful Pathways*, 88 Fed. Reg. 11704 (2023). The proposal has faced substantial criticism and multiple lawsuits. *See, e.g.*, Miriam Jordan, *Biden Administration Announces New Border Crackdown*, N.Y. Times, Feb. 21, 2023. These developments are discussed in more detail in the Update to page 744 of this Chapter.

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

"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*, Amer. Immigr. Council, Mar. 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, and the "metering" waitlists grew to include at least 20,600. *See Human Rights Travesty: Biden Administration Embrace of Trump Asylum Expulsion Policy Endangers Lives, Wreaks Havoc*, Human Rights First (Aug. 2021). Many asylum seekers who arrived after the "metering" lists had closed waited near the border to see if the waitlists would reopen. *Id.* For a fuller discussion of "metering," *see* Hillel R. Smith, *The Department of Homeland Security's "Metering" Policy: Legal Issues* (Cong. Res. Serv. 2022).

On November 1, 2021, DHS rescinded Trump administration memoranda regarding "metering" and issued new guidance that Customs and Border Protection (CBP) units must increase capacity to process asylum seekers at the border and allow individuals to wait in line to present their claims for protection. CBP officers may not "instruct travelers that they must return to the POE [Port of Entry] at a later time." U.S. Customs & Border Prot.,

Guidance for Management and Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry, Nov. 1, 2021. Nonetheless, until May 11, 2023, most asylum seekers continued to be barred from entering the United States based on the 2020 issuance of a public health ruling pursuant to Title 42. See Update to pages 746-747 of this Chapter for further discussion of the Title 42 policy change. Related discussions of the Title 42 public health bar can be found in the 2023 Update to pages 66, 545, 736, and 746 of the casebook.

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, but a lawsuit filed by Texas and Missouri led U.S. District Judge Kacsymaryk of the Northern District of Texas to reject the federal government's action, vacate the DHS decision, and issue a nationwide injunction against terminating MPP. *Texas v. Biden*, 554 F. Supp. 3d 818 ((N.D. Tex. 2021). On October 29, 2021, DHS issued a new decision to terminate MPP, accompanied by an expanded memorandum and explanation for the decision. The Fifth Circuit rejected the government's procedural and substantive arguments and affirmed the trial court. *Texas v. Mayorkas*, 20 F. 4th 928 (5th Cir. 2021). The U.S. Supreme Court granted certiorari, 142 S. Ct. 1098 (Mem) (2022), provided expedited review, and reversed. *Texas v. Biden,* 2022 WL 2347211 (June 30, 2022). The majority opinion by Justice Roberts concluded that the DHS October 2021 decision to terminate MPP was reviewable under the Administrative Procedure Act (APA) as final agency action, and that the Secretary of Homeland Security had discretion to end the policy of returning noncitizens to Mexico. The Court remanded the case to the district court to determine whether the October 2021 DHS decision complied with the APA. On December 15, 2022, Judge Kacsymaryk granted the motion filed by Texas and Missouri to postpone the termination of the MPP pending the court's ruling on the APA challenge to the DHS decision. *Texas v. Biden*, 2022 WL 17718634. An appeal was filed in the Fifth Circuit on Feb. 14, 2023, but no further proceedings have been reported. *Id.*

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

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* U.S. 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 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. As of July 2023, the United States has a safe third country agreement with only one country, Canada. *See* Agreement between the Government of Canada and the Government of the United States for Cooperation in the Examination of Refugee Status Claim from Nationals of Third Countries (Dec. 5, 2002). In June 2023, the Supreme Court of Canada upheld this agreement against a constitutional challenge that it violates the right to life, liberty, and security. The Court remanded the dispute to the trial court to determine whether the U.S. approach to gender violence asylum claims breaches the constitutional equal protection guarantee. *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17 (June 16, 2023).

As noted in the Update to page 545 in Chapter Five, recent regulations proposed by the Biden administration create a presumption against eligibility for asylum for migrants who cross the border unlawfully and have not sought asylum in a third country through which they traveled on their way to the United States. *See* U.S. Dep't of Homeland Sec., Notice of Proposed Rulemaking, *Circumvention of Lawful Pathways*, 88 Fed. Reg. 11704 (2023). The proposal has faced substantial criticism, including the claim that it replicates Trump-era policies, contravenes federal law, and effectively forecloses asylum for many asylum-seekers. *See, e.g.*, Miriam Jordan, *Biden Administration Announces New Border Crackdown*, N.Y. Times, Feb. 21, 2023. On the day it was to go into effect, immigrant advocacy groups sued to enjoin its implementation, arguing that it unlawfully restricts asylum availability in contravention of the INA. *East Bay Sanctuary Covenant, et. al. v. Biden,* Amended and Supplemental Complaint for Declaratory Relief, 18-CV-06810-JST (N.D. Cal. May 11, 2023). On July 25, 2023, the federal district court for the Northern District of California vacated the new regulation, though it stayed its ruling for two weeks, allowing the federal government to seek review in the Ninth Circuit. Meanwhile, the state of Texas sued the Biden administration in federal court in Texas, arguing that different aspects of the same proposed rule encourage unlawful migration. *Texas v. Mayorkas*, Complaint, 2:23-CV-00024 (W.D. Tex. May 23, 2023). As of this Update, the federal district court in Texas has yet to issue a ruling.

page 746, replace the third full paragraph with this text:

Although arriving migrants were not allowed to apply for asylum, there was cursory screening to see if the individual had a fear of torture or of persecution that would threaten her life or freedom. The majority of asylum seekers were returned to Mexico in less than two hours. Asylum seekers from other countries were delivered to ICE, which rapidly returned them to their homelands. *See* Ben Fox*, U.S. Extends Heightened Border Enforcement During Coronavirus Crisis*, Assoc. Press, May 19, 2020. During the first two years of the Title 42 policy, the Border Patrol carried out 1.87 million expulsions. From March 2020 through

September 2021 only 3,217 individuals received a screening for torture; 272 were allowed to apply for asylum. *See* Amer. Immigr. Council, *A Guide to Title 42 Expulsions at the Border* 3-4 (May 2022).

page 747, replace and revise the first full paragraph, as follows, and then add the following four new paragraphs:

Lawsuits raised challenges that the sweeping public health order violated statutory protections provided by INA §§ 208 and 241(b)(3), the Convention Against Torture, the Trafficking Victims Protection Reauthorization Act, and the Administrative Procedure Act. *See, e.g., G.Y.J.P. v. Wolf,* 2020 WL 4192490 (D.D.C. July 21, 2020). They argued that the Title 42 ban of asylum seekers was a pretext, as demonstrated by the exemption of hundreds of thousands of individuals—students, truck drivers, and professional athletes—from the public health ban. *See id. See also* Lucas Guttentag, *COVID-19 and Immigration Border Enforcement: Understanding CDC "Expulsions" of Asylum Seekers and Unaccompanied Minors*, 25 Bender's Immigr. Bull. 815 (2020).

As discussed more fully in the Update to page 66 in Chapter One, 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 remained 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. In the spring of 2022, the D.C. Circuit ruled that it was unlawful to turn away families without allowing an opportunity to seek protection from persecution. *Huisha-Huisha v. Mayorkas*, 27 F. 4th 718 (D.C. Cir. 2022).

On April 1, 2022, the Centers for Disease Control announced that the availability of vaccines and rapid tests to detect COVID-19 had created circumstances in which a ban on asylum seekers was not necessary, and declared that the Title 42 policy would end on May 23, 2022. Amer. Immigr. Council, *A Guide to Title 42 Expulsions at the Border* (May 2022). Shortly after the termination announcement, a federal district judge in Louisiana ruled that the CDC's April 1 order violated the Administrative Procedure Act due to failure to seek notice and comment before ending the Title 42 ban. The court issued a nationwide preliminary injunction keeping the ban on asylum seekers in place, *Louisiana v. Centers for Disease Control*, 2022 WL 1604901 (W.D. La May 20, 2022). The federal government appealed, but the Title 42 policy remained in effect while the appeal was pending.

As noted in the Update to page 545 in Chapter Five, in January 2023, the Biden administration announced that it would not renew the public-health emergency for COVID-19 when it expired on May 11, 2023. *See* Sharon LaFraniere & Noah Weiland, *U.S. Plans to end Public Health Emergency for Covid in May*, N.Y. Times, Feb. 3, 2023. In light of that development, the U.S. Supreme Court cancelled oral argument and later dismissed the

pending Title 42 case. *See Arizona v. Mayorkas,* 143 S.Ct. 1312 (May 18, 2023) (*vacating and remanding with instructions to dismiss the case as moot*); Amy Howe, *Court Dismisses Title 42 Case*, SCOTUSBlog, May 18, 2023. Without an ongoing, declared public-health emergency, the statutory prerequisite for Title 42 orders ceased to exist, and thus the orders expired on the same day as the emergency declaration was lifted. U.S. Dep't of Homeland Security, *Fact Sheet: U.S Government Announces Sweeping New Actions to Manage Regional Migration*, Apr. 27, 2023.

With Title 42 orders no longer applicable, migrant processing at the border returned to the rules and procedures generally used for immigration control in Title 8. Recent regulations proposed by the Biden administration, however, would change significantly the Title 8 asylum process at the border from that which governed previously. *See* U.S. Dep't of Homeland Security, Notice of Proposed Rulemaking, *Circumvention of Lawful Pathways*, 88 Fed. Reg. 11704 (2023). The proposed rule creates a presumption against eligibility for asylum for migrants who cross the border unlawfully and have not sought asylum in a third country through which they traveled on their way to the United States. In addition, the rule would require migrants to schedule appointments at U.S. Border Patrol sites through an online application available on mobile phones (the "CBP One" app). The proposal has faced substantial criticism, including the claim that it replicates Trump-era policies, contravenes federal law, and effectively forecloses asylum for many asylum-seekers. *See, e.g.*, Miriam Jordan, *Biden Administration Announces New Border Crackdown*, N.Y. Times, Feb. 21, 2023. On the day it was to go into effect, immigrant advocacy groups sued to enjoin its implementation, arguing that it unlawfully restricts asylum availability in contravention of the INA. *East Bay Sanctuary Covenant, et. al. v. Biden,* Amended and Supplemental Complaint for Declaratory Relief, 18-CV-06810-JST (N.D. Cal. May 11, 2023). Meanwhile, the state of Texas sued the administration in federal court in Texas over aspects of the same proposed rule, arguing that the use of the mobile phone application encourages unlawful migration. *Texas v. Mayorkas*, Complaint, 2:23-CV-00024 (W.D. Tex. May 23, 2023). On July 25, 2023, the federal district court for the Northern District of California vacated the new regulation, though it stayed its ruling for two weeks, allowing the federal government to seek review in the Ninth Circuit. The federal district court in the Western District of Texas has yet to issue a ruling as of this Update.

page 747, at the end of the second full paragraph, replace the last sentence with the following:

There were 94,752 pending cases of unaccompanied minors at the end of FY 2020 and 94,233 pending cases at the end of FY 2021. *See* EOIR, *Workload and Adjudication Statistics: Pending Unaccompanied Alien Child Cases*, Apr. 21, 2023. Immigration judges issued 27,474 decisions concerning unaccompanied children in FY 2022. *See* EOIR, *Workload and Adjudication Statistics: UAC Statistics*, Oct. 13, 2022. In addition, 79,702 pending cases involved unaccompanied minors at the end of FY 2022. *See* EOIR, *Workload and Adjudication Statistics: Pending Unaccompanied Alien Child Cases*, Apr. 21, 2023.

page 748, at the end of the first full paragraph, add a new paragraph:

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. Dep't 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. Unaccompanied children continued to arrive at the U.S. borders, which led the Centers for Disease Control and Prevention (CDC) to modify the COVID-19 public health order. In July 2021, the CDC determined that the Title 42 ban should not prevent unaccompanied noncitizen children from entering 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 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 (pages 789-819) of this Chapter 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*. One year later Attorney General Merrick Garland referred the 2020 BIA decision to himself for review, automatically staying the decision pending the review. *Matter of Negusie*, 28 I & N Dec. 399 (AG 2021). There were no further decisions as of this Update.

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, 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

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

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 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

[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.

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 concluding the new *Matter of A-R-C-G-* excerpt, replace the heading [*MATTER OF A-B-*] with NOTES AND QUESTIONS ON ASYLUM CLAIMS BASED ON DOMESTIC VIOLENCE.

pages 801-803, replace notes 1 – 5 with new notes 1 – 4, below:

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 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

[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.

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 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 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.

2. The pathbreaking case involving asylum based on domestic abuse is *Matter of R-A,* 22 I & N Dec. 906 (BIA 1999), filed by a woman from Guatemala who had been repeatedly beaten by her husband and whose pleas to the local police had been unavailing. After the BIA decision, subsequent proceedings lasted more than a decade and involved three presidential administrations. In 2000, the Department of Justice published proposed amendments to the asylum regulations, with the intent to make the regulations more amenable to domestic violence claims. *Asylum and Withholding Definitions*, 65 Fed. Reg. 76588 (2000). Attorney General Janet Reno then vacated *Matter of R-A-*, thus removing its precedential value, and remanded the case to the BIA with directions to reconsider the case in the light of the new regulations. When final regulations had not appeared by 2009, DHS agreed that R-A- was eligible for asylum, and the immigration judge granted her asylum. *See* Paul Elias, *Domestic Violence Victim Granted Asylum in U.S.*, Assoc. Press, Dec. 18, 2009; Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching toward Recognition of Women's Claims*, 29 Ref. Surv. Q. 49, 56-60 (2010).

3. The BIA has held that an applicant seeking asylum or withholding of removal based on membership in a particular social group must clearly indicate, on the record and before the immigration judge, the exact delineation of any proposed particular social group. *See Matter of W-Y-C- & H-O-B-*, 27 I & N Dec. 189, 190-91 (BIA 2018). In other words, the BIA generally will address a newly articulated particular social group only if it was first advanced before the immigration judge.

4. *Matter of A-R-C-G-* cites two BIA decisions, *M-E-V-G-* and *W-G-R-*, discussed in Section C3 of this Chapter. Both BIA decisions rejected particular social group asylum claims tied to gang violence. Research has begun to shed light on domestic abuse and gender dynamics within gang culture, see Thomas Boerman & Jennifer Knapp, *Gang Culture and Violence Against Women in El Salvador, Honduras, Guatemala*, 17-03 Immigr. Briefings (2017). As the subsequent cases in this Section indicate, violent encounters with gangs continue to play a prominent role in asylum claims in the United States. *See* Kate Jastram & Sayoni Maitra, *Matter of A-B- One Year Later: Winning Back Gender-Based Asylum Through Litigation and Legislation*, 20-03 Immigr. Briefings (2020).

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 concluding the *Hernandez-Avalos* excerpt, replace the heading [*MATTER OF L-E-A-*] with NOTES AND QUESTIONS ON ASYLUM CLAIMS BASED ON FAMILY MEMBERSHIP.

pages 818-819, replace notes 1 – 5 with new notes 1 – 4, below:

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?

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).

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. *See* 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.

4. **Landowning families.** Prior BIA decisions referred to the likelihood that landowners can qualify as a potential particular social group in some settings. *See Matter of Acosta*, 19 I & N Dec. 211 (BIA 1985) (landownership); *Matter of M-E-V-G-*, 26 I & N Dec. 227 (BIA 2014) (landowners in underdeveloped oligarchical society). Faced with recent asylum claims by families of landowners in Guatemala, the BIA rejected the proposed social group as too amorphous and—because the landowners abandoned the land in response to the drug cartel's lethal violence—lacking immutability. *Matter of E-R-A-L-*, 27 I & N Dec. 767 (BIA 2020). In addition to rejecting the proffered social group, the BIA characterized the asylum seeker in *Matter of E-R-A-L-* as an unfortunate victim of private criminal activity. In late 2020 the Ninth Circuit vacated *Matter of E-R-A-L-* and remanded the case to the BIA for further consideration, including additional briefing. *Albizures-Lopez v. Barr*, 2020 WL 7406164 (9th Cir. Dec. 10, 2020).

page 821, replace the first and second full paragraphs, as follows:

In recognition of the potential overlap in eligibility for CAT protection and asylum, applicants for protection under the CAT file their claims on the I-589 form, the same form used for asylum claims. Generally, immigration judges, not asylum officers, decide applications for protection under the CAT. Immigration judges typically examine all the requests for protection together and determine the applicability of CAT protection only if the person fails to qualify for asylum or regular withholding.

The expedited removal procedure, discussed in Chapter Three, incorporates consideration of claims of torture, as well as persecution, into the credible fear determinations. New asylum regulations that became effective on May 31, 2022, grant asylum officers authority to decide protection claims under the CAT (as well as asylum and withholding of removal pursuant to § 241(b)(3)) in expedited removal cases when asylum seekers are determined to have a credible fear of persecution. *See* 8 C.F.R. § 208.16(a). Asylum officers who grant CAT protection, after concluding that the asylum and withholding claims are not successful, must refer the asylum seekers to immigration judges for removal hearings, 8 C.F.R. § 208.14(c), and the immigration judge will adjudicate all the claims for protection. 8 C.F.R. § 208.16(a).

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). EOIR has not published more recent statistics concerning CAT protection.

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

After President Biden took office in 2021, he reinstated Deferred Enforced Departure (DED) to Liberians. He extended TPS for the six countries involved in litigation challenging the Trump administration terminations: El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan. He continued TPS for citizens of the four countries—Somalia, South Sudan, Syria, and Yemen–that had retained TPS protection under Trump.

In 2021 President Biden granted TPS status to citizens of two additional countries, Venezuela (estimated 300,000 eligible in the United States) and Myanmar (estimated 1,600 eligible). He also redesignated Haiti for TPS, with a new eligibility date (May 21, 2021) replacing the original one (Jan. 12, 2010). This redesignation rendered roughly 100,000 additional Haitians eligible for TPS because Haitians residing in the United States as of May 21, 2021 (as opposed to only those already residing in the United States in early 2010) could now apply for TPS. As the chart below shows, President Biden's continuation of TPS designations when he took office in January 2021 protected roughly 320,000. His new designations in 2021 of Myanmar and Venezuela, plus his redesignation of the eligibility date for Haiti, opened the possibility of TPS for approximately 425,000 additional individuals residing in the United States.

Country	TPS Holders as of January 2021	Newly TPS Eligible
El Salvador	198,420	N/A
Haiti	40,865	100,000
Honduras	60,350	N/A
Myanmar	N/A	1,600
Nepal	10,160	N/A
Nicaragua	3,200	N/A
Somalia	385	100
South Sudan	80	N/A
Sudan	550	N/A
Syria	3,945	1,800
Venezuela	N/A	323,000
Yemen	1,385	480
TOTAL	**319,340**	**426,980**

Source for chart: Muzaffar Chishti & Jennifer Bolter, *Biden at the One-Year Mark: A Greater Change in Direction on Immigration Than is Recognized* (Migration Pol'y Inst. 2022)

In the first half of 2022 President Biden designated three more countries for TPS protection, with estimates that close to 150,000 individuals currently residing in the United States may now be eligible: Ukraine (60,000), Afghanistan (72,500), and Cameroon (12,000). In June 2023 the Biden administration announced 18-month extensions of TPS for nationals of El Salvador, Honduras, Nepal, and Nicaragua. As of the 2023 Update, 16 countries are currently designated for TPS in the United States. *See* USCIS, *Temporary Protected Status*.

As noted in the Update to page 304 in Chapter Three and to page 659 in Chapter Six, on July 1, 2022, USCIS announced a new policy that may allow many more TPS-holders to seek adjustment of status under INA § 245. In a nutshell, USCIS will no longer use the advance parole mechanism for TPS-holders traveling abroad, but instead provide a new TPS travel authorization document. TPS-holders returning to the United States pursuant to the new travel authorization will be deemed to have been "inspected and admitted" into TPS status, which may, in turn, satisfy one of the requirements for adjustment of status. *See* USCIS Policy Memorandum, *Rescission of Matter of Z-R-Z-C- as an Adopted Decision; Agency*

Interpretation of Authorized Travel by TPS Beneficiaries, July 1, 2022. *See* Kjerstin Lewis, *USCIS Restores Pathway to a Green Card for TPS Holders*, Amer. Immigr. Council, July 11, 2022.

Parole

As a complement to protection offered pursuant to the TPS legislation, the Biden administration has established short-term protection via several new initiatives denominated as "humanitarian parole" programs. These country-specific programs allow individuals with private sponsors to enter the United States with permission to reside and work for two years. Approved parolees must have a valid passport and must travel by air to the United States. For an overview of the multiple settings in which the Biden administration has deployed its parole authority, see the Update to page 301 in Chapter Three.

In April 2022 the Biden administration initiated the Uniting for Ukraine parole program. Shortly after, the administration announced a pilot humanitarian parole program for Afghans outside the United States. By the end of the first year of the Russian military attack on Ukraine, close to 300,000 Ukrainians had entered the United States, and more than 200,000 Americans had sought to serve as sponsors. *See* Julia Ainsley, *U.S. Has Admitted 271,000 Ukrainian Refugees Since Russian Invasion, Far Above Biden's Goal of 100,000*, NBC NEWS, Feb. 24, 2023. For a comparison of the multiple dimensions in which the humanitarian parole offered to Ukrainians was more favorable than that offered to Afghans, *see* Muzaffar Chishti & Jessica Bolter, *Welcoming Afghans and Ukrainians to the United States: A Case in Similarities and Contrasts* (Migration Pol'y Inst. 2022).

In October 2022, the administration launched a humanitarian parole program for Venezuela, and in spring 2023, the administration consolidated that program into a parole program for up to 30,000 people per month from Cuba, Haiti, Nicaragua, and Venezuela combined. More than 1.5 million Americans expressed interest in being sponsors. *See* Camilo Montoya-Galvez, *1.5 Million Apply for U.S. Migrant Sponsorship Program With 30,000 Monthly Cap*, N.N.Y., May 22, 2023. The Federal Register notices for Cuba, Haiti, Nicaragua, and Venezuela are at 88 Fed. Reg. 26,329 (2023) (Cuba); 88 Fed. Reg. 1243 (2023) (Haiti); 88 Fed. Reg. 1255 (2023) (Nicaragua); and 87 Fed. Reg. 63,507 (2022) (Venezuela). *See also* Nicole Ward & Jeanne Batalova, *Refugees and Asylees in the United States* (Migration Pol'y Inst. 2023).

In July 2023, the Biden administration announced another parole program, this time for some noncitizens from Colombia, El Salvador, Guatemala, and Honduras. They must be beneficiaries of approved petitions that qualify them for immigrant visas based on a family relationship to a U.S. citizen or lawful permanent resident. Nationals of these countries can be considered for parole on a case-by-case basis for a period of up to three years. The following explanation in the Federal Register notice for the Guatemala program is repeated in substance for the other three countries:

> This process will allow family members to reunite in the United States while they wait for their immigrant visas to become available. This process is voluntary and intended to provide an additional lawful, safe, and orderly avenue for migration from Guatemala to the United States as an alternative to irregular migration to help relieve pressure at the Southwest Border (SWB) and reunite families, consistent with U.S. national security interests and foreign policy priorities. The process complements other efforts to collaboratively manage migration in the Western Hemisphere and at the SWB as the U.S. Government (USG) continues to implement its broader, multi-pronged, and regional strategy to address the challenges posed by irregular migration.

Implementation of a Family Reunification Parole Process for Guatemalans, 88 Fed. Reg. 43,581 (July 7, 2023). *See also* Dep't of Homeland Security, *DHS Announces Family Reunification Parole Processes for Columbia, El Salvador, Guatemala, and Honduras*, July 7, 2023.

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CHAPTER EIGHT

REMOVAL PROCEEDINGS AND JUDICIAL REVIEW

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

One media report notes that President Trump filled two-thirds of the 520 IJ positions that existed at the end of his administration (which would amount to over 340 appointments). *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 report 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). As of January 2023, the Biden administration had seated 117 judges, an increase of 23% from 2020. *See* Maria Ramirez Uribe, *Biden still hasn't doubled number of immigration judges, but more judges have been seated,* Politifact, Jan. 17, 2023. In February 2023, the EOIR added 23 more IJs, bringing the total up to 140. U.S. Dep't of Justice, *Notice: EOIR Announces 23 New Immigration Judges*, February 6, 2023.

page 854, at the end of note 2, add:

In November 2022, Rep. Donald McEachin (D-Va.) introduced the Funding Attorneys for Indigent Removal (FAIR) Proceedings Act, H.R. 9304, 117th Cong. (2022), which would require counsel for children and certain vulnerable individuals during removal proceedings. If the DOJ failed to provide counsel, the statute would exempt those noncitizens from subsequent filing deadlines (such as for a motion to reopen removal proceedings) where applicable. The matter was referred to the House Committee on the Judiciary for further consideration. As of July 2023, Congress has taken no further action on the bill.

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. The Vera Institute of Justice website offers a map depicting other publicly funded local and state deportation defense programs (the "SAFE Network") across the United States. *See* https://www.vera.org/ending-mass-incarceration/reducing-incarceration/detention-of-immigrants/advancing-universal-representation-initiative.

page 857, at the end of first full paragraph, add:

In Feb. 2022, Representative Zoe Lofgren introduced The Real Courts, Rule of Law Act of 2022, which would constitute immigration courts as Article I courts outside the executive

branch. H.R. 6577, 117th Cong., (2d Sess. 2022). The bill has not been put up for a floor vote. In the wake of continued congressional inaction, the Migration Policy Institute released an in-depth report diagnosing the ever-increasing workload and strains on the immigration court system, and suggesting administrative and technological recommendations that might help achieve more timely and fair adjudications. Muzaffar Chishti, Doris Meissner, Stephen Yale-Loehr, Kathleen Bush-Joseph & Christopher Levesque, *The Breaking Point: Rethinking the U.S. Immigration Court System*, Migration Pol'y Inst. (July 2023).

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 was enjoined from doing so by a district court. *See Centro Legal de La Raza v. Exec. Office for Immigration Review*, 524 F. Supp. 3d 919 (N.D. Cal. 2021) (preliminarily enjoining, for failure to comply with the APA, the final rule on administration closure); *see* U.S. 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.

On November 17, 2022, citing the same reasons given for overruling *Castro-Tum*, Attorney General Garland overruled *Matter of S-O-G & F-D-B-*, 27 I. & N. Dec. 462 (AG 2018). *See Matter of Coronado Acevedo*, 28 I. & N. Dec. 648 (BIA 2022). In *Coronado Acevedo*, the noncitizen had been granted an immigrant visa petition while an appeal of her removal proceedings was pending before the Board. The Board refused to dismiss the removal proceedings, concluding that *S-O-G-* meant it had no "inherent authority to terminate or dismiss" the proceedings. Overruling *S-O-G* in light of *Cruz-Valdez*, AG Garland noted that IJs must be permitted this authority "in these types of limited circumstances" and that the DOJ expects "to issue a notice of proposed rulemaking that would address the authority of immigration judges and the Board to terminate removal proceedings." *Id.* at 651.

As the DOJ considers rulemaking on this issue, the extent of IJs' authority to terminate proceedings initiated prior to *Coronado Acevedo* remains contested. Compare *Garcia v. Garland*, 2023 WL 2718766 (2d Cir. March 31, 2023) (holding BIA decision that IJs lack authority to administratively close cases warranted *Chevron* deference, was not an abuse of discretion, and that *Castro-Tum* reflects a reasonable interpretation of ambiguous authority that controlled at the time of the BIA's decision) with *Umana-Escobar v. Garland*, 2023 WL 2544854 (9th Cir. March 17, 2023) (remanding for the agency to re-assess its decision, made before *Castro-Tum* was overruled, that it lacked authority to administratively close cases).

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 887, after the first full paragraph, add:

The U.S. Supreme Court further constrained judicial review of removal decisions in *Patel v. Garland,* 142 S.Ct. 1614 (2022). Mr. Patel entered the country unlawfully in the 1990s, but later applied for adjustment of status under INA § 245(i). While his adjustment application was pending, he also applied for a state driver's license. On that license application, he checked a box stating that he was a U.S. citizen. USCIS denied Patel's adjustment, concluding that his misrepresentation on the license application made him statutorily ineligible to adjust. Later, DHS sought to remove him based on his unlawful entry. Patel conceded his removability but repeated his request for adjustment as a form of relief. He testified that he had mistakenly checked the "citizen" box and therefore lacked the mental state required to establish misrepresentation and bar him from adjustment. The IJ did not believe his testimony, however, and ordered his removal. Importantly, because the IJ concluded Patel was statutorily ineligible, the IJ did not have to decide whether Patel warranted a favorable exercise of discretion. On petition for review, both a panel and the Eleventh Circuit *en banc*, held that it lacked jurisdiction to hear Patel's claim, holding that § 242(a)(2)(B)(i) prohibited a federal court from reviewing "any judgment regarding the granting of relief" of various INA provisions, including § 245. In May 2022, a 5-4 majority of the Supreme Court affirmed the judgment, reading § 242 as foreclosing judicial review of Patel's appeal. As a result of the case, Patel, who has lived in the United States for nearly thirty years with his spouse and three children, one of whom is a citizen and two of whom are permanent residents, could face deportation because he checked the wrong box on a license application.

In reaching this result, the majority rejected both of the litigating parties' interpretations of § 242. Indeed, the federal government agreed with Patel's position that § 242 did not foreclose his appeal, albeit for slightly different reasons. Patel maintained that § 242's bar only applied to the ultimate decision of the immigration judge whether to grant relief, and not any underlying decision upon which that final judgment might be based. The government, in comparison, argued that the "judgment" foreclosed by § 242 only referred to discretionary decisions, but would have classified the factual findings at issue as nondiscretionary. Rejecting both arguments, Justice Amy Coney Barrett's opinion adopted the view that § 242's bar on review of "any judgment" meant a bar on review on any and all authoritative decisions relating to the granting or denial of discretionary relief.

In dissent, Justice Neil Gorsuch's opinion (joined by Justices Breyer, Kagan, and Sotomayor) would have read § 242 as inapplicable to the initial, statutory ineligibility determination, and only applicable to the secondary, discretionary decision whether to grant or deny relief. As a result of the majority's decision, Justice Gorsuch noted that federal courts may not review or correct IJ or BIA decisions that an individual is ineligible for relief, even when those decisions might rest on mistaken factual determinations. More broadly, potentially erroneous determinations that lead to statutory ineligibility for several avenues of relief might be shielded from any meaningful federal court oversight.

The Seventh Circuit has since extended the majority's reasoning in *Patel v. Garland* to hold that judicial review is unavailable for discretionary denials of adjustment of status by USCIS. *Britkovyy v. Mayorkas*, 60 F.4th 1024 (7th Cir. 2023).

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); s*ee also De La Rosa-Rodriguez v. Garland*, 49 F.4th 1282 (9th Cir. 2022), reh'g *en banc* granted, opinion vacated, 62 F.4th 1232 (9th Cir. 2023) (surveying circuit split and treating hardship as a mixed question of law and fact). Meanwhile, other circuits have held that they lack jurisdiction over such hardship determinations related to forms of discretionary relief. *See, e.g., Hernandez-Morales v. Att'y Gen. United States*, 977 F.3d 247 (3d Cir. 2020). In June 2023, the Supreme Court granted a petition for certiorari in *Wilkinson v. Garland*, No. 22-666 (2023), on the following question:

> The question presented is whether an agency determination that a given set of established facts does not rise to the statutory standard of "exceptional and extremely unusual hardship" is a mixed question of law and fact reviewable under § 1252(a)(2)(D), as three circuits have held, or whether this determination is a discretionary judgment call unreviewable under § 1252(a)(2)(B)(i), as the court below and two other circuits have concluded.

page 920, after first sentence of second paragraph and before the sentence that starts "Does (f)(1) also bar..." add:

In *Garland v. Aleman Gonzales*, 142 S.Ct. 2057 (2022), the U.S. Supreme Court ruled that § 242(f)(1) barred class-wide injunctive relief in a case involving a class of noncitizens facing prolonged detention after removal. The district court had interpreted the underlying post-removal-order statute (INA § 241) to require bond hearings, and then issued a class-wide injunction to that effect. In a 6-3 opinion penned by Justice Alito, the Court held that subsection (f)(1) prohibits lower courts from entering such injunctions. Importantly, the ruling still leaves open the possibility of injunctive relief for individual plaintiffs. In addition, the decision does not foreclose declaratory relief or other types of remedies. In dissent, Justice Sotomayor (joined by Justices Breyer and Kagan), argued that an unlawful executive action could not be understood to be "the operation of" the INA as required by subsection (f)(1). Therefore, according to the dissent, that section did not bar class-wide injunctions to cure an unauthorized practice under the INA.

The effects of the Court's ruling were evident soon after in *Al Otro Lado, Inc. v. Mayorkas,* 619 F. Supp. 3d 1029 (S.D. Cal. 2022) (assessing legality of DHS's "Turnback Policy," including a "metering" and "waitlist" system for asylum-seekers arriving at ports of entry). The district court, prior to *Aleman Gonzales*, had ruled that the DHS "turnback policy" for asylum seekers at ports of entry violated immigration law and the APA. Subsequently, in considering the appropriate remedy, the district stated that had it heard the case prior to *Aleman Gonzales*, it "would not [have] hesitate[d]" to issue "broad, programmatic injunctive relief." In the wake of *Aleman Gonzales*, however, the district court could only provide injunctive relief to the individual plaintiffs. In the remedies ruling, District Judge Cynthia Bashant offered a scathing appraisal of the effect of *Aleman Gonzales*:

> With acknowledgment that its decision will further contribute to the human suffering of asylum seekers enduring squalid and dangerous conditions in Mexican border communities as they await entry to POEs, this Court finds the shadow of *Aleman Gonzalez* inescapable in this case. Even the most narrow, meaningful equitable relief would have the effect of interfering with the "operation" of § 1225, as that term is construed by the *Aleman Gonzalez* Court, and, thus, would clash with § 1252(f)(1)'s remedy bar. *Aleman Gonzalez* not only renders uneconomical vindication of Plaintiff class members' statutorily- and constitutionally-protected right to apply for asylum, those inefficiencies inevitably will lead to innumerable instances in which Plaintiff class members will be unable to vindicate their rights at all. Thus, while the majority and

> dissent in *Aleman Gonzalez* hash out their textual disagreements concerning § 1252(f)(1)'s scope in terms of remedies, make no mistake, *Aleman Gonzalez* leaves largely unrestrained immigration enforcement agencies to rapaciously scale back rights. *Al Otro Lado,* 619 F.Supp.3d at 1033-34. `

The court did, however, issue class-wide declaratory relief, a possibility left open by the Supreme Court ruling. **[Continue with remainder of second paragraph on p. 920, with sentence starting "Does (f)(1)also bar…"]**

CHAPTER NINE

ENFORCEMENT AND BEYOND

page 928, after the second full paragraph, add this paragraph:

On Trump administration enforcement policies in general, see Julie Hirschfeld Davis & Michael D. Shear, Border Wars: Inside Trump's Assault on Immigration (2019); Stuart Anderson, *Revelations Show Trump Immigration Policy Was Supposed To Be Harsher*, Forbes, June 23, 2022.

page 945, after note 4, add new notes 5 and 6 and the following excerpt:

5. *Egbert v. Boule*, 142 S. Ct. 1793 (2022), arose from a physical confrontation between a U.S. citizen plaintiff and a U.S. Border Patrol agent who allegedly injured the plaintiff and retaliated against him for filing a complaint with the agent's supervisors at the Border Patrol. The U.S. Supreme Court held that the plaintiff had no cause of action for money damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The Court, with Justice Thomas writing for the majority, applied *Hernandez v. Mesa*, 140 S. Ct. 735 (2020), to disallow a *Bivens* claim. Though the defendant agent was not "straddling" the border and the plaintiff was a U.S. citizen, national security was "at issue," and the defendant was furthering the Border Patrol's statutory mandate to prevent unlawful entry or exit. Justice Sotomayor dissented, joined by Justices Breyer and Kagan.

6. On January 20, 2021, President Biden terminated the state of emergency on the U.S. southern border that President Trump had declared on February 19, 2019, in Presidential Proclamation 9844. 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 late 2021, the Biden administration announced that it would stop most border wall construction and instead use border wall funding to close "small" gaps in the wall and pay for environmental and cleanup projects in areas of wall construction during the Trump administration. Camilo Montoya-Galvez, *U.S. to Use Border Wall Funds to Close Gaps and Clean Up Trump-Era Construction Sites*, CBS News, Dec. 20, 2021. More recently, some observers have noted that the administration has continued construction of barriers on the border, even if they might be called "closing small gaps" or "environmental and cleanup projects." *See* Philip Bump, *Has Biden Actually Not Built "One Meter" of Border Wall?*, Wash. Post, Jan. 11, 2023.

The next selection addresses border enforcement in the Biden administration.

MUZAFFAR CHISHTI & KATHLEEN BUSH-JOSEPH
U.S. BORDER ASYLUM POLICY ENTERS NEW TERRITORY POST-TITLE 42

Migration Policy Institute. May 25, 2023.

U.S. border enforcement finds itself in an uncertain new era now that the pandemic-era Title 42 border expulsions policy has been lifted. The chaos predicted to occur in the days after the May 11 end of the public-health emergency declaration did not immediately materialize. The unexpected dip in arrivals could be seen as a sign of a new normal, but may also be a temporary pause before a renewed uptick. Strong migration push factors through much of the Western Hemisphere and beyond may mean that there is continued pressure on the U.S.-Mexico border in the months ahead.

In response to the end of a Title 42 order that resulted in more than 2.8 million expulsions at the U.S.-Mexico border, the Biden administration has issued a slew of fresh policies to bolster a border enforcement regime developed in the 1990s—mostly to halt unauthorized economic migrants from Mexico. Today, that regime is tasked with managing an historic level of asylum seekers and other arrivals from an increasing number of countries across the planet. The administration is hoping to funnel migrants in orderly fashion through official ports of entry, yet the government's finite processing capacity means many are receiving only initial screenings and then are being allowing into the United States to appear at immigration proceedings, frequently many years in the future. Meanwhile, migrants who cross without authorization between ports of entry now face new hurdles that in some ways are more consequential than those of Title 42, which prevented access to asylum.

To accomplish its goals, the government is racing to scale up its capacity for processing new arrivals by surging resources to the border at the expense of immigration adjudications elsewhere. The new process also depends on cooperation from other countries—particularly Mexico—to accept returned migrants, including those from places such as Cuba and Venezuela where U.S. diplomatic relations are strained. Looming over the changes is the specter of ongoing litigation, which could dramatically upset the new process. And finally, political pressures are likely to put the administration in a delicate position, with significant criticism coming from within President Joe Biden's own party. This article analyzes the new immigration landscape and ramifications nationwide.

A Return to Title 8: Expedited Removal and Processing Asylum Claims

Title 42, which was imposed in March 2020, marked an unprecedented chapter in U.S. immigration history. Never before had an emergency health measure been invoked to summarily expel asylum seekers and other migrants arriving at the border without authorization. Ending the COVID-19-related emergency declaration that triggered the use of Title 42 meant a return to the normal immigration authority, Title 8 of the U.S. code. While this marked a formal shift for arrivals at the border, it simply sped up a transition that was already well underway. In April, just before Title 42 was lifted, 65 percent of unauthorized arrivals were processed under Title 8, with much higher percentages for nationalities from countries other than Mexico and northern Central America.

* * *

Title 8 is legally more punitive than Title 42. Under Title 8, the Department of Homeland Security (DHS) places noncitizens arriving without authorization into expedited removal, without a hearing. Those who are deported under expedited removal are barred from re-entering the country for five years and face criminal charges if they attempt another unlawful re-entry. On the other hand, people expelled under Title 42 faced no such sanctions, leading unsuccessful crossers to repeat their attempts.

During the expedited removal process, people who claim fear of persecution in their country of origin are entitled to a credible fear interview to determine their preliminary eligibility for asylum. If they pass this first step, they are released into the interior of the country to pursue their asylum case. Those who do not seek asylum protection or who do not pass the credible fear interview may be removed. Most asylum seekers pass this initial step: From February 2022 through January, asylum officers denied 32 percent of credible fear cases, but some of those decisions were later overturned by immigration judges, leaving a total denial rate of 23 percent of cases, according to the Transactional Records Access Clearinghouse (TRAC).

Resource capacity plays a major role in this processing. Expedited removal, despite what its name suggests, takes time. Credible fear determinations take longer. At times of significant border arrivals, DHS cannot place everyone into expedited removal or subject them to credible fear determinations. As a result, some noncitizens may be released into the U.S. interior with a charging document known as a notice to appear (NTA) in immigration court, which schedules them for deportation proceedings. This court process can take years; for example, some recent arrivals in New York City have been scheduled for hearings in 2027. In some cases, noncitizens may be allowed in and issued a notice to report to a U.S. Immigration and Customs Enforcement (ICE) office. DHS officials may also allow noncitizens to enter the country temporarily via humanitarian parole, which allows them to remain in the country for a designated period and obtain work authorization.

All such noncitizens still face removal proceedings and can be deported unless they have a basis to seek lawful status, including asylum. To seek asylum, noncitizens who have met the credible fear test are ordered to appear in immigration court, or are ordered to report to an ICE office where they can defensively seek asylum in removal proceedings. Parolees, on the other hand, can affirmatively seek asylum at U.S. Citizenship and Immigration Services (USCIS). In either route, migrants with successful claims are granted the same legal status.

Biden Administration Ushers in a New Border Asylum Policy

In anticipation of the end of Title 42, the administration announced in early January a new rule to usher in a radically different asylum system at the U.S. southwest border. The new rule, formally issued on May 10, declared that noncitizens (not including unaccompanied minors) who cross the border without permission will be presumed ineligible for asylum unless they applied for and were denied asylum in a transit country. They only have access

to lesser forms of relief—withholding of removal or protections under the Convention Against Torture—regardless of whether they go through expedited removal at the border or are released into the country. Migrants who show they face a medical emergency, imminent threat to life, or are a victim of trafficking may be allowed to pursue their asylum claim.

An individual migrant could thus be screened under the new rule multiple times. Those who invoke asylum protection while in expedited removal will be screened by an asylum officer for exemptions to the presumption of ineligibility for asylum and credible fear at the same time. Also, those let into the country without a credible fear determination and those admitted after passing the credible fear screening will have their eligibility for exceptions determined during their full asylum adjudication, either by an asylum officer or an immigration judge.

The new border asylum rule incentivizes asylum seekers to schedule an appointment with U.S. Customs and Border Protection (CBP) using the CBP One app. The transit rule does not apply to those with appointments, although space is limited; as of this writing, about 1,000 appointments per day were available. For comparison, authorities encountered unauthorized migrants an average of more than 7,000 times daily in April.

Capacity Constraints at the Border

DHS's ability to implement the new asylum rule runs into longstanding capacity constraints. Ports of entry are run by CBP's Office of Field Operations (OFO), which lacks the physical space and personnel to process all migrant arrivals. Thus, only a fraction of those with CBP One appointments undergo actual asylum screening. Instead, they are often screened only for security concerns and quickly released into the country with two years of parole and an NTA. Hence, although the administration is encouraging asylum seekers to arrive at ports of entry, only minimal processing happens there.

Even noncitizens who arrive without an appointment may be issued parole and an NTA. But depending on capacity, they could also be transferred to the custody of the Border Patrol (also a branch of CBP) or ICE—for those deemed threats to national security or public safety—and placed into expedited removal.

For noncitizens encountered between ports of entry, Border Patrol officials place as many as possible into expedited removal, during which they are held in ICE detention. The agency has recently begun conducting credible fear determinations for some noncitizens without putting them into detention—a faster process that was initiated during the Trump administration. When the practice was in place previously, just 23 percent of migrants met the credible fear finding.

Border Patrol and ICE face similar space constraints as OFO. At the peak of the rush before Title 42 ended, Border Patrol held about 29,000 people at its soft-sided tent facilities, well above the capacity range of 18,000 to 20,000. ICE's detention capacity, driven by COVID-19-related restrictions, was until recently limited to a daily average population of about

24,000; the end of those requirements means the agency can now hold thousands more, including detainees from its interior enforcement.

The number of asylum officers available to conduct credible fear interviews for those seeking asylum while in custody is also limited. DHS plans by the end of May to conduct 1,000 interviews per day using 1,100 asylum officers. That would be a record. Historically, the most credible fear interviews DHS has ever conducted was 103,000 in fiscal year (FY) 2019—an average of 283 per day. In the first three months of FY 2023, USCIS completed 21,200 credible fear screenings, a rate of about 230 per day.

* * *

Thus, the resource constraints are real. In the four days leading up to the end of Title 42, Border Patrol encountered about 10,000 migrants per day. On May 10 and 11, DHS released almost 9,000 migrants into the country with just parole documents because it was unable to issue them NTAs. In the week after Title 42 was lifted, the number of daily encounters dropped to an average of about 4,100.

Still, administration officials have cautioned that this decline may be temporary, as migrants and smugglers assess the impacts of the new plans and attempt to secure CBP One appointments. In fact, an estimated 60,000 migrants were waiting near the U.S.-Mexico border as Title 42 ended, according to Border Patrol Chief Raul Ortiz. The UN High Commissioner for Refugees has also warned that 400,000 migrants this year could travel through the dangerous Darien Gap between Colombia and Panama on their way to the U.S. border, after a record 248,000 crossed last year. While it remains to be seen how many people will arrive at the border without authorization in the coming weeks and months, it is clear that DHS's capacity limitations mean thousands will be released into the country rather than removed, even under the restrictive new asylum transit rule.

The government's ability to physically remove noncitizens has its own constraints, determined both by its resources and other countries' cooperation. DHS lacks the necessary planes and pilots to return all removable noncitizens. Furthermore, Mexico has stated it will accept only up to 1,000 foreign nationals per day. While the administration has pushed other countries to accept returns of their nationals, Colombia recently halted return flights temporarily due to allegations of "degrading treatment" for returnees. In the first week after Title 42 was lifted, DHS returned more than 11,000 migrants to more than 30 countries.

* * *

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. Dep't 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 prosecutions 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 Title 42 border restrictions, 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). On the more recent increase in the number of criminal referrals—mostly prosecutions for unlawful reentry by the Border Patrol and other CBP units—see *Criminal Immigration Referrals Up from the Border Patrol*, TRAC Immigration (July 7, 2022). *See also Immigration Prosecutions for May 2023*, TRAC Immigration (July 6, 2023).

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

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, when Congress amended the statute to create subsection (d), it made the existence of a valid removal order 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.

In August 2021, the federal district court in *U.S. v. Carrillo-Lopez*, 555 F. Supp. 3d 996 (D. Nev. 2021), held that INA § 276 is unconstitutional because it violates the equal protection component of the Fifth Amendment. Analyzing both the statute's original enactment in 1929 and its reenactment in 1952 as part of the Immigration and Nationality Act, the court found that "racial animus—as evidenced through the historical background, legislative history, sequence of events leading up to passage—was, at minimum, a motivating factor in the passage of Section [276] that disparately impacts Mexican and Latinx individuals." The court concluded that the statute, though facially neutral, has a racially disparate impact. Applying *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977), this showing of disparate impact shifted the burden to the government to show that § 276 would have been

enacted without a racially discriminatory purpose. After finding that the government failed to carry this burden, the court granted the defendant's motion to dismiss his indictment for unlawful reentry under § 276.

On appeal, a Ninth Circuit panel reversed. *See U.S. v. Carrillo-Lopez*, 68 F.4th 1133 (9th Cir. 2023). Crucially, the Ninth Circuit treated the 1952 statute as a new enactment, not a reenactment of the 1929 statute. The court started its analysis by acknowledging the government's argument that U.S. Supreme Court decisions like *Fiallo v. Bell*, 430 U.S. 787 (1977), and *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), suggest great deference to legislative enactments relating to immigration. But the court also observed that the Supreme Court had examined discrimination claims in immigration-related cases more closely by applying *Arlington Heights* — the precedent that would apply to similar claims outside the immigration arena. As an example, the court cited *Dep't of Homeland Security v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1915 (2020). The court declined to decide if *Arlington Heights* or a more deferential standard should apply. Under either approach, the court ruled, several aspects of the district court's decision called for reversal due to "clear error": (1) its reliance on Congress' decision to override President Truman's veto of the Immigration and Nationality Act (INA) as evidence of discriminatory animus; (2) its finding that Congress' failure in 1952 to expressly repudiate the discriminatory purpose motivating the 1929 enactments tainted the illegal reentry provision of the INA; and (3) its reliance on evidence of illegal reentry statute's disproportionate impact as evidence of racial animus. The Ninth Circuit also held that the use of term "wetback" in 1952 by the Deputy Attorney General in a letter commenting on the illegal reentry provision was not evidence of Congress' discriminatory animus.

page 951, after the second full paragraph, add:

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). These interim priorities signaled a rejection of the Trump administration's approach and a return to the priorities of the Obama administration. 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*, 524 F.Supp.3d 598 (S.D. Tex. 2021) (finding state had standing to challenge federal policy and issuing nationwide injunction). A subsequent ruling by the same district judge enjoined the enforcement priorities in the interim memo. 555 F.Supp.3d 351 (S.D. Tex. 2021).

While litigation over the interim priorities was pending, DHS issued new guidance to replace the interim memorandum as of November 29, 2021.[a] U.S. Dep't of Homeland Security, *Guidelines for the Enforcement of Civil Immigration Laws*, (Memorandum from A. Mayorkas to ICE, CBP, CIS Directors) (Sept. 30, 2021). The Secretary's memorandum first explained:

> It is estimated that there are more than 11 million undocumented or otherwise removable noncitizens in the United States. We do not have the resources to apprehend and seek the removal of every one of these noncitizens. Therefore, we need to exercise our discretion and determine whom to prioritize for immigration enforcement action.
>
> In exercising our discretion, we are guided by the fact that the majority of undocumented noncitizens who could be subject to removal have been contributing members of our communities for years. They include individuals who work on the frontlines in the battle against COVID, lead our congregations of faith, teach our children, do back-breaking farm work to help deliver food to our table, and contribute in many other meaningful ways. Numerous times over the years, and presently, bipartisan groups of leaders have recognized these noncitizens' contributions to state and local communities and have tried to pass legislation that would provide a path to citizenship or other lawful status for the approximately 11 million undocumented noncitizens.
>
> The fact an individual is a removable noncitizen therefore should not alone be the basis of an enforcement action against them. We will use our discretion and focus our enforcement resources in a more targeted way. Justice and our country's well-being require it.

U.S. Dep't of Homeland Security, *Guidelines for the Enforcement of Civil Immigration Law* (Memorandum from A. Mayorkas to ICE, CBP, CIS Directors) (Sep. 30, 2021).

The memorandum went on to announce that DHS would prioritize the apprehension and removal of noncitizens in three categories:

> A. Threat to National Security
>
> A noncitizen who engaged in or is suspected of terrorism or espionage, or terrorism-related or espionage-related activities, or who otherwise poses a danger to national security, is a priority for apprehension and removal.
>
> B. Threat to Public Safety
>
> A noncitizen who poses a current threat to public safety, typically because of serious criminal conduct, is a priority for apprehension and removal.

[a] This memorandum is reprinted in the 2022 edition of the statutory supplement.—eds.

Whether a noncitizen poses a current threat to public safety is not to be determined according to bright lines or categories. It instead requires an assessment of the individual and the totality of the facts and circumstances.

There can be aggravating factors that militate in favor of enforcement action. Such factors can include, for example:

- the gravity of the offense of conviction and the sentence imposed;
- the nature and degree of harm caused by the criminal offense;
- the sophistication of the criminal offense;
- use or threatened use of a firearm or dangerous weapon;
- a serious prior criminal record.

Conversely, there can be mitigating factors that militate in favor of declining enforcement action. Such factors can include, for example:

- advanced or tender age;
- lengthy presence in the United States;
- a mental condition that may have contributed to the criminal conduct, or a physical or mental condition requiring care or treatment;
- status as a victim of crime or victim, witness, or party in legal proceedings;
- the impact of removal on family in the United States, such as loss of provider or caregiver;
- whether the noncitizen may be eligible for humanitarian protection or other immigration relief;
- military or other public service of the noncitizen or their immediate family;
- time since an offense and evidence of rehabilitation;
- conviction was vacated or expunged.

The above examples of aggravating and mitigating factors are not exhaustive. The circumstances under which an offense was committed could, for example, be an aggravating or mitigating factor depending on the facts. The broader public interest is also material in determining whether to take enforcement action. For example, a categorical determination that a domestic violence offense compels apprehension and removal could make victims of domestic violence more reluctant to report the offense conduct. The specific facts of a case should be determinative.

Again, our personnel must evaluate the individual and the totality of the facts and circumstances and exercise their judgment accordingly. The overriding question is whether the noncitizen poses a current threat to public safety. Some of the factors relevant to making the determination are identified above.

The decision how to exercise prosecutorial discretion can be complicated and requires investigative work. Our personnel should not rely on the fact of conviction or the result of a database search alone. Rather, our personnel should, to the fullest extent possible, obtain and review the entire criminal and administrative record and other investigative information to learn of the totality of the facts and circumstances

of the conduct at issue. The gravity of an apprehension and removal on'a noncitizen's life, and potentially the life of family members and the community, warrants the dedication of investigative and evaluative effort.

C. Threat to Border Security

A noncitizen who poses a threat to border security is a priority for apprehension and removal. A noncitizen is a threat to border security if:

(a) they are apprehended at the border or port of entry while attempting to unlawfully enter the United States; or

(b) they are apprehended in the United States after unlawfully entering after November 1, 2020.

There could be other border security cases that present compelling facts that warrant enforcement action. In each case, there could be mitigating or extenuating facts and circumstances that militate in favor of declining enforcement action. Our personnel should evaluate the totality of the facts and circumstances and exercise their judgment accordingly.

* * *

We must exercise our discretionary authority in a way that protects civil rights and civil liberties. The integrity of our work and our Department depend on it. A noncitizen's race, religion, gender, sexual orientation or gender identity, national origin, or political associations shall never be factors in deciding to take enforcement action. A noncitizen's exercise of their First Amendment rights also should never be a factor in deciding to take enforcement action. We must ensure that enforcement actions are not discriminatory and do not lead to inequitable outcomes.

This guidance does not prohibit consideration of one or more of the above-mentioned factors if they are directly relevant to status under immigration law or eligibility for an immigration benefit. For example, religion or political beliefs are often directly relevant in asylum cases and need to be assessed in determining a case's merit.

State and local law enforcement agencies with which we work must respect individuals' civil rights and civil liberties as well.

* * *

Our society benefits when–individuals - citizens and noncitizens alike - assert their rights by participating in court proceedings or investigations by agencies enforcing our labor, housing, and other laws.

It is an unfortunate reality that unscrupulous employers exploit their employees' immigration status and vulnerability to removal by, for example, suppressing wages, maintaining unsafe working conditions, and quashing workplace rights and activities. Similarly, unscrupulous landlords exploit their tenants'

> immigration status and vulnerability to removal by, for example, charging inflated rental costs and failing to comply with housing ordinances and other relevant housing standards.
>
> We must ensure our immigration enforcement authority is not used as an instrument of these and other unscrupulous practices. A noncitizen's exercise of workplace or tenant rights, or service as a witness in a labor or housing dispute, should be considered a mitigating factor in the exercise of prosecutorial discretion._____

The same federal judge who had enjoined the interim priorities held that the priorities contravened the INA's mandate that the executive branch detain or remove certain noncitizens. The district court issued an order vacating, on a nationwide basis, the Mayorkas' guidance memorandum. *See Texas v. United States*, 606 F. Supp. 3d 437 (S.D. Tex. 2022). A three-judge panel of the Fifth Circuit declined to stay the ruling. *Texas v. United States*, 40 F.4th 205 (5th Cir. 2022). The panel found, among other things, that the Department of Homeland Security had given undue weight to considerations outside the authority that federal statutes conferred on the federal executive branch. These improper considerations included the statement in a related DHS memorandum that the guidelines "are essential to advancing this administration's stated commitment to advancing equity for all, including people of color and others who have been historically underserved, marginalized and adversely affected by persistent poverty and inequality." *Id.* at 226.

In another lawsuit brought by other states to block the enforcement priorities, the district court also issued a nationwide preliminary injunction blocking parts of the Mayorkas memorandum. On appeal, a Sixth Circuit panel reversed, but this decision was rendered irrelevant by the subsequent Fifth Circuit ruling that declined to stay the Texas district court's ruling vacating the same memorandum nationwide. *See Arizona v. Biden*, 31 F.4th 469 (6th Cir. 2022).

The Biden administration then sought certiorari review as well as a stay of the Fifth Circuit's decision from the Supreme Court (both as a whole and as to its nationwide scope). In *Texas v. United States*, the U.S. Supreme Court declined to stay the Texas district court order or limit its geographic scope, but the Court granted certiorari. *See* 143 S.Ct. 51 (2022). The Court directed the parties to brief three questions: (1) whether state plaintiffs had standing to challenge enforcement guidelines; (2) whether the guidelines violate INA §§ 236(c) or 241(a), or the Administrative Procedure Act; and (3) whether INA § 242(f)(1) prevents a federal court from stopping the enforcement of enforcement guidelines. The third question concerned the applicability of *Garland v. Aleman Gonzales*, 142 S.Ct. 2057 (2022), which had raised serious doubts about the use of classwide injunctive relief to remedy violations of immigration statutes. It was unclear if the same reasoning would limit the use of injunctive relief against the federal government's immigration enforcement policies. *Aleman Gonzales* is described more fully in the Update to page 992 in Chapter Eight.

On June 23, 2023, an 8-1 majority of the Supreme Court ruled on the first question, albeit in two separate opinions, one of which garnered five votes, while the other garnered

three. The Court held that the states lacked standing to challenge the enforcement priorities and therefore that federal courts lacked jurisdiction to review the claims, though for different reasons. According to the majority opinion for the Court by Justice Kavanaugh, joined by Chief Justice Roberts and Justices Sotomayor, Kagan, and Jackson: "[t]he states have not cited any precedent, history, or tradition of courts ordering the Executive Branch to change its arrest or prosecution policies so that the Executive Branch makes more arrests or initiates more prosecutions."). *United Stats v. Texas*, 2023 WL 4139000 at *4 (2023).

The majority cited *Reno v. AADC* [covered more fully on pp. 647-59 in Chap. 5 of the casebook, and pp. 702-04 in Chap. 6] and *Arizona v. United States* [covered more fully on pp. 1050-65 in Chap. 9] for the proposition that "enforcement discretion over arrests and prosecutions extends to the immigration context." 2023 WL 4139000 at *5. The majority was careful, however, to note that because plaintiffs lacked standing, the Court's ruling expressed no opinion on whether the President and the executive branch were complying with removal statutes. The majority also stressed that its rationale did not necessarily extend to policies that do more than govern the exercise of enforcement discretion, such as those that also provide benefits such as the DACA program. Justices Gorsuch, Thomas, and Barrett concurred in the judgment, but would have ruled that the district court lacked authority to enjoin the prosecutorial discretion guidelines under 8 U.S.C. 1252(f)(1), as construed in *Aleman-Gonzalez*.

Notes on Immigration Enforcement Under the Biden Administration

1. On October 27, 2021, DHS Secretary Mayorkas issued a memorandum with "guidance for ICE and CBP enforcement actions in or near areas that require special protection."

> To the fullest extent possible, we should not take an enforcement action in or near a location that would restrain people's access to essential services or engagement in essential activities. Such a location is referred to as a "protected area."

The memorandum included a nonexhaustive list of examples of protected areas, including: a school, such as a pre-school, primary or secondary school, vocational or trade school, or college or university; a medical or mental healthcare facility; a place of worship or religious study; a place where children gather, such as a playground, recreation center, childcare center, before-or after-school care center, foster care facility, group home for children, or school bus stop; a social services establishment; a place where disaster or emergency response and relief is being provided; a place where a funeral, graveside ceremony; and a place where there is an ongoing parade, demonstration, or rally. The memorandum explained:

> The fundamental question is whether our enforcement action would restrain people from accessing the protected area to receive essential services or engage in

> essential activities. Our obligation to refrain, to the fullest extent possible, from conducting a law enforcement action in or near a protected area thus applies at all times and is not limited by hours or days of operation.

See Guidelines for Enforcement Actions in or Near Protected Areas, Oct. 27, 2021. *See also* Miriam Jordan, *New Guidance Bars Immigration Enforcement in "Protected Areas,"* N.Y. Times, Oct. 28, 2021.

2. 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).

3. 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.

4. The Biden administration 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 955, at the end of subsection (iii) and before section c, add:

(iv) Application to state governments

On May 18, 2023, the Regents of the University of California, citing the university's commitment to "ensuring that all students, regardless of immigration status, can pursue and attain a world-class UC education," voted unanimously to appoint "a Regents working group that, by the end of November of this year, will consider relevant issues and develop an implementation plan and a legal strategy" to hire students for university employment regardless of immigration status and federal employment authorization. *See* Teresa Watanabe, *UC Regents Take Groundbreaking Step Toward Hiring Immigrant Students Without Legal Status*, L.A. Times, May 18, 2023. The legal foundation for the Regents' decision was the analysis, endorsed by leading constitutional law and immigration law scholars, that federal employer sanctions do not apply to state governments because the

relevant statute nowhere says expressly that it applies to state governments. U.S. Supreme Court decisions have held that especially in areas of traditional state prerogatives (such as employment), a federal statute does not apply to state governments unless its text expressly covers states. IRCA includes no such language. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985); *see also Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 543 (2002).

page 963, at the end of note 5, add new note 6:

In a memorandum dated October 12, 2021, Secretary Alejandro Mayorkas ordered an end to immigration raids at worksites. He elaborated:

> Our worksite enforcement efforts can have a significant impact on the well-being of individuals and the fairness of the labor market. Our accomplishments in this area make clear that we can maximize the impact of our efforts by focusing on unscrupulous employers who exploit the vulnerability of undocumented workers. These employers engage in illegal acts ranging from the payment of substandard wages to imposing unsafe working conditions and facilitating human trafficking and child exploitation. Their culpability compels the intense focus of our enforcement resources.
>
> In addition, unscrupulous employers harm each worker competing for a job. By exploiting undocumented workers and paying them substandard wages, the unscrupulous employers create an unfair labor market. They also unfairly drive down their costs and disadvantage their business competitors who abide by the law.
>
> We can most effectively protect the American labor market, the conditions of the American worksite, and the dignity of the individual by focusing our worksite enforcement efforts on unscrupulous employers. This is how we will proceed.

U.S. Dep't of Homeland Security, *Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual* (Memorandum from A. Mayorkas to ICE, CBP, CIS Directors) (Oct. 12, 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 2023, DHS had 137 287(g) agreements around the country. For a nationwide map of 287(g) agreements, see https://www.ilrc.org/national-

map-287g-agreements, June 15, 2023. *See also* Abigail F. Kolker, *The 287(g) Program: State and Local Immigration Enforcement*, Cong. Res. Serv. (2021).

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 1075, at the end of note 3, add new note 4:

Texas Governor Greg Abbott has adopted policies that involve state law enforcement personnel, without federal authorization, in the enforcement of federal immigration laws. A prominent part of one initiative, Operation Lone Star, authorizes state and local law enforcement agencies to partner with private landowners to arrest migrants for trespassing under state law. Two counties on the border have implemented the program. For discussion of problems that have arisen, see J. David Goodman, *Cases Dismissed, Judge Replaced: Texas Struggles to Prosecute Migrants*, N.Y. Times, Jan. 27, 2022. For an overview of recent state enforcement efforts, see the excerpt from Chishti & Bush-Joseph in this Update to page 1114.

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. In *City & County of San Francisco v. Garland*, 42 F.4th 1078 (9th Cir. 2022), the Ninth Circuit affirmed earlier injunctions against immigration-related conditions on Byrne grants.

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/. As another example, 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. The Vera Institute of Justice website offers a map depicting other publicly funded local and state deportation defense programs (the "SAFE Network") across the United States. *See* https://www.vera.org/ending-mass-incarceration/reducing-incarceration/detention-of-immigrants/advancing-universal-representation-initiative.

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 2023). For overviews of students with DACA or who are undocumented at colleges and universities, and 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 3, add the following excerpt:

MUZAFFAR CHISHTI & JULIA GELATT
ACTIVISM ON IMMIGRATION BY U.S. STATES IS BACK, WITH NEW TACTICS AND DIFFERENT TARGETS

Migration Policy Institute. June 28, 2023.

State governments across the United States are energetically reviving a nearly two-decade-old trend of activism on immigration, displaying diverging approaches towards unauthorized immigration. * * *

At the vanguard of this activism are Florida and Texas, which this year enacted laws intended to discourage the presence or entry of unauthorized immigrants. Florida's new law is particularly far-reaching, enacting penalties for unauthorized immigrant workers, their employers, and people transporting unauthorized immigrants into the state, as well as new mandates requiring hospitals that accept Medicaid to ask patients about their legal status.

These new restrictions are only one side of the coin. In contrast, Minnesota, Utah, and other states have provided various rights and protections to unauthorized immigrants and recipients of quasi-legal statuses under the Temporary Protected Status (TPS) and Deferred Action for Childhood Arrivals (DACA) programs, which offer work authorization and protection from deportation. These state expansions include access to driver's licenses, public benefits, professional certifications, and college tuition assistance.

As states continue to diverge in their approaches towards immigration—and increasingly to challenge each other over their actions—the nationwide landscape of policies and actions becomes ever more fractured.

* * *

Sweeping New Restrictions in Florida

Two weeks before announcing his presidential campaign in May, Florida Governor Ron DeSantis (R) signed a far-reaching law restricting the rights and mobility of unauthorized immigrants and amplifying the state's role in immigration enforcement. The law's provisions include:

- Making it a felony to transport into Florida migrants who entered the country without authorization and were not inspected by federal authorities.
- Requiring hospitals that accept Medicaid to ask patients about their citizenship and immigration status. Hospitals must submit quarterly reports to state authorities on the number of patients served in each citizenship and status category, without providing identifying information.
- Making hiring unauthorized immigrants unlawful under state law, mirroring a federal prohibition.
- Imposing fines and possible jail time on unauthorized immigrants using false documents to obtain employment.
- Requiring employers with at least 25 employees to use the federal government's electronic work authorization verification system, E-Verify, to screen all new hires starting July 1. Previously, the state mandated E-Verify only for the government and its contractors.
- Allocating $12 million to transfer migrants to other parts of the country, including from states other than Florida. DeSantis came under fire from some critics in 2022 when the state paid to pick up 48 migrants in Texas and fly them to Martha's Vineyard, MA.
- Authorizing state law enforcement agencies to audit businesses to investigate employment practices, impose fines, and revoke licenses of those not in compliance with the law.
- Prohibiting localities from funding the creation of identification cards for unauthorized immigrants and deeming invalid unauthorized immigrants' driver's licenses from other states. This provision also makes unauthorized immigrants (and DACA holders) ineligible to practice law in the state by 2028.

This law comes as Florida receives a disproportionate share of migrants entering through the U.S.-Mexico border or via new parole programs. Many newly arriving Cubans, Haitians, Nicaraguans, Venezuelans, and other South Americans have flocked to Florida, where a wide range of Caribbean and Latin American diaspora communities are established.

Florida was the top state for asylum filings in immigration court in fiscal year (FY) 2022 and the first two months of FY 2023.

The law also comes as DeSantis focuses on his presidential campaign. Some see the actions in Florida, where the GOP holds a supermajority in the Legislature, as a winning Republican campaign strategy to hold President Joe Biden and other Democrats responsible for record high numbers of Southwest border encounters.

* * *

Texas Amps Up its Crackdown on Unauthorized Immigration

Following a special legislative session called by Governor Greg Abbott (R), Texas this month enacted six laws focused on immigration and border security. Among other aspects, these laws:

- Deputize U.S. Border Patrol agents who complete relevant training to search and arrest people suspected of violating state law.
- Authorize the governor to create a compact with other states to share border security intelligence and resources.
- Allow the Texas National Guard to use drones for monitoring the border and other purposes.
- Create a training program for local law enforcement agents on identifying and preventing transitional criminal authorities.
- Designate Mexican drug cartels and gangs as foreign terrorist organizations.
- Allocate funding to compensate farmers for property damage from border smuggling or trafficking.

The Texas Legislature originally had more ambitious plans. Lawmakers advanced bills this year to create a state border police force, make crossing the Mexico-Texas border without authorization a state crime, and raise penalties for people convicted of smuggling migrants. However, differences in bills between the two chambers were not reconciled in time to be sent to the governor to sign, including during a special session. It is unclear whether they will be resolved in a future special session.

The measures signed into laws build on Operation Lone Star, a $4 billion border security initiative launched in 2021 through which Texas National Guard members and Department of Public Safety staff have been deployed to the border to arrest trespassers on private property and aid arrests related to drug and human smuggling, among other measures. The initiative has also resulted in more than 384,000 migrant apprehensions and 29,000 arrests as of this month, according to the governor's office, although critics charge these tallies include unrelated enforcement actions and those that would have occurred without the operation.

* * *

States Extending Protections to Immigrants

Recent months have also seen new laws expanding the rights and benefits of unauthorized immigrants and those in quasi-legal statuses. As part of a major push following Democratic takeover of its Legislature this year, Minnesota created new college tuition support for all students in low-income families, regardless of immigration status. Lawmakers also made all residents eligible for driver's licenses regardless of status, reversing a 2003 law to do so. Rhode Island and Massachusetts enacted similar policies last year. Nineteen states and Washington, DC now offer such licenses, up from just three in 2012.

The move towards expanding rights is not simply a Democratic one. Utah, a Republican-controlled state, this year committed to offering in-state college tuition to immigrants who hold or have applied for asylum, humanitarian parole, refugee status, a special immigrant visa (SIV), or TPS. This builds on a 2002 law offering in-state tuition to students graduating from a Utah high school and meeting other conditions, regardless of status. Voters in Arizona last year approved a similar proposition offering in-state tuition at public colleges and universities to high school graduates regardless of status, reflecting a major shift in the state's immigration politics. As of this writing, at least 23 states and the District of Columbia offer in-state tuition to students regardless of immigration status.

Elsewhere, Maryland decided this year to offer health-care occupational licenses to qualified unauthorized immigrants, and last year Tennessee began allowing thousands of immigrants in quasi-legal status to obtain professional licenses. The moves are part of a broader trend; about a dozen states have made professional licenses available to people without permanent status but who hold work authorization, including asylum seekers, DACA and TPS holders, and parolees.

New Mexico also passed a law this year increasing the age at which migrant children who have experienced parental abuse, abandonment, or neglect can apply for Special Immigrant Juvenile status, from age 18 to 21. And California is in the process of expanding state-funded public health insurance to all immigrants ineligible for federal public insurance. Since 2020, eight states and Washington, DC have opened their state Earned Income Tax Credits to tax filers who do not have Social Security numbers.

A Creative Turn to Multiple Strategies

States have diversified their strategies to advance their immigration aims, using not just legislation but a host of tactics to advance policy, particularly for immigration enforcement. Texas was an early leader in suing the federal government over immigration, leading a group of 26 states against the Obama administration over an expansion of DACA and a new program offering deferred action to parents of U.S. citizens and legal immigrants (Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA) in 2014. Democrat-led states were very active in challenging the Trump administration, filing 17 multistate lawsuits focused on immigration issues. Since 2020, Texas has led lawsuits to maintain the Migrant Protection Protocols (MPP, otherwise known as Remain in Mexico) and undermine the Biden administration's attempt to narrow immigration enforcement priorities

(a case the Supreme Court tossed out last week) and erect parole programs for Cubans, Haitians, Nicaraguans, and Venezuelans, among other efforts. Florida has joined many of these lawsuits. It also sued to block federal authorities from releasing migrants from government custody with parole or NTAs.

At least 15 Republican-led states have dispatched their state National Guard to the border, as Texas has done since 2021 under Operation Lone Star. In March, Abbott requested other states assist; governors of Arkansas, Florida, Idaho, Iowa, Mississippi, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Virginia, and West Virginia have heeded the call. Florida is sending the largest number: 1,100 National Guard members and law enforcement officers as of this month. These troops join at least 4,000 troops who were deployed by Biden, including 1,500 active-duty military personnel dispatched ahead of the May end of the pandemic-era Title 42 expulsions policy and 2,500 National Guard members in place since last summer.

Texas and Arizona have constructed border barriers. Abbott's efforts to build a wall along the border have been slowed by the need to secure commitments from private landowners, but deals and construction are continuing. This month, Abbott also announced plans to install 1,000 feet of floating barriers in the Rio Grande to prevent unauthorized crossings. Arizona's former Governor Doug Ducey (R) used shipping containers stacked two-high and connected end-to-end to fill more than 3,800 feet of gaps in the federal border fencing in his state. Federal authorities warned the barriers were trespassing on and damaging federal land, leading to mutual lawsuits and an agreement under which the state is dismantling the wall while the federal government reiterated plans to fill the fencing gaps.

In the newest tactic, state authorities last year began busing and flying migrants from the Southwest border to cities perceived as sanctuaries for immigrants, including Chicago, Denver, Los Angeles, New York City, Philadelphia, and Washington, DC, where some dropoffs occurred in front of Vice President Kamala Harris's Naval Observatory home. More than 22,000 migrants have been sent by Texas on these journeys since April 2022.

DeSantis's efforts in this regard have been smaller but nonetheless equally notable. Florida-funded flights have taken several dozen migrants from Texas to Martha's Vineyard, a Massachusetts island frequented by former President Barack Obama and other prominent Democrats, and to Sacramento, California's capital, sparking a strong reaction from Governor Gavin Newsom (D), himself a potential future presidential candidate. This month, DeSantis spearheaded the formation of a coalition of more than 90 sheriffs from multiple states to focus on border enforcement issues.

Additionally, approximately 3,000 migrants were sent from Arizona to Washington, DC in 2022, although Ducey's efforts appeared less designed to garner media attention, and the trips were coordinated with local Washington service providers. Ducey's Democratic successor, Katie Hobbs, has continued the practice. With minimal political theater, borderland service providers and the city of El Paso have also funded migrants' cross-country trips to their selected destination. Colorado briefly bused migrants to Chicago and New York,

and New York City itself has bought bus and plane tickets for asylum seekers and other migrants to travel elsewhere in the state, other states, and, in a few cases, internationally.

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