

**2023 SUPPLEMENT TO THE SEVENTH EDITION OF
IMMIGRATION AND REFUGEE LAW AND POLICY**

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PREFACE

This Supplement covers developments since the publication of the seventh edition of *Immigration and Refugee Law and Policy* in January 2019. It incorporates and replaces the all prior Supplements.

Immigration law and practice have experienced sweeping, radical shifts in recent years, as the Trump presidency instituted hundreds of measures to aggressively curtail immigration, including “high profile initiatives that have prompted significant public controversy” and many “less prominent, often technical measures that have erected a sprawling, ‘invisible wall’ and placed millions at heightened risk of deportation.”¹ Some of these initiatives were blocked by the courts, and following the change in administrations in 2021, some—but by no means all—of the surviving changes have been reversed by the Biden administration. See, e.g., Exec. Order 13993, Revision of Civil Immigration Enforcement Policies and Priorities, 86 Fed. Reg. 7051 (Jan. 20, 2021) (revoking numerous Trump-era policies on Biden’s first day in office). The current administration also has reversed litigation positions in some pending matters, but has continued to defend a variety of other restrictionist positions taken by the former administration. Of course, there are many for whom the pre-Trump status quo is hardly an ideal to seek.

Some of the Trump-era changes have created lasting quagmires in the already difficult to navigate terrain of immigration law and policy, such that even a return to the pre-Trump status quo may be easier contemplated than achieved. And, of course, there are people who still support the measures instituted by the Trump administration. Some of these now have turned to the courts to challenge Biden administration decisions to retreat from Trump-era policies and practices. Meanwhile, despite all the movement in recent years, the underlying statutory framework has remained virtually unchanged.

It may be tempting to disregard Trump-era changes that have been blocked or reversed altogether. Doing so undoubtedly would have allowed this Supplement to be considerably shorter. But while studying immigration law certainly requires close attention to the current state of the law, it also requires an understanding of where, why, and how legal rules and their underlying principles have been contested. The recent battles over Trump-era immigration law and policy changes provide important insights into these questions, even and perhaps especially in those instances in which a new administration now has reversed course.

For example, litigation over the past several years has forced the courts to grapple with difficult questions regarding the limits of executive action. Issues of administrative procedure have assumed a new prominence in immigration law. States and local governments have been

¹ Anil Kalhan, *Building Immigration Policy Back Better*, in WHAT’S THE BIG IDEA? RECOMMENDATIONS FOR IMPROVING LAW & POLICY IN THE NEXT ADMINISTRATION AND IN THE STATES 7.1, 7.1 (Kara Stein ed. 2020), <https://ssrn.com/id=3768874>. For a comprehensive effort to document every known immigration-related measure instituted by the Trump administration, see Lucas Guttentag, *Immigration Policy Tracking Project*, <https://immpolicytracking.org>.

active participants in immigration litigation, raising anew many questions of the balance of federal and sub-federal roles in immigration. The outcomes of these contests, both settled and ongoing, will enable or constrain the ability of future administrations to shape immigration law. And they inform the incessant and unsuccessful efforts at immigration reform in Congress.

Because the journey often is at least as informative as the destination, we have retained in this Supplement many cases and documents from the earlier Supplements that are related to policies and practices that have subsequently been enjoined or rescinded. The various shifts in direction in recent years raise a number of important questions: Why are these policies no longer in place? Is the demise of a policy a political choice or a statutory or constitutional imperative? Might some of these initiatives have survived if they had been implemented in different ways? Would a future administration be able to easily reinstitute any of these Trump-era initiatives in the same or similar form? If so, why—and if not, why not?

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CHAPTER 1

THE IMMIGRATION DEBATE: GOALS, STRATEGIES, AND IMPACT

Page 27, before Section B insert:

Immigration historians have foregrounded and drawn attention to international and transnational dimensions of immigration politics, policy, and law that frequently have been neglected. Consider, for example, the following perspectives offered by historians Paul Kramer, Donna Gabaccia, and Ellen Wu:

While often treated as a “domestic” matter, U.S. immigration policy has always intersected with more global concerns about the status, extension, and maintenance of the United States’ power in the world. From mercantilist visions that located the strength of the fledgling republic in its rapidly growing population to contemporary efforts to promote the migration of highly skilled workers, immigration has played a critical role in Americans’ visions of and struggles over the United States’ global power, even as its international position, prospects, and projects have fundamentally shaped its approach to migrants and migration. As a growing scholarship is demonstrating, the nation’s alliances, rivalries, campaigns, and conflicts have all been imprinted on the ways in which it maintains its boundaries vis-à-vis migrants. Conversely, the United States’ changing place in the world has shaped Americans’ perceptions and treatment of foreigners in their midst. Shifting patterns of interstate alliance and enmity, for example, have recast the lived realities of neighborhood, community, and social membership in ways that are subtle and dramatic, hopeful and terrifying. As the United States’ global engagements intensified, newcomers came to be interpreted through dynamics of peace and war, power and weakness, safety and danger that were no longer far away, and which some feared they brought to American shores. Periods of confident American global power have often overlapped with the practices and imagery of immigrant inclusion; when the limits of American economic, military, and political power have been most visible, immigration has often been ideologically mobilized as the cause and index of decline. * * *

[Recent scholarship] has successfully connected the “foreign” and the “domestic” politics of immigration. Until relatively recently, histories of U.S. immigration control, even when they have included actors, themes, and processes located outside the United States, have tended to use migration controls as a lens through which to view American identity, U.S. legal regimes, and processes of institutional-political change “within” the United States. This new scholarship asks what histories of U.S. immigration policy might tell scholars about American power in the world, and what might be learned from making international questions—including but not limited to “foreign policy”—a central object of inquiry. In important ways, it has begun turning the history of U.S. immigration policy “outward.”

Paul A. Kramer, *Review Essay: The Geopolitics of Mobility: Immigration Policy and American Global Power in the Long Twentieth Century*, 123 *Am. Hist. Rev.* 393, 394–98 (2018) (citing recent historical scholarship that “either foreground[s] the intersection of U.S. foreign relations, diplomacy, and empire and U.S. immigration politics and policy, or give[s] these factors significant emphasis”).

Policy debates in the United States today treat immigration almost exclusively as a domestic problem that must be solved, somehow, with the passage by Congress of better laws. Americans repeatedly debate what those laws should be. Yet laws that treat immigration as a purely domestic problem are likely to fail. Why? Because immigration is an important continuous, and contentious relationship between the United States and rest of the world. * * *

In the United States, the intersection of immigrant foreign relations with the far-better-known history of American diplomacy becomes most visible in domestic political struggles over some of the main themes of global history—that is, in the areas of foreign trade and investment, empire building, warfare, and geopolitics. Collectively these struggles illustrate a central tension historians have observed between Americans’ desire for isolation from a world that they perceive as somehow dangerous and the obvious global activism of the U.S. government, particularly in the twentieth century. Domestic debates about global matters can and have transformed immigrants and their foreign relations from welcome friends and allies into dangerous enemy aliens. A focus on the intersection of immigrant foreign relations and American international relations reveals clearly that immigration has never been a purely domestic matter. Global perspectives on American immigration provide the foundation for pondering why efforts to control immigration through domestic legislation are likely to fail.

Donna R. Gabaccia, *Foreign Relations: American Immigration in Global Perspective* 1, 4 (2012).

War is central to U.S. immigration history. Yet too often that fact has been obscured by folktales that rhapsodize about the feel-good Ellis Island story: lured by the American Dream, strangers come to a promised land, put down roots, and triumph over adversity through industry, resolve, and pluck.

Scholarly treatments tend to foreground admission and naturalization regulations as the drivers and measures of immigrant mobility, acceptance, and assimilation. Our narratives cling steadfastly to a timeline punctuated by legislation and the paradigm of “exclusion” versus “inclusion.” “Gates” and “doors” slam shut (1882, 1917, 1924) and crack or swing open (1943, 1946, 1952, 1965, 1986, 1990) as Lady Liberty unfurls her arms or turns her back to the huddled masses yearning to breathe free. The Immigration and Nationality Act of 1965 looms especially large for periodization in U.S. immigration history, and its kindred fields like Latinx Studies and Asian American Studies.

Specialists usually talk in terms of “pre-1965” and “post-1965”; this temporal marker has become the taken-for-granted turning point.

Always centering our narratives on the twists and turns of government immigration policies risks narrowing our vista. It downplays the significance of war and militarization as catalysts for the sprawling, varied patterns of migrant entry, exit, exclusion, and inclusion that have characterized the United States since the late nineteenth century. It obscures how much U.S. empire, among other empires, has been an important engine of cross-border transit. And it sidelines refugees, asylum seekers, colonial subjects, military spouses, adoptees, students, detainees, deportees, and others who do not fit neatly into the classic profile of “immigrants” as voluntary arrivals attracted by opportunities for work, well-being, and permanent settlement.

Underlining the significance of geopolitical tensions and armed conflicts in U.S. immigration history requires the crucial step of reframing “immigration” as “migration.” As Adam Goodman explains, this conceptual renovation “enables us to incorporate the free, forced, and coerced migrations” that have shaped U.S. history into a single narrative.” This consolidation, in turn, is indispensable for correcting misguided, if well-meaning, celebrations of the United States as an exceptional “nation of immigrants”—a rhetorical sleight of hand that valorizes voluntary, sanctioned entry while concealing or miscasting other forms of migration.

Ellen D. Wu, *It’s Time to Center War in U.S. Immigration History*, *Modern Am. Hist.* 1–2 (May 2019).

Page 52, before Notes and Questions insert:

Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*

71 *Stanford L. Rev.* 197, 197–203, 209 (2019)

Two years into the Trump presidency, white nationalism may be driving the administration’s immigration policy. We view white nationalism as “the belief that national identity should be built around white ethnicity, and that white people should therefore maintain both a demographic majority and dominance of the nation’s culture and public life.” We do not use the term lightly, nor view all restrictions on immigration as inherently racist. Nonetheless, our review of the Trump administration’s rhetoric and policies affecting nonwhite immigrants suggests this motivation.

* * * [L]egal challenges to Trump’s restrictive immigration policies should call out white nationalism as the underlying harm, both through raising equal protection claims and in presenting the overall theory of the case. Despite longstanding barriers to equality claims in immigration law, asserting these claims can frame public and political understanding of the issues at stake, support social movements challenging racialized immigration enforcement, and offer an alternative vision for immigration law that rejects both racial criteria and the exceptional judicial deference long accorded to the political branches in immigration decisions.

I. The White Nationalism Behind Immigration Policy

A. Rhetoric

The President's statements and policies suggest that he views U.S. national identity in racial terms and seeks to preserve the nation's predominantly white identity. As a general matter, the President has parroted ideas of white cultural threat popular among white nationalists. For instance, on multiple occasions, Trump excoriated the removal of Confederate monuments as a threat to "our culture"—identifying "our culture" with memorials erected to send a message of white supremacy in the name of a war fought to protect slavery. He gestured at the notion of a "white genocide"—a rallying cry of white nationalists worldwide—by tweeting support for South African far-right claims that white farmers were suffering from mass killings and land seizures in that country. Most notably, following the largest U.S. gathering of white supremacists in a generation, the President insisted that some who marched in Charlottesville were "very fine people."

With respect to immigration, Trump has repeatedly disparaged various groups of nonwhite immigrants. He began his presidential campaign by denouncing Mexican migrants as "rapists." He allegedly commented that Haitian immigrants "all have AIDS" and that Nigerian immigrants would never "go back to their huts" after seeing the U.S. He repeatedly conflated Middle Eastern and Muslim immigrants with terrorists and falsely claimed that most people convicted of terrorism in the U.S. came from abroad. In addition, Trump has trafficked in age-old racist tropes, portraying immigrants as criminals, invaders, threats to women, and even subhuman. On one occasion, Trump described unauthorized immigrants as "animals;" on another, he conjured images of vermin in describing immigrants as threatening to "pour into and infest our Country." Perhaps most infamously, he reportedly railed against immigration from "shithole countries"—an apparent reference to Haiti, El Salvador, and African nations—and asked why the U.S. couldn't get more people from countries like Norway.

The President's comments on immigration to Europe even more strongly suggest that he views immigration as a cultural threat to the U.S.—not just an economic or security challenge. He called immigration to Europe a "shame" and stated that it had "changed the fabric of Europe" and that Europeans "are losing [their] culture." He railed against the German government, which had (at one point) welcomed Syrian refugees, calling it a "[b]ig mistake made all over Europe in allowing millions of people in who have so strongly and violently changed their culture!" Lest some might read these statements as pertaining to Europe alone, Trump drew a direct connection to the U.S.: "We don't want what is happening with immigration in Europe to happen with us!"

Putting together the President's claims of cultural threat from immigration with his vilification of nonwhite immigrants, these statements suggest support for white nationalist ideas. Even if certain remarks might be challenged as insufficiently proven or susceptible of non-racist meanings, the record as a whole cannot be read in race-neutral terms. Nor should the fact that non-racial motivations for restricting immigration can exist sanitize the reasons Trump has actually expressed for curtailing immigration.

B. Policies

The Trump administration's immigration policies reflect its white nationalist rhetoric. The administration has issued a dizzying array of policy changes that explicitly target or disproportionately affect noncitizens of color at the same time that President Trump's statements reflect racist intent. These policy changes represent the most wide-ranging Executive Branch attempt to restrict immigration policies in generations.

Shortly after President Trump's inauguration in 2017, the administration instituted the first iteration of the Muslim Travel Ban, barring certain noncitizens from Muslim-majority countries from admission to this country. In 2017 and 2018, the administration ended Temporary Protected Status (TPS) for noncitizens from El Salvador, Haiti, Nicaragua, and Sudan, granted and renewed by prior administrations (for decades in some cases) to protect people unable to return to their home countries because of armed conflict, natural disasters, or other conditions.

Numerous Trump administration policies are designed to limit grants of status to Mexican and Central American immigrants. In 2017 President Trump rescinded the Deferred Action for Childhood Arrivals (DACA) program, under which individuals who had entered the country without papers as children could obtain work permits. Ninety-four percent of DACA recipients are Latino. The Department of Justice has also targeted Mexican and Central American refugees by heightening the standard that asylum-seekers fleeing domestic violence must meet and implementing (later rescinded) draconian family separation policies. The administration is now defending a recent presidential proclamation that attempted to restrict the rights of individuals within the U.S. to apply for asylum, contrary to the plain language of the immigration statutes and this country's longstanding practice.

The Trump administration has also dramatically escalated enforcement and detention, attempted to move deportation cases so quickly in immigration court as to preclude noncitizens from preparing a defense or finding attorneys, slowed down and tightened visa issuances, and planned to restrict severely the ability of certain indigent immigrants to obtain green cards, regardless of the strength of family ties. The administration has also markedly increased efforts to denaturalize U.S. citizens. While these changes do not, on their face, target a specific group of noncitizens, the demographics of immigration to this country mean that their impact falls predominantly on noncitizens of color.

It is true that neither nationality distinctions in immigration law nor efforts to control immigration are new. But the President's racist statements and the breadth of the changes to immigration policy distinguish this administration from prior efforts to restrict immigration.

Moreover, while it is fairly easy to link certain immigration policies, like the Muslim Travel Ban or the termination of TPS for Haitians, to the President's hostile comments about those groups, the President's statements cast doubt on the intent behind a wider swath of immigration policies. To the extent that the President's statements reflect a view of U.S. national identity as centered in white identity, they render immigration policies suspect even if the President has not disparaged the particular nonwhite nationalities affected. * * *

Conclusion

Some may object that emphasizing race may alienate members of the public who would respond more sympathetically to universal or humanitarian narratives, or distract courts from narrower legal arguments with a greater likelihood of success. We recognize that a uniform approach may not be appropriate in every case, and that the communities affected by various measures and their lawyers have to assess potential costs against the benefits we have outlined. But in making that assessment, lawyers in particular should consider that clients, social movement actors, and even the general public may be well ahead of lawyers in recognizing the racism behind the Trump administration's policies. Moreover, the failure to raise equality claims presents its own risk: normalizing white nationalism in our political and legal life. If legal actors cannot call out racism even when it manifests in the express comments and policies of the President, there is little hope of countering it in its more subtle and pervasive forms.

Page 73, before Notes and Questions insert:

Immigrant workers play a central role in health, infrastructure, manufacturing, service, food, safety, and other industries. The Center for Migration Studies (CMS) reports:

Based on 2018 US Census data * * * 19.8 million immigrants work in “essential critical infrastructure” categories (DHS 2020). These workers meet the health, infrastructure, manufacturing, service, food, safety, and other needs of all Americans. Roughly one-half of US foreign-born essential workers—9.6 million—are naturalized citizens, 4.6 million are legal noncitizens (mostly lawful permanent residents or LPRs), and 5.5 million are undocumented. * * *

Nationally, foreign-born workers comprise 18 percent of workers in essential critical infrastructure categories. In the overwhelming majority of states, immigrants make up a larger share of essential workers than the native-born, and a larger share than that of all immigrant workers in the state's labor market. * * *

Naturalized citizens make up 67 percent of immigrants working in health care, including 74 percent of immigrants working in hospitals and 74 percent of those working in doctors' and dentists' offices. Many of these immigrants work on the front lines with coronavirus patients.

Undocumented immigrants comprise 54 percent of foreign-born workers in agriculture and farms, and 40 percent in disinfection. These workers contribute to the nation's food security and health. Undocumented immigrants also comprise 50 percent of foreign-born workers in construction, including plumbers and electricians, and the plurality of immigrant workers in tire, rubber, cement, and household appliance manufacturing. These workers will also be vital to the ability of the Americans and the US economy to rebound from the pandemic. * * *

Donald Kerwin, Mike Nicholson, Daniela Alulema, and Robert Warren, Center for Migration Studies, *US Foreign-Born Essential Workers by Status and State, and the Global Pandemic*, May 2020, <https://cmsny.org/wp-content/uploads/2020/05/US-Essential-Workers-Printable.pdf>.

Deferred Action for Childhood Arrivals (DACA) recipients are prominent on the front lines combating COVID-19. The numbers of DACA recipients working in essential industries include “43,500 * * * in the health care and social assistance industries, including 10,300 in hospitals and 2,000 in nursing care facilities.” Daniela Alulema, Center for Migration Studies, *DACA Recipients are Essential Workers and Part of the Front-line Response to the COVID-19 Pandemic, as Supreme Court Decision Looms*, March 30, 2020, <https://cmsny.org/daca-essential-workers-covid/>. This concentration of migrants in essential positions is not unique to the United States, and “13 percent of essential workers in the EU are immigrants (i.e. non-EU nationals). In some key occupations, however, the share is substantially higher: More than 1 in 3 domestic workers, more than 1 in 4 construction/mining workers, and 1 in 5 workers in food processing are migrants.” Marta Foresti, Brookings Institution, *Less Gratitude, Please. How COVID-19 Reveals the Need for Migration Reform*, May 22, 2020, <https://www.brookings.edu/blog/future-development/2020/05/22/less-gratitude-please-how-covid-19-reveals-the-need-for-migration-reform/>.

Page 77, after Item 10 insert:

11. How does the presence of immigrant workers among those deemed “essential” during the COVID-19 pandemic affect societal attitudes about the economic impact of immigration? How might describing immigrants as essential affect questions about which immigrants might bring the greatest economic benefits? What are the risks that might adhere to valorizing some immigrants as essential?

CHAPTER 2

IMMIGRATION AND THE CONSTITUTION

Page 119, at the end of Item 5 insert:

In this context, consider once again the perspectives offered in Chapter 1 by immigration historians Paul Kramer, Donna Gabaccia, and Ellen Wu. What implications, if any, should their claims concerning the international and transnational dimensions of immigration politics, policy, and law have for our understanding of the nature and scope of the immigration power?

Page 147–48, replace Item 8.a with:

a. Justice Brewer emphasizes that deportation operates on those who are within the United States while exclusion operates only on persons who, in the eyes of the law, are outside the country. He attaches significance to that distinction because, in his view, the Constitution does not apply outside United States territory. If that is his belief, though, how could he have dissented in *Ekiu*, where the majority rejected the immigrant’s constitutional challenge to her exclusion? (Justice Brewer himself provided no explanation for his dissent.)

Writing for a 5-3 majority in *Agency for International Development v. Alliance for Open Society International, Inc.*, Justice Kavanaugh embraced this same premise, stating in dicta that “it is long settled as a matter of American constitutional law that foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution.” *Agency for Int’l Development v. Alliance for Open Society Int’l, Inc.*, 140 S. Ct. 2082 (June 29, 2020).

Is Kavanaugh’s assertion correct? To be sure, the Supreme Court has interpreted *certain* constitutional provisions as being inapplicable in *certain* extraterritorial contexts. E.g., *United States v. Verdugo-Urquidez*, 494 U.S. 2]59 (1990); *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922); *Downes v. Bidwell*, 182 U.S. 244 (1901). But several cases have extended particular constitutional guarantees to United States citizens living abroad. E.g., *Reid v. Covert*, 354 U.S. 1 (1957), and its progeny. Occasionally a court will go a step further and apply constitutional restrictions to the actions of the United States government even when the aggrieved individuals are noncitizens living overseas. E.g., *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931) (Fifth Amendment requires government to provide just compensation when seizing contractual rights of nonresident corporation); *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. for Berlin, 1979) (Sixth Amendment requires government to offer jury trial to nonresident noncitizen criminally prosecuted by U.S. authorities in Berlin). Cf. *Rasul v. Bush*, 542 U.S. 466 548 (2004) (construing habeas corpus *statute* as extending to Guantánamo); *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that Constitution entitles Guantánamo detainees to meaningful opportunity to challenge the legality of their detention).²

² For a comprehensive general discussion of the extraterritorial reach of the U.S. Constitution (including analysis of whether it should matter that the aggrieved individual is not a citizen), see Gerald L. Neuman, *Whose Constitution?*, 100 Yale L.J. 909 (1991).

Dissenting in *Alliance for Open Society International*, Justice Breyer stated that Kavanaugh’s “sweeping assertion is neither relevant to this case nor correct on the law”:

[T]his case does not concern the constitutional rights of foreign organizations. This case concerns the constitutional rights of *American* organizations. Every respondent here is—and has always been. No foreign entities are party to this case * * *. The question before us is clear: whether the First Amendment protects *Americans* when they speak through clearly identified foreign affiliates to reach audiences overseas. Whether the foreign affiliates themselves have their own First Amendment rights is not at issue.

Even taken on its own terms, the majority’s blanket assertion about the extraterritorial reach of our Constitution does not reflect the current state of the law. The idea that foreign citizens abroad *never* have constitutional rights is not a “bedrock” legal principle. At most, one might say that they are unlikely to enjoy very often extraterritorial protection under the Constitution. Or one might say that the matter is undecided. But this Court has studiously avoided establishing an absolute rule that forecloses that protection in all circumstances.

In *Hernández v. Mesa*, 137 S. Ct. 2003 (2017) (*per curiam*) (*Hernández I*), for example, we specifically declined to decide the “sensitive” question whether, on the facts then before us, a Mexican citizen standing on Mexican soil had Fourth Amendment rights—precisely because the answer to that extraterritoriality question “may have consequences that are far reaching.” *Hernández* later came to this Court again, and we decided the case on alternative grounds. See *Hernández II*, 140 S. Ct., at 749–750. Were the majority’s categorical rule of (non)extraterritoriality etched in stone, we could have disposed of *Hernández* the first time around in a few short sentences.

Nor do the cases that the majority cites support an absolute rule. The exhaustive review of our precedents that we conducted in *Boumediene v. Bush* pointed to the opposite conclusion. In *Boumediene*, we rejected the Government’s argument that our decision in *Johnson v. Eisentrager* “adopted a formalistic” test “for determining the reach” of constitutional protection to foreign citizens on foreign soil. This is to say, we rejected the position that the majority propounds today. Its “constricted reading” of *Eisentrager* and our other precedents is not the law. See *Boumediene*, 553 U.S. at 764; see also, *e.g.*, Neuman, *Understanding Global Due Process*, 23 Geo. Immigration L. J. 365, 400 (2009) (describing our cases as rejecting any absolute view).

The law, we confirmed in *Boumediene*, is that constitutional “questions of extraterritoriality turn on objective factors and practical concerns” present in a given case, “not formalism” of the sort the majority invokes today. Those considerations include the extent of *de facto* U.S. Government control (if any) over foreign territory. But they also include the nature of the constitutional protection sought, how feasible extending it would be in a given case, and the foreign citizen’s status vis-à-vis the United States, among other pertinent

circumstances that might arise. Our precedents reject absolutism. Indeed, even our most sweeping statements about foreign citizens' (lack of) constitutional rights while outside U.S. Territory have come with limits.

There is wisdom in our past restraint. Situations where a foreign citizen outside U.S. Territory might fairly assert constitutional rights are not difficult to imagine. Long-term permanent residents are "foreign citizens." Does the Constitution therefore allow American officials to assault them at will while "outside U.S. territory"? Many international students attend college in the United States. Does the First Amendment permit a public university to revoke their admission based on an unpopular political stance they took on social media while home for the summer? Foreign citizens who have never set foot in the United States, for that matter, often protest when Presidents travel overseas. Does that mean Secret Service agents can, consistent with our Constitution, seriously injure peaceful protestors abroad without any justification?

We have never purported to give a single "bedrock" answer to these or myriad other extraterritoriality questions that might arise in the future. To purport to do so today, in a case where the question is not presented and where the matter is not briefed, is in my view a serious mistake.

And there is no need to set forth an absolute rule here. Respondents have conceded that their foreign affiliates lack First Amendment rights of their own while acting abroad. If in spite of everything else, the majority considers this point material to its decision, all that need be said is: "We accept respondents' concession and proceed on that basis." To say so much more "run[s] contrary to the fundamental principal of judicial restraint," a principle that applies with particular force to constitutional interpretation.

Assuming, however, that the distinction between noncitizens outside the United States and those within it is constitutionally significant, in what sense is a noncitizen who faces exclusion located outside the United States? Not in the physical sense. For a variety of practical reasons, the inspection and removal of arriving noncitizens almost always take place on the United States side of the border. Noncitizens who seek admission are "outside" the United States only because the law *deems* them to be. Should Congress, through the simple expedient of declaring that a noncitizen who is physically here is legally not, be able to render the Constitution inapplicable? Conversely, however, should any noncitizen, by taking a few steps into United States territory, be able to assert constitutional rights that he or she otherwise would not have possessed? From either perspective, should physical location determine whether a noncitizen may assert constitutional rights? These questions also arise in *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020), discussed later in this chapter.

Page 214, after Item 2 insert:

3A. Unlike the majority's opinion, which held that the Proclamation had legitimate reasons grounded in national security and that animus against Muslims was not its sole motivating reason, Justice Sotomayor's dissenting opinion criticized the majority's deferential

approach and argued that the Presidential Proclamation’s “primary purpose” was to express animus against Muslims. Shalini Bhargava Ray examines the different analytical approaches between Chief Justice Roberts’s and Justice Sotomayor’s opinions and proposes a third approach—a mixed motives framework—in equal protection analysis. Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 Ohio St. L.J. 13, 61 (2019). Under a mixed-motives framework, legislation would be struck down if it did not have an independently sufficient justification aside from animus. Laws where animus was not a necessary motive would be upheld. Do you think that the adoption of a mixed-motives framework would have been helpful in analyzing the Proclamation’s constitutionality?

Page 215, at the end of Item 7 insert:

Some scholars and commentators who otherwise vigorously opposed and criticized the Court’s decision in *Trump v. Hawaii* nevertheless applauded and welcomed the majority opinion’s repudiation of *Korematsu*, finding in that specific aspect of the Court’s opinion a “silver lining” of sorts. See, e.g., Eric Muller, *Korematsu*, Hirabayashi, and the Second Monster, 98 Tex. L. Rev. 735 (2020) (stating that “[n]ever again can a government lawyer cite [*Korematsu*] to support a decision to force a racial, ethnic, or religious group away from the place it calls home; Gabriel J. Chin, *Putting a Happy Face on an Unfortunate Decision*, Am. Const. Soc’y Blog (Jun. 26, 2018), <https://www.acslaw.org/acsblog/putting-a-happy-face-on-an-unfortunate-decision/> (characterizing *Trump v. Hawaii*’s repudiation of *Korematsu* as “a step forward in the Court’s history of restricted judicial review of racist and otherwise discriminatory immigration laws”); Amy Davidson Sorkin, *One Really Good Thing in the Supreme Court’s Travel-Ban Ruling: Korematsu Is Gone*, New Yorker (Jun. 26, 2018), <https://www.newyorker.com/news/daily-comment/one-really-good-thing-in-the-supreme-courts-travel-ban-ruling-korematsu-is-gone> (celebrating renunciation of *Korematsu* as a “crucial, counterbalancing move[]” and “a historic moment”).

More critical early assessments of the Court’s treatment of *Korematsu* include Eric K. Yamamoto & Rachel Oyama, *Masquerading Behind a Facade of National Security*, 128 Yale L.J. F. 688 (2019) (arguing that the Court “appeared to repudiate *Korematsu*’s validation of mass racial incarceration while replicating its “logic” of unconditional deference to the President”); Neal Katyal, *Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu*, 128 Yale L.J. F. 641 (2019) (stating that the Court’s decision in *Trump v. Hawaii* “perpetuates the very-near-blind deference to the executive branch that led the *Korematsu* Court astray”); Jamal Greene, *Is Korematsu Good Law?*, 128 Yale L.J.F. 629, 630 (2020) (describing the Court’s *Trump v. Hawaii* opinion as “empty” because it did not explain what propositions about *Korematsu* the Court had overruled).

Pages 215–26, replace Item 9 with:

9. Iraq was named in EO-1 but not EO-2. Between the two orders, Iraq agreed to accept Iraqi nationals whom the United States sought to deport. Soon after this agreement was reached, ICE rounded up over 200 Iraqis with old removal orders. Subsequent class action litigation enjoined immediate removals to provide class members the opportunity to file motions to reopen based on changed country conditions. *Hamama v. Adducci*, 342 F.Supp.3d 751 (E.D. Mich. 2018); *Hamama v. Adducci*, 261 F.Supp.3d 820 (E.D. Mich. 2017). However, a divided panel of the Sixth Circuit reversed and vacated the district court’s preliminary

injunctions, concluding that IIRIRA eliminated jurisdiction for the district court to enter its preliminary injunction and that the lack of habeas corpus review was constitutionally permissible. 912 F.3d 869 (6th Cir. 2018), *cert. denied*, 141 S.Ct. 188 (2020).³

Page 216, after Item 10 insert:

11. The legal significance of racist and xenophobic statements by President Trump also was raised in litigation challenging the Trump presidency’s attempted rescission of the Obama administration’s Deferred Action for Childhood Arrivals program. In several cases, plaintiffs argued that the decision to terminate DACA violated equal protection principles because it was motivated by racial animus and had disparate effects on Latinos, especially Mexicans. In support of their claim of discriminatory purpose, the plaintiffs pointed to statements by Trump—both during his campaign and after assuming office as president—that “Mexican immigrants are not Mexico’s ‘best,’ but are ‘people that have lots of problems,’ ‘the bad ones,’ ‘criminals, drug dealers, [and] rapists’; that individuals who protested outside a campaign rally were “thugs who were flying the Mexican flag”; “that a U.S.-born federal judge of Mexican descent could not fairly preside over a lawsuit against Trump’s for-profit educational company because the judge was ‘Mexican’ and Trump intended to build a wall along the Mexican border”; and that “Latino/a immigrants [are] criminals, ‘animals,’ and ‘bad hombres.’” *Batalla Vidal v. Trump*, 291 F.Supp.3d 260, 276 (E.D.N.Y. 2018); *Regents of Univ. of California v. U.S. Dep’t of Homeland Sec.*, 298 F.Supp.3d 1304, 1314 (N.D. Cal. 2018).

Before *Trump v. Hawaii* was decided, two district courts concluded that these allegations stated plausible claims. *Batalla Vidal*, 291 F.Supp.3d 260; *Regents of Univ. of California*, 298 F.Supp.3d 1304. In a post-*Trump v. Hawaii* decision affirming the district court in *Regents*, the Ninth Circuit expressly distinguished the decision:

[I]n *Trump v. Hawaii* ... statements by the President allegedly revealing religious animus against Muslims were “[a]t the heart of plaintiffs’ case” The Court assumed without deciding that it was proper to rely on the President’s statements, but nevertheless upheld the challenged executive order under rational basis review. Here, by contrast, plaintiffs provide substantially greater evidence of discriminatory motivation, including the rescission order’s disparate impact on Latinos and persons of Mexican heritage, as well as the order’s unusual history. Moreover, our case differs from *Hawaii* in several potentially important respects, including the physical location of the plaintiffs within the geographic United States, the lack of a national security justification for the challenged government action, and the nature of the constitutional claim raised.

Regents of Univ. of California v. U.S. Dep’t of Homeland Sec., 908 F.3d 476, 519–20 (9th Cir. 2018). How successful was the Ninth Circuit in distinguishing *Trump v. Hawaii*?

³ The extent to which judicial review of agency immigration decisions may be required under the Suspension Clause, U.S. Const. art. I, § 9, cl. 2, or other constitutional provisions is discussed in Chapter 9.

As discussed in Chapter 8, the Supreme Court affirmed the invalidation of the Trump presidency’s rescission of DACA and remanded to give DHS an opportunity to reconsider its decision anew. *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020). However, in a plurality section of his opinion,⁴ joined only by Justices Ginsburg, Breyer, and Kagan, Chief Justice Roberts concluded that the plaintiffs’ allegations were insufficient to support their claim that the equal protection guarantee had been violated:

To plead animus, a plaintiff must raise a plausible inference that an “invidious discriminatory purpose was a motivating factor” in the relevant decision. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). Possible evidence includes disparate impact on a particular group, “[d]epartures from the normal procedural sequence,” and “contemporary statements by members of the decisionmaking body.” Tracking these factors, respondents allege that animus is evidenced by (1) the disparate impact of the rescission on Latinos from Mexico, who represent 78% of DACA recipients; (2) the unusual history behind the rescission; and (3) pre- and post-election statements by President Trump.

None of these points, either singly or in concert, establishes a plausible equal protection claim. First, because Latinos make up a large share of the unauthorized alien population, one would expect them to make up an outsized share of recipients of any cross-cutting immigration relief program. Were this fact sufficient to state a claim, virtually any generally applicable immigration policy could be challenged on equal protection grounds.

Second, there is nothing irregular about the history leading up to the September 2017 rescission. The lower courts concluded that “DACA received reaffirmation by [DHS] as recently as three months before the rescission,” referring to the June 2017 DAPA rescission memo, which stated that DACA would “remain in effect.” But this reasoning confuses abstention with reaffirmation. The DAPA memo did not address the merits of the DACA policy or its legality. Thus, when the Attorney General later determined that DACA shared DAPA’s legal defects, DHS’s decision to reevaluate DACA was not a “strange about-face.” It was a natural response to a newly identified problem.

Finally, the cited statements are unilluminating. The relevant actors were most directly Acting Secretary Duke and the Attorney General. As the [district] court acknowledged, respondents did not “identif[y] statements by [either] that would give rise to an inference of discriminatory motive.” Instead, respondents contend that President Trump made critical statements about Latinos that evince discriminatory intent. But, even as interpreted by respondents, these statements—remote in time and made in unrelated contexts—do not qualify as “contemporary statements” probative of the

⁴ While declining to join the plurality, Justices Thomas, Alito, Gorsuch, and Kavanaugh all separately concurred in the rejection of the plaintiffs’ equal protection claims, thereby creating a majority in favor of dismissing those claims.

decision at issue. Thus, like respondents' other points, the statements fail to raise a plausible inference that the rescission was motivated by animus.

While joining the rest of Roberts's opinion, Justice Sotomayor dissented from the Court's dismissal of the plaintiffs' equal protection claims, concluding that dismissal was "unwarranted on the existing record and premature at this stage of the litigation":

Respondents' equal protection challenges come to us in a preliminary posture. All that respondents needed to do at this stage of the litigation was state sufficient facts that would "allo[w a] court to draw the reasonable inference that [a] defendant is liable for the misconduct alleged." The three courts to evaluate respondents' pleadings below held that they cleared this modest threshold.

I too would permit respondents' claims to proceed on remand. The complaints each set forth particularized facts that plausibly allege discriminatory animus. The plurality disagrees, reasoning that "[n]one of these points, either singly or in concert, establishes a plausible equal protection claim." But it reaches that conclusion by discounting some allegations altogether and by narrowly viewing the rest.

First, the plurality dismisses the statements that President Trump made both before and after he assumed office. * * * The plurality brushes these aside as "unilluminating," "remote in time," and having been "made in unrelated contexts."

But "nothing in our precedent supports [the] blinkered approach" of disregarding any of the campaign statements as remote in time from later-enacted policies. Nor did any of the statements arise in unrelated contexts. They bear on unlawful migration from Mexico—a keystone of President Trump's campaign and a policy priority of his administration—and, according to respondents, were an animating force behind the rescission of DACA. Taken together, "the words of the President" help to "create the strong perception" that the rescission decision was "contaminated by impermissible discriminatory animus." This perception provides respondents with grounds to litigate their equal protection claims further.

Next, the plurality minimizes the disproportionate impact of the rescission decision on Latinos after considering this point in isolation. But the impact of the policy decision must be viewed in the context of the President's public statements on and off the campaign trail. At the motion-to-dismiss stage, I would not so readily dismiss the allegation that an executive decision disproportionately harms the same racial group that the President branded as less desirable mere months earlier.

Finally, the plurality finds nothing untoward in the "specific sequence of events leading up to the challenged decision." I disagree. As late as June 2017, DHS insisted it remained committed to DACA, even while rescinding a related

program, the Deferred Action for Parents of Americans and Lawful Permanent Residents. But a mere three months later, DHS terminated DACA without, as the plurality acknowledges, considering important aspects of the termination. The abrupt change in position plausibly suggests that something other than questions about the legality of DACA motivated the rescission decision. Accordingly, it raises the possibility of a “significant mismatch between the decision ... made and the rationale ... provided.” Only by bypassing context does the plurality conclude otherwise.

The facts in respondents’ complaints create more than a “sheer possibility that a defendant has acted unlawfully.” Whether they ultimately amount to actionable discrimination should be determined only after factual development on remand.

To what extent does it seem relevant to the plurality’s analysis that the case arises in the context of immigration? Are there are significant continuities or contrasts between the discussions by Roberts and Sotomayor in their opinions here and their opinions in *Trump v. Hawaii* assessing the significance of President Trump’s anti-Muslim statements surrounding the Proclamation?

Natasha Merle and Samuel Spital observe that while the plurality “did not purport to recede from” its prior decision in *Arlington Heights*, it failed to undertake the “sensitive inquiry into such circumstantial and direct evidence of intent as may be available” that the decision requires:

The plurality * * * asserted that President Trump’s statements were not probative under *Arlington Heights* because they were not “contemporary statements” made by a decisionmaker during the rescission process. But, while such “contemporary statements” are one of the specific factors identified in *Arlington Heights* as probative of intentional discrimination, the Court in *Arlington Heights* explained that it was not “purporting to be exhaustive” when it identified these specific factors. * * *

The plurality opinion is especially unfortunate for at least two reasons.

First, the opinion may resonate with future candidates running for the nation’s highest office, even encouraging them to freely make racially discriminatory statements in their bids. It surely does not discourage them from doing so. The plurality opinion can be interpreted as giving candidates a free pass to forecast their discriminatory platforms. And once elected, their statements of racial animus are deemed irrelevant for constitutional purposes, even if their platform comes to fruition. The far-reaching harm to people of color of allowing government policies to be motivated by such overt racism cannot be underestimated.

Discriminatory government policies are harmful for many reasons, including that they send a message that people of color “are . . . inferior and degraded” so as to justify the discrimination. * * * [T]he harms from state-sponsored racial

discrimination “extend[] beyond the direct victims” of the discrimination. Such discrimination “corrupt[s] our governmental institutions, stigmatize[s] all members of the disfavored group and incite[s] further discrimination.” When such explicit racial animus is permitted, or left unchecked, by the courts, it consigns people of color to an inferior status and reinforces racist ideas about them. Such discrimination also undermines public confidence in the courts as neutral arbiters of the rule of law.

These harms are especially acute because they tap into the overt racism that has long plagued our nation’s immigration and naturalization laws. * * * The evidence before the Court supported an inference that the Trump administration’s rescission of DACA was grounded in this same kind of historical bigotry that conveys a message of racial hierarchy. By failing to acknowledge that evidence, the plurality opinion reinforces that, for people of color, constitutional rights ebb and flow with election cycles.

Second, the plurality opinion reflects a troubling discomfort about addressing evidence that racism motivated a government policy. After carefully explaining and analyzing the evidence showing that the rescission of DACA was arbitrary and capricious in violation of the APA, the Court dismissed plaintiffs’ race discrimination claim without even acknowledging the core (and shocking) facts at the center of that claim: while campaigning for the highest office in the nation, the now-President of the United States referred to immigrants from Mexico as “rapists,” “drug dealers,” and “criminals.”

Natasha Merle & Samuel Spital, Regents of Univ. of Calif.: *Trump Administration Held Accountable by the APA but a Missed Opportunity for the Constitution*, Geo. Wash. L. Rev. On the Docket (Jun. 24, 2020), <https://www.gwlr.org/regents-of-univ-of-a-missed-opportunity-for-the-constitution/>. Is the plurality’s analysis and conclusion legally sound?

Pages 274, replace the three paragraphs after the heading for Part V with:

Because the Court of Appeals erroneously concluded that periodic bond hearings are required under the immigration provisions at issue here, it had no occasion to consider respondents’ constitutional arguments on their merits. The Court asserted that consistent with its role as “a court of review, not of first view,” it would not reach those arguments. Instead, the Court remanded the case to the Court of Appeals to consider them in the first instance:

Before the Court of Appeals addresses those claims, however, it should reexamine whether respondents can continue litigating their claims as a class. When the District Court certified the class under Rule 23(b)(2) of the Federal Rules of Civil Procedure, it had their statutory challenge primarily in mind. Now that we have resolved that challenge, however, new questions emerge.

Specifically, the Court of Appeals should first decide whether it continues to have jurisdiction despite INA § 242(f)(1). Under that provision, “no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [INA §§ 231–241] other than with respect

to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.” Section 242(f)(1) thus “prohibits federal courts from granting classwide injunctive relief against the operation of INA §§ 231–241.” The Court of Appeals held that this provision did not affect its jurisdiction over respondents’ *statutory* claims because those claims did not “seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct not authorized by the statutes.” This reasoning does not seem to apply to an order granting relief on constitutional grounds, and therefore the Court of Appeals should consider on remand whether it may issue classwide injunctive relief based on respondents’ constitutional claims. If not, and if the Court of Appeals concludes that it may issue only declaratory relief, then the Court of Appeals should decide whether that remedy can sustain the class on its own.

Pages 284–85, replace Item 9 with:

9. On remand in *Jennings v. Rodriguez*, the U.S. Court of Appeals for the Ninth Circuit commented on the constitutional issues that the Supreme Court declined to reach before remanding the case to the district court:

The Court ... remanded the constitutional issues to our court, and we now, taking our cue from it, likewise remand this case to the district court * * *

The Court also decided to give us some homework on issues not raised by the parties, asking us to reexamine whether the class should remain certified for consideration of the constitutional issues and available class remedies and whether a Rule 23(b)(2) class action remains the appropriate vehicle in light of *Wal-Mart Stores, Inc. v. Dukes* (2011), and as a means for resolving petitioners’ due process clause claims. * * *

We have grave doubts that any statute that allows for arbitrary prolonged detention without any process is constitutional or that those who founded our democracy precisely to protect against the government’s arbitrary deprivation of liberty would have thought so. Arbitrary civil detention is not a feature of our American government. “[L]iberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” Civil detention violates due process outside of “certain special and narrow nonpunitive circumstances.” As Justice Breyer wrote in [*Jennings v. Rodriguez*],

The Fifth Amendment says that “[n]o person shall be ... deprived of life, liberty, or property without due process of law.” An alien is a “person.” To hold him without bail is to deprive him of bodily “liberty.” And, where there is no bail proceeding, there has been no bail-related “process” at all. The Due Process Clause—itsself reflecting the language of the Magna Carta—prevents arbitrary detention. * * *

[W]e therefore remand with instructions to the district court to consider and determine: (5) the minimum requirements of due process to be accorded to all

claimants that will ensure a meaningful time and manner of opportunity to be heard; and (6) a reassessment and reconsideration of both the clear and convincing evidence standard and the six-month bond hearing requirement.

Rodriguez v. Marin, 909 F.3d 252, 256–57 (9th Cir. 2018). Leaving aside the issues concerning class certification and injunctive relief, how would you predict the constitutional issues presented in *Rodriguez* (i.e., issues (5) and (6)) to be adjudicated and resolved in light of the materials you have studied so far? How do you believe those issues *should* be adjudicated and resolved?

10. In *Garland v. Aleman Gonzalez*, 142 S.Ct. 2057 (2022), the Supreme Court sua sponte requested briefing on the question that Justice Alito had raised at the end of his opinion in *Jennings*—which similarly had not been raised by the parties—concerning the scope of INA § 242(f)(1). Subsequently writing for a 6-3 majority, Alito concluded that the provision “generally” bars lower courts from granting classwide injunctive relief “that order[s] federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out [INA §§ 231–241].” On that basis, the Court reversed two lower court decisions in which the district courts, after certifying classes of similarly situated noncitizens subject to detention for over 180 days under INA § 241(a)(6), had enjoined the government from detaining any class members for more than 180 days without individualized bond hearing before immigration judges. While he acknowledged that the provision includes an exception “with respect to the application ... to an individual alien against whom proceedings ... have been initiated,” Alito rejected the argument that this exception permits classwide injunctive relief “so long as all the class members are ‘*individuals* who already face the enforcement action.’”

In an opinion joined by Justice Kagan, and in part by Justice Breyer, Justice Sotomayor dissented from the majority’s conclusion concerning the scope of § 242(f)(1), concluding that “the most natural and contextual reading of the provision’s primary clause does not limit federal courts’ authority to enjoin or restrain agency action unauthorized by statute, or to compel agency action commanded by a statute.” Emphasizing “a longstanding clear-statement principle [that] counsels in favor of preserving the lower courts’ remaining equitable jurisdiction,” Sotomayor concluded that § 242(f)(1) “contains nothing approaching the clear command necessary, under centuries of this Court’s precedents, to displace that authority.” She also highlighted the likely practical consequences of the Court’s decision:

Today’s holding risks depriving many vulnerable noncitizens of any meaningful opportunity to protect their rights. * * * Noncitizens subjected to removal proceedings are disproportionately unlikely to be familiar with the U. S. legal system or fluent in the English language. Even so, these individuals must navigate the Nation’s labyrinthine immigration laws without entitlement to appointed counsel or legal support. If they are detained, like respondents here, they face particularly daunting hurdles. On average, immigration detention facilities are located significantly farther away from detained individuals’ communities and court proceedings than criminal jails, making it extraordinarily difficult to secure legal representation. Even for those individuals who can locate and afford counsel under these circumstances, such remote confinement impedes evidence gathering and communication with

counsel. After traveling (perhaps for hours) to meet with detained clients, attorneys may be barred from doing so due to logistical or administrative errors; legal phone calls, too, frequently are nonconfidential, prohibitively costly, or otherwise unavailable. Exacerbating these challenges, the Government regularly transfers detained noncitizens between facilities, often multiple times.

It is one matter to expect noncitizens facing these obstacles to defend against their removal in immigration court. It is another entirely to place upon each of them the added burden of contesting systemic violations of their rights through discrete, collateral, federal-court proceedings. In a great many cases, the inevitable consequence of barring classwide injunctive relief will be that those violations will go unremedied, except as to the few fortunate enough to afford competent collateral counsel or to secure vigorous pro bono representation. The burdens will fall on those least able to vindicate their rights, as well as the law firms and nonprofit organizations that will endeavor to assist as many of these noncitizens as their capacity permits.

If, somehow, a substantial number of noncitizens are able to overcome these obstacles and file separate federal lawsuits against unlawful removal or detention policies, a different problem will arise. Class litigation not only enables individual class members to enforce their rights against powerful actors, but also advances judicial economy by eliminating the need for duplicative proceedings pertaining to each class member. In contrast, the Court's overbroad reading of § 1252(f)(1) forces noncitizens facing unlawful detention, if they are able, "to flood district court dockets with individual habeas actions raising materially indistinguishable claims and requesting materially indistinguishable injunctive relief." There is no reason to think Congress intended either of these untenable results.

Sotomayor concluded by identifying and emphasizing substantive limits to the Court's holding:

The Court does not purport to hold that § 242(f)(1) affects courts' ability to "hold unlawful and set aside agency action, findings, and conclusions" under the Administrative Procedure Act. No such claim is raised here. In addition, the Court rightly does not embrace the Government's eleventh-hour suggestion at oral argument to hold that § 242(f)(1) bars even classwide declaratory relief, a suggestion that would (if accepted) leave many noncitizens with no practical remedy whatsoever against clear violations by the Executive Branch.

In a companion case, *Johnson v. Arteaga-Martinez*, 142 S.Ct. 1827 (2022), the Court addressed the merits of the underlying issue in *Aleman Gonzalez*, holding on statutory grounds that INA § 241(a)(6) did not require bond hearings for individuals subject to detention under that provision for more than six months. Writing for an 8-1 majority, Sotomayor declined to apply the canon of constitutional avoidance, invoking the approach to avoidance taken in *Jennings* and concluding that there is "no plausible construction of the text of § 241(a)(6)" that

would require bond hearings under those circumstances. In dissent, Justice Breyer concluded that *Zadvydas* “controls the outcome here”:

The statutory language is identical, which is not surprising, for this case concerns the same statutory provision. There are two conceivable differences between this case and *Zadvydas*, but both argue in favor of applying *Zadvydas*’ holding here.

First, the respondent here, Antonio Arteaga-Martinez, has been ordered removed, and is therefore subject to § 1231(a), for a different reason than the persons whose cases we considered in *Zadvydas*. Kestutis Zadvydas and Kim Ho Ma were ordered removed because they had been convicted of serious crimes. Zadvydas had committed drug crimes, attempted robbery, attempted burglary, and theft; Ma was involved in a gang-related shooting and convicted of manslaughter. *Ibid.* Arteaga-Martinez’s only crime (besides minor traffic violations) is entering the United States without inspection. The Government seeks to detain him while an immigration judge considers his claim that he will be persecuted or tortured if he is returned to Mexico. There is less reason, not more, to detain Arteaga-Martinez without bail.

Second, *Zadvydas* provided for outright release; this case involves a bail hearing. Again, the Government has less reason to detain a person when the alternative is a bail hearing (where the Government has an opportunity to show that that person might pose a danger to the community or a flight risk) than when the alternative is simply release.

The Government argues that a later case, *Jennings v. Rodriguez*, dictates the result here, rather than *Zadvydas*. Not at all. That later case involved detention under statutes other than the one at issue here and in *Zadvydas*. The Court in *Jennings* did not modify or overrule *Zadvydas*, but rather explicitly distinguished that case. * * *

The court below did not order periodic bond hearings, but it did require the Government to satisfy a “clear and convincing evidence” standard. I agree that *Jennings* forecloses this latter requirement. Otherwise, I would find the lower courts’ bail hearing requirements reasonable implementations of the *Zadvydas* standard, which is applicable here.

Since the Court remands this case for further proceedings, I would add that, in my view, *Zadvydas* applies (the Court does not hold to the contrary), and the parties are free to argue about the proper way to implement *Zadvydas*’ standard in this context, and, if necessary, to consider the underlying constitutional question, a matter that this Court has not decided.

11. INA § 236(c)(1) provides that an individual subject to § 236(c) shall be taken into custody “when the alien is released.” Does this language place any temporal limitations on when individuals are subject to mandatory custody without bond hearings? A number of lower courts, including the Ninth Circuit, concluded that the “when . . . released” language limits the reach of the provision to only cover individuals who are taken into immigration custody

“promptly after their release from criminal custody, not to those detained [by immigration authorities] long after.” *Preap v. Johnson*, 831 F.3d 1193, 1206 (9th Cir. 2016).

In a 5-4 decision, the Supreme Court reversed the Ninth Circuit’s decision. *Nielsen v. Preap*, 139 S. Ct. 954 (2019). Alito’s majority opinion concluded that the “plain text” of the “when ... released” language, along with “grammar and usage” and other “textual cues,” establish that the provision does not require immediate arrest after the individual has been released from criminal custody. In support of this interpretation, Alito also concluded that a contrary interpretation of the provision would be inconsistent with “the design and function of the statute”:

From Congress’s perspective, after all, it is irrelevant that the Secretary could go on detaining criminal aliens subject to a bond hearing. Congress enacted mandatory detention precisely out of concern that such individualized hearings could not be trusted to reveal which “deportable criminal aliens who are not detained” might “continue to engage in crime [or] fail to appear for their removal hearings.” And having thus required the Secretary to impose mandatory detention without bond hearings immediately, for safety’s sake, Congress could not have meant for judges to “enforce” this duty in case of delay by—of all things—forbidding its execution.

Is Alito’s assessment of legislative purpose correct? Consider the following excerpt from an amicus curiae brief filed in *Preap* on behalf of several members of Congress:

Congress enacted mandatory detention for the first time in 1988. Congress sought to address concerns about certain noncitizens being allowed back into the community when they were released from criminal custody. Congress’s solution to this specific and narrow problem was to mandate that immigration authorities take custody of noncitizens convicted of aggravated felonies at the time of their release from criminal custody and then retain custody of them pending removal. Congress thus ensured a continuous chain of custody from criminal custody to immigration detention through to the completion of removal proceedings. This remained Congress’s goal for mandatory detention from 1988 through IIRIRA’s passage in 1996. * * *

From the initial enactment of mandatory detention in 1988 through IIRIRA’s passage in 1996, Congress consistently focused on the narrow category of noncitizens transferred directly from criminal custody to immigration custody. Contrary to the government’s submission, there is nothing in the legislative history indicating that Congress sought to address through mandatory detention the separate and distinct issue of detaining noncitizens who were released from criminal custody and reintegrated into society. * * *

With the enactment of IIRIRA in the fall of 1996, Congress once again expanded the group of individuals subject to mandatory detention. As before, for these and the other individuals covered by mandatory detention, the

amendments focused on ensuring that the agency maintain a continuous chain of custody from criminal custody to immigration detention. * * *

Legislative history demonstrates that, in revising the text of Section 1226(c) from “upon release” to “when . . . released,” Congress did not intend to make a substantive change to the statute; the mandate continued to be triggered by the timing of release from criminal custody.

Over four iterations of the mandatory detention provisions, Congress’s focus was on ensuring that certain noncitizens be transferred to immigration custody when they were released from criminal custody. The provisions do not address individuals like Respondent class members, many of whom have lived peacefully in their communities for years after serving their time for a criminal conviction.

Which account of Congress’s purpose in enacting the “when the alien is released” language do you find more persuasive? What bearing should either account have on the interpretation of § 236(c)?

Alito concluded by rejecting the notion that the canon of constitutional avoidance required a different result:

Respondents say we should be uneasy about endorsing any reading of § 236(c) that would mandate arrest and detention years after aliens’ release from criminal custody—when many aliens will have developed strong ties to the country and a good chance of being allowed to stay if given a hearing. At that point, respondents argue, mandatory detention may be insufficiently linked to public benefits like protecting others against crime and ensuring that aliens will appear at their removal proceedings. In respondents’ view, detention in that scenario would raise constitutional doubts under *Zadvydas v. Davis*, which held that detention violates due process absent “adequate procedural protections” or “special justification[s]” sufficient to outweigh one’s “‘constitutionally protected interest in avoiding physical restraint.’” Thus, respondents urge, we should adopt a reading of § 236(c)—their reading—that avoids this result.

The trouble with this argument is that constitutional avoidance “‘comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction.’” The canon “has no application” absent “ambiguity.” Here the text of § 236 cuts clearly against respondents’ position, making constitutional avoidance irrelevant.

We emphasize that respondents’ arguments here have all been statutory. Even their constitutional concerns are offered as just another pillar in an argument for their preferred reading of the language of § 236(c)—an idle pillar here because the statute is clear. While respondents might have raised a head-on constitutional challenge to § 236(c), they did not. Our decision today on the meaning of that statutory provision does not foreclose as-applied challenges—

that is, constitutional challenges to applications of the statute as we have now read it.

Justice Breyer dissented, disagreeing with both the majority's interpretation of the statutory language and its rejection of constitutional avoidance:

The language of the statute will not bear the broad interpretation the majority now adopts. Rather, the ordinary meaning of the statute's language, the statute's structure, and relevant canons of interpretation all argue convincingly to the contrary. * * *

The issue may sound technical. But it is extremely important. That is because the Government's reading of the statute—namely, that paragraph (2) forbids bail hearings for all [covered] aliens regardless of whether they were detained “when ... released” from criminal custody—would significantly expand the Secretary's authority to deny bail hearings. Under the Government's view, the aliens subject to detention without a bail hearing may have been released from criminal custody years earlier, and may have established families and put down roots in a community. These aliens may then be detained for months, sometimes years, without the possibility of release; they may have been convicted of only minor crimes—for example, minor drug offenses, or crimes of “moral turpitude” such as illegally downloading music or possessing stolen bus transfers; and they sometimes may be innocent spouses or children of a suspect person. Moreover, for a high percentage of them, it will turn out after months of custody that they will not be removed from the country because they are eligible by statute to receive a form of relief from removal such as cancellation of removal. These are not mere hypotheticals. [In an appendix, Justice Breyer cites illustrative cases.] Thus, in terms of potential consequences and basic American legal traditions, the question before us is not a “narrow” one.

Why would Congress have granted the Secretary such broad authority to deny bail hearings, especially when doing so would run contrary to basic American and common-law traditions? The answer is that Congress did not do so. Ordinary tools of statutory interpretation demonstrate that the authority Congress granted to the Secretary is far more limited. * * *

Even if statutory text and structure were not enough to resolve these cases, the Government's reading would fail for another reason. A well-established canon of statutory interpretation provides that, “if fairly possible,” a statute must be construed “so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.” The Government's reading of the statute, which the majority adopts, construes the statute in a way that creates serious constitutional problems. That reading would give the Secretary authority to arrest and detain aliens years after they have committed a minor crime and then hold them without a bail hearing for months or years. This possibility is not simply theoretical.

In *Jennings*, I explained why I believe the practice of indefinite detention without a bail hearing likely deprives a “person” of his or her “liberty ... without due process of law.” * * *

Rather than repeat what I wrote there, I refer the reader to that opinion. I add only the obvious point that a bail hearing does not mean release on bail. It simply permits the person held to demonstrate that, if released, he will neither run away nor pose a threat. It is especially anomalous to take this opportunity away from an alien who committed a crime many years before and has since reformed, living productively in a community.

The majority’s reading also creates other anomalies. As I have said, by permitting the Secretary to hold aliens without a bail hearing even if they were not detained “when ... released,” the majority’s reading would allow the Secretary to hold indefinitely without bail those who have never been to prison and who received only a fine or probation as punishment. *See, e.g.*, § 236(c)(1)(A) (incorporating INA § 212(a)(2), which covers controlled substance offenses for which the maximum penalty exceeds one year). That fact simply aggravates the constitutional problem. * * *

The question before us is not “narrow.” That is because we cannot interpret the words of this specific statute without also considering basic promises that America’s legal system has long made to all persons. In deciphering the intent of the Congress that wrote this statute, we must decide—in the face of what is, at worst, linguistic ambiguity—whether Congress intended that persons who have long since paid their debt to society would be deprived of their liberty for months or years without the possibility of bail. We cannot decide that question without bearing in mind basic American legal values: the Government’s duty not to deprive any “person” of “liberty” without “due process of law”; the Nation’s original commitment to protect the “unalienable” right to “Liberty”; and, less abstractly and more directly, the longstanding right of virtually all persons to receive a bail hearing.

I would have thought that Congress meant to adhere to these values and did not intend to allow the Government to apprehend persons years after their release from prison and hold them indefinitely without a bail hearing. In my view, the Court should interpret the words of this statute to reflect Congress’ likely intent, an intent that is consistent with our basic values. To speak more technically, I believe that aliens are subject to paragraph (2)’s bar on release only if they are detained “when ... released” from criminal custody. To speak less technically, I fear that the Court’s contrary interpretation will work serious harm to the principles for which American law has long stood.

11. In *Jennings v. Rodriguez*, Justice Alito states that because the lower court had concluded that the relevant statutory provisions required bond hearings, “it had no occasion to consider respondents’ constitutional arguments on their merits.” In *Nielsen v. Preap*, he states in a similar vein that “respondents’ arguments here have all been statutory. Even their constitutional concerns are offered as just another pillar in an argument for their preferred

reading of the language of [INA § 236(c)].”

Can these statements be reconciled with the manner in which *Jennings* and *Preap* were litigated? In *Rodriguez*, the plaintiffs directly challenged the statutory provisions on constitutional grounds, and the Ninth Circuit expressly discussed the constitutional principles relevant to the case at some length before applying the constitutional avoidance canon. In *Preap*, the challengers expressly argued that “the government’s interpretation raises serious constitutional problems. Civil detention generally may be imposed only when it is not arbitrary or punitive and subject to an individualized process to ensure that it is justified.”

What do Alito’s statements (and Justice Kavanaugh’s similar assertion in a concurring opinion that the issue in *Preap* is “narrow” and “entirely statutory”) suggest about how the justices in the majority understand the constitutional avoidance canon, either in immigration law cases or generally? See Anita S. Krishnakumar, *Passive Avoidance*, 71 Stan. L. Rev. 513 (2019) (discussing the Roberts Court’s retreat from use of the constitutional avoidance canon outside the immigration law context).

Page 285, before Section e insert:

10. The Supreme Court further narrowed bond eligibility in 2021, finding that respondents who had previously been ordered removed, had reentered without authorization, and were placed in removal proceedings in which they only were seeking withholding of removal (a form of humanitarian protection discussed in Chapter 11) were not entitled to bond hearings. *Johnson v. Guzman Chavez*, 141 S.Ct. 2271, 2285 (2021). Based on the prior orders of removal, the Court concluded that respondents’ detention was governed by INA § 241, not § 236, because the prior removal orders were administratively final and the proceedings were simply to determine if there was a limitation on the countries to which respondents could be removed.

Page 287, before the section divider insert:

8. Recall the discussion after *Fong Yue Ting v. United States* about territoriality, and whether physical location should determine whether a noncitizen may assert constitutional rights. Although none of those issues were squarely presented in the case, Justice Alito reached out to opine on some of them at the end of his opinion in *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020), which is excerpted and discussed in Chapter 9. Thuraissigiam, a Sri Lankan Tamil, fled Sri Lanka in 2016 and in 2017, he crossed the U.S.-Mexico border and entered the United States without inspection. Later that same night, he was arrested by a CBP officer 25 yards north of the border and four miles west of the port of entry in San Ysidro, California. While he sought to apply for asylum pursuant to the minimal procedures available under the “expedited removal” provisions set forth in INA § 235 (discussed in Chapter 6), and both the asylum officer and immigration judge found him credible, his claim was denied and he was ordered removed.

Thuraissigiam filed a petition for a writ of habeas corpus in federal court to challenge the legality of his removal order on several constitutional, statutory, and regulatory grounds. Although the district court dismissed Thuraissigiam’s petition for lack of jurisdiction, the Ninth Circuit reversed, concluding that “as applied to Thuraissigiam,” the provision in INA

§ 242(e)(2) precluding judicial review of expedited removal orders was unconstitutional under the Suspension Clause. U.S. Const. art. I, § 9, cl. 2 (“[T]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

In reaching that conclusion, the Ninth Circuit emphasized that the scope of constitutional protections available to Thuraissigiam under the Due Process Clause was not “determinative of whether he can invoke the Suspension Clause” to seek review of the agency’s removal order. Accordingly, while it held that Thuraissigiam was entitled under the Suspension Clause to seek habeas review of his removal order, the Ninth Circuit did not decide the merits of his claims, including the scope and extent of the protections that might be available to him under the Due Process Clause. To the contrary, the Ninth Circuit expressly stated that it “d[id] not profess to decide . . . what right or rights Thuraissigiam may vindicate via use of the writ,” a set of questions that the Ninth Circuit instructed the district court to address on remand.

The question presented to the Supreme Court by the government was “whether, as applied to respondent, INA § 242(e)(2) is unconstitutional under the Suspension Clause.” As discussed in Chapter Nine, a majority of the Court reversed the Ninth Circuit and concluded that the Suspension Clause did not require habeas court review in Thuraissigiam’s case. However, writing for five justices, Alito ventured further to discuss the due process rights of noncitizens within the United States. After mischaracterizing the Ninth Circuit’s decision (and the arguments advanced by counsel for Thuraissigiam in the Supreme Court) as asserting that “due process provided an independent ground for the decision below,” Alito then stated that the Due Process Clause “does not require review” in federal court of the government’s decision-making:

In 1892, the Court wrote that as to “foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law,” “the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.” *Nishimura Ekiu*, 142 U.S. at 660. Since then, the Court has often reiterated this important rule. See, e.g., *Knauff*, 338 U.S. at 544 (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned”); *Mezei*, 345 U.S. at 212 (same); *Landon v. Plasencia*, 459 U.S. at 212 (“This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative”).

Alito rejected the notion that because Thuraissigiam had entered the United States, the Due Process Clause required judicial review of his claim:

[That notion] disregards the reason for our century-old rule regarding the due process rights of an alien seeking initial entry. That rule rests on fundamental propositions: “[T]he power to admit or exclude aliens is a sovereign prerogative,” [*Plasencia*, 459 U.S. at 32]; the Constitution gives “the political department of the government” plenary authority to decide which aliens to

admit, *Nishimura Ekiu*, 142 U.S. at 649; and a concomitant of that power is the power to set the procedures to be followed in determining whether an alien should be admitted, see *Knauff*, 338 U.S. at 544.

This rule would be meaningless if it became inoperative as soon as an arriving alien set foot on U.S. soil. When an alien arrives at a port of entry—for example, an international airport—the alien is on U.S. soil, but the alien is not considered to have entered the country for the purposes of this rule. On the contrary, aliens who arrive at ports of entry—even those paroled elsewhere in the country for years pending removal—are “treated” for due process purposes “as if stopped at the border.” *Mezei*, 345 U.S. at 215 * * *.

The same must be true of an alien like respondent. As previously noted, an alien who tries to enter the country illegally is treated as an “applicant for admission,” § 235(a)(1), and an alien who is detained shortly after unlawful entry cannot be said to have “effected an entry,” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Like an alien detained after arriving at a port of entry, an alien like respondent is “on the threshold.” *Mezei*, 345 U.S. at 212. The rule advocated by respondent and adopted by the Ninth Circuit would undermine the “sovereign prerogative” of governing admission to this country and create a perverse incentive to enter at an unlawful rather than a lawful location.

For these reasons, an alien in respondent’s position has only those rights regarding admission that Congress has provided by statute. In respondent’s case, Congress provided the right to a “determin[ation]” whether he had “a significant possibility” of “establish[ing] eligibility for asylum,” and he was given that right. INA §§ 235(b)(1)(B)(ii), (v). Because the Due Process Clause provides nothing more, it does not require review of that determination or how it was made. As applied here, therefore, § 242(e)(2) does not violate due process.

In an opinion concurring only in the judgment, Justice Breyer, joined by Justice Ginsburg, declined to “come to conclusions about the Due Process Clause, a distinct constitutional provision that is not directly at issue here.”

Justice Sotomayor (joined by Justice Kagan) dissented, concluding that Alito’s opinion “upends settled constitutional law and paves the way toward transforming already summary expedited removal proceedings into arbitrary administrative adjudications”:

By determining that respondent, a recent unlawful entrant who was apprehended close in time and place to his unauthorized border crossing, has no procedural due process rights to vindicate through his habeas challenge, the Court unnecessarily addresses a constitutional question in a manner contrary to the text of the Constitution and to our precedents.

The Court stretches to reach the issue whether a noncitizen like respondent is entitled to due process protections in relation to removal proceedings, which the court below mentioned only in a footnote and as an aside. In so doing, the

Court opines on a matter neither necessary to its holding nor seriously in dispute below.

The Court is no more correct on the merits. To be sure, our cases have long held that foreigners who had never come into the United States—those “on the threshold of initial entry”—are not entitled to any due process with respect to their admission. *Shauhghnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); see also *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). * * *

Noncitizens in this country, however, undeniably have due process rights. In *Yick Wo v. Hopkins*, 118 U.S. 359 (1886), the Court explained that “[t]he Fourteenth Amendment to the Constitution is not confined to the protection of citizens” but rather applies “to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality.” *Id.*; *Zadvydas v. Davis*, 533 U.S. 678 (2001). * * *

In its early cases, the Court speculated whether a noncitizen could invoke due process protections when he entered the country without permission or had resided here for too brief a period to “have become, in any real sense, a part of our population.” But the Court has since determined that presence in the country is the touchstone for at least some level of due process protections. See *Mezei*, 345 U.S. at 212 (explaining that “aliens who have once passed through our gates, even illegally,” possess constitutional rights); *Mathews v. Diaz*, 426 U.S. 67 (1976) (“There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment ... protects every one of these persons Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection”). * * *

In order to reach a contrary conclusion, the Court assumes that those who do not enter the country legally have the same due process rights as those who do not enter the country at all. The Court deems that respondent possesses only the rights of noncitizens on the “threshold of initial entry,” skirting binding precedent by assuming that individuals like respondent have “assimilated to [the] status” of an arriving noncitizen for purposes of the constitutional analysis. *Mezei*, 345 U.S. at 212. But that relies on a legal fiction. Respondent, of course, was actually within the territorial limits of the United States.

More broadly, by drawing the line for due process at legal admission rather than physical entry, the Court tethers constitutional protections to a noncitizen’s legal status as determined under contemporary asylum and immigration law. But the Fifth Amendment, which of course long predated any admissions program, does not contain limits based on immigration status or duration in the country: It applies to “persons” without qualification. *Yick Wo*, 118 U.S. at 369. The Court has repeatedly affirmed as much long after Congress began regulating entry to the country. *Mathews*, 426 U.S. at 77; *Zadvydas*, 533 U.S. at 693–94. The Court lacks any textual basis to craft an exception to this rule, let alone one hinging on dynamic immigration laws that may be amended at any time, to redefine when an “entry” occurs. Fundamentally, it is out of step with

how this Court has conceived the scope of the Due Process Clause for over a century: Congressional policy in the immigration context does not dictate the scope of the Constitution.

In addition to creating an atextual gap in the Constitution's coverage, the Court's rule lacks any limiting principle. This is not because our case law does not supply one. After all, this Court has long affirmed that noncitizens have due process protections in proceedings to remove them from the country once they have entered.

Perhaps recognizing the tension between its opinion today and those cases, the Court cabins its holding to individuals who are "in respondent's position." Presumably the rule applies to—and only to—individuals found within 25 feet of the border who have entered within the past 24 hours of their apprehension. Where its logic must stop, however, is hard to say. Taken to its extreme, a rule conditioning due process rights on lawful entry would permit Congress to constitutionally eliminate all procedural protections for any noncitizen the Government deems unlawfully admitted and summarily deport them no matter how many decades they have lived here, how settled and integrated they are in their communities, or how many members of their family are U. S. citizens or residents.

This judicially fashioned line-drawing is not administrable, threatens to create arbitrary divisions between noncitizens in this country subject to removal proceedings, and, most important, lacks any basis in the Constitution. Both the Constitution and this Court's cases plainly guarantee due process protections to all "persons" regardless of their immigration status * * *.⁵

What precisely does Alito's opinion hold about due process protection for noncitizens? Is it possible to reconcile his discussion with the rest of the cases discussed in this chapter? How should lower courts treat this discussion in Alito's opinion in future cases involving the due process rights of noncitizens?

Page 319, at the end of Item 4 insert:

The Trump administration forced these questions by attempting to restrict the ability of local governments to pass or implement non-cooperation or "sanctuary" laws and policies. One way it did so was threaten to deny them federal funding. In January 2017, President Trump issued Executive Order 13768, which intended to withdraw federal funds from "sanctuary jurisdictions that willfully refuse to comply with 8 U.S.C. § 1373." Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017). Section 1373, in turn, states:

⁵ [Note 12 in original] The Court notes that noncitizens like respondent seeking legal admission lack due process rights "'regarding [their] application.'" It does not, however, explain what kinds of challenges are related to one's application and what kinds are not. Presumably a challenge to the length or conditions of confinement pending a hearing before an immigration judge falls outside that class of cases. Because respondent only sought promised asylum procedures, however, today's decision can extend no further than these claims for relief.

Notwithstanding any other provision of Federal, State or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

The legislative history of § 1373 shows that Congress enacted the law to address the then-increasing number of state and local governments that were limiting their employees' ability to share information with federal immigration authorities. See *New York v. U.S. Dep't of Justice*, 951 F.3d 84, 96 (2d Cir. 2020) (discussing congressional hearings and report regarding the passage of law that became § 1373).

Within days of Executive Order 13,768's announcement, the City and County of San Francisco sued to enjoin its enforcement, contending that the executive order violates the Tenth Amendment because it commandeered state and local governments to report immigration information to federal officials. Complaint for Declaratory and Injunctive Relief, *City & County of San Francisco v. Trump*, 2017 WL 412999 (N.D. Cal. 2017). The plaintiffs subsequently added other constitutional arguments in this case and related cases, including that the executive order violates principles of separation of powers and the Spending Clause (that only Congress and not the President has power to place conditions on federal funds). *County of Santa Clara v. Trump*, 275 F.Supp.3d 1196, 1213–19 (N.D. Cal. 2017). Agreeing with the city and county, the district court enjoined enforcement and issued a nationwide injunction. On appeal, the Ninth Circuit affirmed the lower court and concluded that the executive order violated the “principle of Separation of Powers and in consideration of the Spending Clause” but vacated the issuance of a nationwide injunction. *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1231–35 (9th Cir. 2018) (holding that the injunction applies in California only). The court chose not to address the Tenth Amendment ruling because it had already made a decision on different grounds.

The executive order raised several constitutional questions, including whether § 1373 is unconstitutional under the Tenth Amendment because it commandeers state and local governments into enforcing federal law. What role does the legislative history play in the executive order's goal of enforcing compliance with § 1373 by withdrawing federal funds?

These cases also raise questions regarding what relief is appropriate. Is it legally permissible for a court to issue nationwide injunctions in circumstances like these? The issue has become controversial in litigation challenging a range of different Trump administration policies, including in the area of immigration law. Compare Amanda Frost, *In Defense of Nationwide Injunctions*, 96 N.Y.U. L. Rev. 1065, 1091–98 (2018) (noting that “[i]mmigration is just one area in which a change in government policy might injure thousands or millions of individuals who lack the ability to file suit quickly themselves”), with Howard Wasserman, “Nationwide” Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate, 22 Lewis & Clark L. Rev. 335, 357–358 (2018) (criticizing the issuance of nationwide injunctions in immigration-related cases and contending that “the particularized, non-universal injunctions . . . represents a more appropriate approach to constitutional litigation. It better describes what happens in constitutional litigation, it is more consistent with Article III on the jurisdiction of federal courts, and it better controls litigant behavior”). Some current critics of

nationwide injunctions took a rather different view in the context of litigation challenging the Obama administration’s deferred action initiatives, which is discussed in Chapter 8.

On his first day in office, President Biden formally revoked Executive Order 13768. Exec. Order 13993, Revision of Civil Immigration Enforcement Policies and Priorities, 86 Fed. Reg. 7051 (Jan. 20, 2021).

4A. The Trump administration also attempted to get local governments to terminate non-cooperation policies by threatening to deprive them of grants under the Edward Byrne Memorial Justice Assistance Grant Program. Established in 2006, and administered by DOJ the Byrne JAG program, these grants provide resources to states and local governments for law enforcement programs. When DOJ seeks grant applications, it lists certain conditions with which the state or local government must comply and explains that failure to comply with those laws would result in either withholding or termination of grants.

In passing the law that created the Byrne JAG program, Congress wrote that “the applicant will comply with all provisions of this part and all other applicable Federal laws” but did not list what constitute applicable laws. 34 U.S.C. §10153(a)(5)(d). How broadly should the statutory term “applicable Federal laws” be interpreted? Should the absence of what constitutes “applicable federal law[]” affect DOJ’s interpretation of what laws it chooses to include?

These questions became the subject of litigation that began in July 2017. That month, DOJ announced that § 1373 would constitute “applicable federal law[]” and that for Byrne JAG applications for fiscal year 2017, it would include certain grant conditions. These conditions, as described below, are known as the “notice,” “access” and “compliance” conditions:

- Grant recipients must ensure that they will “honor” formal written requests authorized by federal immigration law that seeks “advance notice” of a non-citizen’s scheduled release date and time from state or local law enforcement custody (notice condition);
- Grant recipients must ensure that immigration agents have access to correction facilities “for the purpose of permitting such agents to meet with individuals who are (or are believed to be by such agents to be) aliens and to inquire as to such individual’s right to be or remain in the United States” (access condition);
- Grant recipients must submit a “Certification of Compliance with 8 U.S.C. § 1373” and ensure ongoing compliance (compliance condition).⁶

⁶ Prior to 2017, Byrne JAG programs did not include such conditions although the question of whether § 1373 constitutes “applicable federal law” was previously raised and left unanswered). Memorandum from Michael Horowitz, Inspector General to Karol V. Mason, Asst. Attorney General for the Office of Justice Programs, Department of Justice Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 (May 31, 2016), <https://oig.justice.gov/reports/2016/1607.pdf> (recommending that the Office of Justice Programs should provide clear guidance on whether § 1373 is an “applicable federal law” that grant recipients are expected to comply with and to require grant applicants to certify their compliance with § 1373). In October 2016, DOJ published guidance that going forward, all Byrne applicants “must certify compliance with applicable federal laws, including Section 1373. Office of

Similar to the lawsuits regarding the constitutionality of Executive Order 13.768, litigation challenged the imposition of these conditions under the Tenth Amendment anti-commandeering principles, preemption grounds, and statutory construction. The lawsuit filed by the City of Chicago demonstrates these points. At the outset, the city contended that the conditions would negatively impact their municipal goal of “enhance[ing] the City’s relationship with the immigrant communities” by limiting cooperation between local law enforcement officers and immigration authorities. Complaint for Injunctive and Declaratory Relief, *City of Chicago v. Sessions*, 264 F.Supp.3d 933 (N.D. Ill. Aug. 7, 2017) (No. 17-cv-5720), 2017 WL 3386388. Since the 1980s, the city has had a policy of limiting its employees’ cooperation with federal immigration authorities. In 2006, the City Council enacted the “Welcoming City Ordinance,” which codified that policy as part of Chicago’s Municipal Code. In 2017, the Council expanded that policy by prohibiting city agencies and employees, “from requesting or disclosing information about an individual’s immigration status . . . detaining anyone solely based on their immigration status or an ICE detainer . . . [and] communicating with ICE regarding a person’s custody status or release date.” Chi., Ill., Mun. Code § 2-173-042(a)(1) (2018). It further explained that “the cooperation of the City’s immigrant communities is essential to prevent and solve crimes and maintain public order, safety and security in the entire City.” Id. § 2-173-005. Challenging the DOJ notice and access conditions on the 2017 Byrne JAG grants, Chicago contended, among other arguments, that such conditions are unlawful because they are not authorized under the Byrne JAG statute and unconstitutional because they violate the Spending Clause, separation of powers doctrine, and that § 1373 is unconstitutional because it constitutes federal conscription of state power and thus violates the anti-commandeering doctrine.

Ruling in the city’s favor, the district court issued a nationwide injunction on the implementation of the notice and access conditions. *City of Chicago v. Sessions*, 264 F.Supp.3d 933, 951 (N.D. Ill. 2017) (stating that “there being no reason to think that the legal issues present in this case are restricted to Chicago or that the statutory authority given to the Attorney General would differ in another jurisdiction”). The court, however, did not enjoin the compliance certification. On appeal, the Seventh Circuit initially upheld the district court’s findings and issuance of a nationwide injunction, but later stayed the nationwide injunction pending *en banc* review. *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018), *stayed pending reh’g en banc*, 2018 WL 4268817 (7th Cir. June 4, 2018).

The district court subsequently granted a permanent injunction as applied to Chicago only and ruled that in addition to the notice and access conditions being unconstitutional, the compliance condition was unconstitutional as well. *City of Chicago v. Sessions*, 321 F.Supp.3d 855, 879-82 (N.D. Ill. 2018) (*Chicago I*). The Seventh Circuit combined *Chicago I* with another case, *City of Chicago v. Barr*, 405 F.Supp.3d 748 (N.D. Ill. 2019) (*Chicago II*), which challenged conditions attached to the 2018 Byrne JAG and reaffirmed its previous rulings that the executive branch violated separation of powers principles. In *City of Chicago v. Barr*, 961 F.3d. 882, 887 (7th Cir. June 4, 2020), the court held:

Justice Programs, Additional Guidance Regarding Compliance with 8 U.S.C. § 1373 (Oct. 6, 2016), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/additional-bja-guidance-on-section-1373-october-6-2016.pdf>.

We conclude again today, as we did when presented with the preliminary injunction, that the Attorney General cannot pursue the policy objectives of the executive branch through the power of the purse or the arm of local law enforcement; that is not within its delegation. It is the prerogative of the legislative branch and the local governments, and the Attorney General's assertion that Congress itself provided that authority in the language of the statutes cannot withstand scrutiny.

Describing the Attorney General's use of "extra-statutory conditions on federal grant awards as a tool to obtain compliance with" policy objectives, the court noted that the Attorney General strikes at the heart of the "separation of powers among the branches of the federal government." Crucially, the Seventh Circuit, while recognizing the authority of the district court to issue a nationwide injunction, ultimately held that a narrow relief was more appropriate in this case and therefore enjoined the conditions as applied to Chicago only.

For the most part, other courts similarly ruled against the federal government and held that DOJ lacked authorization to attach the three conditions. E.g., *City of Providence v. Barr*, 954 F.3d 23, 31-32 (1st Cir. 2020); *City of Los Angeles v. Barr*, 941 F.3d 931 (9th Cir. 2019); *City of Philadelphia v. Attorney Gen.*, 916 F.3d 276 (3d Cir. 2019). However, the Second Circuit has reached the opposite conclusion. *New York v. U.S. Dep't of Justice*, 951 F.3d 84 (2d Cir. 2020). Like Chicago and other cities, New York City (along with several states) filed a lawsuit seeking to enjoin DOJ from imposing notice, access, and compliance conditions on the 2017 Byrne JAG grant applications. *New York v. U.S. Dep't of Justice*, 343 F.Supp.3d 213 (S.D.N.Y. 2018). The district court sided with the city and states, holding that the Attorney General and the DOJ lacked authority under the Byrne JAG statute to impose the conditions.

The Second Circuit, however, reversed and concluded that the Attorney General has authority to impose notice and access conditions on receipt of federal grants and certification of compliance with § 1373. *New York v. U.S. Dep't of Justice*, 951 F.3d 84 (2d Cir. 2020), *reh'g en banc denied*, 964 F.3d 150 (2d Cir. 2020). Disagreeing with the conclusions of several other circuits, the court noted:

To be sure, the Attorney General's authority in identifying qualified Byrne applicants is not limitless but, rather, a function of the particular requirements prescribed by Congress. Not surprisingly, however, Congress has prescribed those requirements broadly, enlisting the Attorney General to delineate the rules and forms for them to be satisfied.⁷

Although the Second Circuit declined to examine whether § 1373 is facially invalid under the Tenth Amendment, it held that it was unconstitutional as applied in the context of the case. Moreover, the court concluded that there are no commandeering concerns here because the amount that the federal government may withhold is not unconstitutionally coercive because they represent less than one percent of the states' budgets. On July 13, 2020, a divided Second

⁷ Turning to the specific conditions, the court held that the certification (compliance) condition is authorized by the provision of law requiring "Byrne grant applicants to satisfy the program's statutory requirements in such 'form' and according to such 'rules' as the Attorney General prescribes."

Circuit declined to rehear the case en banc. *New York v. U.S. Dep't of Justice*, 964 F.3d 150 (2d Cir. 2020). Given the Biden administration's shift in position on conditioning grants, the Supreme Court dismissed certiorari. 141 S.Ct. 1291 (2021).

4B. Some local governments also have been forced to defend their non-cooperation policies from opposition by their own state governments. A number of states have passed "anti-sanctuary laws" that seek to preempt local or city sanctuary or non-cooperation laws. E.g., Ind. Code § 5-2-18.2 (2017); Iowa Code § 825.1 (2018); Miss. Code Ann. § 25-1-119 (2017); S.B. 145, Gen. Assemb., Reg. Sess. (N.C. 2017); H.B. 2315, 110th Gen. Assemb., Reg. Sess. (Tenn. 2018); S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017); Va. Code § 15.2-1409.1 (2018); Va. Code § 15.2-1409.1 (2018). These laws aim to use state preemption power to invalidate local or municipal laws by explicitly prohibiting non-cooperation laws, but also by imposing civil fines and criminal penalties against officials who continue to employ non-cooperation policies and refuse to enforce federal immigration laws.

In *City of El Cenizo v. Texas*, 264 F.Supp.3d 744 (W.D. Tex. 2017), the City of El Cenizo sought to enjoin the enforcement of Texas's S.B. 4, which limits the ability of local governments to endorse "sanctuary" policies and created civil and criminal penalties against local government leaders who refuse to cooperate with federal immigration authorities. The city challenged the legality of S.B. 4 in federal court on a variety of bases, including First Amendment, Fourth Amendment, and federal preemption grounds. Although the district court issued a preliminary injunction against the state, the Fifth Circuit reversed, concluding S.B. 4's provisions "do not on their face, violate the Constitution." *City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018).

These state anti-sanctuary laws are not new. See Rick Su, *The First Anti-Sanctuary Law: Proposition 187 and the Transformation of Immigration Enforcement*, 53 U.C. Davis L. Rev. 1983 (2020) (characterizing California's Proposition 187, which was passed in 1994, as a state anti-sanctuary law). But as Pratheepan Gulasekaram, Rick Su, and Rose Cuison Villazor maintain, the more recently passed state anti-sanctuary laws are different. Unlike the federal government, state officials arguably have the authority under principles governing the relationship between state and local governments to conscript local officials into taking certain action. Under "localism principles," cities are considered "creatures of the state" and may be compelled by the state to cooperate with federal immigration law. However, as these authors argue, there are recognized limits to the ability of states to conscript local governments into enforcing immigration law. Pratheepan Gulasekaram, Rick Su and Rose Cuison Villazor, *State Anti-Sanctuary & Immigration Localism*, 119 Colum. L. Rev. 837 (2019).

CHAPTER 3

IMMIGRANT PRIORITIES

Page 326, before Section A insert:

The sections below discuss the choices that Congress has made regarding who is eligible to apply for immigrant status in the United States. Complicating this complex statutory scheme, in April 2020, President Trump issued a proclamation pursuant to INA § 212(f) intended to prohibit many of those who qualify as immigrants under the INA from entering the United States for 60 days.⁸ Proclamation No. 10014, 85 Fed. Reg. 23441 (Apr. 22, 2020). A subsequent proclamation extended this exclusion order for immigrants and extended it to cover specified nonimmigrants as well, declaring that the suspension would extend to December 31, 2020 and “may be continued as necessary.” Proclamation No. 10052, 85 Fed. Reg. 38263 (June 25, 2020). President Biden revoked the ban on immigrant visas soon after taking office and allowed the ban on nonimmigrant visas expire a month later. See Proclamation No. 10149, 86 Fed. Reg. 11,847 (Mar. 1, 2021). The exclusion order was estimated by the Trump presidency itself to have blocked at least 525,000 noncitizens from entering the United States.

With respect to immigrants, the proclamations set forth in Section 1 a broad, categorical prohibition of “entry into the United States of all immigrants,” proclaiming that entry by the designated categories of individuals “would * * * be detrimental to the interests of the United States,” followed by a series of exceptions. .” Section 2 then carved out from the exclusion order some large categories, including persons who were already lawful permanent residents, persons who were currently inside the United States, and persons who already had been issued immigrant visas. In addition to these carve outs, Section 2 exempts certain family-sponsored categories and some employment-based categories from the proclamation’s restrictions.

The authority or lack thereof for these exclusion orders is examined in depth in Chapter 5, Exclusion and Waiver Grounds. Still, it is important to initially explore these proclamations as they attempt to preserve immigration for persons in some of the immigrant categories discussed below while purporting to ban others from entry. The effects of these bans also will be discussed in context below as the various categories of immigrants (and nonimmigrants in Chapter 4) are introduced. One overarching question to keep in mind when examining the statutory scheme that Congress has created is how the approach of these proclamations—blocking all immigration while waiving some preferred immigrants through, would rewrite immigration law to narrow the eligibility choices that are embodied in the INA. When working through the material below, pay close attention to the ways in which these proclamations, if allowed, might undermine or revise Congressional judgments regarding who is allowed to immigrate to the United States.

⁸ INA § 212(f) is considered in Chapter 2, in the context of its discussion of *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), and in Chapter 5.

Page 346, replace October 2018 Visa Bulletin with:

*United States Department of State
Bureau of Consular Affairs*

VISA BULLETIN

August 2023

Final Action Dates for Family-Sponsored Immigrant Visas					
	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
Family-Sponsored					
F1	01JAN15	01JAN15	01JAN15	22APR01	01MAR12
F2A	08OCT17	08OCT17	08OCT17	01SEP16	08OCT17
F2B	22SEP15	22SEP15	22SEP15	01AUG01	22OCT11
F3	08JAN09	08JAN09	08JAN09	15JAN98	08JUN02
F4	22APR07	22APR07	15SEP05	01AUG00	22AUG02

Final Action Dates for Employment-Based Immigrant Visas					
	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
Employment Based					
1st	01AUG23	01FEB22	01JAN12	01AUG23	01AUG23
2nd	01APR22	08JUL19	01JAN11	01APR22	01APR22
3rd	01MAY20	01JUN19	01JAN09	01MAY20	01MAY20
Other Workers	01MAY20	01SEP15	01JAN09	01MAY20	01MAY20
4th	01SEP18	01SEP18	01SEP18	01SEP18	01SEP18
Certain Religious Workers	01SEP18	01SEP18	01SEP18	01SEP180	01SEP18
5th Unreserved	C	08SEP15	01APR17	C	C
5th Rural	C	C	C	C	C
5th High Unemployment	C	C	C	C	C
5th Infrastructure	C	C	C	C	C

Page 379, after Item 8 insert:

9. In the context of the Violence Against Women Act (discussed in Chapter 6), a child who sought to self-petition for immigration relief as the abused stepchild of a U.S. citizen after the child's natural mother divorced the abuser, then died, was denied because she was deemed to no longer be a stepchild. In reversing, the Seventh Circuit rejected the proposition found near the end of the *Mourillon* excerpt, which originated in *Matter of Mowrer*, 17 I.&N. Dec. 613, 615 (BIA 1981), that a stepchild remains a stepchild after divorce only where "a family relationship has continued to exist as a matter of fact between the stepparent and stepchild." *Arguijo v. USCIS*, 991 F.3d 736, 737–40 (7th Cir. 2021):

Our reaction is: Huh? If divorce ends a stepparent/stepchild relation, how can a family relationship continue "between the stepparent and stepchild." And if divorce does not un-make a stepchild relation that arose from a marriage, why should it matter whether a 'family relationship' exists?

Mowrer created this standard out of whole cloth. It did not cite any provenance for this rule (other than the Board's earlier unreasoned decisions) and did not discuss any judicial decision that interpreted the word "stepchild" * * * *Mowrer* treated the meaning of "stepchild" as something that that Board of Immigration Appeals could define in any way it wanted. Immigration officials have considerable leeway when acting under delegated interpretive authority, but the part of *Mowrer* that we have discussed is utterly a-textual. * * * [At oral argument] the agency added that an immigration judge in removal proceedings might treat *Arguijo* as a stepchild, despite the divorce, but that only an immigration judge can do so. At this point the agency was in full flight from both statutory text and common understanding. If an immigration judge can treat *Arguijo* as a stepchild, why not United States Citizenship and Immigration Services. One statute should have the one meaning in all of immigration law.

"Stepchild" is hardly a new word, without legal roots. Nor is it new to common usage. Does anyone think that Cinderella stopped being the wicked stepmother's stepchild once Cinderella's natural father died, ending the marriage? She was still a stepchild even after she married Prince Charming and moved to the palace. * * *

[After reviewing the use of the term in a variety of legal contexts, the court concludes that] someone who is a stepchild during a marriage remains one after divorce, when termination of "stepchild" status would defeat application of the substantive rule that abused stepchildren are entitled to an immigration benefit.

The word "stepchild" does not have a single legal meaning, free of the context in which it appears. When legal language has some plasticity, the agency retains interpretive discretion – but we repeat, *Mowrer* does not interpret the Violence Against Women Act, and the bureau that rejected *Arguijo*'s application did not offer an independent understanding of the word. This leaves us to interpret the

word on our own, and we hold that in the context of the Violence Against Women Act “stepchild” status survives divorce.

USCIS has since adopted this interpretation, at least in this context. *See* In re: 19267292 Motion on Administrative Appeals Office Decision Form I-360, Petition for Abused Spouse of Child of U.S. Citizen under the Violence Against Women Act (VAWA), 2021 WL 2806640 (DHS June 21, 2021)(acknowledging “that in the context of the Violence Against Women Act ‘stepchild’ status survives divorce”).

Page 386, after Item 6 insert:

7. As noted at the beginning of this Chapter, in April 2020 the Trump presidency issued a proclamation that curtails family-sponsored immigration by barring all noncitizens from entering the United States as immigrants and then providing exemptions to this prohibition for some family-sponsored categories. For example, the order, now revoked, exempted from its prohibition spouses and children under age 21 of U.S. citizens, as well as the spouse and children of U.S. Armed Forces members. Proclamation No. 10014, 85 Fed. Reg. 23,441 (Apr. 22, 2020). What are the ways in which this exclusion order essentially rewrote family-sponsored immigration categories? Keep these in mind when returning to these issues in Chapter 5, which considers the authority of the executive in relation to Congress in determining who is eligible to immigrate to the United States.

Page 393, after last paragraph insert:

As noted at the beginning of this Chapter, in April 2020 the Trump presidency issued a proclamation, now revoked, that limited employment-based immigration. One justification set forth was that “lawful permanent residents, once admitted, are granted “open market” employment authorization documents, allowing them immediate eligibility to compete for almost any job, in any sector of the economy. There is no way to protect already disadvantaged and unemployed Americans from the threat of competition for scarce jobs from new lawful permanent residents by directing those new residents to particular economic sectors with a demonstrated need not met by the existing labor supply.” Proclamation No. 10014, 85 Fed. Reg. 23,441 (Apr. 22, 2020). The proclamation asserted that even though “some employment-based visas contain a labor certification requirement, because visa issuance happens substantially after the certification is completed, the labor certification process cannot adequately capture the status of the labor market today.” Is this critique of the labor certification process valid? If so, is it limited to the current economic situation? Chapter 5 further explores the authority of the executive to determine who is eligible to immigrate where Congress has established eligibility criteria.

Page 425, after Item 11 insert:

12. As noted at the beginning of this Chapter, Presidential Proclamation No. 10014, now revoked, purported to suspend certain employment-based immigration, by barring all immigration then providing exemptions to this suspension for some. For example, it exempts from the suspension EB-5 investors and those entering as a “physician, nurse, or other healthcare professional; to perform medical research or other research intended to combat the spread of COVID-19; or to perform work essential to combating, recovering from, or otherwise

alleviating the effects of the COVID-19 outbreak, as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees; and any spouse and unmarried children under 21 years old of any such alien who are accompanying or following to join the alien.” Proclamation No. 10,014, 85 Fed. Reg. 23,441 (Apr. 22, 2020). How did this suspension, with carve outs, attempt to rewrite employment-based immigration?

CHAPTER 4

NONIMMIGRANT PRIORITIES

Page 440, replace the chart with:

NON-IMMIGRANT ADMISSIONS BY CLASS OF ADMISSION

Source: U.S. Department of Homeland Security, Nonimmigrant Admissions By Class of Admissions: Fiscal Years 2017-2019, Table 25, <https://www.dhs.gov/immigration-statistics/yearbook/2019/table25>.

Class of Admissions	2017	2018	2019
All admissions	181,100,000	186,200,000	186,200,000
Foreign government officials and families (A)	(A1+A2) 223,255	(A1+A2) 228,384	(A1+A2) 221,022
Temporary visitors <ul style="list-style-type: none"> For business (total) For pleasure (total) 	8,456,038 (B1) 5,301,451 61,600,219 (B2) 41,117,760	8,967,224 (B1) 5,725,099 64,819,854 (B2) 44,054,664	9,059,770 (B1) 5,853,592 64,864,687 (B2) 43,968,625
Transit without visa (C)	498,272	453,723	462,914
Treaty traders and investors and their families	Traders & investors - 496,936 Families - 451,858	Traders & investors - 503,199 Families - 453,874	Traders & investors - 515,672 Families - 462,809
Students <ul style="list-style-type: none"> Academic students (F1) Vocational students (M1) 	<ul style="list-style-type: none"> 1,845,739 19,129 	<ul style="list-style-type: none"> 1,862,828 18,838 	<ul style="list-style-type: none"> 1,817,724 18,385
Spouses and children of students (F2 and M2)	(F2) 74,461 (M2) 842	(F2) 75,344 (M2) 842	(F2) 70,288 (M2) 779
Visitors for business or pleasure to Guam and CNMI	Pleasure - 1,321,248 Business - 1,931	Pleasure - 1,173,311 Business - 2,453	Pleasure - 1,151,042 Business - 3,100
Temporary workers and their			

families			
• H1-B (specialty occupations)	H1B - 531,280	H1B - 570,368	H1B - 601,594
• H-2A (agricultural workers)	H2A - 412,820	H2A - 298,228	H2A - 442,822
• H-2B (lesser-skilled non-agricultural workers)	H2B - 124,319	H2B - 120,351	H2B - 129,120
• O-1 and O-2 “extraordinary ability” workers and their staffs	O1 - 111,516 O2 - 30,659	O1 - 120,625 O2 - 33,780	O1 - 127,972 O2 - 35,370
• P workers (athletes and entertainers)	P1 - 103,097	P1 - 105,856	P1 - 101,878
• Q (cultural exchange)	Q1 - 3,406	Q1 - 3,443	Q1 - 3,414
• R (religious workers)	R1 - 14,359	R1 - 14,672	R1 - 14,817
• TN (NAFTA professional workers)	TN - 741,899	TN - 731,496	TN - 725,929
Representatives (and families) of foreign information media (I1)	48,818	44,140	43,845
Exchange visitors (J1) Families of exchange visitors (J2)	J1 - 523,864 J2 - 70,321	J1 - 537,705 J2 - 73,668	J1 - 548,717 J2 - 71,762
Fiance(e)s (and certain spouses) of U.S. citizens, and their children (K1-4)	41,028	29,140	39,554
Intra-company transferees (L1) Families of intra-company transferees (L2)	L1 - 687,096 L2 - 289,412	L1 - 703,102 L2 - 290,186	L1 - 698,794 L2 - 289,040
NATO officials and families (N1-7)	55,284	53,765	55,417
Commuter students (Canada and Mexico)	67,527	35,297	18,917
Other	63	59	75
Unknown	57,707	43,925	38,738

Page 462, before subsection b insert:

The current economic decline caused by the COVID-19 pandemic has affected the ability of nonimmigrant workers such as those on H-1B visa to work in the United States. News reports have explained that many H-1B workers have been furloughed, laid off, or lost their jobs altogether. E.g., Miriam Jordan, *They Lost Their Jobs. Now They May Have to Leave the U.S.*, N.Y. Times (May 12, 2020), <https://www.nytimes.com/2020/05/12/us/foreign-workers-visas-immigrants.html>. H-1B workers must find new employment within sixty-days in order to maintain their status. INA §214(n); 8 C.F.R. 214.2(h). In a proclamation issued under INA § 212(f), the Trump administration has suspended the entry of nonimmigrants seeking to enter

the United States in the H-1B, H-2B, J, or L categories until at least December 31, 2020, maintaining that “the present admission of workers within several nonimmigrant visa categories [] poses a risk of displacing and disadvantaging United States workers.” Proclamation No. 10,052, 85 Fed. Reg. 38,263 (Jun. 22, 2020). As discussed in Chapter 5, the validity of the Trump administration’s economic claims has been sharply contested, and litigation challenging the legality of this proclamation is ongoing.

Page 488, before subsection 2 insert:

Under the statute, international students may be admitted in the F-1 category if they are “qualified to pursue a *full course of study*” and “seek[] to enter the United States temporarily and solely for the purpose of pursuing such a course of study ... at an established college, university,” or other qualifying educational institution. INA § 101(a)(15)(F)(i). However, the statute itself does not define the term “full course of study.” Regulations interpreting the term were first issued in 1975, providing that a “full course of study” consists of a course load that either has been “certified by an authorized official of the institution as a full course of study” or consists of at least 12 hours of instruction per week “or its equivalent.” Special Requirements for Extension and Maintenance of Status of Students; Approval of Schools; and Withdrawal of School Approval, 40 Fed. Reg. 32,312 (Aug. 1, 1975) (codified at 8 C.F.R. § 214.2(f)(1)(1a) (1976)). Today, the regulations set forth a more detailed and elaborate scheme defining what constitutes an approved “full course of study,” determining which institutions are approved for international students to attend, and monitoring whether students and institutions are in compliance. 8 C.F.R. §§ 214.2(f)(6), 214.3(a)(3).

Under amendments to these regulations in 2002, the INS limited the extent to which F-1 students may count online or distance courses as part of that “full course of study,” providing that no more than “the equivalent of one class or three credits” per academic term may be counted toward the “full course of study” requirement “if the class is taken online or through distance education and does not require the student’s physical attendance for classes, examination or other purposes integral to completion of the class.” 8 C.F.R. § 214.2(f)(6)(G).⁹

Is this rule a reasonable interpretation of the statute? Is it sound as a matter of policy? Even when the rule was initially proposed in 2002—at a moment when distance education looked rather different than it does today—some commenters objected on the ground that the determination of what constitutes a “full course of study,” and the extent to which online or distance education courses should be included, is a decision that should be made by educational institutions, and that the rule would harm those institutions as more programs added online courses. The legacy INS responded dismissively, stating that international students could still complete educational programs with significant online or distance components by either enrolling in those courses from abroad, “without being admitted to the United States,” or adding in-person courses on top of their course loads so that they can comply with the

⁹ In turn, the regulation defines “on-line or distance education course” as “a course that is offered principally through the use of television, audio, or computer transmission including open broadcast, closed circuit, cable, microwave, or satellite, audio conferencing, or computer conferencing.” 8 C.F.R. § 214.2(f)(6)(G). For students in language study programs, the rule prohibits counting any online or distance courses toward the student’s “full course of study.”

regulation. Retention and Reporting of Information for F, J, and M Nonimmigrants; Student and Exchange Visitor Information System (SEVIS), 67 Fed. Reg. 76,256, 76,263 (Dec. 11, 2002).

As Paul Jaeger and Gary Burnett emphasized soon after this rule was instituted, these rules are unrealistic for many international students:

[I]n order to enroll in more than one online course per semester, [students] would have to be full-time students to comply with SEVIS and then add extra hours above the full course load. For most students, this option is not viable. It is difficult to imagine that . . . many students would be able to go to college in a foreign country and take more than a full-time course load, especially when many of these students will have to use a language other than their native tongue in their studies. Further complicating this situation is that many colleges and universities have a limit on the number of credit hours that a student can take in a semester. As a result, many international students may not even have the option of taking more courses than the full-time course load required by SEVIS.

The regulations also suggest that if an international student wishes to take a program of study that is offered exclusively online, all the student needs to do is take the courses online in their native country. This breezy suggestion is not necessarily realistic for many international students who might want to enroll in online education programs in the United States. The infrastructure required to provide consistent access to and use of the Internet is far from universal in many countries and completely absent in many others. Potential students might lack any access to the Internet, have only limited access, or may not be able to afford the access in their own countries. For technological reasons alone, many international students may simply be unable to enroll in an online program in the United States from their native lands. Further, depending on the student's nationality, there may be significant differences between the time when a course meets in the United States and the time in the international student's country. Not many people could succeed in an education program if they had to attend online courses at four in the morning.

Paul Jaeger & Gary Burnett, *Curtailling Online Education in the Name of Homeland Security: The USA PATRIOT Act, SEVIS, and International Students in the United States*, 8 First Monday (2003), <https://firstmonday.org/ojs/index.php/fm/article/view/1073>. In addition to the practical and technological difficulties discussed above, political interference with and monitoring of online activity would alter the nature of the education experience. To what extent do these and other educational or pedagogical considerations bear upon the legality of the agency's regulation?

After being issued in 2002, the regulation garnered limited attention, even as online and remote education have grown and changed significantly due to changes in technology. However, a series of developments arising from the coronavirus pandemic prompted renewed attention to this regulation. In March 2020, ICE announced an "exemption" to these regulations, as colleges and universities across the country shut down their campuses—in many

cases, as required by public health authorities—and moved to fully remote instruction. Under this guidance, the agency indicated that it “intend[ed] to be flexible with temporary adaptations” by institutions due to the “fluid and rapidly changing” circumstances caused by the pandemic. U.S. Immigr. & Customs Enf’t, *Broadcast Message: Coronavirus Disease 2019 (COVID-19) and Potential Procedural Adaptations for F and M Nonimmigrant Students* (Mar. 9, 2020), <https://www.ice.gov/doclib/sevis/pdf/bcm2003-01.pdf>. ICE also stated expressly that F-1 students would be permitted to temporarily count online courses towards a full course of study, notwithstanding the restrictions set forth by regulation, for the duration of the emergency.” U.S. Immigr. & Customs Enf’t, *COVID-19: Guidance for SEVP Stakeholders* (Mar. 13, 2020), https://www.ice.gov/sites/default/files/documents/Document/2020/Coronavirus%20Guidance_3.13.20.pdf.

With the pandemic not yet contained, many institutions continued to make adaptations to their programs, including by continuing to make extensive or even full use of online or remote instruction. However, on July 6, 2020, ICE abruptly and somewhat belatedly announced modifications to its March 2020 guidance, stating that F-1 students attending institutions that are operating “entirely online” for the fall 2020 semester would not be permitted to take a full online course load. U.S. Immigr. & Customs Enf’t, *Broadcast Message: COVID-19 and Fall 2020* (July 9, 2020), <https://www.nafsa.org/sites/default/files/media/document/bcm2007-01.pdf>. The guidance stated that those students should either “depart the country” or “take other measures, such as transferring to a school with in-person instruction,” in order to remain in lawful status and avoid the possibility of facing removal proceedings.

Did ICE act lawfully in announcing its July 6, 2020 changes to the March 2020 guidance? Several lawsuits were quickly filed seeking to restore the exemption in that guidance, claiming that the July 6, 2020 announcement violated the APA as arbitrary and capricious—since it failed to consider important aspects of the problem or address reliance interests engendered by the March 2020 guidance, and because it failed to offer a sufficiently reasoned basis for the policy—and as a violation of the requirement of notice-and-comment rulemaking. Complaint, *President & Fellows of Harvard Coll. v. U.S. Dep’t of Homeland Sec.*, No. 20-cv-11283 (D. Mass. July 8, 2020); Complaint, *Massachusetts v. U.S. Dep’t of Homeland Sec.*, No. 20-cv-11311 (D. Mass. July 13, 2020). In support of these claims, the plaintiffs relied in significant part on *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020), which invalidated the Trump presidency’s rescission of DACA on APA grounds (and which is discussed in Chapter 9). The plaintiffs also emphasized that a senior official at DHS, Ken Cuccinelli, had publicly stated that the purpose of the change was to “encourage schools to reopen”—thereby calling the agency’s purported rationale for the change into question. How strong do those legal claims appear to be?

In the face of significant opposition by many stakeholders, including educational institutions, cities and states, and the business community, DHS backed down and rescinded its proposed modification shortly before a hearing in federal court to consider whether it should be enjoined. Miriam Jordan & Anemona Hartocollis, *U.S. Rescinds Plan to Strip Visas from International Students in Online Classes*, N.Y. Times (July 16, 2020), <https://www.nytimes.com/2020/07/14/us/coronavirus-international-foreign-student-visas.html>. However, on July 24, 2020, ICE issued a second modification to its March 2020

guidance, announcing that while continuing international students would be permitted to count online courses towards a full course of study, students in new or initial status after March 9, 2020 would not be permitted to enroll as nonimmigrant students “to pursue a full course of study that is 100 percent online.” U.S. Immigr. & Customs Enf’t, Broadcast Message: Follow-up: ICE Continues March Guidance for Fall School Term (July 24, 2020), <https://www.ice.gov/doclib/sevis/pdf/bcmFall2020guidance.pdf>. Would this follow-up guidance have been vulnerable to legal challenge?

These announcements about online and distance education were not the only initiatives that significantly affected F-1 students in 2020. On May 29, 2020, President Trump issued another exclusion order, pursuant to INA § 212(f) and effective on June 1, 2020, that banned entry by noncitizens from the People’s Republic of China on F or J visas for graduate study or to conduct research currently or previously received funding from, were employed by, or conducted research connected to China’s “military civil fusion strategy.” Proclamation No. 10,043, 85 Fed. Reg. 34,353 (May 29, 2020).¹⁰ In issuing the order, the President explained that the entry of these graduate students would “be detrimental to the interests” of the U.S., claiming, without providing support, that China may be using Chinese graduate students “to operate as non-traditional collectors of intellectual property” in order to “acquire sensitive United States technologies” to modernize its military.

Are there legitimate grounds for this proclamation? What impact might have the executive order have on research? What impact might it have on F-1 students from China who are already in the United States? Given the lack of evidence justifying the proclamation, some universities have expressed concerns that the executive order would discourage top graduate scholars from doing research in the U.S. Indeed, for F-1 students from China already in the United States—still reeling from comments from the President about the “Chinese virus”—the proclamation was seen as yet another executive order intended to target them because of their race. See, e.g., Teresa Watanabe, *‘It’s the New Chinese Exclusion Act’: How a Trump Order Could Hurt California Universities*, L.A. Times (June 7, 2020), <https://www.latimes.com/california/story/2020-06-07/trump-move-to-bar-entry-of-some-chinese-graduate-students-stirs-campus-anxiety-anger>.

¹⁰ The directive defines China’s “military-civil fusion strategy” to refer to “actions by or at the behest of the [People’s Republic of China] to acquire and divert foreign technologies, specifically critical and emerging technologies, to incorporate into and advance the PRC’s military capabilities. Proclamation No. 10043, § 1.

CHAPTER 5

EXCLUSION GROUNDS AND WAIVERS

Page 573, replace Section D with:

D. ECONOMIC GROUNDS

As the historical summary in Section A explains, Congress from time to time has enacted exclusion grounds that were either explicitly economic or at least partly driven by economic concerns. Some of the latter—including some of the medical exclusions and illiteracy—reflected fears that the classes of noncitizens they covered were likely to require public assistance.

The Immigration Act of 1990 repealed many of those grounds. Only two explicitly economic grounds were left: INA §§ 212(a)(5)(A) (labor certification), which you have already studied, and 212(a)(4) (public charge), which will be considered presently. The illiteracy ground has been repealed, and as discussed below the health-related exclusions have been narrowed.

In 1996, Congress added another “economic” exclusion. In recent years, many wealthy Americans have discovered that they could reduce their income tax liability by renouncing their United States citizenship and moving to other countries. That way, they would be neither United States citizens nor LPRs. See generally Alice G. Abreu, *Taxing Exits*, 29 U.C. Davis L. Rev. 1087 (1996). IIRIRA § 352 added a new exclusion ground for those who formally renounced their United States citizenship “for the purpose of avoiding taxation by the United States.” INA § 212(a)(10)(E).¹¹

The main economic exclusion ground is INA § 212(a)(4) (noncitizen “likely at any time to become a public charge”). Emma Lazarus’s inspiring words, “Give me your tired, your poor * * *,” were inscribed in the Statue of Liberty in 1903. John Higham, *Send These to Me: Immigrants in Urban America* 71–74 (rev. ed. 1984). By 1882, however, Congress had already acted to exclude “any person unable to take care of himself or herself without becoming a public charge.” Act of August 3, 1882, ch. 376, § 2, 22 Stat. 214.

The public charge provision raises two basic implementation questions: What does “public charge” mean? And what evidence will permit a prediction that a person is “likely” to become one?

Until 2020, the State Department through its Foreign Affairs Manual (F.A.M.) provided the basic guide to the meaning of public charge. Following the 1996 changes, the F.A.M. was amended in 1999, 76 IR 980 (June 28, 1999), to clarify that the mere receipt of public funds does not make a person a public charge. Rather, the State Department defined “public charge” to mean “primarily dependent on the U.S. Government for subsistence,” as demonstrated by “the receipt of public cash assistance for income maintenance” or “institutionalization for long-term care at U.S. Government expense.” 9 F.A.M. § 40.41

¹¹ Section 212(a)(10)(E) is considered further in Chapter 13.

n.2.1(a) (2018). These included such programs as Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), and state general assistance. *Id.* n.2.1. Even programs for which qualifying requirements included income specifications did not necessarily constitute cash assistance “for income maintenance;” the State Department offered as examples of non-public-charge programs the Supplemental Nutrition Assistance Program (SNAP, formerly called the Food Stamp Program), Medicaid (other than long-term institutional care), the Child Health Insurance Program (CHIP), emergency medical services, the nutritional program for women, infants, and children (WIC), energy assistance, Head Start, job training programs, provision of in-kind services such as soup kitchens or crisis counseling, and several others. *Id.* n.2.2. The question in all cases was whether the program is “intended to be a primary source of cash for income maintenance.” Moreover, earned cash benefit programs like Social Security payments and veterans benefits were not considered public-charge programs.

In August 2019, the Trump administration published a final regulation on inadmissibility on public charge grounds that significantly alter the meaning of public charge. 84 Fed. Reg. 41292 (Aug. 14, 2019). Following litigation which delayed implementation, the Supreme Court lifted the last remaining injunction, allowing the new rule to go into effect on February 24, 2020, for consular interviews and adjustment applications filed after that date. *Wolf v. Cook County*, 140 S. Ct. 681 (2020). Justices Ginsburg, Breyer, and Kagan noted their dissents from the Supreme Court’s disposition and Justice Sotomayor published a dissenting opinion, noting the four same justices’ dissents from a previous order staying an injunction against the same rule, *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020), the plaintiffs’ “weighty arguments on the merits,” and the government’s failure to carry its burden to obtain a stay. Sotomayor criticized the Trump administration for “com[ing] to treat ‘th[e] exceptional mechanism’ of stay relief ‘as a new normal’” and the Court itself for “be[ing] all too quick to grant the Government’s reflexiv[e] requests” for ostensibly “emergency” relief.

Following the change of administrations, on March 15, 2021, DHS issued a final rule “removing the regulations resulting from [the 2019 rule].” Inadmissibility on Public Charge Grounds; Implementation of Vacatur, 86 Fed. Reg. 14,221 (Mar. 15, 2021). The web of litigation and administrative action that led to this moment is complex and was followed by a motion ultimately joined by a number of states to intervene to defend the 2019 rule. The Ninth Circuit denied this motion to intervene. *City and County of San Francisco v. U.S. Citizenship and Immigration Services*, 992 F.3d 742. The Supreme Court granted certiorari on the issue of intervention, 142 S.Ct. 417 (2021), but after oral argument it dismissed writ as improvidently granted. 142 S.Ct. 1926 (2022). Concurring in the dismissal, Chief Justice Roberts signals his view that the underlying issues raised in this litigation are far from settled:

We granted certiorari in this case not to address the merits of that argument, but to decide whether the petitioners—13 States which support the Rule—should have been permitted to intervene in this litigation to defend the Rule’s legality in the Court of Appeals. * * *

When this and other suits challenging the Rule were first brought in 2019, the Government defended it. And when multiple lower courts, including the District Court here, found the Rule unlawful, the Government appealed those

decisions. After a change in administrations, though, the Government reversed course and opted to voluntarily dismiss those appeals, leaving in place the relief already entered.

A new administration is of course as a general matter entitled to do that. But the Government then took a further step. It seized upon one of the now-consent judgments against it—a final judgment vacating the Rule nationwide, issued in a different litigation—and leveraged it as a basis to immediately repeal the Rule, without using notice-and-comment procedures. 86 Fed. Reg. 14221 (2021) (“Because this rule simply implements the district court’s vacatur of the August 2019 rule ... DHS is not required to provide notice and comment.”). This allowed the Government to circumvent the usual and important requirement, under the Administrative Procedure Act, that a regulation originally promulgated using notice and comment (as the Public Charge Rule was) may only be repealed through notice and comment. As part of this tactic of “rulemaking-by-collective-acquiescence,” *City and County of San Francisco v. United States Citizenship and Immigration Servs.*, 992 F.3d 742, 744 (C.A.9 2021) (VanDyke, J., dissenting), the Government successfully opposed efforts by other interested parties—including petitioners here—to intervene in order to carry on the defense of the Rule, including possibly before this Court.

These maneuvers raise a host of important questions. The most fundamental is whether the Government’s actions, all told, comport with the principles of administrative law. But bound up in that inquiry are a great many issues beyond the question of appellate intervention on which we granted certiorari, among them standing; mootness; vacatur under *United States v. Munsingwear, Inc.*; the scope of injunctive relief in an APA action; whether, contrary to what the government has long argued, the APA authorizes district courts to vacate regulations or other agency actions on a nationwide basis; how the APA’s procedural requirements apply in this unusual circumstance; and more.

It has become clear that this mare’s nest could stand in the way of our reaching the question presented on which we granted certiorari, or at the very least, complicate our resolution of that question. I therefore concur in the Court’s dismissal of the writ of certiorari as improvidently granted. But that resolution should not be taken as reflective of a view on any of the foregoing issues, or on the appropriate resolution of other litigation, pending or future, related to the 2019 Public Charge Rule, its repeal, or its replacement by a new rule.

On September 9, 2022, DHS published a final rule providing that “a noncitizen would be considered likely at any time to become a public charge if they are likely at any time to become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense.” Department of Homeland Security, *Public Charge Ground of Inadmissibility*, 87 Fed. Reg. 10570 (Sep. 9, 2022).

Though now superseded, cases challenging the Trump Administration's attempt to redefine public charge provide insight into the issues at stake. For example, in two of the earliest decisions, on July 29, 2020, a district court in New York issued preliminary injunctions blocking certain modifications to the public charge rule, *New York v. U.S. Dep't of Homeland Sec.*, 475 F.Supp.3d 208 (S.D.N.Y. 2020), and the F.A.M. changes. *Make the Road New York v. Pompeo*, 475 F.Supp.3d 232 (S.D.N.Y. 2020). The reasoning in the two decisions was similar. In the matter against DHS, the court noted that since the Court's ruling "[m]uch has significantly changed." Citing COVID-19 and presidential declaration of state of national emergency, the court found that "[a]ttempting to effectively combat this plague has immediately come in conflict with the federal government's new 'public charge' policy, a policy which is intended to discourage immigrants from utilizing government benefits and penalizes them for receipt of financial and medical assistance." In particular, the court found that

Plaintiffs provide ample evidence that the Rule deters immigrants from seeking testing and treatment for COVID-19, which in turn impedes public efforts * * * to stem the spread of the disease. * * * As a direct result of the Rule, immigrants are forced to make an impossible choice between jeopardizing public health and personal safety or their immigration status. * * * [E]ven if immigrants act in part on mistaken belief, the Supreme Court has recognized injury where plaintiff's harms are based on the predictable effect of Government action on the decision of third parties, even if such decisions are motivated by unfounded fears. Here, such decisions are more than predictable, they are already occurring. * * *

Adverse government action that targets immigrants * * * is particularly dangerous during a pandemic. Immigrants make up a substantial portion of workers in essential industries who have continued to work through the national emergency and interact with large swaths of population, whether in healthcare, agriculture, food packing and distribution, or sanitation, among other industries. * * * When individuals with a high percentage of public exposure are fearful of receiving medical care for a deadly, contagious disease, the health and security of communities across the country is jeopardized.

The court's injunction was entered nationwide, as "[l]imited relief would simply not protect the interests of all stakeholders."

The court's fears of widespread impact on immigrant communities is not overstated. The Trump rules would have greatly expanded the benefits which are considered in making a public charge determination. Under those rules, instead of focusing on whether a potential immigrant is likely to become primarily dependent on governmental support for basic subsistence, a person would be considered a public charge based on receipt of any of a number of benefits for an aggregate of 12 months over any 36 month period. 8 C.F.R. § 212.21(a). Any use of a single benefit would count, so if an applicant received two different benefits in a month, that would count as two months toward the twelve. The relevant benefits included many previously outside the public charge analysis, such as important health, housing, and nutrition programs, including federally-funded Medicaid, SNAP (formerly food stamps) benefits, and

Section 8 housing benefits. 8 C.F.R. § 212.21(b). A new form, I-944 Declaration of Self Sufficiency, would have required those subject to the public charge inadmissibility ground to report and submit information about whether the person applied for or was approved to receive non-cash benefits on or after October 15, 2019.

Adding consideration of the past receipt of benefits to the public charge analysis, however, would have had limited legal impact for many, as most potential immigrants do not have access to these benefits. Further, many humanitarian-based categories are exempt from public charge requirements. These include those with U and T status, refugees, asylees, and special immigrant juveniles. 8 C.F.R. § 212.23.

Beyond past receipt of benefits, trying to predict the likelihood that a given individual will become a public charge is problematic. Often an applicant for an immigrant visa lines up a permanent job that will produce an adequate income. If not, however, the applicant can still avoid public charge problems by showing funds sufficient to provide support until a job is found. How much will be required depends, of course, on the needs of the applicant and his or her dependents and on the applicant's prospects for getting work. As a result of IIRIRA § 531(a), the public charge exclusion ground now lays out the factors that will affect public charge determinations. They include age, health, family status, financial status, education, skills, and "affidavits of support." INA § 212(a)(4)(B). The regulations taking effect in 2020 specify that the determination of a person's likelihood of becoming a public charge "at any time in the future" must be based on the totality of circumstances relevant to whether the person "is more likely than not at any time in the future to receive one or more public benefits." 8 C.F.R. § 212.22.

Until 1996, a person who could not show sufficiently promising prospects of adequate employment was allowed to submit an "affidavit of support," in which a sponsor stated a willingness to come to the applicant's aid in the event aid is later needed. State courts were divided over whether such affidavits were legally binding on the affiant, see 9 F.A.M. § 40.41 n.6.4 (1993), but even in states where affidavits were held not to be binding, they were often accepted as strong evidence of future support. See, e.g., *Matter of Kohama*, 17 I. & N. Dec. 257 (INS Assoc. Comm'r 1978). The factors affecting the weight to be placed on affidavits of support included the motivation of the sponsor, his or her relationship to the applicant, and of course the sponsor's financial ability to provide the promised support. 9 F.A.M. § 40.41 n.6.2 (1993).

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105 (Aug. 22, 1996) [hereafter the Welfare Act], restricted welfare in many ways and took special aim at immigrants, as discussed in chapter 13 below. Affidavits of support prompted particular concern, to which Congress responded in section 423 of the Welfare Act, adding new INA § 213A (amended a few weeks later by IIRIRA § 551(a)). The new section puts severe restrictions on affidavits of support.¹²

¹² The regulations spell out most of the details. See 8 C.F.R. § 213a (2018); 22 C.F.R. § 40.41(b, c) (2018).

The most important change was to make the affidavit a binding contract. It must be “legally enforceable against the sponsor by the sponsored immigrant, the Federal Government, any state (or any political subdivision of such state), or by any other entity that provides any means-tested public benefit.” INA § 213A(a)(1)(B). The promise is binding for 40 qualifying quarter-years after the immigrant last receives benefits or until naturalization if sooner. INA § 213A(a)(2). Notably, when a spouse is the sponsor, the promise remains binding even if the marriage is terminated.¹³

The sponsor must be a United States citizen, national, or LPR, over age 18, and domiciled in the United States. INA § 213A(f)(1)(A, B, C). The sponsor must be the person who is petitioning for the immigrant’s admission. INA § 213A(f)(1)(D). If the petitioner lacks the required resources (see below), he or she may join with another person as a co-sponsor. INA § 213A(f)(5).

The combination of the foregoing requirements has significant effects independent of the public charge issue. Before 1996, a United States citizen could petition for the admission of an otherwise qualifying noncitizen family member even if the petitioner was living overseas. That is no longer possible. Since the petitioner must be a sponsor (either alone or jointly), and since a sponsor has to be domiciled in the United States, citizens domiciled overseas may no longer petition for the admission of their family members. See David A. Martin, INS General Counsel, Legal Op. 97-10 (July 8, 1997), *available at* 75 IR at 380-83 (Mar. 16, 1998). Nor, according to the former INS, can a citizen domiciled overseas solve the problem by enlisting a co-sponsor domiciled in the United States; a co-sponsor will not suffice unless the petitioner is also eligible to be a sponsor. *Id.* The only opening in such cases is that the citizen petitioner, although physically overseas, might be able to prove that his or her foreign presence is temporary and that the plan is to return to the United States. *Id.*; accord 8 C.F.R. § 213a.2(c)(1)(ii)(A) (2018). The sponsor may therefore reside overseas temporarily.

The sponsor’s income must be at least 125% of the poverty level. INA §§ 213A(f)(1)(E), 213A(f)(6). Moreover, for immediate relative and family-sponsored petitions (except for certain widowed and certain abused family members), affidavits of support are mandatory, not optional. INA § 212(a)(4)(C).

Even before the 1996 reforms, the sponsor’s assets and income were treated as if they belonged to the beneficiary for purposes of calculating the latter’s eligibility for specified federal welfare programs, for varying periods of years after admission. Section 421 of the Welfare Act expanded these “deeming” provisions. Subject to some exceptions added by IIRIRA § 552, the Welfare Act extended deeming to all federal means-tested benefits and lengthened the time period during which deeming would operate (until naturalization or until the applicant has worked for 40 qualifying quarter-years, whichever comes sooner). Section 422 of the Welfare Act authorized states to take similar action with respect to state means-tested benefits.

¹³ The enforceability and continuing viability of affidavits of support even as marriages are dissolved has effects in divorce, custody, and child support matters that often fall under the radar of family courts and attorneys. See Veronica T. Thronson, *‘Til Death Do Us Part: Affidavits of Support and Obligations to Immigrant Spouses*, 50 Fam. Ct. Rev. 594 (2012).

The public charge ground may be waived upon the giving of what is usually called a “public charge” bond. INA § 213. The person who furnishes the bond promises to indemnify the United States or any state or local governmental unit in which the sponsored individual becomes a public charge. Security may be provided. In practice, the decision whether to accept such a bond is made in the local USCIS office after a request from a consular officer abroad. 8 C.F.R. § 213.1(b).

As noted above, sponsors must now demonstrate income equal to 125% of the federal poverty levels. For purposes of that requirement, the State Department uses the Poverty Income Guidelines prepared and revised annually by the Department of Health and Human Services. These guidelines are designed principally for use in administering federal welfare programs, awarding block grants, and compiling Census data.

For fiscal year 2022, the 125% of the HHS Poverty Guideline is \$22,88 per year for a two-person household plus \$5,900 for each additional person (higher figures for Alaska and Hawaii). USCIS, Form I-864P, HHS Poverty Guidelines for Affidavit of Support, <https://www.uscis.gov/i-864p>. The sponsor’s annual income must therefore meet or exceed that figure for the number of family members who will be dependent on the sponsor, including the applicants.

Page 579, after first full paragraph insert:

In an attempt to further link health exclusions with the public charge exclusion ground, on October 4, 2019 President Trump issued Proclamation No. 9945, 84 Fed. Reg. 53,991 (Oct. 4, 2019). The proclamation asserted that a non-citizen “will financially burden the United States healthcare system unless ... covered by approved health insurance,” and sets stringent criteria for insurance to qualify. On May 14, 2021, President Biden revoked this proclamation. Proclamation No. 10209, 86 Fed. Reg. 27,015 (May 14, 2021). In a series of orders placing limitations on entry of non-citizens traveling from specific countries or regions deemed to have high levels of COVID-19, the Trump administration similarly invoked INA § 212(f).¹⁴ Although COVID-19 is perhaps a paradigm of a “a communicable disease of public health significance,” the proclamation made reference to neither INA § 212(a)(1) nor INA § 212(a)(1). Why might the Trump administration have preferred to rely upon INA § 212(f) instead of INA § 212(a)(1)? What limits might apply under INA § 212(a)(1) that these orders attempt to circumvent? These questions should be revisited when considering the cases regarding the proclamation in Section F below. *Doe #1 v. Trump*, 418 F.Supp.3d 573 (D. Or. 2019) (enjoining the ban); *Doe #1 v. Trump*, 957 F.3d 1050 (9th Cir. 2020) (declining to stay injunction).

In another invocation of health-related reasons to bar admission to the United States, again eschewing invocation of INA § 212(a)(1). On March 20, 2020, the Trump administration

¹⁴ Proclamation No. 10,042, 85 Fed. Reg. 32,291 (May 25, 2020) (Brazil); Proclamation No. 10,041, 85 Fed. Reg. 31,933 (May 24, 2020) (Brazil); Proclamation No. 9996 85 Fed. Reg. 15,341 (Mar. 14, 2020) (United Kingdom and Ireland); Proclamation No. 9993, 85 Fed. Reg. 15,045 (Mar. 11, 2020) (European countries within the Schengen Area); Proclamation No. 9992, 85 Fed. Reg. 12,855 (Feb. 29, 2020). (Iran); Proclamation No. 9984, 85 Fed. Reg. 6709 (Jan. 31, 2020). (China).

imposed restrictions on the entry of noncitizens arriving from Canada and Mexico at land and sea ports of entry, following the announcement of mutual agreements with those two governments on account of the coronavirus pandemic. U.S. Customs & Border Protection, Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Canada 85 Fed. Reg. 16,548 (Mar. 24, 2020); U.S. Customs & Border Protection, Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico 85 Fed. Reg. 16,547 (Mar. 24, 2020).

To implement those agreements, and with reference to the emergency declared under the National Emergencies Act on account of the pandemic, CBP issued rules pursuant to 19 U.S.C. §§ 1318(B)(1)(C) and (b)(2). Those provisions respectively (1) authorize temporary modifications of operations at ports of entry to “respond directly” to a declared emergency under the National Emergencies Act or a “specific threat to human life or national interests,” and (2) authorize the CBP Commissioner to temporarily close any port of entry “or take any other lesser action” that may be necessary “to respond to a specific threat to human life or national interests.” The restrictions—which were initially instituted for thirty days but subsequently extended indefinitely—limited entry at those ports of entry to “essential travel,” which they defined to include (but not be limited to) entry by U.S. citizens, returning lawful permanent residents, and members of the U.S. military and by other individuals traveling for a variety of other purposes, including education, work, public health, medical treatment, and emergency response. The rules expressly exclude individuals traveling for tourism purposes from the definition of “essential travel.” Why do you think the Trump administration relied on 19 U.S.C. § 1318(B)(1)(C) and (b)(2) to implement these restrictions? Were they on sound legal ground in doing so?

Page 580, after the Question insert:

F. PRESIDENTIAL EXCLUSION AUTHORITY UNDER INA § 212(F)

As discussed in Chapter 2, in connection with the Trump presidency’s Muslim exclusion orders and the Supreme Court’s decision in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), INA § 212(f) provides statutory authority for the President to prohibit or restrict the entry of noncitizens on a broad, classwide basis:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

The provision was first enacted as part of the INA in 1952. According to the Congressional Research Service, the provision was not used to restrict noncitizens from entering the United States until the Reagan administration. While every president from Reagan to Obama invoked the provision at least once to prohibit or restrict entry of noncitizens, those restrictions tended to be relatively narrow in their scope and limited in their objectives, very often seeking to resolve ongoing diplomatic disputes. See Cong. Research Serv., Executive Authority to Exclude Aliens: In Brief (2017); Cong. Research Serv., Presidential Actions to Exclude Aliens

Under INA § 212(f) 1–2, 8–18 (2020). By contrast, the Trump presidency issued directives invoking INA § 212(f) much more frequently than its predecessors—with the bulk of them coming after the Supreme Court’s validation of its Muslim exclusion orders in *Trump v. Hawaii*.¹⁵ Although most of Trump’s specific invocations of INA § 212(f) have now been reversed by President Biden, the treatment of such orders by the courts are instructive in understanding the extent of executive power.

1. INA § 212(F) IN THE *TRUMP V. HAWAII* ERA

Perhaps emboldened by the wide latitude given by the Supreme Court’s interpretation of § 212(f), the Trump presidency’s invocations of the provision were much broader than those of earlier administrations, in terms of both the number of people subject to exclusion and the nature of the restrictions being imposed. The Trump presidency’s directives under § 212(f) also tended to be more open-ended in their stated objectives and rationales. While all of them purported to be merely temporary suspensions of entry, none of them were in fact revoked by Trump. Despite designating many of its restrictions as “temporary,” it is not at all clear that the Trump presidency intended for its most significant restrictions to be limited in duration.

After the Supreme Court’s decision in *Trump v. Hawaii*, the Trump presidency invoked INA § 212(f) on more than twenty separate occasions to ban or restrict large numbers of noncitizens from entering the United States as immigrants or nonimmigrants. The sweeping extent of several of these orders required lower federal courts to consider the outer limits of the Supreme Court’s interpretation of § 212(f) in *Trump v. Hawaii*. The Trump presidency’s § 212(f) orders may be classified as falling into several distinct substantive categories.

a. FOREIGN POLICY AND NATIONAL SECURITY-BASED EXCLUSION ORDERS

At least seven of the § 212(f) orders issued by Trump after *Trump v. Hawaii* purported to address foreign policy or national security-related concerns, often in connection with other sanctions, including an order banning entry by students and researchers from China, one amending and extending the provisions of the Muslim exclusion orders at issue in the *Trump v. Hawaii* litigation, and several banning entry by designated groups of noncitizens from Iran, Mali, Nicaragua, Syria, and Venezuela as immigrants or nonimmigrants.¹⁶

¹⁵ INA § 212(f) might also be the only provision of the immigration statute to be given a dramatic reading during a political rally. See President Donald J. Trump, Speech to Political Rally in Nashville, Tennessee (C-SPAN TV broadcast, Mar. 15, 2017), available at <http://klhn.co/Trump-INA-212f-2017-03-15>.

¹⁶ Proclamation No. 10,043, 85 Fed. Reg. 34,353, 043 (May 29, 2020) (banning entry by students and researchers from China); Proclamation No. 9983, 85 Fed. Reg. 6699 (Jan. 31, 2020) (extending previous exclusion orders to cover Burma (Myanmar), Eritrea, Kyrgyzstan, Nigeria, Sudan, and Tanzania); Exec. Order No. 13,902, 85 Fed. Reg. 2003 (Jan. 10, 2020) (banning entry by designated groups of individuals from Iran); Exec. Order No. 13,894, 84 Fed. Reg. 55,851 (Oct. 14, 2019); (banning entry by designated groups of individuals from Syria); Proclamation No. 9932, 84 Fed. Reg. 51,935 (Sept. 30, 2019) (banning entry by certain designated officials of the government of Iran and their family members); Proclamation No. 9931, 84 Fed. Reg. 51,931 (Sept. 25, 2019) (banning entry by certain designated officials of the government of Venezuela, others deemed to have ties to the government of Venezuela, and their family members); Exec. Order No. 13,884, 84 Fed. Reg. 38,843 (Aug. 5, 2019)

b. ASYLUM BANS

In November 2018, the Trump presidency issued a § 212(f) proclamation, in combination with a related interim final rule, intended to significantly curb the ability of individuals fleeing persecution to apply for asylum.¹⁷ Taken together, the two directives sought to ban individuals from applying for asylum if they entered the United States from Mexico without presenting themselves for inspection at a designated port of entry.¹⁸ These directives were blocked by a temporary restraining order and subsequent preliminary injunction, both of which were affirmed by the Ninth Circuit. *East Bay Sanctuary Covenant v. Trump*, 349 F.Supp.3d 838 (N.D. Cal.) (“EBSC I”) (granting temporary restraining order), *aff’d*, 932 F.3d 742 (9th Cir.) (“EBSC II”), *stay denied*, 139 S. Ct. 782 (2018); *East Bay Sanctuary Covenant v. Trump*, 354 F.Supp.3d 1094 (N.D. Cal. 2018) (“EBSC III”) (granting preliminary injunction), *aff’d*, 950 F.3d 1252 (9th Cir. 2020) (“EBSC IV”) (petition for rehearing en banc filed June 28, 2020).

Writing for the Ninth Circuit, Judge Jay Bybee concluded that by prohibiting individuals physically present within the United States from applying for asylum, the rule of decision created by the two directives in combination exceeded the authority granted under INA § 212(f), which only authorizes restrictions on “entry,” and was inconsistent with the statutory provisions governing asylum, which permit noncitizens physically present in the United States to apply for asylum regardless of where and how they arrived. *EBSC II*, 932 F.3d at 770-75 (“Here, the Executive has attempted an end-run around Congress.... Just as we may not, as we are often reminded, ‘legislate from the bench,’ neither may the Executive legislate from the Oval Office.”); see also *EBSC IV*, 950 F.3d at 1272-77. The implications of these directives for asylum and refugee law—along with their relationships to other asylum-related initiatives by the Trump presidency that do not involve the use of INA § 212(f)—are considered in Chapter 11.

(banning entry by designated groups of individuals from Venezuela); Exec. Order No. 13,882, 84 Fed. Reg. 37,055 (Jul. 30, 2019) (banning entry by designated groups of individuals from Mali); Exec. Order No. 13,876, 84 Fed. Reg. 30,573 (Jun. 24, 2019) (banning entry by designated groups of individuals from Iran); Exec. Order No. 13,871, 84 Fed. Reg. 20,761 (May 8, 2019) (banning entry by designated groups of individuals from Iran); Exec. Order No. 13,851, 83 Fed. Reg. 61,505 (Nov. 27, 2018) (banning entry by designated groups of individuals from Nicaragua).

¹⁷ Proclamation No. 9822, 83 Fed. Reg. 57,661 (Nov. 9, 2018); Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934, 55,952 (Nov. 9, 2018) (codified at 8 C.F.R. §§ 208.13, 208.30). Initially instituted for a 90-day period, Proclamation 9822 was subsequently twice extended for additional 90-day periods. Proclamation No. 9842, 84 Fed. Reg. 3665 (Feb. 7, 2019); Proclamation No. 9880, 84 Fed. Reg. 21,229 (May 8, 2019).

¹⁸ As discussed in Chapter 11, two parallel sets of asylum policies, referred to by the government as “metering” and the “third country transit” rules, created a Catch-22 situation for asylum-seekers by blocking individuals from applying for asylum at those ports of entry themselves. See *Al Otro Lado v. McAleenan*, 423 F.Supp.3d 848 (S.D. Cal. 2019), *stay denied*, 950 F.3d 999 (9th Cir. 2020); see also *Capital Area Immigrants’ Rights Coalition v. Trump*, 471 F.Supp.3d 25 (D.D.C. 2020).

c. PUBLIC HEALTH EXCLUSION ORDERS

At least six orders since the onset of the novel SARS-CoV-2 coronavirus pandemic in January 2020 placed limitations on entry by noncitizens who have recently been physically present in countries or regions deemed to render those individuals at high risk of transmitting the virus.¹⁹

d. LARGE-SCALE BANS ON ENTRY BY IMMIGRANTS AND NONIMMIGRANTS

Finally, two additional sets of § 212(f) orders sought to ban entry by broadly defined, overlapping categories of noncitizens on an enormous scale. In practice, these orders rewrote congressionally-enacted immigration policies by executive decree.

i. Immigration Bans Based on Claimed Effects on Health Care System

On October 4, 2019, the Trump presidency issued a directive banning noncitizens from entering the United States as immigrants if they cannot establish either that they will be covered within thirty days after entry by an “approved health insurance” plan or that they have sufficient financial resources to pay for “reasonably foreseeable medical costs.” Proclamation No. 9945, 84 Fed. Reg. 53,991 (Oct. 4, 2019). While the ostensible rationale of the policy was that lawful immigrants are “three times more likely” than U.S. citizens to lack health insurance, and therefore disproportionately contribute to the costs of uncompensated health care, the Proclamation did not itself provide any specific data or analysis in support of that assertion beyond a single, conclusory sentence.²⁰

Experts estimate that if implemented, the health insurance-based immigration ban would have had the effect of banning almost two-thirds of all individuals who currently enter the United States on immigrant visas, with noncitizens from Asia, Africa, and Latin America and those seeking to enter in the family-sponsored and diversity visa categories disproportionately affected.²¹ While the Proclamation enumerated several categories of “approved health insurance” that would satisfy its requirements, those categories were sufficiently narrow that most individuals seeking to enter as immigrants would likely be unable

¹⁹ Proclamation No. 10042, 85 Fed. Reg. 32,291 (May 25, 2020) (Brazil); Proclamation No. 10041, 85 Fed. Reg. 31,933 (May 24, 2020) (Brazil); Proclamation No. 9996 85 Fed. Reg. 15,341 (Mar. 14, 2020) (United Kingdom and Ireland); Proclamation No. 9993, 85 Fed. Reg. 15,045 (Mar. 11, 2020) (European countries within the Schengen Area); Proclamation No. 9992, 85 Fed. Reg. 12,855 (Feb. 29, 2020). (Iran); Proclamation No. 9984, 85 Fed. Reg. 6709 (Jan. 31, 2020). (China).

²⁰ Public health research casts some doubt on the Proclamation’s rationale. See, e.g., *Doe #1 v. Trump*, 418 F.Supp.3d 573, 582–83 (D. Or. 2019) (discussing opinion of health policy researcher Dr. Leighton Ku, offered by plaintiffs as an expert, that recent uninsured immigrants use less than one-tenth of one percent of all U.S. health care resources).

²¹ Julia Gelatt & Mark Greenberg, *Health Insurance Test for Green-Card Applicants Could Sharply Cut Future U.S. Legal Immigration*, Migration Pol’y Inst. (Oct. 2019), <https://www.migrationpolicy.org/news/health-insurance-test-green-card-applicants-could-sharply-cut-future-us-legal-immigration>.

to obtain the required coverage. The Proclamation also did not provide any criteria to determine what medical costs should be deemed “reasonably foreseeable.”

Before the health insurance-based immigration ban could go into effect, the U.S. District Court for the District of Oregon issued a temporary restraining order and subsequent preliminary injunction blocking its implementation and enforcement, and motions panels of the Ninth Circuit denied two separate government motions to stay the district court’s injunction before it reversed itself and blocked the injunction on the merits of the appeal.²² See *Doe #1 v. Trump*, 984 F.3d 848 (9th Cir. 2020). After the Biden administration jettisoned the health-insurance based ban, the court dismissed its decision as moot. *Doe #1 v. Trump*, 2 F.4th 1284 (9th Cir. 2021). Because the cases themselves are now moot, arguments related to the nondelegation doctrine that were raised did not reach the Supreme Court for resolution. Still, the following excerpts of the opinions below lay out contrasting views that are likely to arise in the future.

Doe #1 v. Trump

U.S. District Court for the District of Oregon, 2019
418 F.Supp.3d 573 (D. Or. 2019)

■ MICHAEL H. SIMON, DISTRICT JUDGE.

* * * The President issued the Proclamation under authority delegated to him by Congress in INA §§ 212(f) and 215(a). Plaintiffs argue that if the President’s delegated authority is as broad as Defendants’ assert, it violates the nondelegation doctrine. Plaintiffs also argue that the Proclamation is unconstitutional because it violates the fundamental principle of separation of powers. Plaintiffs further argue that the Proclamation violates their due process rights under the Fifth Amendment. * * *

2. Nondelegation Doctrine

Congress “may not transfer to another branch ‘powers which are strictly and exclusively legislative.’” Congress may, however, “obtain the assistance of its coordinate Branches” and may “confer substantial discretion” on the Executive branch. Thus, “a statutory delegation is constitutional as long as Congress ‘lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.’” “The constitutional question is whether Congress has supplied an intelligible principle to guide the delegatee’s use of discretion.” “In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.” “[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.”²³

²² Judge Daniel Bress, a Trump appointee who was confirmed to the federal bench in July 2019, dissented from the decisions of both Ninth Circuit motions panels. The subsequent decision reversing the district court’s preliminary injunction ruling was written by Judge Daniel P. Collins, a Trump appointee confirmed to Ninth Circuit in May 2019.

²³ [Note 3 in original] Concerns with broad delegations of unconstrained discretion are

“Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government.... that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.” The Supreme Court “has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.” Congress established in § 212(a) “classes of aliens ineligible for visas or admission.” Specific subsections bar immigrants based on numerous specific grounds, including health-related grounds, criminal-related grounds, whether the visa applicant would cause “potentially serious adverse foreign policy consequences,” participation in acts of genocide or torture, membership in a totalitarian political party, or whether the visa applicant would become a “public charge.”

Congress delegated authority to the President to make additional limitations or to suspend entry of aliens [under § 212(f)]. * * *

On its face, this provision provides no guidance whatsoever for the exercise of discretion by the President. The only limit to the President’s discretion is the requirement to make the finding that entry would be “detrimental to the interests of the United States.” There is no “intelligible principle” provided as to what it means to be “detrimental,” what the “interests” of the United States are, what degree of finding is required, or what degree of detriment is required. This is the type of unrestrained delegation of legislative power that the Supreme Court has invalidated. It is “a standard so indefinite as to confer an unlimited power.”

Defendants argue that this delegation of authority does not present nondelegation concerns because the Supreme Court has already addressed the issue in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950). In [*Knauff*], the Supreme Court evaluated the lawfulness of the delegation of authority to the President in a precursor statute to the INA. This precursor statute, however, delegated to the President authority as follows:

When the United States is at war or during the existence of the national emergency proclaimed by the President on May 27, 1941, or as to aliens whenever there exists a state of war between, or among, two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful

In evaluating this delegation of authority, which was applicable only in times of war or the 1941 national emergency, the Supreme Court stated that excluding aliens was not only a legislative function but also “inherent in the executive power to control the foreign affairs of the nation.” The Supreme Court thus concluded:

the decision to admit or to exclude an alien may be lawfully placed with the President Normally Congress supplies the conditions of the privilege of

applicable to the President.

entry into the United States. But because the power of exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power, e.g., as was done here, for the best interests of the country during a time of national emergency. * * *

The Supreme Court directly analyzed the President's authority under § 212(f) in [*Trump v.*] *Hawaii*. Again, however, the Supreme Court did not specifically address the nondelegation doctrine. The Supreme Court noted the "comprehensive delegation" of authority in § 212(f) and that § 212(f) "exudes deference" to the President. That case involved the President's proclamation resulting in the "travel" or "Muslim" ban. That proclamation "sought to improve vetting procedures by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries present 'public safety threats'" and "placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate." It "reflect[ed] the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies." In discussing the sufficiency of the President's findings under § 212(f), the Supreme Court quoted *Sale* regarding the deference given to a President in his "chosen method" for dealing with foreign relations problems and stated that "when the President adopts 'a preventive measure ... in the context of international affairs and national security,' he is 'not required to conclusively link all of the pieces in the puzzle before [courts] grant weight to [his] empirical conclusions.'"

In evaluating the nondelegation issues raised by § 212(f), the Court considers what these three cases addressing the authority granted to the President in § 212(f) and a similar earlier provision instruct. *Knauff* does not support the conclusion that the current version of § 212(f) does not present any nondelegation issues. *Knauff* involved a much narrower delegation of authority, only in time of war or national emergency. The discussion in *Knauff* regarding immigration involving both executive and legislative power, although not limited to times of war or national emergency, was focused on the President's authority to govern "foreign affairs." The proclamation in *Knauff* was also issued during a time of war, when the President's authority is at its zenith. *Sale* involved several issues relating to foreign affairs in an emergency and extraterritorial context. These included the diplomatic concerns in trying to restore a democratic government in Haiti and concerns regarding the lives of tens of thousands of Haitians, most of whom were not going to qualify for refugee status, who were risking their lives attempting to travel by boat to the United States in dangerous crafts. This was a political and humanitarian emergency occurring beyond the borders of the United States. *Hawaii* also involved important issues of national security and foreign affairs. The proclamation at issue was an attempt to enhance detection of "terrorists" and other similar "public safety threats." It also involved activities occurring beyond the borders of the United States, because it dealt with vetting processes taking place in foreign countries.

The Court extrapolates from these cases that when Congress delegates authority to the President in the immigration context and that authority involves foreign relations or national security, especially in an emergency or extraterritorial context, then the nondelegation concerns are lessened because the President has his own inherent powers under Article II. That appears to be the intent of Congress in enacting the broad authority of § 212(f). It also appears to be how § 212(f) has been previously exercised, until now. The Proclamation, however, uses

§ 212(f) to engage in *domestic* policymaking, without addressing any foreign relations or national security issue or emergency. In this wholly domestic context, the delegation by Congress is without any intelligible principle and thus fails under the nondelegation doctrine.

Defendants argue that because immigrants come from foreign countries, anything to do with immigration is inherently “foreign relations.” The Court, however, does not accept such a broad construction. As the text of Article I and more than two centuries of legislative practice and judicial precedent make clear, the Constitution vests Congress, not the President, with the power to set immigration policy. If the fact that immigrants come from other countries inherently made their admission foreign relations subject to the President’s Article II power, then all of this law would be superfluous.

3. Separation of Powers

Even if the Proclamation is not an unconstitutional exercise of domestic lawmaking authority under the nondelegation doctrine, it would still be unconstitutional under separation of powers. Plaintiffs contend that the Proclamation is an unconstitutional attempt to rewrite a key provision of the INA through “executive fiat.” Plaintiffs argue that they are likely to succeed on their claims * * * because the Proclamation contravenes or overrides specific provisions of the INA.

Defendants respond that this claim is not a constitutional claim, but a statutory claim that the Proclamation was issued outside the President’s authority delegated by Congress in § 212(f) of the INA. Whether the claim is evaluated as a statutory claim or a constitutional separation of powers claim, the result is the same. The Supreme Court has stated that when the President exercises his authority under § 212(f), the Court “may assume that § 212(f) does not allow the President to expressly override particular provisions of the INA.” *Hawaii*, 138 S. Ct. at 2411. Thus, if the Proclamation contravenes a provision of the INA, it is both a statutory violation and a constitutional violation of separation of powers.

The constitutional principle of separation of powers embodies “the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.” Separation-of-powers concerns are primarily aimed at preventing aggrandizement by one branch encroaching into the sphere of authority of another. Accordingly, the Supreme Court has “not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch.”

“The Constitution and its history evidence the ‘unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process.’” Thus, “[t]he power to enact statutes may only ‘be exercised in accord with a single, finely wrought and exhaustively considered, procedure.’” Further, “[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.”

The President issued the Proclamation purportedly based on authority granted to him by Congress in § 212(f) of the INA. The President may not, however, exercise his discretion

granted under § 212(f) to “override” a provision of the INA. Thus, the primary question is whether the Proclamation overrides, contravenes, or is otherwise incompatible with any provision of the INA. As explained by Justice Jackson in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*:

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Plaintiffs assert that the Proclamation conflicts with INA § 212(a)(4), the “public charge” provision of the INA. Plaintiffs argue that the Proclamation impermissibly establishes healthcare insurance as the sole factor determining inadmissibility based on creating a “financial burden” to the United States, even though the public charge provision directly legislates inadmissibility based on the concern of creating a financial burden on the United States. The public charge provision enumerates a list of factors that must be considered “at a minimum” in evaluating whether a visa applicant will become a public charge, including: age; health; family status; assets, resources, and financial status; and education and skills, and the consular officer also may consider whether an affidavit of support was filed. INA § 212(a)(4)(B)(i)-(ii). These factors were expressly added to the INA by Congress in 1996.

Before the 1996 legislation was passed, some legislators proposed having public charge inadmissibility tied to the receipt of certain non-cash public benefits, but that effort failed. These non-cash benefits included Medicaid, Supplemental Security Income, Aid to Families with Dependent Children, supplemental nutrition assistance, and other means-tested public assistance. In 2013, the U.S. Senate voted down two proposed amendments to the public charge provision. One would have expanded the criteria for public charge to include the requirement that visa applicants show that they were not likely to receive benefits under Medicaid or the Children’s Health Insurance Program. The second would have expanded the definition of “public charge” to ensure that persons who received non-cash health benefits could not become permanent legal residents and that visa applicants who would be likely to receive such benefits in the future would be denied entry.

The public charge provision as amended in 1996 mandates that the consular officer or the Attorney General “shall at a minimum consider” all of the enumerated factors. INA § 212(a)(4)(B)(i). This codified the longstanding practice of evaluating the “totality of the circumstances” of the applicant. That subsection ensures that no one single factor is dispositive.

Defendants argue that the Proclamation does not contravene or supplant the public charge provision, but instead merely supplements it. Defendants argue that the focus of the Proclamation is not on whether an applicant will become a public charge, but on fixing the burden to the healthcare infrastructure and taxpayers. Defendants note that a visa applicant now must meet the requirements of both the public charge provision of the INA and the

Proclamation. Defendants' arguments are not persuasive.

The Proclamation discusses the burden on the national healthcare infrastructure and its effect on American taxpayers. The Proclamation supplants § 212(a)(4)(B), however, because it is designed to stop immigrants from being a burden on taxpayers by using public resources such as Medicaid, subsidized ACA plans, and free emergency room and medical services. This is the purview of the public charge provision. Additionally, the primary concern of the Proclamation is the burden on taxpayers and not the burden on private industry. The Proclamation states: "Immigrants who enter this country should not further saddle our healthcare system, and subsequently American taxpayers, with higher costs." This also is the purview of the public charge provision.

The Proclamation does not create an additional factor, health insurance, to be considered in the totality of the circumstances that Congress has mandated be considered in evaluating whether a visa applicant will create an undue burden on the resources of the United States. Instead, it makes the ability to pay for anticipated care needs a single, dispositive factor, first by requiring an assessment of the applicant's available health insurance, a new factor, and then by requiring an assessment only of the applicant's health and financial resources, which are two of many factors that Congress has mandated must all be considered.

Moreover, the Proclamation is executive lawmaking in a manner that Congress expressly rejected in the public charge provision. The Proclamation excludes in its permissible insurance plans mean-tested health benefits such as Medicaid and subsidized plans under the ACA, notwithstanding the fact that Congress has repeatedly refused to include Medicaid and other mean-tested non-cash public benefits in the public charge inadmissibility standards. The Proclamation does not, therefore, support the INA's approach for determining admissibility but instead essentially amends or supplants the INA in a manner similar to which Congress has previously refused, contravening Congress's will.

The Proclamation also purports to "impose on the entry of aliens [a] restriction[]" the President deems necessary under § 212(f). In effect, however, it actually bars entry from an entire class of immigrants—those who cannot afford health insurance or afford to pay for reasonably necessary medical costs. There are two problems with this restriction.

The first problem is that this bar to entry is not a "suspension" as is authorized by § 212(f), but is indefinite. The President expressly cites the reason for the suspension as the widespread problem of "uncompensated costs" in the nationwide healthcare system. There is no reasonable interpretation of the Proclamation showing that this intractable problem is going to end any time soon, particularly when the only evidence in the record supports that recent immigrant use of medical services is less than one-tenth of one percent. The Proclamation, therefore, is unlikely to make any meaningful difference to address the problem and its implementation will not result in a reduction to the problem that would then, in turn, result in the restriction no longer being necessary. Moreover, the President provides no guidance in the Proclamation for determining under what circumstances the necessity for the Proclamation would be over. This is unlike the travel ban Proclamation, which involved specific deficiencies in a handful of country's vetting systems that triggered that proclamation—if those deficiencies all were cured, that proclamation would no longer be needed. The restrictions to entry were directly connected to the problem that triggered that proclamation and there were identifiable

solutions that would result in the revocation of the suspension to entry. Here, the identified “inadequacies and risks” are a massive, estimated \$35 billion-per-year domestic systemic health care problem. That is the “triggering condition.” The Supreme Court held in *Hawaii* that a proclamation may be a proper “suspension” of entry so long as in the proclamation the President “may link the duration of those restrictions, implicitly or explicitly, to the resolution of the triggering condition.” The Proclamation, however, contains no guidance for how this domestic problem of \$35 billion in “uncompensated costs” can or will be solved any time in the foreseeable future. Thus, despite the fact that the President instructs in the Proclamation for a report on the “continued necessity” of the “suspension and limitation” contained in the Proclamation within 180 days and then annually thereafter, that instruction may not reasonably be interpreted as providing any possible foreseeable end date. Therefore, the Proclamation may not reasonably be interpreted as imposing merely “conditional restrictions.” It may only reasonably be interpreted as a categorical exclusion for any affected immigrant who cannot afford health insurance or reasonably anticipated medical costs. Such an indefinite bar to entry is not within the President’s authority under § 212(f).

The second problem is that this bar to entry is reinstating a bar that Congress expressly eliminated from the INA—the bar to “paupers.” In the 1891 amendment to the immigration law, Congress provided that: “That the following classes of aliens shall be excluded from admission into the United States ... : All idiots, insane persons, paupers or persons likely to become a public charge” “Paupers” continued to be included in the classes of aliens that were excluded for decades. Congress, however, expressly removed, among others, “paupers” from the categories of aliens excluded from § 212 in the 1990 amendments to the INA.²⁴ The President simply does not have the constitutional authority to amend a statute.

The Proclamation also contravenes and overrides § 212(a)(4)(E).²⁵ Congress exempted from the public charge financial burden restriction certain victims of violent crime or domestic violence and their family members. The Proclamation does not provide the same broad exemption. Defendants argue that very few applicants will actually fall within the exemption of § 212(a)(4)(E) and be affected by the Proclamation, but nonetheless at least some will. The Proclamation stands in direct contravention to a statute passed by Congress after Congress’s “exhaustively considered” and “deliberate and deliberative process.”

The Proclamation is anticipated to affect approximately 60 percent of all immigrant visa applicants. The President offers no national security or foreign relations justification for this sweeping change in immigration law. Instead, the President attempts to justify the Proclamation based on an asserted burden to the United States healthcare system and federal

²⁴ [Note 5 in original] Whether the United States should categorically exclude “paupers” from entry as immigrants is a policy decision that Congress may make in its law-making capacity, using its “step-by-step, deliberate and deliberative process” and its “single, finely wrought and exhaustively considered, procedure.” Such decisions are not for the President to make in his law-executing capacity, particularly when Congress has already explicitly rejected that categorical exclusion.

²⁵ [Note 6 in original] The Court expresses no opinion at this stage of the litigation about whether the Proclamation also contravenes or overrides various healthcare laws and other immigration laws and provisions, as argued by Plaintiffs.

taxpayers. Whether a visa applicant is a burden on the resources of the United States and, thus, taxpayers, however, is precisely the sphere governed by § 212(a)(4).

Further, the Proclamation is, significantly, unlike the executive order at issue in *Hawaii*. In that case, the executive order was challenged as being inconsistent with a completely different provision of the INA, § 212(a)(1)(A), and the Supreme Court found that the two provisions “operate in different spheres.” The Proclamation, however, contravenes two provisions of § 212(a)(4), which operate in the same sphere as § 212(f). Indeed, it has been noted that “[t]he President’s sweeping proclamation power thus provides a safeguard against the danger posed by any particular case or class of cases that is not covered by one of the categories in section 212(a).”

The Court finds that § 212(a)(4) and 212(f) are in the same sphere. Congress has already spoken in § 212(a)(4) on the issue of limiting immigrant admissibility based on the potential financial burden on the resources of the United States, and the Proclamation contravenes and overrides Congress’s explicitly stated direction and will. As previously stated, the President may not take action to “enact, to amend, or to repeal statutes.” Plaintiffs, therefore, have shown a likelihood of success on the merits on their claim that the Proclamation violates the Constitution’s principle of separation of powers and is outside the scope of the President’s authority granted in § 212(f). Because the Court finds that Plaintiffs have shown a likelihood of success on the merits of this claim (as well as serious questions going to the merits) and their argument that the Proclamation violates the nondelegation doctrine, the Court does not at this time reach Plaintiffs’ due process challenge to the Proclamation or challenges to agency action under the APA.

Doe #1 v. Trump

U.S. Court of Appeals for the Ninth Circuit, 2020
984 F.3d 848 (9th Cir. 2020)

■ Before: A. WALLACE TASHIMA, JAY S. BYBEE, AND DANIEL P. COLLINS, Circuit Judges.

■ COLLINS, Circuit Judge:

On October 4, 2019, the President of the United States issued Proclamation No. 9945 entitled “Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System, in Order [t]o Protect the Availability of Healthcare Benefits for Americans.” The Proclamation restricts entry of immigrant visa applicants who cannot demonstrate that they either (1) will acquire qualifying healthcare coverage within 30 days of entry or (2) have the ability to pay for reasonably foreseeable healthcare expenses. In November 2019, the district court granted a universal preliminary injunction blocking the implementation of this Proclamation and denied the Government’s request for a stay pending appeal. The Government filed motions for an administrative stay and for a stay pending appeal, which this court denied by a divided vote. We conclude that the Proclamation was within the President’s statutory authority and therefore reverse the district court’s order enjoining the Proclamation’s implementation. * * *

III.B

Plaintiffs' primary contention on appeal is that the Proclamation is not a lawful exercise of the President's delegated authority under INA § 212(f). * * * The Supreme Court recently analyzed the scope of the President's delegated authority under § 212(f) when it reversed the grant of a preliminary injunction blocking the enforcement of a different presidential proclamation in *Trump v. Hawaii*. The Court's analysis in that case therefore frames the inquiry into the merits in this one.

In *Trump v. Hawaii*, * * * a panel of this court upheld a preliminary injunction against the proclamation, concluding that it conflicts with the INA's finely reticulated regulatory scheme by addressing matters of immigration already passed upon by Congress. The Supreme Court rejected this broad theory that the President cannot use § 212(f) to impose additional restrictions that address subject areas already expressly covered by more limited restrictions elsewhere within the INA. Instead, the Court was willing only to "assume" that § 212(f) does not allow the President to *expressly override* particular provisions of the INA. Applying this standard, the Court concluded that the plaintiffs in that case had failed to establish any *contradiction* with another provision of the INA. And because the proclamation otherwise satisfied the prerequisites of § 212(f), the Court held that the proclamation was squarely within the scope of Presidential authority under the INA. Under these standards, Proclamation No. 9945 is likewise well within the President's authority under § 212(f).

1

In addressing the scope of the President's delegated authority under § 212(f), the *Trump v. Hawaii* Court observed that the statutory text exudes deference to the President in every clause and grants the President sweeping authority to decide whether to suspend entry, whose entry to suspend, and for how long. The Court identified three limitations on the President's authority in the text of § 212(f), and it held that all of them were satisfied in the case before it. We conclude that the same is true here.

First, the Court stated that the sole *prerequisite* set forth in § 212(f) for imposing additional restrictions is that the President find that the entry of the covered aliens would be detrimental to the interests of the United States. As in *Trump v. Hawaii*, the President has undoubtedly fulfilled that requirement here. The President expressly made such a finding in the Proclamation, concluding that unrestricted entry of immigrants who could not demonstrate approved insurance coverage or ability to pay for foreseeable healthcare costs would be detrimental to the interests of the United States.

Plaintiffs nonetheless contend that the finding required by § 212(f) has *not* been made because, in their view, the President's supporting explanation for that finding in the Proclamation is inadequate. The Supreme Court rejected a similar argument in *Trump v. Hawaii* and we reject it here as well. There, the Court held that the plaintiffs' request for a searching inquiry into the persuasiveness of the President's justifications for the proclamation at issue was inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere. Indeed, the Court found it questionable that § 212(f)'s requirement to *make* a finding is accompanied by any sort of requirement to *explain* those findings in detail. Even so, the *Trump v. Hawaii* Court noted that the proclamation at issue in

that case was more detailed than any proclamation previously issued under § 212(f), some of which contained merely barebones explanations as short as one or five sentences long.

Here, the Proclamation concisely explains the adverse impact that uncompensated healthcare costs have on the American people, federal and state government budgets, private and public hospitals, and other stakeholders. It also points out that *lawful* immigrants are three times more likely than U.S. citizens to lack health insurance, further exacerbating the problem of uncompensated healthcare costs on the American healthcare system. Considered in light of the substantial deference owed to the President in this area, these explanations are adequate to support the conclusion that restricting the immigration of persons who lack unsubsidized health insurance will avoid an impact that would be detrimental to the interests of the United States. In imposing restrictions under § 212(f), the President is not required to conclusively link all of the pieces in the puzzle before courts grant weight to his empirical conclusions. To demand a more searching inquiry, as Plaintiffs seek here, is inconsistent with the deference owed to the President and would improperly shift to the courts the weighing of policy justifications for additional restrictions under § 212(f). But whether the President's chosen method of addressing perceived risks is justified from a policy perspective is irrelevant to the scope" of his authority under § 212(f).

Second, the Supreme Court noted that § 212(f)'s reference to suspending the entry of particular classes of aliens indicates that the limitations imposed under that section must be temporally limited. In elaborating on this requirement, the Court rejected the notion that the President is required to prescribe in advance a fixed end date for the entry restrictions and instead held that it is sufficient for the President to tie the duration of additional restrictions on entry, implicitly or explicitly, to the resolution of the triggering condition. Plaintiffs contend that the Proclamation fails under this standard because the asserted triggering conditions are too vaguely stated and because it is impossible to determine when those conditions will be resolved. We disagree. As in *Trump v. Hawaii*, the Proclamation here establishes a process to ensure that the continued propriety of its restrictions is subject to a systematic and regular review. Specifically, the Proclamation instructs the Secretary of State to submit to the President, in consultation with certain agency heads, a report addressing the continued necessity of and any adjustments that may be warranted to the Proclamation's suspension and limitation on entry. Such a report must be submitted within 180 days of the Proclamation's effective date, and again annually thereafter. The Proclamation makes clear that if the Secretary of State, in consultation with the heads of other appropriate executive departments and agencies, determines that circumstances no longer warrant the continued effectiveness of the suspension and limitation on entry, the President is to be immediately advised. As confirmed by the findings that underlie the Proclamation and by the title of the section that requires this periodic review, the continued need for these restrictions is to be considered in light of what the available evidence then shows about the financial burdens imposed by immigrants on the healthcare system. Plaintiffs assert—and the dissent agrees—that this standard is too uncertain and open-ended. That is wrong. Nothing in *Trump v. Hawaii* requires a bright-line trigger for terminating additional restrictions that have been imposed under § 212(f), and the sort of diplomatic and security judgments the Court upheld as adequate triggering (and terminating) conditions in that case are no less multi-faceted and inexact than the consideration of financial burdens required here.

Third, the Court held that § 212(f) requires the President to properly identify a class of aliens who are subject to the additional restrictions. Plaintiffs do not contest that the Proclamation adequately defines the specific class of persons who are subject to its restrictions, and so this condition is met as well.

We therefore hold that the Proclamation comports with the textual limitations of § 212(f) as set forth in *Trump v. Hawaii*.

2

Plaintiffs contend that the Proclamation nevertheless exceeds the President’s authority under § 212(f) because, in their estimation, the Proclamation conflicts with *other* provisions of law. In addressing similar arguments in *Trump v. Hawaii*, the Supreme Court rejected this court’s view that an entry restriction promulgated under § 212(f) is invalid if it addresses matters of immigration already passed upon by Congress “ and thereby conflicts with the INA’s finely reticulated regulatory scheme. In lieu of this broad congressional-displacement theory, the Supreme Court was willing only to “assume” that § 212(f) does not allow the President to *expressly override* particular provisions of the INA. We likewise assume that such a limitation applies to § 212(f), and we further assume that it also precludes the President from expressly overriding provisions of statutes other than the INA, such as the Affordable Care Act (“ACA”). This standard would be met, under *Trump v. Hawaii*, when there is a *conflict* between the statute and the Proclamation that would implicitly bar the Proclamation’s additional restriction. Such a contradiction with another provision of the INA would exist where, for example, Congress has stepped into the space and solved the *exact* problem addressed by the Proclamation. Here, Plaintiffs failed to show a likelihood of success on their claims that the Proclamation conflicts with other statutes under these standards.

a

Noting that the Proclamation’s definition of approved health insurance includes a health plan offered in the individual market within a State only if the plan is *unsubsidized*, Plaintiffs contend that the Proclamation conflicts with Congress’s decision in the ACA to make subsidized plans in the individual market available to lawful immigrants. The Government argues that Plaintiffs did not properly present this issue below, and it notes that the district court’s preliminary injunction order does not resolve it. We need not decide whether this contention was adequately raised below, because we conclude that it has no merit in any event.

The ACA seeks to make insurance more affordable by giving refundable tax credits to individuals with household incomes between 100 percent and 400 percent of the federal poverty line. An alien lawfully present in the United States with a household income below a certain threshold may be eligible for such tax credits. Plaintiffs contend that the Proclamation overrides the ACA scheme by denying entry to immigrants who would use the assistance Congress provided for comprehensive coverage and by requiring new immigrants to reject benefits Congress expressly intended for them to have. We disagree.

The Proclamation does not expressly override this feature of the ACA, because the two provisions operate in different spheres. The ACA extends tax credits only to aliens who *already* are lawfully present in the United States. The Proclamation, by contrast, applies

only to aliens seeking to enter the United States pursuant to an immigrant visa. The Proclamation therefore does not prevent aliens who are lawfully present in the United States from purchasing subsidized insurance plans; it instead creates an additional requirement that an alien must satisfy before he or she may receive an immigrant visa. Put simply, the Proclamation excludes only those who, at the threshold, cannot arrange unsubsidized coverage or cannot cover their own medical costs. But as the Government expressly conceded at oral argument, *after* an alien satisfies the requirements of the Proclamation and gains lawful permanent residence, nothing in the Proclamation prevents the alien from then obtaining subsidized insurance plans as provided for under the ACA. There is thus no conflict between the Proclamation and the ACA scheme. * * *

b

Plaintiffs also contend, and the district court held, that they are likely to succeed on their argument that the Proclamation conflicts with the so-called “public charge” provision of the INA. We again disagree.

Section 212(a)(4)(A) of the INA renders inadmissible any alien who is likely at any time to become a public charge. In deciding whether an alien is likely to become a public charge, a consular officer must consider, at a minimum, an alien’s age, health, family status, assets, resources, financial status, education, and skills. No single factor is dispositive; rather, the statute requires a holistic approach. Plaintiffs argue that the Proclamation impermissibly conflicts with this holistic approach by creating a single-factor test based solely on healthcare coverage. This contention fails.

At the broadest level, there is undoubtedly some overlap between the INA’s exclusion of those likely to become a public charge and the Proclamation’s exclusion of those who will financially burden the United States healthcare system. As a result, Plaintiffs’ argument might have had substantial force under the opinion of this court that was reversed in *Trump v. Hawaii*, where we had held that the President could not impose additional restrictions under § 212(f) that addressed matters of immigration already passed upon by Congress. But the Supreme Court held that such overlap was not enough, and that, at the very least, the plaintiffs had to show that the proclamation at issue there expressly overrode particular provisions of the INA. Thus, even though the sort of security and vetting issues addressed by the proclamation challenged in *Trump v. Hawaii* were also addressed in the INA, the Court’s higher standard was not met because the result was not a situation where Congress has stepped into the space and solved the *exact* problem.

The same is true here. The Proclamation does not override the public charge provision or its multi-factor inquiry; rather, the Proclamation merely creates an additional, separate ground for inadmissibility, which is within the President’s authority under § 212(f). The public charge provision is concerned only with *public* costs broadly conceived, while the Proclamation is concerned with a specific type of costs—those involving healthcare—and with the fact that a significant portion of such unreimbursed costs is absorbed by *private* entities in the form of higher insurance premiums and hospital losses. Thus, while the problems and approaches overlap, they do not solve the exact same problem.

Because an alien seeking an immigrant visa must not be inadmissible under any of the numerous inadmissibility grounds in § 212, an immigrant visa applicant would need to satisfy the requirements of *both* the public charge provision and the Proclamation. In short, the suspension of entry created by the Proclamation is an additional inadmissibility ground distinct from the public charge provision. Thus, the Proclamation does not conflict with the public charge provision and is not an unlawful exercise of the President’s authority on that basis. * *

C

Finally, we reject the district court’s contention that, to the extent that § 212(f) allows the President to impose additional entry restrictions based on *domestic* policymaking concerns, § 212(f) *itself* violates the nondelegation doctrine.

As noted earlier, Plaintiffs pointedly avoid defending this holding in their appellate briefing, instead making the more limited argument that the statute would violate the nondelegation doctrine only to the extent that it were construed as placing no constraints on the President’s power to exclude prospective immigrants. But that is not how the Supreme Court in *Trump v. Hawaii*, or we in this case, have construed § 212(f). On the contrary, the Supreme Court articulated several statutory requirements that must be satisfied in connection with an invocation of § 212(f), and it further assumed that the specific requirements of the INA could not be overridden through such an invocation. We have applied the same limitations and the same assumptions here. Even if these various limitations collectively provide only a modest constraint on the comprehensive delegation contained in § 212(f), we have little difficulty concluding that they sufficiently provide an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform. That is enough to defeat any nondelegation challenge to § 212(f).

Contrary to what the district court concluded it makes no difference whether the additional entry restrictions are imposed under § 212(f) based on assertedly domestic policy concerns. The district court’s demand for additional congressional guidance when “domestic” concerns are at issue lacks a principled basis and is unworkable: because all additional restrictions under § 212(f) on who may *enter* the United States are ultimately based on the “detrimental” impact of those aliens’ presence, all such restrictions may be characterized as reflecting “domestic” policy concerns to a greater or lesser degree. Indeed, the many grounds for inadmissibility in § 212(a) of the INA underscore how the decision whether to admit an alien can have adverse domestic consequences. The district court identified no coherent basis for insisting that, in delegating authority to impose additional restrictions on who may immigrate into this country from another nation, Congress must provide greater guidance when the asserted detrimental impact of such aliens is based on “domestic” policy concerns. * * *

■ TASHIMA, Circuit Judge, dissenting:

I agree with the district court, and with the motions panel of this court, that Plaintiffs are likely to succeed on the merits of their ultra vires cause of action because Presidential Proclamation No. 9945 purports to override immigration policies adopted by Congress. The Proclamation overrides both the Affordable Care Act (“ACA”), which makes recently arrived lawful immigrants eligible for subsidized health insurance plans and the public charge rule of

the INA, which comprehensively addresses the circumstances under which individuals may be excluded from this country due to their limited financial means or the financial burdens they will place on others. Although § 212(f) of the INA grants the President broad discretion to suspend the entry of aliens into the United States, it does not authorize a President to override congressional policy judgments. The Proclamation therefore exceeds the President’s authority under § 212(f).

Even if that were not the case, I would have grave doubts for other reasons about whether the Proclamation falls within the authority delegated to the President under § 212(f). In contrast to the order upheld by the Supreme Court in *Trump v. Hawaii*, Proclamation 9945 has no nexus to national security, addresses a purely domestic concern (uncompensated health care costs), lacks any conceivable temporal limit, and works a major overhaul of this nation’s immigration laws without the input of Congress—a sweeping and unprecedented exercise of unilateral Executive power.

As the district court observed, the Proclamation is anticipated to affect approximately 60 percent of all immigrant visa applicants—about 375,000 prospective immigrants a year—requiring them to obtain health insurance plans that are, in many cases, legally or practically unavailable to them, while denying them access to the health insurance plans Congress expressly provided them. Although the Proclamation asserts that these restrictions are needed to address the national problem of uncompensated health care costs, the evidence in the record shows that recent uninsured immigrants use less than one-tenth of one percent (0.06 percent) of total American medical resources and only 0.08 percent of emergency room services. Indeed, although the Proclamation purports to address uncompensated health care costs, it perversely forces lawful immigrants into low-quality health insurance options, plans that often result in significant uncompensated care, worsening the very problem the Proclamation purports to address. * * *

I.A

* * * [Section] 212(f) does not allow the President to expressly override particular provisions of the INA. Under this limitation, the President may not impose entry restrictions under § 212(f) where Congress has implicitly foreclosed the Executive from doing so, where there is a conflict between a statute and the Proclamation, or Congress has stepped into the space and solved the exact problem. As Plaintiffs argued in *Trump v. Hawaii*, the President may supplement the INA, but he cannot supplant it by countermanding Congress’s considered policy judgments.

In *Trump v. Hawaii*, the comparatively narrow additional restrictions on entry imposed by the proclamation satisfied these requirements because they supported and promoted the effectiveness of Congress’s own policy judgments. The Court therefore had no occasion to address a presidential invocation of § 212(f) like the one before us now—a Proclamation that undermines, rather than complements, Congress’s policy judgments.

The majority opinion and the government’s briefing conclude that the expressly override standard articulated by the Court in *Trump v. Hawaii* is akin to the irreconcilable conflict standard governing the repeal by implication doctrine. Because repeals by implication are not favored, a court presented with two statutes will ‘regard each as effective—unless the

two laws are irreconcilable. So long as two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.

The question here, however, is not repeal by implication but rather determining, as a matter of statutory interpretation, the scope of authority Congress intended, in the first instance, to delegate to the President under § 212(f). We certainly do not begin with a presumption that Congress intended to give effect to the Proclamation, and an interpretation that places limits on the authority delegated by § 212(f) is not disfavored. The extraordinarily demanding irreconcilable conflict standard therefore has no place here.

I do not read *Trump v. Hawaii* as suggesting otherwise. The Court there chose the term conflict, not irreconcilable conflict, to describe the assumed limits of § 212(f). And the other word chosen by the Court—override—likewise connotes ordinary rather than irreconcilable conflict. Although this word can mean to set aside or annul, it more commonly means to “ride over or across,” to “trample.” This suggests that, in enacting § 212(f), Congress did not intend to authorize the President to adopt restrictions on entry that are inconsistent with, and antagonistic to, its own immigration laws. It strains credulity to suggest that Congress intended to authorize the President to undermine its own policy judgments.

Thus, the issue before us is simply whether the Proclamation overrides immigration laws in the common understanding of that word. Plaintiffs need not show that the Proclamation and congressionally adopted immigration laws are in *irreconcilable* conflict—that it is *impossible* to give effect to both. They need show only that the Proclamation seriously undermines these laws, or, alternatively, that “Congress has stepped into the space and solved the exact problem.

B

I would further hold that Plaintiffs have made the required showing here.

1

First, Plaintiffs are likely to succeed on their claim that the Proclamation overrides the ACA, which makes lawful immigrants eligible for subsidized health insurance plans. Under the Proclamation, however, a visa applicant cannot rely on a subsidized insurance plan to gain admission to the country. As the motions panel explained:

Despite Congress’s clear intent to extend these tax credits to legal immigrants, the Proclamation explicitly excludes such subsidized plans from the list of approved health insurance plans. As a result, an immigrant attempting to legally enter the United States will not have access to ACA tax credits as Congress intended.

The majority concludes that there is no conflict between the Proclamation and the ACA scheme because *after* an alien satisfies the requirements of the Proclamation and gains lawful permanent residence, nothing in the Proclamation prevents the alien from then obtaining subsidized insurance plans as provided for under the ACA. That argument is specious. It is premised on the assumption unsupported by the record that prospective immigrants will be

able to satisfy the Proclamation's health insurance requirement without relying on the ACA. The district court found, based on the record evidence, that the approved insurance plans delineated in the Proclamation were legally or practically unavailable to intending, or prospective, immigrants. * * *

II

That the Proclamation impermissibly overrides congressional immigration policy is sufficient to show that Plaintiffs have shown a strong likelihood of success on the merits. Even if that were not the case, however, I would have grave doubts about whether the Proclamation falls within the President's authority under § 212(f).

These doubts begin with the Proclamation's sweeping, legislative nature. * * *

* Although the Court has made clear that § 212(f) grants the President sweeping authority to decide whether to suspend entry, whose entry to suspend, and for how long, I am not aware of any instance in which a President has invoked his authority under § 212 to work such a profound transformation of immigration law.

In addition, in contrast to the proclamation at issue in *Trump v. Hawaii*, Proclamation 9945 does not address national security risks. It instead deals with a purely domestic economic problem: uncompensated healthcare costs in the United States.

Moreover, the Proclamation does not qualify as a *suspension*, as the statute requires. Although § 212(f) does not require the President to prescribe in advance a fixed end date for the entry restrictions, the President must link the duration of those restrictions, implicitly or explicitly, to the resolution of the policy concern that triggers the suspension. * * * But the triggering condition at issue—uncompensated health care costs—has no foreseeable end date. The Proclamation itself, certainly, cannot meaningfully address the underlying policy concern, as uninsured immigrants represent only 2.9% of uninsured adults, use less than 0.06% of total American medical resources, and use only 0.08% of emergency service expenditures. Furthermore, even if the problem of uncompensated healthcare costs were resolved tomorrow, nothing in the language of the Proclamation suggests that the President would rescind these entry restrictions. * * *

NOTES AND QUESTIONS

1. Do the district court and Ninth Circuit correctly apply *Trump v. Hawaii*? How persuasive, in turn, is each side's interpretation?

2. Did the Trump presidency's broad interpretation of INA § 212(f)—which the Ninth Circuit majority eventually embraced—render the provision invalid under the nondelegation doctrine? As conventionally understood, the nondelegation doctrine requires Congress to “lay down by legislative act an intelligible principle to which the person or body authorized to [exercise that authority] is directed to conform.” *Mistretta v. United States*, 488 U.S. 361, 372 (1988); see *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (Kagan, J., plurality opinion). On the Trump presidency's interpretation of § 212(f), what is the “intelligible principle” to guide the exercise of discretion under the provision? Are there alternative interpretations of § 212(f) that more successfully furnish “intelligible principles” to constrain the exercise of discretion?

3. Is nondelegation a sound basis on which to scrutinize and assess the constitutionality of § 212(f)? As Cass Sunstein famously wrote twenty years ago, the nondelegation doctrine as conventionally understood “has had one good year,” namely 1935, “and 211 bad ones (and counting).” Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 322 (2000); see also Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277 (2021) (arguing that as an originalist matter, “there was no constitutional problem with delegating the authority to make rules so long as Congress did not irrevocably alienate its power to legislate”). At the same time, Sunstein emphasized that courts have given effect to nondelegation norms in “more specific and smaller” ways by applying canons of statutory construction in ways that function as nondelegation principles. Sunstein, *supra*, at 315–16.

In recent years, however, all five of the Supreme Court’s conservative justices have signaled their interest in reformulating the Court’s approach to the constitutional nondelegation doctrine to impose stronger limits on congressional delegation, joining conservative commentators seeking to use the nondelegation doctrine as a means of reducing the power of the administrative state. See *Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring) (“If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.”); *id.* (Gorsuch, J., with Roberts, C.J. and Thomas, J., dissenting) (“Respectfully, I would not wait.”); *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., respecting the denial of certiorari) (stating that issues raised in Gorsuch’s dissent in *Gundy* “warrant further consideration in future cases”). Mortenson and Bagley argue that these revisionist conceptions of nondelegation are sufficiently expansive to threaten “the very foundation of the modern American state.” Julian Davis Mortenson & Nicholas Bagley, *There’s No Historical Justification for One of the Most Dangerous Ideas in American Law*, Atlantic (May 26, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/nondelegation-doctrine-originalism/612013/>; see also *Gundy*, 139 S. Ct. at 2130 (Kagan, J., plurality opinion) (stating that under revisionist conceptions of nondelegation, “most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs”).

Is the district court’s nondelegation analysis in *Doe #1* rooted in conventional approaches to nondelegation or nondelegation canons of the kind that Sunstein discusses? Or is it rooted in revisionist principles, such as those articulated by Gorsuch in his *Gundy* dissent? Regardless of your assessment of the district court’s analysis, how would you predict that the Court’s conservative justices would apply nondelegation principles in the immigration law context? Do revisionist nondelegation principles *require* invalidation of INA § 212(f), or are there reasons to predict that those justices might take a different approach in the immigration context than the approaches they have urged outside the immigration context?

4. In what other circumstances might nondelegation claims arise in the immigration context? Would they be likely to succeed? See, e.g., *Ctr. for Biological Diversity v. McAleenan*, 404 F.Supp.3d 218, 242–49 (D.D.C. 2019) (denying nondelegation-based challenge to INA § 102(c)(1), which authorizes the Secretary of Homeland Security to “waive all legal requirements” that the Secretary deems “necessary to ensure expeditious construction” of the physical barriers along the U.S.-Mexico border), *cert. denied*, 141 S. Ct. 158 (2020).

ii. Immigration Bans Based on Claimed Labor Market Effects

In the midst of the coronavirus pandemic, the Trump presidency issued two sweeping § 212(f) proclamation banning large categories of individuals from entering the United States as immigrants or nonimmigrants, ostensibly on economic grounds.²⁶ The first proclamation, issued on April 22, 2020, banned most noncitizens from entering the United States on immigrant visas for an initial period of sixty days. Proclamation No. 10014, 85 Fed. Reg. 23,441 (Apr. 22, 2020). The immigrants affected by the order constituted almost half of all individuals admitted as lawful permanent residents each year, and disproportionately came from Asia, Latin America, Africa, and Eastern Europe. In 2019, roughly 315,000 individuals were admitted as permanent residents in categories that were banned by Trump’s decree. The directive struck especially hard against family-sponsored immigrants, who comprise over 80 percent of permanent residents admitted from abroad, and the diversity visa program, nearly all of whom are admitted from outside the United States.

While the order included some exemptions—for spouses and children of U.S. citizens, business investors, health care professionals, and others—they likely cover less than a third of individuals legally eligible to become permanent residents from abroad. The proclamation provides no rationale, based on labor market concerns or any other considerations, for its preference among family-sponsored immigrants for spouses and children of U.S. citizens. (Indeed, the proclamation makes no specific findings about the supposed labor market effects of any particular category of permanent resident visas at all.) Perhaps not coincidentally, the proclamation’s preference for “nuclear” family members is the same narrowing that the Trump presidency and its political allies failed to achieve through legislation. See, e.g., RAISE Act, S. 354, 115th Cong. (2017).

A second § 212(f) proclamation, issued on June 22, 2020, extended the first proclamation through the end of 2020 and banned entry by individuals in the H-1B, H-2B, J, and L nonimmigrant categories for that same period of time. Proclamation No. 10,052, 85 Fed. Reg. 38,263 (Jun. 22, 2020).

Soon after taking office, President Biden revoked the ban on immigrant visas and allowed the ban on nonimmigrant visas to expire. Proclamation 10,149, 86 Fed. Reg. 11,847 (Mar. 1, 2021). He asserted that in addition to harm to those individual immigrants who were affected, the suspension of entry “harms the United States” by “preventing certain family members of United States Citizens and lawful permanent residents from joining their families here” and “harms industries in the United States that utilize talent from around the world.”

Although issued in the midst of the pandemic, neither Trump proclamation was justified in public health terms. Rather, both orders posited that because aggressive public health measures have reduced labor demand and increased unemployment, immigration restrictions were necessary to protect U.S. workers from competition for scarce jobs. However,

²⁶ The discussion that follows draws from Anil Kalhan, *Trump’s New Immigration Ban Is Potentially More Dangerous, and More Legally Vulnerable, Than You Might Think*, ACS Expert Forum, Apr. 30, 2020, <https://www.acslaw.org/expertforum/trumps-new-immigration-ban-is-potentially-more-dangerous-and-more-legally-vulnerable-than-you-might-think/>.

neither order provided criteria to determine when those claimed labor market effects—which many experts have disputed—would have sufficiently subsided for the those restrictions to be lifted. Notably, immigration restrictionists have advanced precisely the *same* arguments about labor market competition during non-crisis moments—with unemployment at record lows—in support of legislative proposals to slash immigration levels and rewrite eligibility criteria for permanent residence, thereby calling into doubt whether there might *ever* be economic circumstances in which they would be inclined to lift these ostensibly crisis-based restrictions.

Were these orders genuine, temporary responses to the pandemic or opportunistic efforts to capitalize on that crisis for other purposes? See Peter Margulies, *Trump's Coronavirus Immigration Order Is a Restriction in Search of a Rationale*, Lawfare (Apr. 23, 2020), <https://www.lawfareblog.com/trumps-coronavirus-immigration-order-restriction-search-rationale> (arguing that “the proclamation’s most notable feature is the slack between its stated goals and chosen means”). According to Trump administration officials themselves, the orders were issued to “pleas[e] [Trump’s] political base” and because polls “showed him sliding in some swing states.” The two officials spearheading the Trump presidency’s immigration agenda, Stephen Miller and Ken Cuccinelli, told Republican Party political surrogates in meetings soon after the first proclamation was issued that the order should be understood as designed to pursue longer-term immigration policy goals, not as a temporary crisis response.²⁷

The legal issues arising from these large-scale exclusion orders are analogous to those arising from the health insurance-based immigration ban. For some employment-based visa categories, the INA already requires employers to obtain labor certification to verify that hiring immigrants will not have negative labor market effects. However, the proclamations expressly conclude that labor certification is categorically insufficient, effectively displacing the statutory process altogether. For other visa categories—including some employment-based immigrants, all family-sponsored immigrants, and the diversity visa program—the proclamations require consideration of labor market concerns where Congress has expressly determined that other policy priorities should take precedence. For example, while the law does not require labor certification for immigrants in the employment-based first preference category, who are deemed to have “extraordinary ability,” Trump’s order nevertheless bans those immigrants based on the same supposed labor market concerns that Congress has decided are not relevant criteria.

Several legal challenges were brought seeking to block the two proclamations or ameliorate their effects. See, e.g., *Gomez v. Trump*, 490 F.Supp.3d 276, 294 (D.D.C. 2021) (ordering the Department of State to reserve 9,095 diversity visa numbers for future processing for class members who had been prevented from timely claiming visas); *Nguyen v. U.S. Dep’t*

²⁷ Katie Rogers & Annie Karni, *Home Alone at the White House: A Sour President, With TV His Constant Companion*, N.Y. Times (Apr. 23, 2020), <https://www.nytimes.com/2020/04/23/us/politics/coronavirus-trump.html>; Nick Miroff & Josh Dawsey, *Stephen Miller Has Long-Term Vision for Trump’s ‘Temporary’ Immigration Order, According to Private Call with Supporters*, Wash. Post (Apr. 24, 2020), https://www.washingtonpost.com/immigration/stephen-miller-audio-immigration-coronavirus/2020/04/24/8eaf59ba-8631-11ea-9728-c74380d9d410_story.html.

of Homeland Sec., 460 F.Supp.3d 27 (D.D.C. 2020) (denying motion for temporary restraining order due to lack of Article III standing).

2. PROPOSALS TO REFORM INA § 212(F)

The Trump presidency’s aggressive use of INA § 212(f) prompted proposals to amend or repeal the provision. In April 2019, Sen. Chris Coons (D-DE) and Rep. Judy Chu (D-CA) introduced the National Origin-Based Antidiscrimination for Nonimmigrants Act (or “NO BAN Act”), which would amend INA § 212(f) to narrow and constrain the existing authority to suspend or restrict entry of noncitizens on a classwide basis. National Origin-Based Antidiscrimination for Nonimmigrants Act, H.R. 2214, 116th Cong. 2d Sess. (introduced in the House Apr. 10, 2019); National Origin-Based Antidiscrimination for Nonimmigrants Act, S.1123, 116th Cong. 2d Sess. (introduced in the Senate Apr. 10, 2019). On July 22, 2020, the House of Representatives passed the bill by a 233-183 margin. The companion bill in the Senate has not advanced.

Under the NO BAN Act, entry restrictions could only be imposed by the President following consultation with the Secretary of State, the Secretary of Homeland Security, and Congress, and upon a determination by the Secretary of State, based on “credible facts,” that entry temporarily should be suspended or restricted “to address specific acts that undermine the security or public safety of the United States; human rights; democratic processes or institutions; or international stability.” The President, Secretary of State, and Secretary of Homeland Security would be required to provide “specific evidence” in support of the determination and to specify, also with supporting evidence, the duration of the temporary suspension or restriction. The bill also institutes additional, ongoing requirements for notification and periodic reporting to Congress while any suspensions or restrictions on entry are in place. Any suspension or restriction would need to “narrowly tailor[ed] . . . to meet a compelling government interest” and to “use the least restrictive means possible” to achieve that interest. The bill also would require consideration of waivers from any class-based suspensions or restrictions on entry, with a rebuttable presumption in favor of family-based and humanitarian waivers.

The bill would also clarify and broaden the scope of the antidiscrimination provision in INA § 202(a)(1)(A) by expressly prohibiting discrimination on the basis of religion and extending the provision’s reach to encompass not only discrimination in the “issuance of an immigrant visa,” but also discrimination in the “[issuance of] a nonimmigrant visa, entry into the United States, or the approval or revocation of any immigration benefit.” Finally, the bill would terminate all of the presidential proclamations and executive orders issued by the Trump presidency in 2017 to implement the Trump-Pence campaign’s proposals on Muslim immigration.

QUESTIONS

1. What purposes are served by INA § 212(f)? Are those purposes adequately served by the INA’s other exclusion grounds—and if not, why not?

2. Should INA § 212(f) be revised or repealed altogether? In addition to the approach taken in NO BAN Act, are there other approaches to reform that Congress should consider?

CHAPTER 6

ADMISSION PROCEDURE

Page 589, before the first full paragraph insert:

Across all four of these procedural steps in the admission process, the Trump administration instituted significant but underappreciated barriers to admission, which the American Immigration Lawyers Association has characterized, collectively, as contributing to the creation of an “invisible wall.”²⁸ These initiatives include, for example, the adoption of more extensive screening practices by consular officers abroad. Consular officers have required visa applicants to provide more detailed records of employment history and social media identifiers, and the State Department has suspended the Interview Waiver Program, which had been previously used in high volume consulates to waive in-person interviews of applicants for visa renewals who had already been thoroughly screened and deemed to present low security risks. Heightened screening practices have also been instituted for admissions processes occurring within the United States. USCIS, for instance, has required in-person interviews of all employment-based green card applicants, which prior to October 2017 had been routinely waived. The agency also has mandated interviews of spouses and children of asylees and refugees who have already been admitted to the United States and significantly increased fees for many immigration services and benefits applications. U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 85 Fed. Reg. 46,788 (Aug. 3, 2020).

Page 629, after the first full paragraph insert:

As discussed in Chapter 11, noncitizens may apply for asylum and are entitled to inspection and processing by CBP upon arrival in the United States or while in the process of arriving in the United States, whether or not they arrive at a designated port of entry. INA §§ 208(a)(1), 235(a)(3), 235(b)(1)(A)(ii). However, in 2018, as part of a broader set of efforts to restrict the ability of noncitizens to apply for asylum, the Trump administration formalized a policy—which the government referred to as “metering,” and which critics characterized as a “Turnback Policy”—under which CBP limited the number of individuals permitted to apply for asylum at ports of entry and turned away all other asylum-seekers, instructing them that they must wait in Mexico and only return to the port of entry when it had sufficient resources to inspect and process them.²⁹ According to a 2018 report by the DHS Office of the Inspector General, CBP officers would stand at the pedestrian bridges between the United States and Mexico and only allow non-citizens to cross the international line if there were “space available.” If the ports were deemed “full,” CBP officers would instruct asylum seekers to return later when there was “sufficient space.” Office of Inspector Gen., Dep’t of Homeland Sec., Special Review: Initial Observations Regarding Family Separation Issues Under the Zero

²⁸ AILA, Deconstructing the Invisible Wall (2018), <https://www.aila.org/invisiblewall>.

²⁹ According to the DHS Office of the Inspector General and plaintiffs challenging the policy in litigation, less formalized versions of this policy to “regulat[e] the flow of asylum-seekers at ports of entry” had been instituted as early as 2016. Office of Inspector Gen., Dep’t of Homeland Sec., Special Review: Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy (2018); *Al Otro Lado v. McAleenan*, 394 F.Supp.3d 1168 (S.D. Cal. 2019).

Tolerance Policy 5–6 (2018).

Reports indicate that because of this policy, asylum-seekers have been required to wait in Mexico for prolonged periods of time—often under dangerous circumstances—before being permitted to return to ports of entry to seek asylum. As Fatma Marouf describes:

“[M]etering” has resulted in wait times that range from two weeks to six months at various ports of entry. During that time, asylum seekers are placed on a “waitlist,” but confusion, lack of transparency, and corruption plague the process. At some ports of entry, asylum seekers themselves have created a waitlist. At others, officials from the Mexican National Migration Institute, Mexican security agents, or even cartel members have become managers of waiting lists. A study reported nearly 19,000 asylum seekers on waitlists in May 2019. Corruption is rampant in this haphazard system, waitlist managers often take bribes or charge asylum seekers money to call their numbers or place them on a separate “expedited” list.

Fatma E. Marouf, *Extraterritorial Rights in Border Enforcement*, 77 Wash. & Lee L. Rev. 751, 762–63 (2020); see also Cong. Research Serv., *The Department of Homeland Security’s Reported “Metering” Policy: Legal Issues* 3 (Aug. 13, 2019).

In October, 2020, a DHS Inspector General report found, among other things, that

[s]even ports effectively stopped processing undocumented aliens.... When asylum seekers and other undocumented aliens appeared at these seven ports, CBP officers redirected them to other ports, some of which were more than 30 miles away. We observed CBP officers telling aliens the port was at capacity and did not have the capability to process them, regardless of actual capacity and capability at the time. Further, four CBP ports turned away asylum seekers who had already stepped into the United States, telling them to return to Mexico. Also, at two other ports we visited, CBP had stopped using blocks of available holding cells, allowing those cells to sit empty while asylum seekers and other undocumented aliens waited in ... in Mexico.

U.S. Dep’t of Homeland Security, Office of Inspector General, *CBP Has Taken Steps to Limit Processing of Undocumented Aliens at Ports of Entry*, Oct. 27, 2021, <https://www.oig.dhs.gov/sites/default/files/assets/2020-10/OIG-21-02-Oct20.pdf>. The report concluded:

Under the INA, the U.S. Government must process all those who are physically in the United States and express fear of persecution in their home country or an intention to seek asylum. The law does not set limits as to the number of asylum seekers the Government can or must process. Nevertheless, the Secretary and CBP have effectively limited access for undocumented aliens wishing to claim asylum in the United States, sometimes without notice to the public. As a result, the numbers of asylum seekers in Queue Management lines grew. As the lines grew and asylum seekers were redirected to other ports, some undocumented aliens attempted to enter the United States illegally,

exacerbating the very problem DHS sought to solve.

Why wouldn't the government prefer that asylum seekers present themselves at a port of entry and make an orderly application for asylum? In defending its metering practices, the federal government argued that the INA does not apply in Mexico and it need not accept asylum applications of those who have not yet entered. Does this approach encourage those desperate to obtain asylum to avoid points of entry and enter without inspection? See Office of Inspector Gen., *Special Review*, *supra*, at 7 (reporting that "OIG saw evidence that limiting the volume of asylum-seekers entering at ports of entry leads some aliens who would otherwise seek legal entry into the United States to cross the border illegally").

A federal district court in California rejected the government's position, finding that asylum seekers "located on Mexican soil at the time they were metered were 'arriving in' the United States for purposes of asylum under the plain language of the [INA]." *Al Otro Lado v. Gaynor*, 513 F.Supp.3d 1253, 1257 (S.D. Cal. 2021). Litigation is ongoing, and the court has temporarily enjoined the government from applying specified restrictions on the asylum process for "all non-Mexican asylum who were unable to make a direct asylum claim at a U.S. Port of Entry before July 16, 2019 because of the U.S. government's metering policy, and who continue to seek access to the U.S. asylum process."

Metering seeks to advance purposes similar to those advanced by another Trump administration initiative to restrict asylum, the Migrant Protection Protocols (or "Remain in Mexico" policy), which the Biden administration has discontinued. While metering turned away noncitizens *before* they were inspected by CBP officials and had an opportunity to apply for asylum in the first place, the MPP returned individuals to Mexico *after* they had been inspected by CBP officials, and required them to wait in Mexico while immigration judges adjudicated their asylum claims. The Migrant Protection Protocols are discussed in Chapter 11, in the context of other Trump administration asylum restrictions.

CHAPTER 7

DEPORTABILITY GROUNDS

Page 672, replace Item 18 with:

18. After entering without inspection, can approval of a status other than LPR constitute an admission? Both the Sixth and Ninth Circuits held that recipients of Temporary Protected Status (TPS), discussed in chapter 11, were admitted for purposes of adjustment of status under INA § 245(a). See *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013); *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017). The Third and Eleventh Circuits disagreed. See *Sanchez v. Secretary U.S. Dept. of Homeland Security*, 967 F.3d 242 (3d Cir. 2020); *Serrano v. United States Attorney General*, 655 F.3d 1260 (11th Cir. 2011). A unanimous Supreme Court found that “a foreign national can be in lawful status but not admitted—think of someone who entered the country unlawfully, but then received asylum. The latter is the situation Sanchez is in, except that he received a different kind of lawful status. The TPS statute permits him to remain in the country; and it deems him in nonimmigrant status for purposes of applying to become an LPR. But the statute does not constructively ‘admit’ a TPS recipient—that is, consider him as having entered the country ‘after inspection and authorization.’” *Sanchez v. Mayorkas*, 141 S.Ct. 1809, 1813 (2021). Notably, the Board previously held that a grant of asylum in the United States does not constitute an admission. See *Matter of V-X-*, 26 I. & N. Dec. 147, 150–52 (2013).

Pages 673–75, delete text of Section C.1 and replace with:

Until 1996, noncitizens who entered the United States without inspection were deportable. INA § 241(a)(1)(B), pre-1996 version. As you have seen, that year Congress repealed entry without inspection as a deportability ground and instead made presence in the United States without admission a ground for inadmissibility. As discussed in Chapter 10, entry without inspection also constitutes a criminal offense. INA §§ 275–76.

Page 678, delete final paragraph and replace with:

Finally, INA § 237(a)(1)(E) covers certain cases of people-smuggling. A criminal conviction is not required and anyone who “knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the United States in violation of law is deportable.” The Secretary of Homeland Security has the discretion to waive this ground for LPRs who assist only certain family members. INA § 237(a)(1)(E)(iii).

While a conviction is not required to invoke this ground of deportation, a separate provision uses similar language to impose criminal liability on a person who “encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law.” INA § 274(a)(1)(A)(iv). In 2023, the Court imposed a narrow reading of “encourage” and “induce” to reject the First Amendment argument that the statute is overbroad and chills constitutionally protected speech. *United States v. Hansen*, 143 S.Ct. 1932 (2023). Under the Court’s interpretation, the terms should not be read in their ordinary parlance but rather in “it’s specialized, criminal law sense – that is, as incorporating common-law liability for solicitation and facilitation.” As such, § 274(a)(1)(A)(iv) “reaches no further than the purposeful solicitation and facilitation of specific acts known to violate federal law. So

understood, the statute does not prohibit a substantial amount of protected speech relative to its plainly legitimate sweep.” *Id.* at 1942, 1946. It remains to be seen whether this narrow reading applies to the terms “encourage” and “induce” in the civil deportation context of § 237.

Page 707, before the Questions insert:

In May 2019, Attorney General William P. Barr directed the BIA to refer a case raising this sentencing issue for his review. *Matter of Thomas & Matter of Thompson*, 27 I&N Dec. 556 (A.G. 2019). In a subsequent decision in the matter, he overruled *Matter of Cota-Vargas*, holding that “state-court orders that modify, clarify, or otherwise alter a criminal alien’s sentence . . . will be given effect for immigration purposes only when the orders are based on a procedural or substantive defect in the underlying criminal proceeding.” *Matter of Thomas & Matter of Thompson*, 27 I&N Dec. 674, 674 (A.G. 2019). Such orders “will have no effect for immigration purposes when based on reasons unrelated to the merits of the underlying criminal proceeding, such as rehabilitation or immigration hardship.”

Page 730, before the heading for subsection c. insert:

In the context of determining deportability, the inability to determine under which prong of a divisible statute a conviction falls is often of benefit to the non-citizen as it renders the statute overbroad. But what happens when it is the non-citizen who wishes to establish that eligibility for relief is not barred by criminal activity? In *Pereida v. Barr*, Pereida was convicted under a divisible Nebraska statute that stated several separate crimes. Some of these, such as assuming a false identity for pecuniary gain, involved moral turpitude and one, carrying on a business without a required license, did not. Where the criminal court record did not establish which of the several crimes Pereida was convicted of committing, the Court found that this ambiguity prevented Pereida from establishing that he had not been convicted of a crime involving moral turpitude and thus he had not met his burden of establishing his eligibility for cancellation of removal. 141 S.Ct. 754, 763 (2021). As subsequently put by the Ninth Circuit in a matter where the petitioner bore the burden of showing that her conviction was not a controlled substance conviction, “ambiguity is insufficient” to establish the absence of a disqualifying crime. *Aracely Marinelarena v. Garland*, 6 F.4th 975 (9th Cir. 2021).

Page 748, after first sentence in paragraph after heading for section 3 insert:

In addition to serving as a ground of inadmissibility or deportability, commission or conviction of a CIMT can significantly affect eligibility for some forms of immigration relief. See *Barton v. Barr*, 140 S. Ct. 1442 (2020), which is discussed in Chapter 8.

Page 750, at end of Item 1 insert:

In *Isla-Veloz v. Whitaker*, a Ninth Circuit panel refused to revisit circuit precedent finding that the term “crime involving moral turpitude” is not impermissibly vague. One judge argued that “the Supreme Court’s recent decisions in *Johnson v. United States* and *Sessions v. Dimaya* should lead us, were we not bound, to conclude that the phrase ‘crime involving moral turpitude’ is unconstitutionally vague when used as the basis for removal of a noncitizen.” 914 F.3d 1249, 1251 (9th Cir. 2019) (Fletcher, J. concurring). More recently, the Third Circuit agreed that the term is not void for vagueness. *Bugarenko v. Attorney*

General, 798 Fed.Appx. 741 (3d Cir. 2020). Judicial frustration with efforts to determine when a crime is a CIMT is widespread. As one judge noted:

I do not have to imagine what other judges have said about this approach. Like me, they think it is dumb, dumb, dumb. *See, e.g., Romo v. Barr*, 933 F.3d 1191, 1199–1200 (9th Cir. 2019) (Owens, J., concurring) (listing cases where judges from various circuits have criticized CIMT jurisprudence). We should avoid doing dumb things. Especially ones that are dumb. A smarter (and more just) approach would be to “look to a more objective standard, such as the length of the underlying sentence, before deciding if someone should be removed from our country.” *Almanza-Arenas v. Lynch*, 815 F.3d 469, 482–83 (9th Cir. 2016) (en banc) (Owens, J., concurring, joined by Tallman, Bybee, and Callahan).

Orellano v. Barr, 967 F.3d 927, 940, (9th Cir. 2020) (Owens, J., concurring).

CHAPTER 8

RELIEF FROM REMOVAL

Page 781, before the heading for subsection iii insert:

Under INA § 240A(d)(1)(B), the period of continuous residence also is deemed to end when the alien has committed an offense referred to in section 212(a)(2) that renders the alien inadmissible to the United States under section 212(a)(2) or removable from the United States under section 237(a)(2) or 237(a)(4), whichever is earliest.

In *Barton v. Barr*, 140 S. Ct. 1442 (2020), the Supreme Court interpreted this provision in a broad but counterintuitive manner. Barton, a citizen of Jamaica who was initially admitted to the United States as a nonimmigrant on May 27, 1989 and adjusted to LPR status a few years later, was arrested and charged with several crimes on January 23, 1996 and subsequently convicted in July 1996. In removal proceedings initiated on other grounds many years later, the IJ dismissed his application for cancellation of removal under INA § 240A(a), accepting the government’s argument that while those 1996 criminal offenses might not have rendered Barton “removable” under INA § 237(a)(2) or 237(a)(4) they nevertheless rendered him “inadmissible” under § 212(a)(2)—even though, as a lawful permanent resident who was not seeking admission or readmission to the United States, Barton could not be directly *charged* as “inadmissible” as a matter of law at all, either under § 212(a)(2) or any other inadmissibility ground. The Eleventh Circuit nevertheless affirmed the BIA’s conclusion that the phrase “renders the alien inadmissible” in INA § 240A(d)(1)(B) only requires that offense be one that in fact renders the noncitizen “potentially” inadmissible.

The Court affirmed the Eleventh Circuit’s judgment. Writing for a 5-4 majority, Justice Kavanaugh denied any ambiguity or complexity in either the statutory language or the interpretive question, stating that “[a]s a matter of statutory text and structure, [the] analysis is straightforward.” He emphasized that the text of the stop-time provision does not bar eligibility for cancellation if a noncitizen is “*convicted* of an offense referred to” in § 212(a)(2) during the requisite time period, but rather that it precludes cancellation when the individual “commit[s] an offense referred to” during that time period—and that § 212(a)(2)(A)(i), in turn, renders someone inadmissible either if they are convicted or if they “admit” having committed a qualifying offense. He characterized the purpose of the stop-time provision as akin to “a traditional recidivist sentencing statute,” and that it accordingly should be read to permit consideration of factors “beyond the offense of removal”:

In providing that a noncitizen’s prior crimes (in addition to the offense of removal) can render him ineligible for cancellation of removal, the cancellation-of-removal statute functions like a traditional recidivist sentencing statute. In an ordinary criminal case, a defendant may be convicted of a particular criminal offense. And at sentencing, the defendant’s other criminal offenses may be relevant. So too in the immigration removal context. A noncitizen may be found removable based on a certain criminal offense. In applying for cancellation of removal, the noncitizen must detail his entire criminal record * * * . An

immigration judge then must determine whether the noncitizen has been convicted of an aggravated felony at any time or has committed a § 212(a)(2) offense during the initial seven years of residence. It is entirely ordinary to look beyond the offense of conviction at criminal sentencing, and it is likewise entirely ordinary to look beyond the offense of removal at the cancellation-of-removal stage in immigration cases

It is not surprising, moreover, that Congress required immigration judges considering cancellation of removal to look in part at whether the noncitizen has committed any offenses listed in § 212(a)(2). The offenses listed in § 212(a)(2) help determine whether a noncitizen should be admitted to the United States. Under the cancellation-of-removal statute, immigration judges must look at that same category of offenses to determine whether, after a previously admitted noncitizen has been determined to be deportable, the noncitizen should nonetheless be allowed to remain in the United States. If a crime is serious enough to deny admission to a noncitizen, the crime can also be serious enough to preclude cancellation of removal, at least if committed during the initial seven years of residence.

In response to Barton’s argument that, as an LPR who was not seeking admission or readmission, he could not be deemed “inadmissible” as a matter of law, Kavanaugh stated that the manner in which § 240A(d)(1) uses the term “inadmissible” is different from how the statute deploys the term in the context of determining inadmissibility itself:

According to Barton, conviction of an offense listed in § 212(a)(2)—for example, conviction in state court of a crime involving moral turpitude—does not itself render the noncitizen “inadmissible.” He argues that a noncitizen is not rendered “inadmissible” unless and until the noncitizen is actually adjudicated as inadmissible and denied admission to the United States. And he further contends that a lawfully admitted noncitizen usually cannot be removed from the United States on the basis of inadmissibility. * * *

As a matter of common parlance alone, that argument would of course carry some force. But the argument fails because it disregards the statutory text, which employs the term “inadmissibility” as a status that can result from, for example, a noncitizen’s (including a lawfully admitted noncitizen’s) commission of certain offenses listed in § 212(a)(2).

For example, as relevant here, § 212(a)(2) flatly says that a noncitizen such as Barton who commits a crime involving moral turpitude and is convicted of that offense “is inadmissible.” § 212(a)(2)(A)(i). Full stop. Similarly, a noncitizen who has two or more convictions, together resulting in aggregate sentences of at least five years, “is inadmissible.” § 212(a)(2)(B). A noncitizen who a consular officer or the Attorney General knows or has reason to believe is a drug trafficker “is inadmissible.” § 212(a)(2)(C)(i). A noncitizen who receives the proceeds of prostitution within 10 years of applying for admission “is inadmissible.” § 212(a)(2)(D)(ii). The list goes on. See, e.g., §§

212(a)(2)(C)(ii)–(E), (G)–(I). Those provisions do not say that a noncitizen will become inadmissible if the noncitizen is found inadmissible in a subsequent immigration removal proceeding. Instead, those provisions say that the noncitizen “is inadmissible.”

Congress has in turn made that status—inadmissibility because of conviction or other proof of commission of § 212(a)(2) offenses—relevant in several statutory contexts that apply to lawfully admitted noncitizens such as Barton. Those contexts include adjustment to permanent resident status; protection from removal because of temporary protected status; termination of temporary resident status; and here cancellation of removal. See, e.g., §§ 210(a)(1)(C), (a)(3)(B)(ii), 244 (a)(1)(A), (c)(1)(A)(iii), 245(a), (l)(2). In those contexts, the noncitizen faces immigration consequences from being convicted of a § 212(a)(2) offense even though the noncitizen is lawfully admitted and is not necessarily removable solely because of that offense.

Consider how those other proceedings work. A lawfully admitted noncitizen who is convicted of an offense listed in § 212(a)(2) is typically not removable from the United States on that basis (recall that a lawfully admitted noncitizen is ordinarily removable only for commission of a § 237(a)(2) offense). But the noncitizen is “inadmissible” because of the § 212(a)(2) offense and for that reason may not be able to obtain adjustment to permanent resident status. §§ 245(a), (l)(2). So too, a lawfully admitted noncitizen who is convicted of an offense listed in § 212(a)(2) is “inadmissible” and for that reason may not be able to obtain temporary protected status. §§ 244(a)(1)(A), (c)(1)(A)(iii). A lawfully admitted noncitizen who is a temporary resident and is convicted of a § 212(a)(2) offense is “inadmissible” and for that reason may lose temporary resident status. §§ 210(a)(1)(C), (a)(3)(B)(ii).

Those statutory examples pose a major hurdle for Barton’s textual argument. The examples demonstrate that Congress has employed the concept of “inadmissibility” as a status in a variety of statutes similar to the cancellation-of-removal statute, including for lawfully admitted noncitizens. Barton has no persuasive answer to those examples. Barton tries to say that some of those other statutes involve a noncitizen who, although already admitted to the United States, is nonetheless seeking “constructive admission.” But that ginned-up label does not avoid the problem. Put simply, those other statutes show that lawfully admitted noncitizens who are, for example, convicted of § 212(a)(2) crimes are “inadmissible” and in turn may suffer certain immigration consequences, even though those lawfully admitted noncitizens cannot necessarily be removed solely because of those § 212(a)(2) offenses.

The same is true here. A lawfully admitted noncitizen who was convicted of a crime involving moral turpitude during his initial seven years of residence is “inadmissible” and for that reason is ineligible for cancellation of removal.

Leaving “common parlance” to one side, is this discussion consistent with the INA’s *legal* parlance? In dissent, Justice Sotomayor highlighted the ways in which the majority’s

interpretation is in considerable tension with the longstanding distinction in the immigration laws—which Kavanaugh does not address—between inadmissibility and exclusion on the one hand, and deportability and deportation on the other:

This distinction between “inadmissible” and “deportable” matters. Indeed, both are terms of art, so it is critical to understand their histories and their attached meaning over time.

Until Congress passed [IIRIRA], noncitizens seeking physical entry were placed in “exclusion proceeding[s],” while those already physically present were placed in “deportation proceeding[s].” Although the grounds for exclusion and deportation—and the procedures applying to each—evolved over time, the immigration laws retained a two-track system; different procedures and processes applied to noncitizens who were deportable and noncitizens who were excludable.

IIRIRA changed the proceedings and some of the language. * * *

Still, the immigration laws have retained their two-track structure. Inadmissibility and deportability remain separate concepts, triggered by different grounds. With few exceptions, the grounds for inadmissibility are broader than those for deportability. Further, while a noncitizen charged with inadmissibility bears the ultimate burden to show that he is admissible, the Government bears the burden of demonstrating that a noncitizen is deportable.

Whether a noncitizen is charged with inadmissibility or deportability also affects what the noncitizen or the Government must show to carry their respective burdens. A criminal ground for inadmissibility can be made out by showing either that the noncitizen admitted to conduct meeting the elements of a crime or that she was actually convicted of an offense. By contrast, most criminal grounds for deportability can be established only through convictions.

Finally, the substantive standards for cancellation of removal are also less stringent for a subset of deportable noncitizens: LPRs like Barton. Among other things, while an otherwise-eligible LPR must merely demonstrate that he or she deserves the relief as a matter of discretion, non-LPRs must demonstrate exceptional and extremely unusual hardship to an LPR or citizen parent, spouse, or child.

These separate categories and procedures—treating deportable noncitizens more generously than inadmissible noncitizens, and treating one group of deportable noncitizens (LPRs) the most generously of all—stem from one animating principle. All noncitizens in this country are entitled to certain rights and protections, but the protections afforded to previously admitted noncitizens and LPRs are particularly strong. Indeed, “[t]he immigration laws give LPRs the opportunity to establish a life permanently in this country by developing economic, familial, and social ties indistinguishable from those of a citizen.” Because those already admitted, like Barton, are often presumed to

have greater connections to the country, the immigration laws use separate terms and create separate procedures for noncitizens seeking admission to the country on the one hand, and those who were previously admitted on the other.

The stop-time rule carries that distinction forward. The rule specifies how a period of continuous residence ends for noncitizens who are seeking admission and thus are inadmissible, as well as noncitizens who are already admitted and thus are deportable. By using separate terms and grounds for two groups of people, the stop-time rule thus reflects the two-track dichotomy for inadmissible or deportable noncitizens that pervades the INA. * * *

Because the stop-time rule uses the terms “removable” (i.e., deportable) and “inadmissible” in the disjunctive, the Court must analyze the rule against the INA’s historic two-track backdrop. That context confirms that the term “inadmissible” cannot refer to a noncitizen who, like Barton, has already been admitted and is not seeking readmission. Indeed, the terms “inadmissible” and “deportable” are mutually exclusive in removal proceedings: A noncitizen can be deemed either inadmissible or deportable, not both. § 240(e) (for the purposes of removal statute and § 240A—governing cancellation of removal—a noncitizen is “inadmissible under section 212” if “not admitted to the United States,” and “deportable under section 237” if “admitted to the United States”). For the purposes of the stop-time rule, a person is not “inadmissible” unless that person actually seeks admission, and thus is subject to charges of inadmissibility.

After all, if the provision applied to those who could hypothetically be rendered inadmissible, it could have said so. For example, the statute would have said that it applied when “the alien has committed an offense referred to in section 212(a)(2) of this title” that either (2) “could render the alien inadmissible to the United States under section 212(a)(2) of this title” or (3) could render the noncitizen “removable [i.e., deportable] from the United States under section 237(a)(2) or 237(a)(4) of this title.”³⁰ * * *

To be sure, there are limited exceptions to the general rule that questions of admissibility apply only to noncitizens seeking formal admission. Noncitizens applying for adjustment of status must establish admissibility. §§ 245(a), (l)(2). But that is because adjustment of status is an express proxy for admission: “Congress created the [process] to enable an alien physically present in the

³⁰ [Note 2 in original] The Court seems to suggest that the stop-time rule’s tense simply mirrors § 212(a)(2). It is true that § 212(a)(2) speaks in the present tense, stating that a noncitizen “is inadmissible” if she has been “convicted of” or “admits having committed” certain offenses. § 212(a)(2)(A)(i). But the Court’s argument does not follow. Section 212, by its terms, applies only to “[c]lasses of aliens ineligible for visas or admission.” § 212(a). Because the provision applies only to noncitizens seeking admission, it is only natural that the clause uses the present tense to describe when such a noncitizen “is inadmissible.” By contrast, the stop-time rule, under the Government’s and Court’s reading, purports to apply to noncitizens not seeking admission at all—and who therefore could not possibly be adjudicated inadmissible.

United States to become an LPR without incurring the expense and inconvenience of traveling abroad to obtain an immigrant visa” and then presumably demonstrating admissibility on return. Far from a “ginned-up label,” the term “constructive admission” expresses precisely how the INA conceives of adjustment of status: an admissions process that occurs inside the United States as opposed to outside of it.

Sotomayor also stressed that the majority’s “contorted reading” of the statute “breezily wav[es] away applicable canons of construction” by failing “to give effect to all its provisions, so that no part will be inoperative or superfluous, void or insignificant”:

Were the stop-time rule agnostic to whether the noncitizen actually seeks admission, then the rule’s third clause—regarding deportability—would be meaningless. When a noncitizen is “removable”—i.e., deportable—under § 237 for an offense “referred to” in § 212(a)(2), he or she is also “inadmissible” for an offense “referred to” in § 212(a)(2). The third clause has meaning only if inadmissibility and deportability apply, as they always have, to separate groups of noncitizens—noncitizens seeking admission on the one hand, and noncitizens already admitted on the other. * * *

To be sure, “[s]ometimes the better overall reading of the statute contains some redundancy.” But the Court relies on more than just “some redundancy.” It dismisses out of hand one of only three clauses in the stop-time rule—without regard for the clause’s pedigree or the core difference between deportability and inadmissibility.

It remains this Court’s “duty to give effect, if possible, to every clause and word of a statute.” It must therefore be “reluctan[t] to treat statutory terms as surplusage in any setting”—especially in this context, where each word could dictate categorical ineligibility for relief from removal. It also does not matter that, as the Government points out, § 237(a)(4) did not initially refer to any crimes cross-referenced in § 212(a)(2). Congress’ decision to make a noncitizen ineligible for cancellation based on a to-be-determined class of crimes is far different from excising and giving no meaning to an entire clause.

While Kavanaugh acknowledged that his interpretation of the statute renders that language superfluous in precisely the manner that Sotomayor describes, he dismissed any concern about surplusage by essentially inferring that the provision is duplicative by implicit congressional design:

Under the Government’s interpretation, it is true that the reference to § 237(a)(2) also appears to be redundant surplusage. Any offense that is both referred to in § 212(a)(2) and an offense that would render the noncitizen deportable under § 237(a)(2) would also render the noncitizen inadmissible under § 212(a)(2). But redundancies are common in statutory drafting—sometimes in a congressional effort to be doubly sure, sometimes because of congressional inadvertence or lack of foresight, or sometimes simply because of the shortcomings of human communication. The Court has often

recognized: “Sometimes the better overall reading of the statute contains some redundancy.” So it is here. Most importantly for present purposes, we do not see why the redundant statutory reference to § 237(a)(2) should cause us to entirely rewrite § 240A so that a noncitizen’s commission of an offense referred to in § 212(a)(2) would preclude cancellation of removal only if it is also the offense of removal. Redundancy in one portion of a statute is not a license to rewrite or eviscerate another portion of the statute contrary to its text, as Barton would have us do.

NOTES AND QUESTIONS

1. Based on the interpretation of INA § 240A(d) in *Barton*, lawful permanent residents may be subject to the stop-time rule not only if they are “convicted” of an offense falling under INA § 212(a)(2) within seven years after admission, but also if they “admit having committed” or “admit[] committing acts which constitute the essential elements” of such an offense, since criminal grounds of inadmissibility do not necessarily require a conviction. INA § 212(a)(2)(A)(i). Under what circumstances should noncitizens facing removal be deemed to have “admitted” to an offense for which they might not have been convicted or even charged? See Immigrant Defense Project et al., *Practice Advisory: Avoiding the Stop-Time Rule after Barton v. Barr* 10–16 (June 25, 2020), <https://www.immigrantdefenseproject.org/wp-content/uploads/2020.06.25-Barton-PA-final-w-appendix.pdf> (noting that after *Barton*, “DHS attorneys or IJs may try to elicit admissions about past conduct to pretermitt cancellation,” but emphasizing that “agency and federal court case law establish specific parameters for when an admission to an offense triggers a § 212(a)(2) inadmissibility ground”).

2. To what extent does Kavanaugh’s “straightforward” interpretation of § 240A(d) involve what Victoria Nourse describes as “textual gerrymandering”:

Textualism has within it an internal methodological tension. On the one hand, textualists insist that they look to context to find meaning. But the actual process of analyzing text amounts to slicing the text into smaller and smaller units. * * *

To gerrymander is to change the outcome of an election by drawing political boundaries in particular ways. * * * Gerrymandering text is also possible, and it occurs by virtue of a process of decontextualization * * *. A word is pulled out of a statute. Once it is pulled out, it is in a new “null” context, apart from the statute. At this point, the interpreter may add meaning to the targeted text, in part because it is in the interest of interpreters to find meaning and in part because it economizes on mental effort. * * *

As Justice Gorsuch has made clear, no judge should add his own meaning to the text. But query whether it is ever possible to interpret text in a hard case without, in effect, adding or subtracting meaning. This is particularly true when one is engaged in decontextualizing (pulling words out of the statutory context). If I say the word “fifth,” it could mean the Fifth Amendment to the Constitution or a fifth of Scotch depending on the context—a law school classroom or a liquor store. If you take the word “fifth” out of context and zero

in on it, you are taking it out of that context, and robbing it of contextual clues. This is why all interpreters, including textualists and their critics, insist that context is crucial. This is also why the law tells us both to give words independent meanings and to consider the “whole” text, demanding that the interpreter toggle back and forth between the part and the whole.

Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 Ala. L. Rev. 667 (2019). Are there ways in which Kavanaugh is “adding or subtracting meaning” in his interpretation of the stop-time provision?

3. To what extent does Kavanaugh’s interpretation of § 240A(d) depend on his implicit characterizations of Congress’s purpose or intent when enacting that provision? Nancy Morawetz argues that even as he opens the door to implicit consideration of legislative purpose outside of the statutory text, Kavanaugh disregards, without explanation, an arguably better understanding of congressional purpose:

[INA § 240A(d)(1)] was added to the 1996 immigration laws during the conference committee process in 1996. * * * [O]riginally (before the conference) [the bill] only stopped the clock when proceedings commenced. In the conference, an extra provision was added that stopped the clock based on criminal offenses. The conference report described that provision as being about a conviction that rendered the person deportable. But the text of the conference add-on was more complicated and that text was at issue in *Barton*. The text says that the clock stopping offense must be listed in the grounds of inadmissibility and render the individual deportable or inadmissible. * * *

[I]f overall statutory purpose is at issue, why presume that the better reading is the more draconian one that denies relief to those who, on balance, show the equities to remain in the country. As Justice Sotomayor reminds us in dissent, the immigration judge looked at all the facts, including Mr. Barton’s 25 years of residence in the United States, 10 years of residence after his last arrest, close family ties to the country, and his documented rehabilitation in which he graduated from college, began running an automobile repair shop and became a father to four children. The immigration judge made clear that these factors meant that Mr. Barton deserved to stay as a lawful permanent resident if allowed to have a hearing on the equities. * * *

Moreover, the logic Justice Kavanaugh invents, that the statute operates like a recidivism statute, is completely hollow. I know of no recidivism statute that applies to conduct that has not led to a conviction. Furthermore, criminal history in sentencing allows a judge to weigh the overall facts, just as it does at a cancellation hearing. Instead, the conservative majority has closed off the ability of judges to look at the facts and reach a judgment on whether a long-term resident must be deported without any opportunity to make a case on the equities. * * *

[T]he Court has elsewhere concluded that it should not expect extreme results from legislation to lie in small technical language, saying that Congress “does

not hide elephants in mouseholes.” But plainly, that rule is for other parties and got no traction in this case * * * .

Nancy Morawetz, *The Illogic and Cruelty of Barton v. Barr*, ImmigrationProf Blog (Apr. 23, 2000), <https://lawprofessors.typepad.com/immigration/2020/04/guest-post-nancy-morawetz-the-illogic-and-cruelty-of-barton-v-barr.html>. Whose account of congressional purpose seems correct, and what bearing should that have on how the provision is interpreted? If congressional purpose is relevant, how should it be determined?

4. Are there broader potential implications to the manner in which *Barton* treats the distinction between inadmissibility and deportability? Consider that question both directly, in terms of the formal implications of *Barton* itself, and as a conceptual matter, in terms of what the case might suggest about how the Court’s justices understand the status of noncitizens who have entered or been admitted to the United States. In this context, compare the Court’s decision in *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020), which is discussed in Chapters 2 and 9.

Page 847–849, replace entire text of section with:

THE BATTLEGROUND SHIFTS BACK TO DACA

On September 5, 2017—following threats by Republican officials in ten states several months earlier that they would sue the federal government if it did not terminate DACA by that date—the Trump Administration rescinded the program.³¹ A series of lawsuits quickly followed challenging the rescission. Two district courts issued nationwide preliminary injunctions blocking the termination of DACA.³² In *NAACP v. Trump*, the court vacated and set aside the agency’s termination of DACA—thereby requiring the government to resume processing both initial and renewal DACA applications..³³

None of the lawsuits claimed that the executive branch is legally obligated to create, or even maintain, a program like DACA. Rather, the challengers offered several narrower arguments as to why this particular decision to terminate DACA was unlawful. Their principal claim was that the stated reason for the termination—that DACA exceeded the legal authority of the executive branch—was legally flawed and therefore should be set aside as “not in

³¹ Elaine C. Duke, Acting Secretary of Homeland Security, Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA) (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>; Antonio Olivo, *GOP Officials in 10 States Push Trump Administration to End DACA Program*, Wash. Post (Jun. 30, 2017), https://www.washingtonpost.com/local/immigration/officials-in-10-states-push-trump-administration-to-end-daca-program/2017/06/30/5bd05ec4-5da1-11e7-a9f6-7c3296387341_story.html.

³² *Regents of Univ. of California v. U.S. Dep’t of Homeland Sec.*, 279 F.Supp.3d 1011 (N.D. Cal. 2018), *aff’d*, 908 F.3d 476 (9th Cir. 2018); *Batalla Vidal v. Trump*, 279 F.Supp.3d 401 (E.D.N.Y. 2018).

³³ 315 F.Supp.3d 457 (D.D.C. 2018). One district court declined to enjoin the termination of DACA, but was reversed by the Fourth Circuit on appeal. *Casa de Maryland v. U.S. Dep’t of Homeland Sec.*, 284 F.Supp.3d 758 (D. Md. 2018), *rev’d*, 924 F.3d 684 (4th Cir. 2019).

accordance with law” under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). As discussed in Chapter 2, some of the plaintiffs also brought equal protection claims based on President Trump’s racist and xenophobic statements.

Meanwhile, Texas and six other states sued the United States, seeking a contrary injunction that would block the federal government from continuing DACA. Judge Andrew Hanen, who had issued the preliminary injunction in the DAPA case, was also the judge in this DACA lawsuit. In an exceedingly long opinion, Hanen concluded that the plaintiffs were likely to succeed on the merits of their claim challenging the legality of DACA. However, he nevertheless declined to issue a preliminary injunction, concluding that the plaintiffs had failed to establish that they faced a sufficient threat of irreparable injury (owing principally to their delay in filing suit), that any such threat would outweigh the harms to other parties, or that an injunction would not disserve the public interest.³⁴

In each of the three cases in which the district courts enjoined the rescission of DACA, the Trump Administration took the highly unusual step of applying for certiorari before judgment had been rendered in the court of appeals, arguing that the government would suffer “institutional injury” if the Supreme Court did not intervene immediately, before full adjudication in the court of appeals. The Court eventually granted certiorari—but “on the Court’s, rather than the government’s preferred timing, and in a manner that left the lower court injunctions in place pending the Court’s disposition of the merits.”³⁵

Department of Homeland Security v. Regents of the University of California

Supreme Court of the United States, 2020

140 S. Ct. 1891 (2020)

■ ROBERTS, C.J., delivered the opinion of the Court, except as to Part IV. GINSBURG, BREYER, and KAGAN, JJ., joined that opinion in full, and SOTOMAYOR, J., joined as to all but Part IV. SOTOMAYOR, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part. THOMAS, J., filed an opinion concurring in the judgment in part and dissenting in part, in which ALITO and GORSUCH, JJ., joined. ALITO, J., and KAVANAUGH, J., filed opinions concurring in the judgment in part and dissenting in part.

■ Chief Justice ROBERTS delivered the opinion of the Court, except as to Part IV. * * *

I.A

* * * [I]n June 2017, following a change in Presidential administrations, DHS rescinded the DAPA Memorandum. In explaining that decision, DHS cited the preliminary injunction and ongoing litigation in Texas, the fact that DAPA had never taken effect, and the new administration’s immigration enforcement priorities.

³⁴ *Texas v. United States*, 328 F.Supp.3d 662 (S.D. Tex. 2018).

³⁵ Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123, 140–41 (2019).

Three months later, in September 2017, Attorney General Jefferson B. Sessions III sent a letter to Acting Secretary of Homeland Security Elaine C. Duke, “advis[ing]” that DHS “should rescind” DACA as well. Citing the Fifth Circuit’s opinion and this Court’s equally divided affirmance, the Attorney General concluded that DACA shared the “same legal ... defects that the courts recognized as to DAPA” and was “likely” to meet a similar fate. “In light of the costs and burdens” that a rescission would “impose[] on DHS,” the Attorney General urged DHS to “consider an orderly and efficient wind-down process.”

The next day, Duke acted on the Attorney General’s advice. In her decision memorandum, Duke summarized the history of the DACA and DAPA programs, the Fifth Circuit opinion and ensuing affirmance, and the contents of the Attorney General’s letter. “Taking into consideration the Supreme Court’s and the Fifth Circuit’s rulings” and the “letter from the Attorney General,” she concluded that the “DACA program should be terminated.”

Duke then detailed how the program would be wound down: No new applications would be accepted, but DHS would entertain applications for two-year renewals from DACA recipients whose benefits were set to expire within six months. For all other DACA recipients, previously issued grants of deferred action and work authorization would not be revoked but would expire on their own terms, with no prospect for renewal.

B

* * *

In *Regents* and *Batalla Vidal*, the District Courts * * * entered coextensive nationwide preliminary injunctions, based on the conclusion that the plaintiffs were likely to succeed on the merits of their claims that the rescission was arbitrary and capricious. These injunctions did not require DHS to accept new applications, but did order the agency to allow DACA recipients to “renew their enrollments.”

In *NAACP*, the D.C. District Court took a different course. In April 2018, it * * * granted partial summary judgment to the plaintiffs on their APA claim, holding that Acting Secretary Duke’s “conclusory statements were insufficient to explain the change in [the agency’s] view of DACA’s lawfulness.” The District Court stayed its order for 90 days to permit DHS to “reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority.”

Two months later, Duke’s successor, Secretary Kirstjen M. Nielsen, responded via memorandum. She explained that, “[h]aving considered the Duke memorandum,” she “decline[d] to disturb” the rescission. Secretary Nielsen went on to articulate her “understanding” of Duke’s memorandum, identifying three reasons why, in Nielsen’s estimation, “the decision to rescind the DACA policy was, and remains, sound.” First, she reiterated that, “as the Attorney General concluded, the DACA policy was contrary to law.” Second, she added that, regardless, the agency had “serious doubts about [DACA’s] legality” and, for law enforcement reasons, wanted to avoid “legally questionable” policies. Third, she identified multiple policy reasons for rescinding DACA, including (1) the belief that any class-

based immigration relief should come from Congress, not through executive non-enforcement; (2) DHS's preference for exercising prosecutorial discretion on "a truly individualized, case-by-case basis"; and (3) the importance of "project[ing] a message" that immigration laws would be enforced against all classes and categories of aliens. In her final paragraph, Secretary Nielsen acknowledged the "asserted reliance interests" in DACA's continuation but concluded that they did not "outweigh the questionable legality of the DACA policy and the other reasons" for the rescission discussed in her memorandum. *Id.*, at 125a.

The Government asked the D.C. District Court to revise its prior order in light of the reasons provided by Secretary Nielsen, but the court declined. In the court's view, the new memorandum, which "fail[ed] to elaborate meaningfully" on the agency's illegality rationale, still did not provide an adequate explanation for the September 2017 rescission. * * *

The issues raised here are (1) whether the APA claims are reviewable, (2) if so, whether the rescission was arbitrary and capricious in violation of the APA, and (3) whether the plaintiffs have stated an equal protection claim.

II

* * *

The APA sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts. It requires agencies to engage in "reasoned decisionmaking" and directs that agency actions be "set aside" if they are "arbitrary" or "capricious," 5 U.S.C. § 706(2)(A). Under this narrow standard of review, ... a court is not to substitute its judgment for that of the agency, but instead to assess only whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.

But before determining whether the rescission was arbitrary and capricious, we must first address the Government's contentions that DHS's decision is unreviewable under the APA[.] * * *

A

The APA establishes a "basic presumption of judicial review [for] one suffering legal wrong because of agency action." That presumption can be rebutted by a showing that the relevant statute "preclude[s]" review, § 701(a)(1), or that the "agency action is committed to agency discretion by law," § 701(a)(2). The latter exception is at issue here.

To "honor the presumption of review, we have read the exception in § 701(a)(2) quite narrowly," confining it to those rare "administrative decision[s] traditionally left to agency discretion." This limited category of unreviewable actions includes an agency's decision not to institute enforcement proceedings, and it is on that exception that the Government primarily relies.

In [*Heckler v.*] *Chaney*, several death-row inmates petitioned the Food and Drug Administration (FDA) to take enforcement action against two States to prevent their use of certain drugs for lethal injection. The Court held that the FDA's denial of that petition was

presumptively unreviewable in light of the well-established “tradition” that “an agency’s decision not to prosecute or enforce” is “generally committed to an agency’s absolute discretion.” We identified a constellation of reasons that underpin this tradition. To start, a non-enforcement decision “often involves a complicated balancing of a number of factors which are peculiarly within [the agency’s] expertise,” such as “whether the particular enforcement action requested best fits the agency’s overall policies.” The decision also mirrors, “to some extent,” a prosecutor’s decision not to indict, which has “long been regarded as the special province of the Executive Branch.” And, as a practical matter, “when an agency refuses to act” there is no action to “provide[] a focus for judicial review.”

The Government contends that a general non-enforcement policy is equivalent to the individual non-enforcement decision at issue in *Chaney*. In each case, the Government argues, the agency must balance factors peculiarly within its expertise, and does so in a manner akin to a criminal prosecutor. Building on that premise, the Government argues that the rescission of a non-enforcement policy is no different—for purposes of reviewability—from the adoption of that policy. While the rescission may lead to increased enforcement, it does not, by itself, constitute a particular enforcement action. Applying this logic to the facts here, the Government submits that DACA is a non-enforcement policy and that its rescission is therefore unreviewable.

But we need not test this chain of reasoning because DACA is not simply a non-enforcement policy. For starters, the DACA Memorandum did not merely “refus[e] to institute proceedings” against a particular entity or even a particular class. Instead, it directed USCIS to “establish a clear and efficient process” for identifying individuals who met the enumerated criteria. Based on this directive, USCIS solicited applications from eligible aliens, instituted a standardized review process, and sent formal notices indicating whether the alien would receive the two-year forbearance. These proceedings are effectively “adjudicat[ions].” And the result of these adjudications—DHS’s decision to “grant deferred action”—is an “affirmative act of approval,” the very opposite of a “refus[al] to act.” In short, the DACA Memorandum does not announce a passive non-enforcement policy; it created a program for conferring affirmative immigration relief. The creation of that program—and its rescission—is an “action [that] provides a focus for judicial review.”

The benefits attendant to deferred action provide further confirmation that DACA is more than simply a non-enforcement policy. As described above, by virtue of receiving deferred action, the 700,000 DACA recipients may request work authorization and are eligible for Social Security and Medicare. Unlike an agency’s refusal to take requested enforcement action, access to these types of benefits is an interest “courts often are called upon to protect.”

Because the DACA program is more than a non-enforcement policy, its rescission is subject to review under the APA. * * *

III.A

Deciding whether agency action was adequately explained requires, first, knowing where to look for the agency’s explanation. The natural starting point here is the explanation provided by Acting Secretary Duke when she announced the rescission in September 2017. But the Government urges us to go on and consider the June 2018 memorandum submitted by

Secretary Nielsen as well. That memo was prepared after the D.C. District Court vacated the Duke rescission and gave DHS an opportunity to “reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority.” According to the Government, the Nielsen Memorandum is properly before us because it was invited by the District Court and reflects the views of the Secretary of Homeland Security—the official responsible for immigration policy. Respondents disagree, arguing that the Nielsen Memorandum, issued nine months after the rescission, impermissibly asserts prudential and policy reasons not relied upon by Duke.

It is a “foundational principle of administrative law” that judicial review of agency action is limited to “the grounds that the agency invoked when it took the action.” If those grounds are inadequate, a court may remand for the agency to do one of two things: First, the agency can offer “a fuller explanation of the agency’s reasoning *at the time of the agency action*.” This route has important limitations. When an agency’s initial explanation “indicate[s] the determinative reason for the final action taken,” the agency may elaborate later on that reason (or reasons) but may not provide new ones. Alternatively, the agency can “deal with the problem afresh” by taking *new* agency action. An agency taking this route is not limited to its prior reasons but must comply with the procedural requirements for new agency action.

The District Court’s remand thus presented DHS with a choice: rest on the Duke Memorandum while elaborating on its prior reasoning, or issue a new rescission bolstered by new reasons absent from the Duke Memorandum. Secretary Nielsen took the first path. Rather than making a new decision, she “decline[d] to disturb the Duke memorandum’s rescission” and instead “provide[d] further explanation” for that action. Indeed, the Government’s subsequent request for reconsideration described the Nielsen Memorandum as “additional explanation for [Duke’s] decision” and asked the District Court to “leave in place [Duke’s] September 5, 2017 decision to rescind the DACA policy.” Contrary to the position of the Government before this Court, and of Justice KAVANAUGH in dissent, the Nielsen Memorandum was by its own terms not a new rule implementing a new policy.

Because Secretary Nielsen chose to elaborate on the reasons for the initial rescission rather than take new administrative action, she was limited to the agency’s original reasons, and her explanation “must be viewed critically” to ensure that the rescission is not upheld on the basis of impermissible “*post hoc* rationalization.” But despite purporting to explain the Duke Memorandum, Secretary Nielsen’s reasoning bears little relationship to that of her predecessor. Acting Secretary Duke rested the rescission on the conclusion that DACA is unlawful. Period. By contrast, Secretary Nielsen’s new memorandum offered three “separate and independently sufficient reasons” for the rescission, only the first of which is the conclusion that DACA is illegal.

Her second reason is that DACA is, at minimum, legally *questionable* and should be terminated to maintain public confidence in the rule of law and avoid burdensome litigation. No such justification can be found in the Duke Memorandum. Legal uncertainty is, of course, related to illegality. But the two justifications are meaningfully distinct, especially in this context. While an agency might, for one reason or another, choose to do nothing in the face of uncertainty, illegality presumably requires remedial action of some sort.

The policy reasons that Secretary Nielsen cites as a third basis for the rescission are also nowhere to be found in the Duke Memorandum. That document makes no mention of a preference for legislative fixes, the superiority of case-by-case decisionmaking, the importance of sending a message of robust enforcement, or any other policy consideration. Nor are these points included in the legal analysis from the Fifth Circuit and the Attorney General. They can be viewed only as impermissible *post hoc* rationalizations and thus are not properly before us.

The Government, echoed by Justice KAVANAUGH, protests that requiring a new decision before considering Nielsen’s new justifications would be “an idle and useless formality.” Procedural requirements can often seem such. But here the rule serves important values of administrative law. Requiring a new decision before considering new reasons promotes “agency accountability,” by ensuring that parties and the public can respond fully and in a timely manner to an agency’s exercise of authority. Considering only contemporaneous explanations for agency action also instills confidence that the reasons given are not simply “convenient litigating position[s].” Permitting agencies to invoke belated justifications, on the other hand, can upset “the orderly functioning of the process of review,” forcing both litigants and courts to chase a moving target. Each of these values would be markedly undermined were we to allow DHS to rely on reasons offered nine months after Duke announced the rescission and after three different courts had identified flaws in the original explanation.

Justice KAVANAUGH asserts that this “foundational principle of administrative law” actually limits only what lawyers may argue, not what agencies may do. While it is true that the Court has often rejected justifications belatedly advanced by advocates, we refer to this as a prohibition on *post hoc* rationalizations, not advocate rationalizations, because the problem is the timing, not the speaker. The functional reasons for requiring contemporaneous explanations apply with equal force regardless whether *post hoc* justifications are raised in court by those appearing on behalf of the agency or by agency officials themselves.³⁶

Justice Holmes famously wrote that “[m]en must turn square corners when they deal with the Government.” *Rock Island, A. & L.R. Co. v. United States* (1920). But it is also true, particularly when so much is at stake, that “the Government should turn square corners in dealing with the people.” *St. Regis Paper Co. v. United States* (1961) (Black, J., dissenting). The basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted. This is not the case for cutting corners to allow DHS to rely upon reasons absent from its original decision.

B

We turn, finally, to whether DHS’s decision to rescind DACA was arbitrary and capricious. As noted earlier, Acting Secretary Duke’s justification for the rescission was succinct: “Taking into consideration” the Fifth Circuit’s conclusion that DAPA was unlawful because it conferred benefits in violation of the INA, and the Attorney General’s conclusion

³⁶ [Note 3 in original] Justice KAVANAUGH further argues that the contemporaneous explanation requirement applies only to agency adjudications, not rulemakings. But he cites no authority limiting this basic principle—which the Court regularly articulates in the context of rulemakings—to adjudications. The Government does not even raise this unheralded argument.

that DACA was unlawful for the same reason, she concluded—without elaboration—that the “DACA program should be terminated.”³⁷

Respondents maintain that this explanation is deficient for three reasons. Their first and second arguments work in tandem, claiming that the Duke Memorandum does not adequately explain the conclusion that DACA is unlawful, and that this conclusion is, in any event, wrong. While those arguments carried the day in the lower courts, in our view they overlook an important constraint on Acting Secretary Duke’s decisionmaking authority—she was *bound* by the Attorney General’s legal determination.

The same statutory provision that establishes the Secretary of Homeland Security’s authority to administer and enforce immigration laws limits that authority, specifying that, with respect to “all questions of law,” the determinations of the Attorney General “shall be controlling.” INA § 103(a)(1). Respondents are aware of this constraint. Indeed they emphasized the point in the reviewability sections of their briefs. But in their merits arguments, respondents never addressed whether or how this unique statutory provision might affect our review. They did not discuss whether Duke was required to explain a legal conclusion that was not hers to make. Nor did they discuss whether the current suits challenging Duke’s rescission decision, which everyone agrees was within her legal authority under the INA, are proper vehicles for attacking the Attorney General’s legal conclusion.

Because of these gaps in respondents’ briefing, we do not evaluate the claims challenging the explanation and correctness of the illegality conclusion. Instead we focus our attention on respondents’ third argument—that Acting Secretary Duke “failed to consider ... important aspect[s] of the problem” before her.

Whether DACA is illegal is, of course, a legal determination, and therefore a question for the Attorney General. But deciding how best to address a finding of illegality moving forward can involve important policy choices, especially when the finding concerns a program with the breadth of DACA. Those policy choices are for DHS.

Acting Secretary Duke plainly exercised such discretionary authority in winding down the program. Among other things, she specified that those DACA recipients whose benefits were set to expire within six months were eligible for two-year renewals.

But Duke did not appear to appreciate the full scope of her discretion, which picked up where the Attorney General’s legal reasoning left off. The Attorney General concluded that “the DACA policy has the same legal ... defects that the courts recognized as to DAPA.” So, to understand those defects, we look to the Fifth Circuit, the highest court to offer a reasoned opinion on the legality of DAPA. That court described the “core” issue before it as the “Secretary’s decision” to grant “eligibility for benefits”—including work authorization,

³⁷ [Note 4 in original] The Government contends that Acting Secretary Duke also focused on litigation risk. Although the background section of her memo references a letter from the Texas Attorney General threatening to challenge DACA, the memo never asserts that the rescission was intended to avert litigation. And, given the Attorney General’s conclusion that the policy was unlawful—and thus presumably could not be maintained or defended in its current form—it is difficult to see how the risk of litigation carried any independent weight.

Social Security, and Medicare—to unauthorized aliens on “a class-wide basis.” The Fifth Circuit’s focus on these benefits was central to every stage of its analysis. And the Court ultimately held that DAPA was “manifestly contrary to the INA” precisely because it “would make 4.3 million otherwise removable aliens” eligible for work authorization and public benefits.³⁸

But there is more to DAPA (and DACA) than such benefits. The defining feature of deferred action is the decision to defer removal (and to notify the affected alien of that decision). And the Fifth Circuit was careful to distinguish that forbearance component from eligibility for benefits. As it explained, the “challenged portion of DAPA’s deferred-action program” was the decision to make DAPA recipients eligible for benefits. The other “[p]art of DAPA,” the court noted, “involve[d] the Secretary’s decision—at least temporarily—not to enforce the immigration laws as to a class of what he deem[ed] to be low-priority illegal aliens.” Borrowing from this Court’s prior description of deferred action, the Fifth Circuit observed that “the states do not challenge the Secretary’s decision to decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation.” And the Fifth Circuit underscored that nothing in its decision or the preliminary injunction “requires the Secretary to remove any alien or to alter” the Secretary’s class-based “enforcement priorities.” In other words, the Secretary’s forbearance authority was unimpaired.

Acting Secretary Duke recognized that the Fifth Circuit’s holding addressed the benefits associated with DAPA. In her memorandum she explained that the Fifth Circuit concluded that DAPA “conflicted with the discretion authorized by Congress” because the INA “flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits, including work authorization.” Duke did not characterize the opinion as one about forbearance.

In short, the Attorney General neither addressed the forbearance policy at the heart of DACA nor compelled DHS to abandon that policy. Thus, removing benefits eligibility while continuing forbearance remained squarely within the discretion of Acting Secretary Duke, who was responsible for “[e]stablishing national immigration enforcement policies and priorities.” 6 U.S.C. § 202(5). But Duke’s memo offers no reason for terminating forbearance. She instead treated the Attorney General’s conclusion regarding the illegality of benefits as sufficient to rescind both benefits and forbearance, without explanation.

That reasoning repeated the error we identified in one of our leading modern administrative law cases, *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.* There, the National Highway Traffic Safety Administration (NHTSA) promulgated a requirement that motor vehicles produced after 1982 be equipped with one of two passive restraints: airbags or automatic seatbelts. Four years later,

³⁸ [Note 5 in original] As the Fifth Circuit noted, DAPA recipients were eligible for Social Security and Medicare benefits because they had been designated “lawfully present.” Lawful presence is a statutory prerequisite for receipt of certain benefits. It is not the same as forbearance nor does it flow inexorably from forbearance. Thus, while deferred action recipients have been designated lawfully present for purposes of Social Security and Medicare eligibility, agencies can also exclude them from this designation.

before the requirement went into effect, NHTSA concluded that automatic seatbelts, the restraint of choice for most manufacturers, would not provide effective protection. Based on that premise, NHTSA rescinded the passive restraint requirement in full.

We concluded that the total rescission was arbitrary and capricious. As we explained, NHTSA’s justification supported only “disallow[ing] compliance by means of “ automatic seatbelts. It did “not cast doubt” on the “efficacy of airbag technology” or upon “the need for a passive restraint standard.” Given NHTSA’s prior judgment that “airbags are an effective and cost-beneficial lifesaving technology,” we held that “the mandatory passive restraint rule [could] not be abandoned without any consideration whatsoever of an airbags-only requirement.”

While the factual setting is different here, the error is the same. Even if it is illegal for DHS to extend work authorization and other benefits to DACA recipients, that conclusion supported only “disallow[ing]” benefits. It did “not cast doubt” on the legality of forbearance or upon DHS’s original reasons for extending forbearance to childhood arrivals. Thus, given DHS’s earlier judgment that forbearance is “especially justified” for “productive young people” who were brought here as children and “know only this country as home,” the DACA Memorandum could not be rescinded in full “without any consideration whatsoever” of a forbearance-only policy.³⁹

The Government acknowledges that “[d]eferred action coupled with the associated benefits are the two legs upon which the DACA policy stands.” It insists, however, that “DHS was not required to consider whether DACA’s illegality could be addressed by separating” the two. According to the Government, “It was not arbitrary and capricious for DHS to view deferred action and its collateral benefits as importantly linked.” Perhaps. But that response misses the point. The fact that there may be a valid reason not to separate deferred action from benefits does not establish that DHS considered that option or that such consideration was unnecessary.

The lead dissent [by Justice Thomas] acknowledges that forbearance and benefits are legally distinct and can be decoupled. It contends, however, that we should not “dissect” agency action “piece by piece.” The dissent instead rests on the Attorney General’s legal determination—which considered only benefits—“to supply the ‘reasoned analysis’ “ to support rescission of both benefits and forbearance. But *State Farm* teaches that when an agency rescinds a prior policy its reasoned analysis must consider the “alternative[s]” that are “within the ambit of the existing [policy].” Here forbearance was not simply “within the ambit of the existing [policy],” it was the centerpiece of the policy: DACA, after all, stands for “

³⁹ [Note 6 in original] The three-page memorandum that established DACA is devoted entirely to forbearance, save for one sentence directing USCIS to “determine whether [DACA recipients] qualify for work authorization.” The benefits associated with DACA flow from a separate regulation. See 8 CFR § 1.3(a)(4)(vi); see also 42 CFR § 417.422(h) (cross-referencing 8 CFR § 1.3). Thus, DHS could have addressed the Attorney General’s determination that such benefits were impermissible under the INA by amending 8 CFR § 1.3 to exclude DACA recipients from those benefits without rescinding the DACA Memorandum and the forbearance policy it established. But Duke’s rescission memo shows no cognizance of this possibility.

Deferred Action for Childhood Arrivals” (emphasis added). But the rescission memorandum contains no discussion of forbearance or the option of retaining forbearance without benefits. Duke “entirely failed to consider [that] important aspect of the problem.”

That omission alone renders Acting Secretary Duke’s decision arbitrary and capricious. But it is not the only defect. Duke also failed to address whether there was “legitimate reliance” on the DACA Memorandum. When an agency changes course, as DHS did here, it must “be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.” “It would be arbitrary and capricious to ignore such matters.” Yet that is what the Duke Memorandum did.

For its part, the Government does not contend that Duke considered potential reliance interests; it counters that she did not need to. In the Government’s view, shared by the lead dissent, DACA recipients have no “legally cognizable reliance interests” because the DACA Memorandum stated that the program “conferred no substantive rights” and provided benefits only in two-year increments. But neither the Government nor the lead dissent cites any legal authority establishing that such features automatically preclude reliance interests, and we are not aware of any. These disclaimers are surely pertinent in considering the strength of any reliance interests, but that consideration must be undertaken by the agency in the first instance, subject to normal APA review. There was no such consideration in the Duke Memorandum.

Respondents and their *amici* assert that there was much for DHS to consider. They stress that, since 2012, DACA recipients have “enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance” on the DACA program. The consequences of the rescission, respondents emphasize, would “radiate outward” to DACA recipients’ families, including their 200,000 U.S.-citizen children, to the schools where DACA recipients study and teach, and to the employers who have invested time and money in training them. In addition, excluding DACA recipients from the lawful labor force may, they tell us, result in the loss of \$215 billion in economic activity and an associated \$60 billion in federal tax revenue over the next ten years. Meanwhile, States and local governments could lose \$1.25 billion in tax revenue each year.

These are certainly noteworthy concerns, but they are not necessarily dispositive. To the Government and lead dissent’s point, DHS could respond that reliance on forbearance and benefits was unjustified in light of the express limitations in the DACA Memorandum. Or it might conclude that reliance interests in benefits that it views as unlawful are entitled to no or diminished weight. And, even if DHS ultimately concludes that the reliance interests rank as serious, they are but one factor to consider. DHS may determine, in the particular context before it, that other interests and policy concerns outweigh any reliance interests. Making that difficult decision was the agency’s job, but the agency failed to do it.

DHS has considerable flexibility in carrying out its responsibility. The wind-down here is a good example of the kind of options available. Acting Secretary Duke authorized DHS to process two-year renewals for those DACA recipients whose benefits were set to expire within six months. But Duke’s consideration was solely for the purpose of assisting the agency in dealing with “administrative complexities.” She should have considered whether she had similar flexibility in addressing any reliance interests of DACA recipients. The lead dissent contends that accommodating such interests would be “another exercise of unlawful power,”

but the Government does not make that argument and DHS has already extended benefits for purposes other than reliance, following consultation with the Office of the Attorney General.

Had Duke considered reliance interests, she might, for example, have considered a broader renewal period based on the need for DACA recipients to reorder their affairs. Alternatively, Duke might have considered more accommodating termination dates for recipients caught in the middle of a time-bounded commitment, to allow them to, say, graduate from their course of study, complete their military service, or finish a medical treatment regimen. Or she might have instructed immigration officials to give salient weight to any reliance interests engendered by DACA when exercising individualized enforcement discretion.

To be clear, DHS was not required to do any of this or to “consider all policy alternatives in reaching [its] decision.” Agencies are not compelled to explore “every alternative device and thought conceivable by the mind of man.” But, because DHS was “not writing on a blank slate,” it *was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns. * * *

The dissent is correct that DACA was rescinded because of the Attorney General’s illegality determination. But nothing about that determination foreclosed or even addressed the options of retaining forbearance or accommodating particular reliance interests. Acting Secretary Duke should have considered those matters but did not. That failure was arbitrary and capricious in violation of the APA.

IV

[Part IV of Roberts’s opinion is discussed in Chapter 2.]

* * * We do not decide whether DACA or its rescission are sound policies. “The wisdom” of those decisions “is none of our concern.” We address only whether the agency complied with the procedural requirement that it provide a reasoned explanation for its action. * * *

The judgment in *NAACP* is affirmed.⁴⁰ * * *

* * *

■ Justice SOTOMAYOR, concurring in part, concurring in the judgment in part, and dissenting in part.

[Sotomayor’s opinion is discussed in Chapter 2.]

■ Justice THOMAS, with whom Justice ALITO and Justice GORSUCH join, concurring in the judgment in part and dissenting in part.

⁴⁰ [Note 7 in original] Our affirmance of the *NAACP* order vacating the rescission makes it unnecessary to examine the propriety of the nationwide scope of the injunctions issued by the District Courts in *Regents* and *Batalla Vidal*.

Between 2001 and 2011, Congress considered over two dozen bills that would have granted lawful status to millions of aliens who were illegally brought to this country as children. Each of those legislative efforts failed. In the wake of this impasse, [DHS] under President Barack Obama took matters into its own hands. Without any purported delegation of authority from Congress and without undertaking a rulemaking, DHS unilaterally created a program known as Deferred Action for Childhood Arrivals (DACA). The three-page DACA memorandum made it possible for approximately 1.7 million illegal aliens to qualify for temporary lawful presence and certain federal and state benefits. When President Donald Trump took office in 2017, his Acting Secretary of Homeland Security, acting through yet another memorandum, rescinded the DACA memorandum. To state it plainly, the Trump administration rescinded DACA the same way that the Obama administration created it: unilaterally, and through a mere memorandum.

Today the majority makes the mystifying determination that this rescission of DACA was unlawful. In reaching that conclusion, the majority acts as though it is engaging in the routine application of standard principles of administrative law. On the contrary, this is anything but a standard administrative law case.

DHS created DACA during the Obama administration without any statutory authorization and without going through the requisite rulemaking process. As a result, the program was unlawful from its inception. The majority does not even attempt to explain why a court has the authority to scrutinize an agency's policy reasons for rescinding an unlawful program under the arbitrary and capricious microscope. The decision to countermand an unlawful agency action is clearly reasonable. So long as the agency's determination of illegality is sound, our review should be at an end.

Today's decision must be recognized for what it is: an effort to avoid a politically controversial but legally correct decision. The Court could have made clear that the solution respondents seek must come from the Legislative Branch. Instead, the majority has decided to prolong DHS' initial overreach by providing a stopgap measure of its own. In doing so, it has given the green light for future political battles to be fought in this Court rather than where they rightfully belong—the political branches. Such timidity forsakes the Court's duty to apply the law according to neutral principles, and the ripple effects of the majority's error will be felt throughout our system of self-government.

Perhaps even more unfortunately, the majority's holding creates perverse incentives, particularly for outgoing administrations. Under the auspices of today's decision, administrations can bind their successors by unlawfully adopting significant legal changes through Executive Branch agency memoranda. Even if the agency lacked authority to effectuate the changes, the changes cannot be undone by the same agency in a successor administration unless the successor provides sufficient policy justifications to the satisfaction of this Court. In other words, the majority erroneously holds that the agency is not only permitted, but required, to continue administering unlawful programs that it inherited from a previous administration.

* * *

II

* * *

DACA alters how the immigration laws apply to a certain class of aliens. “DACA [recipients] primarily entered the country either by overstaying a visa or by entering without inspection, and the INA instructs that aliens in both classes are removable.” But DACA granted its recipients deferred action, *i.e.*, a decision to “decline to institute [removal] proceedings, terminate [removal] proceedings, or decline to institute a final order of [removal].” Under other regulations, recipients of deferred action are deemed lawfully present for purposes of certain federal benefits. Thus, DACA in effect created a new exception to the statutory provisions governing removability and, in the process, conferred lawful presence on an entire class of aliens.

To lawfully implement such changes, DHS needed a grant of authority from Congress to either reclassify removable DACA recipients as lawfully present, or to exempt the entire class of aliens covered by DACA from statutory removal procedures. * * * [A]n examination of the highly reticulated immigration regime makes clear that DHS has no implicit discretion to create new classes of lawful presence or to grant relief from removal out of whole cloth. Accordingly, DACA is substantively unlawful.

This conclusion should begin and end our review. * * *

A

Congress has not authorized DHS to reclassify an entire class of removable aliens as lawfully present or to categorically exempt aliens from statutory removal provisions.

1

I begin with lawful presence. As just stated, nothing in the federal immigration laws expressly delegates to DHS the unfettered discretion to create new categories of lawfully present aliens. And, there is no basis for concluding that Congress implicitly delegated to DHS the power to reclassify categories of aliens as lawfully present. The immigration statutes provide numerous ways to obtain lawful presence, both temporary and permanent. The highly detailed nature of these provisions indicates that Congress has exhaustively provided for all of the ways that it thought lawful presence should be obtainable, leaving no discretion to DHS to add new pathways.

For example, federal immigration laws provide over 60 temporary nonimmigrant visa options, including visas for ambassadors, full-time students and their spouses and children, those engaged to marry a United States citizen within 90 days of arrival, athletes and performers, and aliens with specialized knowledge related to their employers. INA §§ 101(a)(15)(A)–(V), 214; 8 CFR § 214.1. In addition, the statutes permit the Attorney General to grant temporary “parole” into the United States “for urgent humanitarian reasons or [a] significant public benefit,” § 212(d)(5)(A); provide for temporary protected status when the Attorney General finds that removal to a country with an ongoing armed conflict “would pose a serious threat to [an alien’s] personal safety,” § 244(b)(1)(A); and allow the Secretary of Homeland Security (in consultation with the Secretary of State) to waive visa requirements for certain aliens for up to 90 days, §§ 217(a)–(d).

The immigration laws are equally complex and detailed when it comes to obtaining lawful permanent residence. Congress has expressly specified numerous avenues for obtaining an immigrant visa, which aliens may then use to become lawful permanent residents. §§ 221, 245(a). Among other categories, immigrant visas are available to specified family-sponsored aliens, aliens with advanced degrees or exceptional abilities, certain types of skilled and unskilled workers, “special immigrants,” and those entering the country to “engag[e] in a new commercial enterprise.” §§ 203(a)–(b), 204. Refugees and asylees also may receive lawful permanent residence under certain conditions, § 209; 8 CFR §§ 209.1, 209.2.⁴¹ As with temporary lawful presence, each avenue to lawful permanent residence status has its own set of rules and exceptions.

As the Fifth Circuit held in the DAPA litigation, a conclusion with which then-Attorney General Sessions agreed, “specific and detailed provisions[of] the INA expressly and carefully provid[e] legal designations allowing defined classes of aliens to be lawfully present.” In light of this elaborate statutory scheme, the lack of any similar provision for DACA recipients convincingly establishes that Congress left DHS with no discretion to create an additional class of aliens eligible for lawful presence. Congress knows well how to provide broad discretion, and it has provided open-ended delegations of authority in statutes too numerous to name. But when it comes to lawful presence, Congress did something strikingly different. Instead of enacting a statute with “broad general directives” and leaving it to the agency to fill in the lion’s share of the details, Congress put in place intricate specifications governing eligibility for lawful presence. This comprehensive scheme indicates that DHS has no discretion to supplement or amend the statutory provisions in any manner, least of all by memorandum.

2

The relief that Congress has extended to removable aliens likewise confirms that DACA exceeds DHS’ delegated authority. Through deferred action, DACA grants temporary relief to removable aliens on a programmatic scale. But as with lawful presence, Congress did not expressly grant DHS the authority to create categorical exceptions to the statute’s removal requirements. And again, as with lawful presence, the intricate level of detail in the federal immigration laws regarding relief from removal indicates that DHS has no discretionary authority to supplement that relief with an entirely new programmatic exemption.

At the outset, Congress clearly knows how to provide for classwide deferred action when it wishes to do so. On multiple occasions, Congress has used express language to make certain classes of individuals eligible for deferred action.⁴² Congress has failed to provide

⁴¹ [Note 4 in original] The immigration statutes also provide for conditional lawful permanent residence status.

⁴² [Note 6 in original] In the DAPA litigation, DHS noted that some deferred-action programs have been implemented by the Executive Branch without explicit legislation. But “past practice does not, by itself, create [executive] power.” If any of these programs had been challenged, it would seem that they would be legally infirm for the same reasons as DACA. Moreover, if DHS had the authority to create new categories of aliens eligible for deferred action, then all of Congress’ deferred-action legislation was but a superfluous exercise. Finally, whereas some deferred-action programs were followed by legislation, DACA has existed for eight years, and Congress is no closer to a legislative

similar explicit provisions for DACA recipients, and the immigration laws contain no indication that DHS can, at will, create its own categorical policies for deferred action.

Other provisions pertaining to relief from removal further demonstrate that DHS lacked the delegated authority to create DACA. As with lawful presence, Congress has provided a plethora of methods by which aliens may seek relief from removal. For instance, both permanent and temporary residents can seek cancellation of removal if they meet certain residency requirements and have not committed certain crimes. §§ 240A(a)–(b). And certain nonpermanent residents may have their status adjusted to permanent residence during these proceedings. § 240A(b)(2). Aliens can apply for asylum or withholding of removal during removal proceedings unless they have committed certain crimes. §§ 208, 241(b)(3). Applicants for certain nonimmigrant visas may be granted a stay of removal until the visa application is adjudicated. § 237(d). And, aliens may voluntarily depart rather than be subject to an order of removal. § 240B.

In sum, like lawful presence, Congress has provided for relief from removal in specific and complex ways. This nuanced detail indicates that Congress has provided the full panoply of methods it thinks should be available for an alien to seek relief from removal, leaving no discretion to DHS to provide additional programmatic forms of relief.⁷

3

Finally, DHS could not appeal to general grants of authority, such as the Secretary’s ability to “perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter,” § 103(a)(3), or to “[e]stablis[h] national immigration enforcement policies and priorities,” 6 U.S.C. § 202(5). See also INA § 103(g)(2). Because we must interpret the statutes “as a symmetrical and coherent regulatory scheme,” these grants of authority must be read alongside the express limits contained within the statute. Basing the Secretary’s ability to completely overhaul immigration law on these general grants of authority would eviscerate that deliberate statutory scheme by “allow[ing the Secretary of DHS] to grant lawful presence ... to any illegal alien in the United States.” Not only is this “an untenable position in light of the INA’s intricate system,” but it would also render many of those provisions wholly superfluous due to DHS’ authority to disregard them at will. And in addition to these fatal problems, adopting a broad interpretation of these general grants of authority would run afoul of the presumption that “Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.” And it would also conflict with the major questions doctrine, which is based on the expectation that Congress speaks clearly when it delegates the power to make “decisions of vast economic and political significance.”

Read together, the detailed statutory provisions governing temporary and lawful permanent resident status, relief from removal, and classwide deferred-action programs lead ineluctably to the conclusion that DACA is “inconsisten[t] with the design and structure of the statute as a whole.” * * * The immigration statutes contain a level of granular specificity that is exceedingly rare in the modern administrative state. It defies all logic and common sense to conclude that a statutory scheme detailed enough to provide conditional lawful presence to

solution than it was in 2012.

groups as narrowly defined as “alien entrepreneurs,” § 216A, is simultaneously capacious enough for DHS to grant lawful presence to almost two million illegal aliens with the stroke of a Cabinet secretary’s pen.

B

Then-Attorney General Sessions concluded that the initial DACA program suffered from the “same legal ... defects” as DAPA and expanded DACA, finding that, like those programs, DACA was implemented without statutory authority. Not only was this determination correct, but it is also dispositive for purposes of our review. “It is axiomatic that an administrative agency’s power ... is limited to the authority granted by Congress.” DHS had no authority here to create DACA, and the unlawfulness of that program is a sufficient justification for its rescission. * * *

In implementing DACA, DHS under the Obama administration arrogated to itself power it was not given by Congress. Thus, every action taken by DHS under DACA is the unlawful exercise of power. Now, under the Trump administration, DHS has provided the most compelling reason to rescind DACA: The program was unlawful and would force DHS to continue acting unlawfully if it carried the program forward.

III

The majority’s demanding review of DHS’ decisionmaking process is especially perverse given that the 2012 memorandum flouted the APA’s procedural requirements—the very requirements designed to prevent arbitrary decisionmaking. Even if DHS were authorized to create DACA, it could not do so without undertaking an administrative rulemaking. * * *

As described above, DACA fundamentally altered the immigration laws. * * * DACA is thus what is commonly called a substantive or legislative rule.⁴³ As the name implies, our precedents state that legislative rules are those that “have the force and effect of law.” * * *

Because DACA has the force and effect of law, DHS was required to observe the procedures set out in the APA if it wanted to promulgate a legislative rule. * * * Because DHS failed to engage in the statutorily mandated process, DACA never gained status as a legally binding regulation that could impose duties or obligations on third parties.

Given this state of affairs, it is unclear to me why DHS needed to provide any explanation whatsoever when it decided to rescind DACA. * * *

Instead of recognizing this, the majority now requires the rescinding Department to treat the invalid rule as though it were legitimate. As just explained, such a requirement is not supported by the APA. * * *

At bottom, of course, none of this matters, because DHS *did* provide a sufficient explanation for its action. DHS’ statement that DACA was ultra vires was more than sufficient

⁴³ [Note 8 in original] The majority tacitly acknowledges as much, as it must. Otherwise, the majority would have to accept that DACA was nothing more than a policy of prosecutorial discretion, which would make its rescission unreviewable.

to justify its rescission. By requiring more, the majority has distorted the APA review process beyond recognition, further burdening all future attempts to rescind unlawful programs. Plaintiffs frequently bring successful challenges to agency actions by arguing that the agency has impermissibly dressed up a legislative rule as a policy statement and must comply with the relevant procedures before functionally binding regulated parties. But going forward, when a rescinding agency inherits an invalid legislative rule that ignored virtually every rulemaking requirement of the APA, it will be obliged to overlook that reality. Instead of simply terminating the program because it did not go through the requisite process, the agency will be compelled to treat an invalid legislative rule as though it were legitimate.

IV

Even if I were to accept the majority's premise that DACA's rescission required additional policy justifications, the majority's reasons for setting aside the agency's decision still fail.

A

First, the majority claims that the Fifth Circuit discussed only the legality of the 2014 memorandum's conferral of benefits, not its "forbearance component" — *i.e.*, the decision not to place DACA recipients into removal proceedings. The majority, therefore, claims that, notwithstanding the then-Attorney General's legal conclusion, then-Acting Secretary Duke was required to consider revoking DACA recipients' lawful presence and other attendant benefits while continuing to defer their removal. Even assuming the majority correctly characterizes the Fifth Circuit's opinion, it cites no authority for the proposition that arbitrary and capricious review *requires* an agency to dissect an unlawful program piece by piece, scrutinizing each separate element to determine whether it would independently violate the law, rather than just to rescind the entire program.⁴⁴

The then-Attorney General reviewed the thorough decisions of the District Court and the Fifth Circuit. Those courts exhaustively examined the INA's text and structure, the relevant provisions of other federal immigration statutes, the historical practice of deferred action, and the general grants of statutory authority to set immigration policy. Both decisions concluded that DAPA and expanded DACA violated the carefully crafted federal immigration scheme, that such violations could not be justified through reference to past exercises of deferred action, and that the general grants of statutory authority did not give DHS the power

⁴⁴ [Note 14 in original] The majority's interpretation of the Fifth Circuit's opinion is highly questionable. Because a grant of deferred action renders DACA recipients eligible for certain benefits and work authorization, it is far from clear that the Department could separate DACA's "forbearance component" from the major benefits it conferred without running into yet another APA problem. * * * DACA recipients have been eligible for and have received Medicare, Social Security, and work authorization for years. DHS therefore is not writing on a blank slate. Under the majority's rule, DHS would need to amend all relevant regulations and explain why all recipients of deferred action who have previously received such benefits may no longer receive them. Alternatively and perhaps more problematically, it would need to provide a reason why other recipients of deferred action should continue to qualify, while DACA recipients should not. It thus seems highly likely that the majority's proposed course of action would be subject to serious arbitrary and capricious challenges.

to enact such a sweeping nonenforcement program. Based on the reasoning of those decisions, then-Attorney General Sessions concluded that DACA was likewise implemented without statutory authority. He directed DHS to restore the rule of law. DHS followed the then-Attorney General’s legal analysis and rescinded the program. This legal conclusion more than suffices to supply the “reasoned analysis” necessary to rescind an unlawful program. * * *

B

Second, the majority claims that DHS erred by failing to take into account the reliance interests of DACA recipients. But reliance interests are irrelevant when assessing whether to rescind an action that the agency lacked statutory authority to take. * * *

Even if reliance interests were sometimes relevant when rescinding an *ultra vires* action, the rescission still would not be arbitrary and capricious here. Rather, as the majority does not dispute, the rescission is consistent with how deferred action has always worked. As a general matter, deferred action creates no rights—it exists at the Government’s discretion and can be revoked at any time. The Government has made clear time and again that, because “deferred action is not an immigration status, no alien has the right to deferred action. It is used solely in the discretion of the [Government] and confers no protection or benefit upon an alien.” Thus, contrary to the majority’s unsupported assertion, this longstanding administrative treatment of deferred action provides strong evidence and authority for the proposition that an agency need not consider reliance interests in this context.⁴⁵

Finally, it is inconceivable to require DHS to study reliance interests before rescinding DACA considering how the program was previously defended. DHS has made clear since DACA’s inception that it would not consider such reliance interests. Contemporaneous with the DACA memo, DHS stated that “DHS can terminate or renew deferred action at any time at the agency’s discretion.” In fact, DHS repeatedly argued in court that the 2014 memorandum was a valid exercise of prosecutorial discretion in part *because* deferred action created no rights on which recipients could rely. * * *

■ Justice ALITO, concurring in the judgment in part and dissenting in part.

Anyone interested in the role that the Federal Judiciary now plays in our constitutional system should consider what has happened in these cases. Early in the term of the current President, his administration took the controversial step of attempting to rescind the Deferred Action for Childhood Arrivals (DACA) program. Shortly thereafter, one of the nearly 700 federal district court judges blocked this rescission, and since then, this issue has been mired in litigation. In November 2018, the Solicitor General filed petitions for certiorari, and today, the Court still does not resolve the question of DACA’s rescission. Instead, it tells the Department of Homeland Security to go back and try again. What this means is that the Federal Judiciary,

⁴⁵ [Note 16 in original] The majority’s approach will make it far more difficult to change deferred-action programs going forward, which is hardly in keeping with this Court’s own understanding that deferred action is an “exercise in administrative discretion” used for administrative “convenience.” Agencies will likely be less willing to grant deferred action knowing that any attempts to undo it will require years of litigation and time-consuming rulemakings.

without holding that DACA cannot be rescinded, has prevented that from occurring during an entire Presidential term. Our constitutional system is not supposed to work that way.

I join Justice THOMAS's opinion. DACA presents a delicate political issue, but that is not our business. As Justice THOMAS explains, DACA was unlawful from the start, and that alone is sufficient to justify its termination. But even if DACA were lawful, we would still have no basis for overturning its rescission. First, to the extent DACA represented a lawful exercise of prosecutorial discretion, its rescission represented an exercise of that same discretion, and it would therefore be unreviewable under the Administrative Procedure Act. Second, to the extent we could review the rescission, it was not arbitrary and capricious for essentially the reasons explained by Justice KAVANAUGH.

■ Justice KAVANAUGH, concurring in the judgment in part and dissenting in part.

[Kavanaugh's opinion is omitted.]

NOTES AND QUESTIONS

1. The Solicitor General's arguments in the Supreme Court rested primarily on the proposition that the Trump administration's decision to rescind DACA was a valid exercise of discretion to set its own enforcement policies, and therefore was either legally permissible or not subject to judicial review at all. However, as the Court notes, Secretary Duke rested her decision to rescind DACA not on enforcement policy grounds, but on the basis of Attorney General Sessions's categorical, one-page conclusion that the Obama administration had acted unlawfully and unconstitutionally by establishing DACA. And in their public statements, Trump and other administration officials repeatedly insisted that they rescinded DACA because they believed it to be illegal—not for reasons of enforcement policy.⁴⁶

Why did the Trump administration avoid stating directly that it was rescinding DACA in the exercise of discretion to set enforcement policies, and instead insist so firmly that its decision to rescind DACA rested on legal grounds? Relatedly, when given the opportunity by the district court in *NAACP* to issue a new memorandum rescinding DACA, why did Secretary Nielsen decline to do so? By the same token, why did the Solicitor General emphasize to the Supreme Court the legal permissibility of rescinding DACA for policy reasons, rather than the Trump presidency's position that DACA is unlawful and unconstitutional?

2. For his part, why does Chief Justice Roberts avoid directly addressing DACA's legality? As he notes, lower courts concluded that the rescission of DACA was arbitrary and capricious not only because the Trump administration had failed to adequately explain its decision, but because that decision rested on the incorrect legal premise that DACA is unlawful. See, e.g., *Regents of Univ. of California v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 502–10 (9th Cir. 2018) (concluding that “DACA was a permissible exercise of executive discretion”); *Batalla Vidal*, 279 F.Supp.3d at 420–29 (noting that “agency action based on a

⁴⁶ See, e.g., Sarah Sanders, Press Secretary, Briefing at White House (Sept. 5, 2017), <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-090517/> (stating that the decision to end DACA “was a legal decision,” and that “it’s something that he would support if Congress puts it before him”).

misconception of the applicable law is arbitrary and capricious in substance,” and concluding that rescission decision rests on the “legally erroneous” premise that the DACA is unlawful). Are there legitimate reasons why the Court chooses instead to avoid addressing whether the Trump administration’s legal premise about DACA’s legality is correct, or is Justice Thomas correct in charging that Roberts and the other justices in the majority are simply seeking to avoid making a “politically controversial” decision?

In defense of that choice, Roberts emphasizes that the lower courts had “overlook[ed]” that Duke was bound under INA § 103(a)(1) by Sessions’s legal determination in determining the bounds of her permissible discretion. However, the Supreme Court of course is not bound by the Attorney General’s legal conclusion. As such, is Roberts’s invocation of § 103(a)(1) a persuasive basis for declining to directly address whether Duke’s decisionmaking rested on an incorrect legal premise? If DACA is lawful, as lower courts concluded, then what would the “full scope of [Duke’s] discretion” have looked like when she made her decision?

3. Just as the Fifth Circuit did in *Texas v. United States*, Roberts describes DACA as not “simply a non-enforcement policy,” but instead as a “program for conferring affirmative immigration relief” and granting attendant benefits. For his part, Thomas’s dissenting opinion similarly describes DACA as a program that confers “temporary lawful presence and certain federal and state benefits” to its beneficiaries. Are either of these characterizations correct? Roberts also suggests that Duke should have “picked up where the Attorney General’s legal reasoning left off” by considering whether to implement the rescission of DACA in a manner consistent with the Fifth Circuit’s decision, which he describes as having been “careful to distinguish” the “forbearance component” of DAPA from the “eligibility for benefits.” To what extent should Roberts’s discussion of *Texas v. United States* be interpreted as an endorsement of that decision and its reasoning? Does Roberts correctly characterize the Fifth Circuit’s decision in the course of suggesting an avenue that Duke could have followed to terminate DACA properly, or is Thomas correct in calling that description of the Fifth Circuit’s decision “highly questionable”?

In this context, consider again the discussion in the Notes and Questions following *Texas v. United States*, especially on pp. 838–43, above. While the plaintiffs in the litigation challenging DAPA *eventually* foregrounded an argument distinguishing between “forbearance” and “collateral benefits” when the case reached the Supreme Court, the district court order that the Fifth Circuit affirmed made no such distinction—and in any event, those “collateral rights and benefits do not arise from [DACA and DAPA] themselves, but from other laws and regulations.” Anil Kalhan, *The Strange Career of United States v. Texas*, Dorf on Law (Apr. 18, 2016), <http://www.dorfonlaw.org/2016/04/the-strange-career-of-united-states-v.html> (documenting the ways in which “the arguments that the plaintiffs now raise in the Supreme Court diverge from those that they originally made”); Kalhan UCLA, item 11 above (noting that the district court injunction affirmed by the Fifth Circuit was not limited to benefits).

Does this discussion in Roberts’s opinion have potential consequences for the future use of deferred action? See Adam Cox & Cristina Rodriguez, *The Supreme Court’s Ominous DACA Decision: Perils for Dreamers in What Comes Next*, Just Security (Jun. 22, 2020), <https://www.justsecurity.org/70956/the-supreme-courts-ominous-daca-decision-perils-for-dreamers-in-what-comes-next/> (arguing that “the Court’s decision calls into question one of

DACA's key pillars and a crucial tool that executive branch officials have used for decades to ameliorate the plight of many unauthorized noncitizens: the power to authorize them to work while their removal has been put on hold").

4. Justice Thomas claims that the majority's decision creates perverse incentives for executive officials to "unlawfully adopt[] significant legal changes" through executive action and then bind its successors while those actions are challenged and reviewed in court. Does that claim seem correct? Why or why not?

5. What substantive purposes does Justice Alito's separate dissenting opinion seem to advance that are not advanced by Thomas's opinion? Are there continuities either in substance or tone with his other separate opinions during the Supreme Court's 2019 term? For a review and assessment of those opinions, see Ariane de Vogue, *Samuel Alito Dissents. A Frustrating Few Months for the Conservative Justice*, CNN (Jun. 29, 2020), <https://www.cnn.com/2020/06/28/politics/samuel-alito-supreme-court/index.html> (discussing "unusually strong language" in Alito's recent opinions and concluding that "his unhappiness with the court's direction has been palpable"); see also *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2267 (2020) (Alito, J., concurring); *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2153 (2020) (Alito, J., dissenting); *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1754–56, 1759 (2020) (Alito, J., dissenting); *Andrus v. Texas*, 140 S. Ct. 1875, 1887 (2020) (Alito, J., dissenting); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1425–27 (2020) (Alito, J., dissenting).

6. By virtue of the Supreme Court's decision, DHS was obliged to continue administering DACA as the program existed before the Trump presidency's attempt to axe the program in September 2017. However, roughly one month after the Court's ruling, DHS took steps to terminate DACA once again, announcing an "interim" set of changes pending "a full and careful consideration of a full rescission." The policy change effected an immediate, partial termination of DACA and proceeded in two steps.

First, in a letter to Acting DHS Secretary Chad Wolf, Attorney General William Barr withdrew not only the September 2017 letter by Sessions concluding that DACA was unlawful, but also the November 2014 OLC Opinion (discussed above, p. 835) concluding that both DACA and DAPA were "well within the legal authority of the executive branch." Letter from William Barr, Attorney Gen., to Chad F. Wolf, Acting Sec'y of Homeland Sec. (June 30, 2020), <https://www.dhs.gov/publication/attorney-general-william-p-barr-s-letter-acting-secretary-chad-f-wolf-daca>. Barr stated that he was taking those steps "to wipe the slate clean to make clear beyond that doubt that you are free to exercise your own independent judgment in considering the full range of legal and policy issues implicated by a potential rescission or modification of DACA."

Second, on July 28, 2020, Wolf issued a memorandum concluding that DACA, "at a minimum, presents serious policy concerns that may warrant its full rescission":

First, even if the DACA policy could have been justified as a temporary measure when it was created, Congress arguably has had more than sufficient time to consider affording permanent status or immigration relief to the class of aliens covered by the policy. And yet, although various proposals have been advanced to do that, Congress has so far declined to take action. Particularly in

the face of this failure to reach a legislative solution, I have serious doubts as to whether DHS should continue to provide either a reprieve from removal or a grant of attendant benefits to more than half a million aliens through a broad, class-based deferred-action policy.

By contrast, rescinding DACA entirely may well create a more pressing need for Congress to decide whether it wants to address this issue and the underlying conditions that led to a population of this size to remain in the United States in violation of our immigration laws for so long, and any other efforts to reform our immigration system in a manner that advances the national interest. * * *

Second, there has been much debate about the discretion exercised by DHS personnel in implementing the DACA policy. In my view, however, regardless of the amount of discretion that has been exercised or could be exercised under the policy, I have reservations as a matter of policy about setting out a list of detailed criteria, and maintaining a formal process, for non-enforcement. * * *

Third, because DHS is a law enforcement agency, I am concerned about sending mixed messages about DHS's intention to consistently enforce the immigration laws as Congress has written them. DACA makes clear that, for certain large classes of individuals, DHS will at least tolerate, if not affirmatively sanction, their ongoing violation of the immigration laws. I am deeply troubled that the message communicated by non-enforcement policies like DACA may contribute to the general problem of illegal immigration * * * .

Fourth, these concerns are all the more pressing in the context of children. It is vitally important to convey a message that discourages individuals from undertaking what can often be a perilous journey to this country with no legitimate claim to enter or remain. Of course, the DACA policy would not apply to children who are sent or brought to this country today. But rescinding the DACA policy may further DHS's efforts to discourage illegal immigration involving children going forward. By contrast, I am concerned that retaining the policy creates some risk of communicating the contrary message and encouraging such illegal conduct by suggesting a potential for similar future policies.

However, Wolf declined to immediately rescind DACA altogether, opting instead to make immediate changes to "limit its scope" pending the agency's "careful consideration" of whether DACA should be "maintained, rescinded, or modified":

First, while my reconsideration of the DACA policy continues, no new initial requests for DACA should be accepted. Second, advance parole should be granted to current DACA beneficiaries only in exceptional circumstances. Third, going forward, renewals of deferred action and the accompanying work authorization should be granted for one-year, rather than two-year, periods.

These changes will mitigate my concerns without encroaching materially on the reliance interests that have been raised by individuals, organizations, and state

and local governments during the course of the extensive litigation over the Duke and Nielsen Memoranda, and in recent letters to the President and DHS.

* * *

Whatever the merits of these asserted reliance interests on the maintenance of the DACA policy, they are significantly lessened, if not entirely lacking, with regard to aliens who have never before received deferred action pursuant to the policy. And any reliance interests possessed by an alien or a third party within the United States on that alien's ability to remain in the country does not depend on the extraordinary ability to come and go from the country as they please. In light of my concerns about the policy as a whole, I do not believe that, at least absent exceptional circumstances, DHS should continue to make the benefit of advance parole available while I reconsider whether the DACA policy itself should exist. * * *

Nor are the asserted reliance interests significantly affected by shortening the renewal periods from two years to one year. Shortening renewal periods granted during this reconsideration period will have the potential benefit of significantly lessening the lasting effects of the DACA policy if I ultimately decide to rescind it. And the costs will be limited in the meantime, because the aliens who currently have DACA grants and have structured their affairs based on their expectation of its continuance may still seek renewal. They will merely have to seek renewal on an annual, rather than biannual, basis. In a similar manner, the third parties who are benefiting from those aliens' continued presence today will continue to receive the same derivative benefits that they are receiving as long as the aliens' renewals continue—whether on an annual or biannual basis. * * *

Memorandum from Chad F. Wolf, Acting Secretary, Dep't of Homeland Sec., Reconsideration of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" 1, 4 (July 28, 2020), <http://www.dhs.gov/publication/reconsideration-june-15-2012-memo-entitled-exercising-prosecutorial-discretion-respect>. A senior Trump administration official explained to reporters that "despite the Supreme Court ruling, the White House still viewed the program * * * as illegal," and that the Wolf Memo was intended to "limit the scope of DACA while the administration reviews its legality."⁴⁷

In November 2020, U.S. District Judge Nicholas Garaufis of the Eastern District of New York concluded that Wolf was not lawfully serving as Acting Secretary of Homeland Security when he issued the memo modifying and partially rescinding DACA. On that basis, the court vacated the Wolf Memo and directed the Trump presidency to resume operation of DACA as the program existed prior to the attempted rescission in September 2017. *Batalla*

⁴⁷ Lauren Egan & Shannon Pettypiece, *Trump Administration to Reject New DACA Applications During "Comprehensive" Review*, NBC News (Jul. 28, 2020), <https://www.nbcnews.com/politics/white-house/trump-announces-steps-roll-back-daca-program-n1235115>.

Vidal v. Wolf, 501 F.Supp.3d 117 (E.D.N.Y. 2020); *Batalla Vidal v. Wolf*, 2020 WL 7121849 (E.D.N.Y. Dec. 4, 2020).

THE BIDEN ADMINISTRATION AND THE FUTURE OF DACA

Immediately after taking office in January 2021, President Biden directed DHS and DOJ to take steps to “preserve and fortify DACA, and DHS subsequently announced plans to effectuate that directive by issuing a notice of proposed rulemaking to codify DACA in formal regulations. Camilo Montoya-Galvez, *Biden Administration Moves to Safeguard DACA Program for “Dreamers” as Court Ruling Looms*, CBS News, Mar. 26, 2021, <https://www.cbsnews.com/news/biden-administration-to-shore-up-daca-program-for-dreamers-as-court-ruling-looms/>; Presidential Memorandum, 86 Fed. Reg. 7053 (Jan. 20, 2021). The DHS announcement was apparently made in response to earlier rulings by Judge Andrew Hanen that DACA and DAPA violated the notice-and-comment requirements of the Administrative Procedure Act. However, in July 2021—relying significantly on Thomas’s dissenting opinion in *Regents*—Hanen nevertheless issued a ruling invalidating DACA not only on procedural APA grounds, but also on the substantive ground that DHS lacked authority to institute DACA altogether:

Texas v. United States

U.S. District Court for the Southern District of Texas, 2021
549 F.Supp.3d 572

■ ANDREW S. HANEN, U.S. DISTRICT JUDGE:

* * * [In *Regents*,] the dissent filed by Justice Clarence Thomas and joined by Justices Samuel Alito and Neil Gorsuch addressed the ultimate issue that is before this Court—the legality of DACA’s creation. According to the dissenters, DHS was “without any statutory authorization” to create DACA, and, even if DHS did have such authority, the agency needed to go through “the requisite rulemaking process” to create DACA. DACA was therefore an “unlawful program” whose rescission could not have possibly been arbitrary or capricious. While a dissenting opinion does not carry the full force and compelling nature of a majority opinion, it is clear the dissenters found DACA to have been illegal *ab initio*.

Justice Thomas noted that the majority’s failure to address DACA’s creation was “an effort to avoid a politically controversial but legally correct decision” that would result in future “battles to be fought in this Court.” While this controversial issue may ultimately return to the Supreme Court, the battle Justice Thomas predicted currently resides here and it is not one this Court can avoid. * * *

IV.E. Substantive APA Claim

The Government has notified the Court that it “intends to issue Notice of Proposed Rulemaking proposing a new regulation concerning Deferred Action for Childhood Arrivals (DACA) consistent with the President’s Memorandum of January 20, 2021.” That action, if performed appropriately, could resolve the procedural deficiencies [alleged by the plaintiffs]. * * * That being the case, the Court elects to address and rule on the alleged substantive flaws so DHS has a better appreciation of what it must address on remand. * * *

1. Congress has directly spoken on the precise question at issue.

The first step when reviewing an agency's interpretation of a statute that it administers is to apply the ordinary tools of statutory construction and determine whether Congress has directly spoken to the precise question at issue. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." * * *

- a. Congress has not granted DHS the statutory authority to adopt DACA.

In *Texas I*, the Fifth Circuit * * * held that neither of the two statutes that grant DHS authority broadly, 6 U.S.C. § 202(5) or INA § 103, nor any other statute, provided the authority for DHS to implement DAPA or Expanded DACA. The agency's interpretation of the statutes was overly broad, and the statutes did not convey the claimed authority to institute the programs. DHS had argued that those statutes allowed it to enact virtually any kind of deferred action program. The Fifth Circuit reasoned that the agency's interpretation of those statutes would allow the Secretary to grant lawful presence and work authorization to every illegal alien in the United States. * * * Given the INA's intricate system for allocating immigration status, the Fifth Circuit said that this limitless position was "untenable." The same problem exists for DACA.

The Government and Defendant-Intervenors also argue that the authority "is inherent to DHS's prosecutorial rule in determining how to allocate its scarce resources to best enforce the nation's immigration laws." In other words, the Government argues DHS's authority is found in its inherent right to exercise prosecutorial discretion. While the law certainly grants some discretionary authority to the agency, it does not extend to include the power to institute a program that gives deferred action and lawful presence, and in turn, work authorization and multiple other benefits to 1.5 million individuals who are in the country illegally. The delegations of power to DHS "cannot reasonably be construed as assigning decisions of vast economic and political significance, such as [DACA], to an agency."

Moreover, the claim that DHS has an inherent right to create DACA as an exercise of prosecutorial discretion is unreasonable. "Although prosecutorial discretion is broad, it is not 'unfettered.' Declining to prosecute does not transform presence deemed unlawful by Congress into lawful presence and confer eligibility for otherwise unavailable benefits based on that change."

Secretary Napolitano, when fielding questions from the Senate in April of 2012 (just before the implementation of DACA), more or less admitted that DHS's power was limited to true forms of prosecutorial discretion, like administratively closing a case:

SEN. LEE: [G]iven the fact that the DREAM Act was not passed into law, what assurances can you give us or what assurances can I give to my constituents when they approach me and suggest that perhaps there might be an effort under way to back-door these same factors in—through regulatory channels that couldn't be passed through Congress?

SEC. NAPOLITANO: Senator, first, let me begin by saying, having worked in this field for decades now, we strongly need overall reform. And we strongly support the DREAM Act as a legislative enactment

That being said, *what we have the capacity or only jurisdiction to do is to administratively close a case*. That doesn't give the person involved any kind of a green card or anything of that sort. It simply means their case is effectively suspended and they can remain the United States.

This testimony indicates that the Secretary thought that DHS only had authority to administratively close cases. Mere administrative closure, which according to the administrative record is the "preferred mechanism" for exercising discretion on a case-by-case basis, would have been within the purview of prosecutorial discretion. * * *

While Congress has allowed the Executive Branch to create regulations and to selectively grant deferred action in some specific instances, it has reserved for itself the broad authority to regulate immigration. This is further evinced by the fact that Congress had already declined to give a DACA-like population legal status multiple times before DACA's creation[.] * * * This consistent rejection shows Congress's clear intent not to take this action. * * *

Even after the implementation of the DACA Memorandum, Congress has continued to consider and reject proposals to protect a DACA-like population. The Executive Branch cannot just enact its own legislative policy when it disagrees with Congress's choice to reject proposed legislation.

Congress has not given DHS the power to implement DACA, nor can DACA be characterized as authorized by DHS's inherent authority to exercise prosecutorial discretion. * * *

- b. The INA and related statutes provide a comprehensive statutory scheme for removal and allocation of lawful presence.

Congress has already determined that the DACA-eligible population is removable through a variety of provisions in the INA. DACA beneficiaries entered the country either by overstaying a visa or by entering without inspection, and the INA instructs that aliens in both classes are removable. Recipients who entered legally but overstayed their legal permission to be in the country are deportable under INA 237(a)(1)(C)(i): "Any alien ... who has failed to maintain the nonimmigrant status in which the alien was admitted ... is deportable." An alien who is "deportable" under § 237 is "removable." INA § 240(e)(2).

Those who enter the country illegally are also removable. The INA defines "[a]n alien present in the United States who has not been admitted" as an "applicant for admission," INA § 235(a)(1), and further requires all applicants for admission to "be inspected by immigration officers." INA 235(a)(3). "[I]f the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under [INA § 240]." INA § 235(b)(2)(A). In a § 240 removal proceeding, the alien has the burden of proof to show that he or she is not removable for one of two reasons: he or she is "clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182" or "by clear and convincing evidence" he or she is "lawfully

present in the United States pursuant to a prior admission.” INA § 240 (c)(2)(A)-(B). If the alien cannot carry his or her burden of proof under one of these tests, he or she is deemed “removable.” INA § 240(e)(2).

Thus, all DACA applicants and recipients fall into a category for removal regardless of their mode of entry. The DACA Memorandum prevents immigration officials from enforcing these provisions of the INA, whether or not the recipient has entered removal proceedings, is “[currently] in removal proceedings,” or is “subject to a final order of removal regardless of their age.” In other words, DACA prevents the removal of its recipients, despite Congress having dictated their eligibility for removal.

Next, as the Fifth Circuit ruled in *Texas I*, the INA describes several detailed methods by which immigrants may acquire lawful presence in the United States. The INA specifies several particular groups of aliens for whom lawful presence is available⁴⁸ and groups of aliens eligible for “discretionary relief allowing [aliens in deportation proceedings] to remain in the country.”⁴⁹ Congress has also passed a multitude of statutes allocating lawful presence to persons who have served in the armed forces⁵⁰ and persons seeking or possessing a higher education.⁵¹ The *Texas I* court recognized that this statutory scheme did not encompass the groups of persons described by the DAPA and Expanded DACA programs at issue in that case. Similarly, the statutory scheme does not encompass the population given lawful presence by DACA.

Where Congress has explicitly described a statutory scheme with the detail present in these circumstances, an agency may not supplant the scheme with its own methods. In this

⁴⁸ [Note 44 in original] *See, e.g.*, INA §§ 101(a)(20), 245 (lawful-permanent-resident (“LPR”) status); 101(a)(15), 1201(a)(1) (nonimmigrant status); 101(a)(42), 207–09, 241(b)(3) (refugee and asylum status); 212(d)(5) (humanitarian parole); 244 (temporary protected status).

⁴⁹ [Note 45 in original] *Arizona*, 567 U.S. at 396 (citing INA §§ 208 (asylum), 240A (cancellation of removal), 240B (voluntary departure)); *see also* INA § 237(d) (administrative stays of removal for T-and U-visa applicants (victims of human trafficking, or of various serious crimes, who assist law enforcement)).

⁵⁰ [Note 46 in original] *See, e.g.*, INA §§ 327(a) (persons who lost United States citizenship because they served in the armed forces of a United States ally during World War II); 328 (noncitizens who have served honorably in the United States armed forces for at least one year); 329 (noncitizens who served in the United States armed forces during World War I, World War II, Korean hostilities, Vietnam hostilities, or other periods of military hostilities); 329A (posthumous conferral of United States citizenship to noncitizens who died as a result of injuries incurred while serving in periods of hostilities).

⁵¹ [Note 47 in original] *See, e.g.*, INA §§ 101(a)(15)(F) (the “F-1” visa for full-time students) (the “F-2 visa” for dependents of full-time students) (the “F-3” visa for students from Canada and Mexico who commute across the border); 101(a)(15)(H) (the “H-1B” visa for skilled workers) (the “H-4” visa for dependents of “H-1B” visa holders); 101(a)(15)(J) (the “J-1” visa for students, scholars, trainees, teachers, professors, research assistants, specialists, or leaders in a field of specialized knowledge or skill participating in cultural exchange); 101(a)(15)(L) (the “L-1A” visa for foreign employees of a corporation, executives or managers) (the “L-1B” visa for foreign employees of a corporation with specialized knowledge of the company’s techniques or methodologies); 101(a)(15)(M) (the “M-1” visa for vocational or technical students) (the “M-2 visa” for dependents of vocational or technical students).

instance, Congress's careful plan for the allotment of lawful presence forecloses the possibility that DHS may designate up to 1.5 million people to be lawfully present.

Ultimately, "the INA expressly and carefully provides legal designations allowing defined classes of aliens to be lawfully present," and Congress has not granted the Executive Branch free rein to grant lawful presence to persons outside the ambit of the statutory scheme.

- c. The INA provides a comprehensive statutory scheme for the allocation of work authorization.

The INA's statutory scheme intricately describes groups to whom Congress wishes to grant work authorization, delineating precise categories of aliens for whom work authorization is available. Where Congress has expressed its intent to provide certain groups of aliens with work authorization, it has promulgated specific laws requiring DHS to do so. Further, Congress has specified particular instances where DHS "may" issue work authorization, specifically delegating to the agency areas in which it may exercise discretion. Neither of these parts of Congress's statutory scheme include the DACA recipients. Congress has also specified that aliens not lawfully admitted for permanent residency with pending removal proceedings are *ineligible* for work authorization. INA § 236(a)(3). DACA specifically applies to individuals in removal proceedings and contradicts Congress's intent, as it enables those aliens to apply for work authorization.

DACA's work authorization also undermines the Immigration Reform and Control Act (IRCA). The Supreme Court has "often recognized that a 'primary purpose in restricting immigration is to preserve jobs for American workers.'" In 1986, "Congress enacted IRCA as a comprehensive framework for 'combating the employment of illegal aliens.'" Through criminal and civil penalties for employers and civil penalties for employees, IRCA made it "illegal for employers to knowingly hire, recruit, refer, or continue to employ unauthorized workers." [INA § 274a(a)(1)(A).] Thus, it is illegal for employers to hire illegal aliens, including those eligible for DACA, but for the fact DACA allows its recipients to obtain work authorization.

DACA actually goes further to undermine Congress's intent to protect American workers as it *requires* applicants to apply for work authorization. (*See* Doc. No. 9, Ex. 20 at 23) ("In addition to the [DACA renewal and application form], all individuals must also submit a Form I-795, Application for Employment Authorization"). Requiring up to 1.5 million aliens to apply for work authorization contradicts the clear congressional purpose of preserving employment opportunities for those persons legally residing in the United States. The DACA program is therefore contrary to the immigration statutes and to Congress's goal of "closely guarding access to work authorization and preserving jobs for those lawfully in the country." *

* *

- d. For some, DACA defies the statutory scheme by awarding advance parole and a clearer path to legal status.

The Plaintiff States also complain that DACA contradicts the statutory scheme by allowing recipients access to "advance parole." Advance parole is a privilege that allows aliens to leave the United States and then lawfully re-enter the country without being turned away at a port of entry. It is designed to be awarded only "on a case-by-case basis for urgent

humanitarian reasons or significant public benefit.” INA § 212(d)(5)(A). DACA, however, made the entire DACA population eligible to apply for advance parole, and expanded these two enumerated categories beyond their intended scope. Due to their DACA status, recipients are allowed to receive advance parole and then to travel outside the United States for a host of reasons, including work-related conferences, semester-abroad programs, and job interviews. Congress did not intend advance “parole authority to create an ad hoc immigration policy or to supplement current immigration categories without Congressional approval.”

In addition to DHS’s generous interpretation of the phrases “urgent humanitarian reasons” and “significant public benefit” for DACA recipients, allocating advance parole to some DACA recipients subverts statutory law in two other ways: 1) it lets certain individuals adjust illegal status to lawful presence and then possibly to legal status by curing the “inadmissibility bar,” and 2) it lets recipients avoid the statutory “unlawful presence bars.”

First, DACA recipients’ entitlement to apply for advance parole contradicts the statutory scheme by curing the bar for unlawful entry. Ordinarily, an alien present in the United States may apply for an adjustment of status to change his or her legal immigration classification to that of an LPR (this is also known as receiving a “Green Card”). There are several possible ways to do this, including an employment qualification or a specified family relationship (like marriage to a United States citizen), but applicants will be deemed inadmissible—that is, they will be unable to adjust their status—if they are present “without being admitted or paroled into the United States.” Generally, immigrants who first entered the United States without inspection are ineligible to adjust their status because they were not “admitted” legally when they first entered the country. Approximately one half of the DACA population is in this category.

DACA, through its advance parole eligibility, allows this segment to circumvent the “inadmissibility bar”—the requirement that aliens be “admitted or paroled into the United States” to adjust status. Once a DACA recipient leaves the country and returns to the United States through advance parole, that individual, who would otherwise be subject to the inadmissibility bar, can now adjust status because he or she has been paroled legally back into the United States. Thus, DACA’s grant of advance parole eligibility allows its recipients to directly circumvent the INA’s statutory requirements.⁵²

Through 2015, over 20,000 DACA recipients had been approved for advance parole, and of those, approximately 3,000 were subsequently granted an adjustment of status. Although this number may seem small compared to the possible DACA population of 1.5 million people, it is not insignificant. Despite the DACA Memorandum stating that it “confers no substantive right, immigration status or pathway to citizenship,” DACA does, in fact, enable certain individuals to change their inadmissible status (due to unlawful entry) into an admitted/paroled category and in some cases then provides a clearer pathway to citizenship. This process is another way DACA directly undermines the deterrent effect intended by

⁵² [Note 58 in original] This “loophole” is not needed by many DACA recipients who overstayed their visas, as they were “admitted” when they first entered the country. Also, all LPR applicants must still meet other requirements, such as having a family relationship. Nevertheless, for a number of DACA recipients, the program’s grant of eligibility for advance parole allows them to adjust status where they otherwise would be barred by law.

Congress.

Second, advance parole for DACA recipients subverts the “unlawful presence bars” instituted by statute. *See* INA § 212(a)(9)(B)(i). Under these provisions, an alien who entered the United States illegally or remained in the United States longer than allowed is unable to return to the United States upon leaving. Individuals who have left the country after having been illegally present for more than 180 days must remain out of the United States for three years, and those illegally present for more than a year must remain out for ten years before they may again become admissible to the United States. All of the DACA recipients have been in the country illegally for more than one year, so the ten-year bar would apply. DACA’s grant of advance parole eligibility, however, allows DACA recipients to travel abroad and then return to the United States without complying with either the three-or ten-year bar. Through DACA, all of these recipients effectively avoid the dictates of Congress while thousands of other individuals who have complied with the law are waiting for their bar period to run. Thus, DACA is contrary to the statutory scheme devised by Congress.

e. DACA fails *Chevron*’s first step.

In sum, DACA cannot withstand analysis under *Chevron*’s first step because Congress has directly addressed the precise issue at hand. It has not delegated the authority to adopt DACA to DHS. Congress’s clear articulation of laws for removal, lawful presence, and work authorization illustrates a manifest intent to reserve for itself the authority to determine the framework of the nation’s immigration system. Against the backdrop of Congress’s “careful plan,” DHS may not award lawful presence and work authorization to approximately 1.5 million aliens for whom Congress has made no provision. DACA is “in excess of statutory jurisdiction” and “short of statutory right,” and therefore violates the APA. An agency’s role is to administer the laws Congress passes, not to enact its own new legislative policy[.] * * *

2. Even if Congress had not spoken directly on the issue, DHS’s interpretation is not a reasonable one.

This Court’s ruling at the first step of *Chevron* alone provides a sufficient ground to settle the question presented, but the Court will proceed to analyze the DACA program under the second step of *Chevron*. At the second *Chevron* step, if the relevant statute is silent or ambiguous, the court asks “whether the agency’s answer is based on a permissible construction of the statute.” * * *

DACA is not a reasonable interpretation of any statute and is “manifestly contrary” to the statutory scheme promulgated by Congress. For the same reasons discussed in this Court’s analysis under the first step of *Chevron*, the program would not pass the second step: DACA is an unreasonable interpretation of the law because it usurps the power of Congress to dictate a national scheme of immigration laws and is contrary to the INA. DACA would grant lawful presence and work authorization to over a million people for whom Congress has made no provision and has consistently refused to make such a provision.

DHS’s interpretation of its authority is especially unreasonable given the Supreme Court’s precedent finding Congress intended to completely preempt further regulation in the area of immigration. The Supreme Court has found that state laws regulating the employment of aliens are preempted when they stand “as an obstacle to the accomplishment and execution

of the full purposes and objectives of Congress,” because they would interfere with “the careful balance struck by Congress with respect to unauthorized employment of aliens.” *Arizona*, 567 U.S. at 406 (quotations omitted). Like those state statutes, DACA not only interferes with the employer side of this balancing act, which makes it illegal for employers to hire those who are here illegally, but it interferes with the labor side as well.

In *Arizona*, the Supreme Court recounted the background as to why Congress did not impose criminal penalties on aliens working illegally. The Court quoted the report of a Commission set up by Congress that concluded such penalties would be “unnecessary and unworkable.” They were unnecessary, at least in part, because the aliens already faced the loss of their ability to adjust status, INA §§ 245(c)(2), (8), and potential removal from the country. INA § 237(a)(1)(C)(i). DACA, of course, removes these consequences.

All of these measures enacted by Congress to protect American jobs for those legally in the country are undermined by DACA. Just as states cannot set up obstacles to the purposes and objectives of Congressional legislation, neither can an executive agency. * * * [U]sing the Government’s logic, echoed by the Defendant-Intervenors in this case, the Executive Branch could theoretically still give every illegal alien currently present in the United States lawful status, if DHS were to do it in smaller numbers, group-by-group. This cannot be a correct interpretation of the law.

The Court “must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.” Common sense instructs that the creation of this program, as was true for the establishment of DAPA and Expanded DACA, is too important to be delegated to an administrative agency. Consequently, DHS’s interpretation of its authority under the INA is faulty. In the end, the Fifth Circuit’s reasoning in *Texas I* controls this case; it is binding case law for this Court, and the result here is inescapable. * * *

3. DACA is not supported by historical precedent.

Defendant-Intervenors also argue historical precedent provides a source of authority for the institution of DACA. * * * In distinguishing previous deferred action programs from DAPA, in *Texas I* the Fifth Circuit noted that DAPA was not a bridge from one legal status to another. Likewise, DACA is not a bridge from one legal status to another. By definition, the DACA recipients did not have a legal status to begin with and do not have legal status now. They have only lawful presence. * * *

V. Conclusion

DHS violated the APA with the creation of DACA and its continued operation. * * * The DACA Memorandum and the DACA program that it created are hereby vacated and remanded to DHS for further consideration[.] * * *

Nevertheless, these rulings do not resolve the issue of the hundreds of thousands of DACA recipients and others who have relied upon this program for almost a decade. That reliance has not diminished and may, in fact, have increased over time. Therefore, the order of immediate vacatur as it applies to current DACA recipients (but not the order of remand) is temporarily stayed until a further order of this Court, the Fifth Circuit Court of Appeals, or the

United States Supreme Court.

DHS may continue to accept new DACA applications and renewal DACA applications as it has been ordered to by the *Batalla Vidal* court * * * , but it is hereby enjoined from approving any new DACA applications and granting the attendant status. * * * To be clear, neither this order nor the accompanying injunction requires DHS or the Department of Justice to take any immigration, deportation, or criminal action against any DACA recipient, applicant, or any other individual that it would not otherwise take.

Anil Kalhan, *DAPA, “Lawful Presence,” and the Illusion of a Problem*, Yale J. Regulation Notice & Comment (Feb. 12, 2016), <https://www.yalejreg.com/nc/dapa-lawful-presence-and-the-illusion-of-a-problem-by-anil-kalhan/>: [D]escribing DAPA and DACA as entailing a grant of “lawful presence” mischaracterizes those initiatives, relying upon a misunderstanding of both the structure and content of immigration law and the manner in which undocumented immigrants are recognized and constructed as legal subjects. * * * [I]n order to characterize DAPA and DACA as something other than guidance structuring the exercise of enforcement discretion, as permitted by existing law, [the opponents of DAPA and DACA] fashion a unitary but entirely mistaken conception of “lawful presence” itself—one that constitutes an aggregated, intertwined package of benefits, in a manner that approximates conventional understandings of lawful immigration “status”—that has no actual legal basis. * * *

Both DACA and DAPA set forth eligibility criteria and processes for certain individuals falling outside the government’s articulated immigration enforcement priorities to seek “deferred action,” which for decades has been a principal mechanism by which immigration authorities operationalize their exercise of enforcement discretion. Whether under those longstanding agency practices or the memos establishing DACA or DAPA, deferred action provides its recipients with nonbinding, revocable notification that officials have deprioritized enforcement action against them—but by itself does nothing more than that. Indeed, deferred action itself confers *no additional benefits of any kind*. It simply memorializes and provides notification * * * that agency officials have deprioritized the individual’s removal and do not have any present intention to prioritize enforcement action against them. * * *

[N]otice of deferred action under [DAPA and DACA]—like notice of deferred action more generally, under the agency’s longstanding practices—does not confer immunity from removal, lawful immigration status, substantive rights, or a pathway to citizenship. When individuals receive a form I-797 providing notice of deferred action, it expressly tells them that “deferred action is an exercise of prosecutorial discretion” that “does not confer or alter any immigration status,” and that the notification itself “does not constitute employment authorization.” Indeed, it is somewhat misleading, even if not entirely inaccurate, to refer to deprioritization of enforcement action in the form of deferred action as a form of “relief” from removal at all, since it is inherently tenuous and temporary and can be revoked at any time, without any opportunity to contest that revocation. Nobody has any right to seek or obtain deferred action, and if deferred action is denied the individual cannot appeal that denial. * * *

[The suggestion that] the Obama administration flipped a switch and affirmatively doled

out an aggregated, intertwined package of goodies to large numbers of undocumented immigrants by decree in one fell swoop * * * misunderstands how recipients of deferred action (and for that matter, undocumented immigrants more generally) are recognized and constructed as legal subjects. To be sure, it is true that once individuals receive notice of deferred action—whether under DACA, DAPA, or otherwise—other legal consequences may result. However, it bears emphasis that any such legal consequences are disaggregated, piecemeal, and *collateral* to the exercise of enforcement discretion—the result of *other* legal authority, not the result of the guidance documents establishing DACA and DAPA. * * *

[T]he combination of rights, benefits, and obligations that recipients of deferred action bear as legal subjects is not an aggregated and inextricably intertwined package, deriving from a single source of legal authority or a single status determination. To the contrary, that combination of those rights, benefits, and obligations arises from a variety of different sources of federal, state, and even local legal authority—and in this instance is definitely not simply the function of the Obama administration’s establishment of the eligibility criteria and processes for DACA and DAPA that the plaintiffs seek to invalidate. In this context, as in others, recognition of noncitizens as legal subjects is considerably more disaggregated and piecemeal than that.

The disaggregated nature of the collateral legal consequences that may arise when individuals receive notice of deferred action accordingly demands similarly disaggregated analysis of the various sources of legal authority that govern those consequences. * * * [H]owever, neither the plaintiffs nor the lower court judges adjudicating their claims have shown much interest in this litigation in carefully parsing and examining that legal authority. Instead, they have largely directed their fire at “DACA” or “DAPA” writ large, as if the guidance documents establishing those initiatives somehow confer something unitary and coherent that approximates lawful immigration status. Indeed, in the district court [in 2015], U.S. District Judge Andrew Hanen went so far as to repeatedly insist that DACA and DAPA confer *actual* legal immigration status—a conclusion that is flatly incorrect. * * *

In their lawsuit, the plaintiffs therefore must be understood as squarely challenging the manner in which the agency seeks to exercise enforcement discretion to implement its enforcement priorities—because, by their terms, the memos establishing DACA and DAPA only provide guidance and structure for the exercise of enforcement discretion. At every stage of the litigation, the plaintiffs have denied that they are challenging the exercise of enforcement discretion, claiming instead that the “real” targets of their challenge are “benefits” and other legal consequences that they believe to be inherent in DAPA. Part of that denial may involve a refusal to acknowledge deferred action as a legitimate means of exercising enforcement discretion at all. But to an even greater extent, that denial also seems to rest upon an even more basic misunderstanding of the manner in which DACA, DAPA, and deferred action actually operate, along with an inability or unwillingness to directly engage, in a precise way, with the legal authority governing any of the particular legal consequences with which they purport to take issue.

NOTES AND QUESTIONS

1. Judge Hanen’s opinion reprises many of the arguments that were raised in the litigation over DAPA discussed earlier in this Chapter. The issues raised in the notes after *Texas v. United States* (on pages 829–46, above), concerning DAPA, are therefore also relevant to

Hanen's most recent decision, concerning DACA.

2. On what basis, precisely, does Judge Hanen dispute the government's position that DACA is a valid exercise of prosecutorial discretion in the form of deferred action? What factors seem most important, and what premises underlie that conclusion? Hanen discusses at some length, for example, the statutory provisions authorizing formal admission of noncitizens as immigrants and nonimmigrants, establishing criteria for naturalization as U.S. citizens, and defining grounds of removability. Are those provisions relevant to the validity of the government's criteria and processes for the exercise of enforcement discretion? If so, why and how? Consider the following:

Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 148–59 (2015): [In its November 2014 opinion on DAPA, DOJ's Office of Legal Counsel] concluded that a limiting principle [for immigration enforcement discretion] could be supplied by "congressional priorities" embedded in the [INA]: these priorities, it concluded, constrain the *substantive criteria* that can lawfully serve as the basis for deportation relief. * * *

To our knowledge, the notion that the exercise of enforcement discretion is lawful only if consistent with congressional priorities had not yet emerged as a claim in the debate at the time OLC issued its opinion. * * * At the same time, the approach feels familiar. It aligns analysis of presidential enforcement authority with the way courts (and offices such as OLC) decide whether administrative agencies have lawfully exercised their delegated authority. This focus on consistency with congressional priorities in the context of administrative rulemaking reflects the dominant approach to administrative law, in which principal-agent models—both informal and formal—are used to conceptualize and evaluate the administrative state. * * *

Of course, elucidating those priorities will likely involve a more freewheeling, inference-based inquiry [in the enforcement context than in other administrative settings] * * * because Congress does not typically draft statutory enforcement priorities to accompany its substantive rules. Priorities can be gleaned from any of a statute's provisions and not just the provisions being enforced or interpreted. * * *

The appeal of the congressional priorities approach is understandable. But we do not believe it provides an effective principle for limiting executive branch enforcement judgments in immigration law and many other domains. The congressional priorities approach fails because those priorities are a mirage.

Little meaningful congressional guidance exists about how to appropriately structure the ex post screening rules for immigration law. * * * [T]he modern structure of immigration law effectively delegates vast screening authority to the President. The interlocking statutory and political developments we describe have opened up a tremendous gap between law on the books and on the ground. In a world where nearly *half* of all noncitizens living in the United States are formally deportable, there can be no meaningful search for the congressionally preferred screening criteria. The keys to the immigrant screening system effectively belong to the Executive, which has the authority (and some might even say obligation) to define screening criteria. * * *

In theory, of course, Congress could constrain de facto delegation by complementing its substantive statutory enactments with detailed enforcement instructions or prohibitions. In

practice, Congress has rarely done this—in immigration law or any other regulatory arena. Occasionally Congress blandly obligates DHS to do something like “prioritize the identification and removal of aliens convicted of a crime by the severity of that crime” or to fund a particular number of beds for immigrant detention (34,000, to be exact). But loose language of prioritization does little to constrain the Executive’s authority, and even numerical prescriptions like the bed-space mandate only scratch the surface of the decisions the Executive must make when enforcing immigration law. Negative injunctions issued by Congress have the potential to be more powerful; prohibiting DHS from granting any immigrant deferred action, for example, would more seriously constrain the President’s power to structure the immigrant screening system. But these sorts of prohibitions are also rare.

In this world, it will generally be futile to search for “congressional priorities” that legally constrain executive branch decisions about which immigrants, from within the vast pool of eleven million unlawfully here, may be deprioritized for deportation (not to mention congressional views as to *how* such deprioritization ought to be structured). And given the absence of such priorities, efforts to invoke them ultimately only obscure the reality that executive branch officials are making important value judgments about our immigrant-screening system. * * *

[O]ur argument [is not] that the very idea of “congressional priorities” is incoherent in principle, or that such priorities can never be identified in practice. Ordinary interpretation often entails the search for Congress’s specific intent or overarching legislative “plan.” The idea of legislative priorities (or purposes, or intent) is, in our view, crucial to the construction of any persuasive interpretive theory (though the fact that it has been embraced by so many conservative legal scholars arguing against DAPA’s lawfulness is perhaps ironic). When a court confronts the question of whether an immigrant’s criminal conviction amounts to a ground of deportability under the [INA], statutory interpretation arguments grounded in legislative intent will be perfectly plausible.

But statutory interpretation questions of this sort typically have as their focus a discrete piece of statutory text. While interpreting that text might require placing it in the context of a larger code or in relation to other statutory provisions, the inquiry will typically be much more grounded in a discrete set of legislative materials than in inquiry into enforcement priorities. Because, as we have noted, legislatures are not in the habit of writing enforcement instructions to accompany the substantive rules of a code, the congressional priorities approach will almost always be unmoored from any particular text and will require drawing inferences from a wide, amorphous range of statutory provisions and legislative materials. These materials are unlikely to contain much guidance. And the lack of guidance should come as no surprise, once we recognize that the pervasive failure of legislatures to write down enforcement instructions reflects the implicit delegation of those choices to the Executive. * * *

[A]rguments have * * * been made that DACA is inconsistent with the INA’s priorities. * * * [But] the mere fact that U.S. citizen children cannot file green card petitions for their parents until age twenty-one does not tell us that the Code prohibits their parents from being provided with some lesser form of relief from deportation. DAPA simply defers a parent’s deportation; it does not provide any lawful immigration status, let alone the right of permanent residency that comes with a green card. For the same reason, critics are mistaken in thinking that the Code’s inclusion of specific, limited grounds for “relief” from removal—like those

contained in the Code’s “Cancellation of Removal” provision—undercuts DAPA’s legality. The relief provided under the cancellation provision is, again, green card status, not deferred action. * * *

The INA, initially adopted in 1952 and amended in significant fashion many times in the decades since, consists of a long series of legislative accretions. Each addition to the Code reflects a complicated mix of conflicting priorities either balanced against one another by a single Congress or across Congresses. * * * A statute like the INA—one constructing a comprehensive regulatory scheme that has evolved in dynamic fashion over time and that embodies such a high level of complexity—will often not be amenable to many common intratextualist interpretive moves. The legislative “plan” of the INA is so full of internal contradictions and complexities as to be nearly impossible to characterize as pursuing concrete “priorities” at anything other than the highest level of generality.

3. On the logic of Hanen’s opinion, are the longstanding agency practices concerning deferred action (discussed on pages 803–06 above) permissible *at all*? If so, how may those practices properly be distinguished from the practices for deferred action under DACA?

4. In September 2021, USCIS issued proposed regulations to codify DACA in modified, narrower form. USCIS, Notice of Proposed Rulemaking: Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53736 (Sept. 28, 2021). In its notice of proposed rulemaking, USCIS laid out the program’s legal basis and policy benefits in extensive detail. While relying upon the same eligibility criteria as the original DACA program, the proposed regulations seeks to decouple the component of the program involving “temporary forbearance from removal,” as in the exercise of the agency’s enforcement discretion, from the ancillary and collateral benefits for which DACA beneficiaries might be eligible under separate legal authority. Most notably, the proposed regulations make it optional for DACA applicants to apply for employment authorization, which was required under the original program. Like other deferred action beneficiaries, DACA beneficiaries would still be permitted to apply for employment authorization, which would continue to be granted only if applicants demonstrate “economic necessity to work”—the same substantive standard that was initially instituted by the Reagan administration in 1987. In contrast to the original DACA program, work authorization would automatically terminate if an individual’s deferred action under DACA itself were terminated. Does this modified approach seem more likely to satisfy the judges who have viewed DACA and DAPA with suspicion in earlier rounds of litigation?

CHAPTER 9

REMOVAL PROCEDURE

Page 867, after the second full paragraph insert:

In *Matter of M-S-*, 27 I & N Dec. 509 (A.G. 2019), the Attorney General held that a noncitizens “transferred from expedited to full removal proceedings after establishing a credible fear are ineligible for bond.” This effort to block bond hearings was enjoined shortly after the decision. *Padilla v. ICE*, No. 18-cv-00928, 2019 WL 2766720 (W.D. Wash. July 2, 2019). The Ninth Circuit agreed, finding that “the district court did not abuse its discretion in concluding that plaintiffs are likely to succeed on their challenge under the Due Process Clause to the detention of class members without any opportunity for a bond hearing” See *Padilla v. ICE*, 953 F.3d 1134, 1152 (9th Cir. 2020). The Supreme Court then granted certiorari, vacated the judgment, and remanded for further consideration in light of *Dep’t of Homeland Security v. Thuraissigiam*, 140 S.Ct. 1959 (2020).

As noted above in Chapter 2, the Supreme Court further narrowed bond eligibility in *Johnson v. Guzman Chavez*, 141 S.Ct. 2271 (2021), finding that respondents who had previously been ordered removed, had reentered without authorization, and were placed in withholding-only removal proceedings were not entitled to bond hearings.

Page 870, before first full paragraph insert:

Several courts of appeals disagreed with the BIA’s conclusion regarding the narrow scope of an immigration judge’s authority to administratively close cases. For example, the Seventh Circuit found that 8 C.F.R. § 1003.10(b)

permits the discretionary exercise of “any action” that is “appropriate and necessary for the disposition of ... cases.” Administrative closure is plainly an “action.” And “appropriate and necessary” is a capacious phrase. Unsurprisingly, then, an immigration judge might sometimes conclude, in exercising [this] discretion ...that it is appropriate and necessary to dispose of a case through administrative closure. For example, in cases in which two coordinate offices in the executive branch are simultaneously adjudicating collateral applications, closing one proceeding might help advance a case toward resolution. Moreover, cases must be disposed of fairly, and granting a noncitizen the opportunity to pursue relief to which she is entitled may be appropriate and necessary for a fair disposition.

Further, the regulation’s requirement that cases be resolved in “timely” fashion does not foreclose administrative closure. For one thing, “timeliness” is not a hard and fast deadline; some cases are more complex and simply take longer to resolve. Thus, not all mechanisms that lengthen the proceedings of a case prevent “timely” resolution. That is presumably why nobody appears to think that continuances conflict with the regulation’s timeliness requirement. And while *Castro-Tum* tries to draw reinforcement from the general policy of expeditiousness underlying immigration law, that policy doesn’t justify departure from the plain text of the rule. Immigration

laws and regulations, like all laws and regulations, are the product of compromise over competing policy goals. Expediousness may be one such goal, but it is not the only goal. * * *

We therefore reject *Castro-Tum* and hold that immigration judges are not precluded from administratively closing cases when appropriate.

Morales v. Barr, 963 F.3d 629, 640-41 (7th Cir. 2020); see also *Romero v. Barr*, 937 F.3d 282, 296-97 (4th Cir. 2019) (concluding that “the relevant regulations confer the general authority to administratively close cases to IJs and the BIA” and “the new interpretation in *Castro-Tum* (1) breaks with decades of the agency’s use and acceptance of administrative closure and (2) fails to give ‘fair warning’ to the regulated parties of a change in a longstanding procedure”).

Noting that three courts of appeals had found administrative closure within an immigration judge’s authority and rejected *Castro-Tum*, and that another court had preliminarily enjoined a regulation seeking to codify it, Attorney General Garland vacated the decision on July 15, 2021 and announced that the regulation is under reconsideration. *Matter of Cruz-Valdez*, 28 I. & N. Dec. 326, 328-29 (A.G. 2021).

On a related note, ICE issued new guidance on prosecutorial priorities and notes that many cases “generally will merit dismissal in the absence of serious aggravating factors.” Memorandum from John D. Trasviña, Principal Legal Advisor, ICE, Office of the Principal Legal Advisor, *Interim Guidance to OPLA Atty’s Regarding Civil Immigr. Enf’t and Removal Policies and Priorities* (May 27, 2021), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf. This was superseded by guidance issued by DHS Secretary Mayorkas, Memorandum from Alejandro N. Mayorkas, Secretary of Homeland Security, Guidelines for the Enforcement of Civil Immigration Law (Sept. 30, 2021), and an subsequent implementing memorandum. Memorandum from Kerry E. Doyle, Principal Legal Advisor, Guidance to OPLA Attorneys Regarding Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion (Apr. 3, 2022), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf.

Arizona, Montana, and Ohio filed a challenge to the guidance and received a nationwide preliminary injunction blocking the implementation of the memorandum from a district court in Ohio. *Arizona v. Biden*, 40 F.4th 375 (6th Cir. 2022). The Sixth Circuit reversed, noting that agents retained significant discretion under the policy and “nothing in the policy...prohibits a single agent from detaining or removing a single person or for that matter any category of noncitizens.” *Id.* The court also noted that “speculation abounds over whether and how the Guidance’s prioritization of the apprehension and removal of noncitizens in the three States will injure them.” *Id.* In a concurrence, Chief Judge Sutton argued that the district court exceeded its authority in issuing a nationwide injunction. *Id.*

The day after the Sixth Circuit issued its opinion, the Fifth Circuit denied a stay pending appeal of a district court order “vacating” the policy guidance, asserting that vacating a policy is different from enjoining a policy and thus the action below was not inconsistent with

Garland v. Aleman Gonzalez. Texas v. United States, 40 F.4th 205 (5th Cir. 2022). While it declined to stay the district court’s order (over the dissents of Justices Sotomayor, Kagan, Barrett, and Jackson), the Supreme Court granted certiorari before judgment and eventually reversed, concluding that the plaintiff States lacked standing. In an opinion for the Court joined by Chief Justice Roberts and Justices Sotomayor, Kagan, and Jackson, Justice Kavanaugh emphasized Supreme Court precedent holding that, “‘in American jurisprudence at least,’ a party ‘lacks a judicially cognizable interest in the prosecution ... of another’”:

The States essentially want the Federal Judiciary to order the Executive Branch to alter its arrest policy so as to make more arrests. But this Court has long held that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution. Consistent with that fundamental Article III principle, we conclude that the States lack Article III standing to bring this suit. * * *

To establish standing, a plaintiff must show an injury in fact caused by the defendant and redressable by a court order. The District Court found that the States would incur additional costs because the Federal Government is not arresting more noncitizens. Monetary costs are of course an injury. But this Court has also stressed that the alleged injury must be legally and judicially cognizable. That requires, among other things, that the dispute is traditionally thought to be capable of resolution through the judicial process—in other words, that the asserted injury is traditionally redressable in federal court. In adhering to that core principle, the Court has examined “history and tradition,” among other things, as a meaningful guide to the types of cases that Article III empowers federal courts to consider.

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. On the contrary, this Court has previously ruled that a plaintiff lacks standing to bring such a suit. * * *

Moreover, lawsuits alleging that the Executive Branch has made an insufficient number of arrests or brought an insufficient number of prosecutions run up against the Executive’s Article II authority to enforce federal law. Article II of the Constitution assigns the “executive Power” to the President and provides that the President “shall take Care that the Laws be faithfully executed.” U. S. Const., Art. II, § 1, cl. 1; § 3. Under Article II, the Executive Branch possesses authority to decide how to prioritize and how aggressively to pursue legal actions against defendants who violate the law. The Executive Branch—not the Judiciary—makes arrests and prosecutes offenses on behalf of the United States.

That principle of enforcement discretion over arrests and prosecutions extends to the immigration context, where the Court has stressed that the Executive’s enforcement discretion implicates not only normal domestic law enforcement priorities but also foreign-policy objectives. In line with those principles, this

Court has declared that the Executive Branch also retains discretion over whether to remove a noncitizen from the United States. * * *

[C]ourts generally lack meaningful standards for assessing the propriety of enforcement choices in this area. After all, the Executive Branch must prioritize its enforcement efforts. That is because the Executive Branch (i) invariably lacks the resources to arrest and prosecute every violator of every law and (ii) must constantly react and adjust to the ever-shifting public-safety and public-welfare needs of the American people.

In addition to the Article II problems raised by judicial review of the Executive Branch’s arrest and prosecution policies, courts generally lack meaningful standards for assessing the propriety of enforcement choices in this area. After all, the Executive Branch must prioritize its enforcement efforts. That is because the Executive Branch (i) invariably lacks the resources to arrest and prosecute every violator of every law and (ii) must constantly react and adjust to the ever-shifting public-safety and public-welfare needs of the American people.

This case illustrates the point. As the District Court found, the Executive Branch does not possess the resources necessary to arrest or remove all of the noncitizens covered by INA § 236(c) and § 241(a)(2). That reality is not an anomaly—it is a constant. For the last 27 years since INA § 236(c) and § 241(a)(2) were enacted in their current form, all five Presidential administrations have determined that resource constraints necessitated prioritization in making immigration arrests.

In light of inevitable resource constraints and regularly changing public-safety and public-welfare needs, the Executive Branch must balance many factors when devising arrest and prosecution policies. That complicated balancing process in turn leaves courts without meaningful standards for assessing those policies.

United States v. Texas, 143 S.Ct. 1964, 1968, 1971–72 (2023). Concurring in the judgment, Justice Gorsuch agreed that the plaintiff States lacked standing, but on different grounds:⁵³

As I see it, the jurisdictional problem the States face in this case isn’t the lack of a “judicially cognizable” interest or injury. The States proved that the Guidelines increase the number of aliens with criminal convictions and final orders of removal released into the States. They also proved that, as a result, they spend more money on everything from law enforcement to healthcare. The problem the States face concerns something else altogether—a lack of redressability.

⁵³ In a separate concurring opinion joined by Gorsuch, Justice Barrett similarly disagreed with the majority’s analysis of standing.

To establish redressability, a plaintiff must show from the outset of its suit that its injuries are capable of being remedied by a favorable decision. Ordinarily, to remedy harms like those the States demonstrated in this suit, they would seek an injunction. The injunction would direct federal officials to detain aliens consistent with what the States say the immigration laws demand. But even assuming an injunction like that would redress the States' injuries, that form of relief is not available to them.

It is not available because of INA § 242(f)(1). There, Congress provided that “no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of “ certain immigration laws, including the very laws the States seek to have enforced in this case. If there were any doubt about how to construe this command, we resolved it in *Garland v. Aleman Gonzalez*. In that case, we held that § 242(f)(1) “prohibits lower courts from ... order[ing] federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions.” Put simply, the remedy that would ordinarily have the best chance of redressing the States' harms is a forbidden one in this case.

The district court thought it could sidestep § 242(f)(1) . Instead of issuing an injunction, it purported to “vacate” the Guidelines [pursuant to the Administrative Procedures Act]. Vacatur, as the district court understood it, is a distinct form of relief that operates directly on agency action, depriving it of legal force or effect. And vacatur, the district court reasoned, does not offend § 242(f)(1), because it does not entail an order directing any federal official to do anything. The States embrace this line of argument before us.

It's a clever workaround, but it doesn't succeed. Start with perhaps the simplest reason. Assume for the moment the district court was right that § 242(f)(1) does not bar vacatur orders and that [the APA] authorizes courts to issue them. Even so, a vacatur order still does nothing to redress the States' injuries. The Guidelines merely advise federal officials about how to exercise their prosecutorial discretion when it comes to deciding which aliens to prioritize for arrest and removal. A judicial decree rendering the Guidelines a nullity does nothing to change the fact that federal officials possess the same underlying prosecutorial discretion. Nor does such a decree require federal officials to change how they exercise that discretion in the Guidelines' absence. It's a point even the States have acknowledged.

In a solo dissent, Justice Alito disagreed with the Court's conclusions about standing and, without detailed analysis, largely embraced the plaintiff States' contested assertions on the substantive merits of their lawsuit:

At issue here is Congress's authority to control immigration, and “[t]his Court has repeatedly emphasized that ‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.” In the exercise of that power, Congress passed and President Clinton signed a law that commands the detention and removal of aliens who have been convicted

of certain particularly dangerous crimes. The Secretary of Homeland Security, however, has instructed his agents to disobey this legislative command and instead follow a different policy that is more to his liking. And the Court now says that no party injured by this policy is allowed to challenge it in court.

That holding not only violates the Constitution's allocation of authority among the three branches of the Federal Government; it also undermines federalism. This Court has held that the Federal Government's authority in the field of immigration severely restricts the ability of States to enact laws or follow practices that address harms resulting from illegal immigration. If States are also barred from bringing suit even when they satisfy our established test for Article III standing, they are powerless to defend their vital interests. If a President fails or refuses to enforce the immigration laws, the States must simply bear the consequences. That interpretation of executive authority and Article III's case or controversy requirement is deeply and dangerously flawed.

* * *

Congress enacted a law that requires the apprehension and detention of certain illegal aliens whose release, it thought, would endanger public safety. The Secretary of DHS does not agree with that categorical requirement. He prefers a more flexible policy. And the Court's answer today is that the Executive's policy choice prevails unless Congress, by withholding funds, refusing to confirm Presidential nominees, threatening impeachment and removal, etc., can win a test of strength. Relegating Congress to these disruptive measures radically alters the balance of power between Congress and the Executive, as well as the allocation of authority between the Congress that enacts a law and a later Congress that must go to war with the Executive if it wants that law to be enforced.

Page 870, before first full paragraph insert:

Continuing his unprecedented increase in using the certification power, in *Matter of S-O-G- & F-D-B-*, 27 I & N Dec. 462, 463 (A.G. 2018), Attorney General Jeff Sessions intervened to override longstanding practices of immigration judges in the control of their dockets. Sessions ruled that "immigration judges have no inherent authority to terminate or dismiss removal proceedings," and declared that in terminating cases immigration judges cannot rely "on 'the particular facts and circumstances of [the] case' ... [and] have no inherent authority to terminate removal proceedings even though a particular case may pose sympathetic circumstances." As with the limits on continuances discussed above, a central effect of this ruling has been to inhibit immigration judges from halting the deportation process to allow applications relevant to relief to be adjudicated by USCIS or other entities. See *Matter of Sujitno Sajuti*, 2020 WL 1244527 at *3 (B.I.A Jan. 27, 2020) (unpublished) (finding that although USCIS had found respondent prima facie eligible for U status, "[u]ntil the respondent is granted a U visa, he remains removable and therefore the Immigration Judge cannot terminate proceedings").

Although Biden administration Attorney General Merrick Garland made no reference to *Matter of S-O-G- & F-D-B-* in his decision overturning *Matter of Castro-Tum*, the authority

that permits an immigration judge to administratively close a matter has application to the immigration judge's ability to grant continuances. See *Matter of Cruz-Valdez*, 28 I. & N. Dec. 326, 328-29 (A.G. 2021). See also Executive Office of Immigration Review, Memorandum of Jean C. King, Acting Director, *Establishing a Dedicated Docket for Certain Individuals in Removal Proceedings* (May 27, 2021), <https://www.justice.gov/eoir/book/file/1399361/download> (noting that respondents "have the opportunity to request continuances ... and immigration judges retain discretion to determine whether a continuance should be granted for good cause").

Page 888, replace Items 3 and 4 with:

3. Before *Pereira*, it was common practice to serve an NTA without specific time or place information, followed later by service of a Notice of Hearing in Removal Proceedings specifying the time and place. Under this approach, a revised NTA typically was not issued. The *Pereira* majority rejected the notion that a later notice of time and place cures the omission of that information in the NTA. Consider the majority's sweeping language that a "putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a 'notice to appear under section 239(a),' and so does not trigger the stop-time rule." Yet despite this clear language, in *Niz-Chavez v. Garland*, Justice Gorsuch was prompted to note:

Perhaps the government could have responded to *Pereira* by issuing notices to appear with all the information INA § 239(a)(1) requires—and then amending the time or place information if circumstances required it. After all, in the very next statutory subsection, § 239(a)(2), Congress expressly contemplated that possibility. But, at least in cases like ours, it seems the government has chosen instead to continue down the same old path. Here, the government sent Mr. Niz-Chavez one document containing the charges against him. Then, two months later, it sent a second document with the time and place of his hearing. In light of *Pereira*, the government now concedes the first document isn't enough to trigger the stop-time rule. Still, the government submits, the second document does the trick. On its view, a "notice to appear" is complete and the stop-time rule kicks in whenever it finishes delivering all the statutorily prescribed information. The government says it needs this kind of flexibility to send information piecemeal. It even suggests it should be allowed to spread the statutorily mandated information over as many documents and as much time as it wishes.

141 S.Ct. 1474, 1479 (2021). Rejecting the government's "notice-by-installment theory," the Court clarified that "[t]o trigger the stop-time rule, the government must serve 'a' notice containing all the information Congress has specified. To an ordinary reader—both in 1996 and today—'a' notice would seem to suggest just that: 'a' single document containing the required information, not a mishmash of pieces with some assembly required. *Id.* at 1480.

4. If a piecemeal notice is "not a notice to appear" at all, the effect of *Pereira* and *Niz-Chavez* potentially extends well beyond the stop-time rule, because an NTA is required to properly commence a removal proceeding. Specifically, in immigration court a "[c]harging

document means the written instrument which initiates a proceeding before an Immigration Judge. . . . For proceedings initiated after April 1, 1997, these documents include a Notice to Appear. . . .” 8 C.F.R. § 1003.13 (2018). In turn “[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court. . . .” 8 C.F.R. § 1003.14 (2018). Does the Court’s language mean that if the government has failed to file a proper NTA it has failed to properly initiate proceedings? Did IJs therefore lack jurisdiction in virtually all removal proceeding for the past several years? In other words, is every order of removal entered in a case that was purportedly initiated with a putative but flawed NTA invalid?

Responding to a wave of motions to reopen after final orders of removal and to terminate pending removal proceedings where NTAs omitted time and date information, the BIA ruled that “a notice to appear that does not specify the time and place of an alien’s initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings and meets the requirements of section 239(a) of the Act, so long as a notice of hearing specifying this information is later sent to the alien.” *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441 (BIA 2018). The courts of appeal have agreed. For example, the Fifth Circuit ruled that it has “already joined the overwhelming chorus of our sister circuits in rejecting attempts to extend *Pereira*’s narrow holding beyond the stop-time rule context.” *Maniar v. Garland*, 998 F.3d 235, 242 (5th Cir. 2021) (asserting that *Niz-Chavez* does not “dislodge its ultimate holding” limiting the reach of *Pereira*).

If immigration courts were determined to have lacked “jurisdiction” because of omissions in putative NTAs, what type of jurisdiction would they have lacked? As Professor Kit Johnson observes, the distinction between personal jurisdiction (which may be waived by appearance) and subject matter jurisdiction (which may not be waived at all) is critical to any analysis of the reach of the Court’s ruling in *Pereira*. Section 1003.14, which determines when a removal proceeding commences, refers only to the immigration court’s “jurisdiction,” without specification. Professor Johnson argues persuasively that under *Pereira* defects in purported NTAs implicate subject matter jurisdiction. See Kit Johnson, *Pereira v. Sessions: A Jurisdictional Surprise for Immigration Courts*, 50 Colum. Hum. Rts. L. Rev. 1 (2019). Of course, even if cases were dismissed under *Pereira*, the government could immediately serve new NTAs to commence new removal proceedings. But even this might provide noncitizens who did not prevail initially with new opportunities to present their cases.

Page 889, at end of Item 4 insert:

The BIA has ruled that a “notice to appear that does not include the address of the Immigration Court where the Department of Homeland Security will file the charging document . . . or include a certificate of service indicating the Immigration Court in which the charging document is filed . . . does not deprive the Immigration Court of subject matter jurisdiction.” *Matter of Rosales Vargas*, 27 I. & N. Dec. 745 (B.I.A. 2020). For example, in upholding jurisdiction despite a defective NTA the Tenth Circuit found that “the Supreme Court in *Pereira* addressed only the ‘narrow question’ of whether a notice to appear that omits the time or place of the initial hearing triggers the statutory stop-time rule for cancellation of

removal and “join[ed] the overwhelming chorus of our sister circuits that have already rejected similar *Pereira*-based challenges.”⁵⁴

Page 899, before Item 7 insert:

6A. In a move that immigration judges formally protested through their union, the National Association of Immigration Judges, as an attempt to limit their independence, under the Trump administration DOJ imposed quotas for case completion and tied these to performance reviews of immigration judges. Exec. Office for Immigr. Review, Memorandum from James McHenry, Director, Immigration Judge Performance Metrics to All Immigration Judges (Mar. 30, 2018), <https://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics>. According to the NAIJ, the imposition of a tight case completion timeframe interferes with noncitizens’ rights to examine and present evidence and fails to provide adequate time for individuals to find attorneys, secure expert witnesses, and obtain evidence from overseas. Nat’l Ass’n of Immigr. Judges, *Imposing Quotas on Immigration Judges will Exacerbate the Case Backlog at Immigration Courts*, (Jan. 31, 2018), https://www.naij-usa.org/images/uploads/publications/NAIJ_Imposing_Quotas_on_IJs_will_Exacerbate_the_Court_Backlog_1-31-18..pdf (“Imposing quotas on IJs which will form the basis of their performance evaluations and impact their ability to retain their jobs creates an untenable conflict between IJs and the public they serve.”). NAIJ also challenged another threat to their independence, a new EOIR policy “that imposes an unconstitutional prior restraint on immigration judges who wish to speak or write publicly in their personal capacities.” *Nat’l Ass’n. of Immigr. Judges v. McHenry*, No. 20-cv-731 (E.D. Va. July 1, 2020).

Evidence of even more direct interference with the decisional independence of immigration judges by the Attorney General and other senior DOJ officials—in specific cases—burst into public view in the context of *Matter of Castro-Tum*, which is discussed above at pp. 869–70. After Attorney General Sessions issued his decision and the case was remanded to the immigration court in Philadelphia, EOIR instructed the immigration judge, Steven Morley, to hold a hearing on a highly expedited basis. However, at the hearing, an attorney entered an appearance as amicus curiae on behalf of Castro-Tum, who did not appear, and argued that notice to Castro-Tum had been deficient. Rather than ordering Castro-Tum deported, as Sessions and EOIR officials apparently expected, Judge Morley granted a continuance, concluding that the rushed scheduling of the hearing had not left sufficient time for legal notice and that the attorney should have an opportunity to locate Castro-Tum and file a brief on his behalf.⁵⁵ Judge Morley was subsequently informed by EOIR supervisory officials that they did not approve of his handling of the case, which was then reassigned to a supervisory immigration judge for the purpose of ordering Castro-Tum deported at the next hearing. The episode quickly became the subject of widespread news coverage and public controversy, and NAIJ later filed a formal grievance against EOIR on Judge Morley’s behalf. Hamed Aleaziz, *Here’s the Thing About Immigration Court: If the Government Doesn’t Like a Ruling, It Can Get a New*

⁵⁴ So far, the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh circuits have issued similar holdings. See *Martinez-Perez v. Barr*, 947 F.3d 1273, 1278 (10th Cir. 2020).

⁵⁵ Prior to Sessions’s decision, Judge Morley had administratively closed the case on account of concern that notice may have been sent to Castro-Tum at the wrong address.

Judge, BuzzFeed News (Jul. 31, 2018), <https://www.buzzfeednews.com/article/hamedaleaziz/retired-immigration-judges-protest-deportation-case>; Nat'l Ass'n of Immigr. Judges, *Grievance Pursuant to Art. 8 of the Collective Bargaining Agreement Between EOIR and NAIJ* (Aug. 8, 2018), <https://assets.documentcloud.org/documents/4639659/NAIJ-Grievance-Morley-2018-Unsigned.pdf> (arguing that EOIR's interference with Judge Morley's decisional independence violated the collective bargaining agreement with NAIJ, applicable statutory provisions and regulations, and the Due Process Clause).

The Biden administration has issued a number of memoranda altering the flow of cases in immigration court, and some instances restoring aspects of independence. See, e.g., *Matter of Cruz-Valdez*, 28 I. & N. Dec. 326, 328-29 (A.G. 2021) (reinstating docket control through administrative closure); Executive Office of Immigration Review, Memorandum of Jean C. King, Acting Director, *Establishing a Dedicated Docket for Certain Individuals in Removal Proceedings* (May 27, 2021), <https://www.justice.gov/eoir/book/file/1399361/download> (noting that respondents "have the opportunity to request continuances ... and immigration judges retain discretion to determine whether a continuance should be granted for good cause").

Page 987, after last full paragraph insert:

In *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1070 (2020), the Supreme Court gave some clarity to the meaning of "questions of law." The Court noted that "we can reasonably interpret the statutory term 'questions of law' to encompass the application of law to undisputed facts. * * * [I]nterpreting [INA 242(a)(2)(D)] to exclude mixed questions would effectively foreclose judicial review of the Board's determinations so long as it announced the correct legal standard. The resulting barrier to meaningful judicial review is thus a strong indication * * * that 'questions of law' does indeed include the application of law to established facts." The Court then rejected the argument that a request for equitable tolling for a motion to reopen was a nonreviewable question of fact and found it to be judicially reviewable as a question of law.

Page 990, replace first paragraph with:

Before the REAL ID Act, the answer was yes.⁵⁶ Although nothing in the REAL ID Act expressly supersedes those decisions, post-REAL ID Act courts divided on this issue, which the Supreme Court addressed in 2022.⁵⁷

⁵⁶ See, e.g., *Reyes-Vasquez v. Ashcroft*, 395 F.3d 903, 907-09 (8th Cir. 2005) (holding BIA finding of no "continuous physical presence" for cancellation of removal purposes non-discretionary and therefore reviewable); *Morales-Morales v. Ashcroft*, 384 F.3d 418, 421-23 (7th Cir. 2004) (same); *Mireles-Valdez v. Ashcroft*, 349 F.3d 213 (5th Cir. 2003) (same); *Gomez-Lopez v. Ashcroft*, 391 F.3d 1109, 1111 (9th Cir. 2004) (holding finding of no "good moral character," for cancellation of removal purposes, non-discretionary and therefore reviewable).

⁵⁷ Compare, e.g., *Gutierrez v. Mukasey*, 521 F.3d 1114, 1116 (9th Cir. 2008) (holding that court of appeals may review, under substantial evidence standard, BIA finding of no continuous physical presence) with *Cevilla v. Gonzales*, 446 F.3d 658 (7th Cir. 2006) (upholding even an "inexplicable" finding of lack of continuous physical presence, where finding was not "wacky" enough to violate due

***Patel v. Garland*, 142 S.Ct. 1614 (2022):** [Pankajkumar Patel entered the United States without inspection in the early 1990s with his family. They later applied for adjustment of status, and Patel was granted work authorization pending consideration of that application. On that basis, he then sought to renew his Georgia driver’s license, but when doing so he checked a box incorrectly indicating that he was a U.S. citizen. Patel consistently maintained that he did so accidentally. His citizenship status was immaterial to his driver’s license application, since his adjustment application and valid work permit made him eligible for a driver’s license under Georgia law in any event. While state officials initially charged Patel with false representation, that charge was dropped for lack of sufficient evidence.]

[Nevertheless, USCIS denied Patel’s adjustment application (and the derivative applications of his wife and two sons) after concluding that the incorrect representation of U.S. citizenship rendered Patel inadmissible under INA § 212(a)(6)(C)(ii)(I) and therefore statutorily ineligible for adjustment.⁵⁸ Years later, when the government initiated removal proceedings against Patel, his wife, and two of their children, he renewed his adjustment of status application, arguing that he lacked the subjective intent required to be inadmissible under that provision. The IJ denied the application, stating—incorrectly—that Patel had a strong incentive to deceive state officials because only U.S. citizens and LPRs could obtain driver’s licenses and finding that his misrepresentation was intentional. Having concluded that Patel was statutorily ineligible for adjustment, the IJ did not address whether Patel warranted a favorable exercise of discretion. In a 2-1 decision, the BIA affirmed.]

[In his petition for review, Patel argued that (1) no adjudicator could have reasonably concluded that his incorrect representation of citizenship was intentional, and (2) the IJ’s factual findings regarding his eligibility for adjustment did not fall within INA § 242(a)(2)(B)(i)’s preclusion because that provision only applied to the “ultimate decision” to grant or deny discretionary relief, not to threshold decisions regarding statutory eligibility for relief in the first place. While the government agreed with Patel that the court had jurisdiction, based on its decades-long position concerning the scope of § 242(a)(2)(B)(i), it argued that the IJ’s factual findings should not be reversed. Overruling circuit precedent and departing from most other circuits, the en banc Eleventh Circuit rejected both of these positions, adopting an interpretation of § 242(a)(2)(B)(i) that encompassed all decisions made in the course of denying discretionary relief, including those concerning statutory eligibility. After appointing a former clerk to Justice Antonin Scalia as *amicus curiae* to defend the Eleventh Circuit’s decision, the Supreme Court affirmed:]

[INA § 242(a)(2)(B)(i)] does not restrict itself to certain kinds of decisions. Rather, it prohibits review of *any* judgment *regarding* the granting of relief under § 245 and the other enumerated provisions. As this Court has “repeatedly explained,” “the word ‘any’ has an expansive meaning.” Here, “any” means that the provision applies to judgments “of whatever kind” under § 245, not just discretionary judgments or the last-in-time judgment. Similarly, the use of “regarding” “in a legal context generally has a broadening effect, ensuring that the

process); *cf. Saintha v. Mukasey*, 516 F.3d 243, 248 (4th Cir. 2008) (holding INA § 242(a)(2)(D) creates no exception for questions of fact for purpose of the crime-related bar on judicial review).

⁵⁸ See INA § 245(i)(2)(A) (requiring adjustment applicants under § 245(i) to be admissible).

scope of a provision covers not only its subject but also matters relating to that subject.” Thus, § 242(a)(2)(B)(i) encompasses not just “the granting of relief” but also any judgment relating to the granting of relief. That plainly includes factual findings. * * *

In contrast to amicus’ straightforward interpretation, both the Government’s and Patel’s arguments read like elaborate efforts to avoid the most natural meaning of the text. * * *

* We begin with the Government’s argument that “judgment” refers exclusively to a “discretionary” decision, which the Government describes as a decision that is “subjective or evaluative.” According to the Government, this requirement is evident in definitions like this one: “the mental or intellectual process of forming an opinion or evaluation by discerning and comparing,” or “an opinion or estimate so formed” (quoting Webster’s Third New International Dictionary). The Government’s argument is subtle, to say the least, given that none of the definitions it cites expressly references discretion. Evidently, the nature of the decisionmaking process does the work: If the process occurs as the definitions describe, then the decision it yields is discretionary and counts as a judgment. And the Government says that the factual findings in this case do not fit that description.

We do not see how the Government’s cited definitions narrow the field in the way that the Government claims. Rather than delineating a special category of discretionary determinations, they simply describe the decisionmaking process. That process might involve a matter that the Government treats as “subjective” or one that it deems “objective.” Either counts as a judgment, even under the definitions that the Government offers.

Take the credibility determination at issue in this case. It is easily described as an “opinion or evaluation” formed “by discerning and comparing” the evidence presented. The Immigration Judge weighed Patel’s testimony, reviewed documents, and considered Patel’s history to conclude that he was an evasive and untrustworthy witness. Using the word “judgment” to describe that kind of credibility determination is perfectly natural * * *. It is just as natural in other factfinding contexts, like the Immigration Judge’s determination that Patel lied on his driver’s license application. Finding that fact involved the same exercise of evaluating conflicting evidence to make a judgment about what happened.

So to succeed, the Government must do more than point to the word “judgment.” It must show that in context, the kind of judgment to which § 242(a)(2)(B)(i) refers is discretionary. But the text of the provision stops that argument in its tracks because the bar on review applies to “any judgment.” Had Congress intended instead to limit the jurisdictional bar to “discretionary judgments,” it could easily have used that language—as it did elsewhere in the immigration code. See, e.g., § 236(e) (“The Attorney General’s discretionary judgment regarding the application of this section shall not be subject to review” (emphasis added)); § 242(b)(4)(D) (“[T]he Attorney General’s discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion” (emphasis added)). We express no view about what “discretionary judgment” means in those provisions—the point is simply that the absence of any reference to discretion in § 1252(a)(2)(B)(i) undercuts the Government’s efforts to read it in. * * *

In short, the Government is wrong about both text and context. A “judgment” does not necessarily involve discretion, nor does context indicate that only discretionary judgments are covered by § 242(a)(2)(B)(i). * * *

Unlike the Government, Patel interprets § 242(a)(2)(B)(i) to prohibit review of only the ultimate grant or denial of relief, leaving all eligibility determinations reviewable. That, Patel says, is because the provision specifies the kind of judgment to which the bar applies: “any judgment regarding the granting of relief.” Eligibility determinations—which Patel characterizes as “first-step decisions”—are not judgments regarding the granting of relief because eligibility is a necessary but insufficient condition for relief. The only judgment that can actually grant relief is what Patel describes as the “second-step decision” whether to grant the applicant the “grace” of relief from removal. So, Patel argues, that is the sole judgment to which the bar applies.

Like the Government, Patel cannot square his interpretation with the text of § 242(a)(2)(B)(i). He claims that his is the only interpretation that makes sense of “regarding the granting of relief”; as he sees it, “any judgment regarding the granting of relief” must narrow the meaning of “judgment” to include only the decision “whether to grant relief.” To be sure, the reference to “the granting of relief” appears to constrain the provision from sweeping in judgments that have nothing to do with that subject. But as even the Government acknowledges, § 242(a)(2)(B)(i) does not stop at just the grant or denial of relief; it extends to any judgment “regarding” that ultimate decision. Patel’s interpretation to the contrary reads “regarding” out of the statute entirely. * * *

Patel and the Government object that our interpretation of § 242(a)(2)(B)(i) would arbitrarily prohibit review of some factual determinations made in the discretionary-relief context that would be reviewable if made elsewhere in removal proceedings. In this case, for example, the question whether Patel intended to falsely claim to be a citizen on his driver’s license application relates to whether he is statutorily inadmissible, which is both an obstacle to discretionary relief and an independent ground for removal. Presumably because Patel openly acknowledged that he was removable for entering the country illegally, the Government did not premise his removal on the contested claim that he had intentionally misrepresented his citizenship. But if the Government had taken that route, the Immigration Judge’s determinations would have been reviewable in the ordinary course.

That distinction is not arbitrary. It reflects Congress’ choice to provide reduced procedural protection for discretionary relief, the granting of which is “not a matter of right under any circumstances, but rather is in all cases a matter of grace.” That reduced protection is reflected in the burden of proof too: The Government bears the burden of proving removability by clear and convincing evidence, while an applicant bears the burden of establishing eligibility for discretionary relief. For both judicial review and the burden of proof, the context in which a fact is found explains the difference in protection afforded.

[Justice Gorsuch, joined by Justices Breyer, Sotomayor, and Kagan, dissented:] Normally in this country, federal courts shoulder the responsibility of reviewing agency decisions to ensure they are at least supported by “substantial evidence.” A similar, if surely more deferential, principle finds voice in the INA. As relevant here, that statute endows federal

courts of appeals with the power to review “all questions of law and fact ... arising from any action taken or proceeding brought to remove an alien from the United States.” INA § 242(b)(9). And the law further provides that a court may reject the agency’s factual findings underlying an order of removal if it concludes that no “reasonable adjudicator” could adopt them. § 242(b)(4)(B). * * *

That is exactly the sort of argument Mr. Patel seeks to pursue. He hopes to persuade a court of law that the BIA’s factual errors in his case are so obvious no reasonable factfinder could adopt them. It is a claim expressly permitted by statute. Tellingly, in the proceedings before us the government has continued to maintain that, however his case is finally resolved, Mr. Patel is entitled to his day in court. Nor is this some new position. For at least 20 years the government has taken the view that the law permits judicial review in cases like these. * * *

[The] language [of § 242(a)(2)(B)(i)] does not begin to do the work the majority demands of it. * * * [R]equests for adjustment of status involve a two-step process. First, the Attorney General, acting through the BIA, must determine whether an individual is statutorily eligible for adjustment of status. If so, the Attorney General may proceed to the second step and decide whether to grant an adjustment request “in his discretion.” INA §§ 245(a), (i)(2)(A). Undoubtedly, the exception in INA § 242(a)(2)(B)(i) creates a special rule insulating from judicial review the second and purely discretionary decision. But nothing in it disturbs the general rule that courts may entertain challenges to the BIA’s factual findings and legal analysis associated with its first-step eligibility determination.

This much follows directly from the statute’s terms. Subparagraph (B)(i) renders unreviewable only those judgments “regarding the granting of relief.” That phrase has a well-understood meaning. To “grant relief “ is to supply “redress or benefit.” And where, as here, the BIA issues a judgment only at step one, it never reaches the question whether to grant relief or supply some redress or benefit. Instead, the agency resolves only the antecedent question whether an individual is statutorily *eligible to petition* for relief, redress, or a benefit. As the BIA has explained, a judgment at step one can never “result in a grant of the application.” Any “judgment regarding the granting of relief “ comes only at step two where the INA expressly vests the Attorney General with substantial discretion. See [*INS v. St. Cyr*], 533 U.S., at 307 (noting the traditional and longstanding “distinction between *eligibility* for discretionary relief, on the one hand, and the favorable *exercise* of discretion, on the other hand” (emphasis added)). * * *

The majority, of course, offers a different view. Following the Eleventh Circuit’s lead, the majority contends that subparagraph (B)(i)’s phrase “any judgment regarding the granting of relief under § 245“ sweeps more broadly. On its account, the statute denies courts the power to correct *all* agency decisions with respect to an adjustment-of-status application under § 245—both the agency’s step-one eligibility decisions and its step-two discretionary decisions. As a result, no court may correct even the agency’s most egregious factual mistakes about an individual’s statutory eligibility for relief. It is a novel reading of a 25-year-old statute. One at odds with background law permitting judicial review. And one even the government disavows. * * *

The majority insists that the word “regarding” has “a broadening effect.” It even suggests that failing to give the term that effect would be to read it “out of the statute entirely.” But in truth, the word can have either a broadening or narrowing effect depending on context. And in subparagraph (B)(i), “regarding” is much more likely to serve a narrowing function, focusing our attention on a specific subset of judgments—namely, those step-two discretionary judgments “regarding the granting of relief.”

To appreciate the point, consider a hypothetical. Imagine I said: “Please bring me any book regarding the history of the American West from that shelf of history books.” In this sentence, the phrase “regarding the history of the American West” does not broaden the referenced set. Instead, it directs you to a narrow subset of books: those regarding the history of the American West. Any other interpretation misses the point and leaves me with a pile of unwanted volumes.

What is true of this hypothetical is true of subparagraph (B)(i). The phrase “regarding the granting of relief “ does not expand the set—again, the sentence already speaks of “any judgment ... under section ... 245.” Instead, it functions as “limiting language” that narrows the kind of judgments under § 245 the command means to cover. And here that means limiting our attention to the agency’s step-two decision, the only place where it can issue a “judgment regarding the granting of relief.” Any other reading renders the statute a garble. * * *

Congress enacted subparagraph (B)(i) in 1996 to address the narrow question of judicial review over administrative “denials of discretionary relief.” Meanwhile, as the majority acknowledges, Congress adopted subparagraph (D) nearly a decade later and did so to address a much larger problem—the potential that many statutes in the INA foreclosing judicial review might be unconstitutional in certain applications. Congress responded to this potential problem by allowing legal and constitutional challenges under “any other provision of [an entire] chapter” of the U. S. Code. § 242(a)(2)(D). In doing so, subparagraph (D)’s later-in-time and more general reference to “constitutional claims or questions of law” across a full chapter of the U. S. Code did nothing to disturb subparagraph (B)(i)’s targeted application to judgments “regarding the granting of relief “ under § 245. Instead, the statutes work in tandem. The majority’s approach ignores this conclusion, and along with it subparagraph (B)(i)’s specific language.⁵⁹

The majority concludes that courts are powerless to correct an agency decision holding an individual ineligible for relief from removal based on a factual error, no matter how egregious

⁵⁹ [Note 3 in original] There’s at least one more problem here yet. The majority says [INA § 242(a)(2)(D)] preserves constitutional and legal questions for judicial review, and the majority further assumes that Mr. Patel’s petition poses only a factual question. But the question Mr. Patel seeks to pose in court is whether the agency’s factual determinations are ones no “reasonable adjudicator” could have adopted given the record before it. INA § 242(b)(4)(B). The majority never explains why that question is something other than a question of law that subparagraph (D) expressly preserves for judicial review. But why wouldn’t it be? Cf. *Colorado Nat. Bank v. Commissioner*, 305 U.S. 23, 25 (1938) (“It is settled law that a finding of fact [made by an agency] will not be disturbed on review if it is supported by substantial evidence. But whether there is substantial evidence to support a finding is a question of law”).

the error might be. The majority's interpretation has the further consequence of denying *any* chance to correct agency errors in processing green-card applications outside the removal context. Even the government cannot bring itself to endorse the majority's arresting conclusions. For good reason. Those conclusions are at war with all the evidence before us. They read language out of the statute and collapse the law's clear two-step framework. They disregard the lessons of neighboring provisions and even ignore the statute's very title. They make no sense of the statute's history. Altogether, the majority's novel expansion of a narrow statutory exception winds up swallowing the law's general rule guaranteeing individuals the chance to seek judicial review to correct obvious bureaucratic missteps. It is a conclusion that turns an agency once accountable to the rule of law into an authority unto itself. Perhaps some would welcome a world like that. But it is hardly the world Congress ordained.

Page 1009, replace item 11 with:

11. Can *St. Cyr* coexist peacefully with the Court's traditional understanding of the immigration power? The cases you read in Chapter 2 suggest that in the field of immigration Congress has especially wide power (literally unreviewable power, according to some of the cases) to do things that would be constitutionally unacceptable in other spheres. Yet the Court in *St. Cyr* finds at least a serious question whether Congress can constitutionally bar judicial review of deportation orders. Can this apparent tension be reconciled?

12. *St. Cyr* involved a lawful permanent resident challenging deportability. What implications does the decision have for other situations in which noncitizens use habeas corpus to challenge the legality of restraints on their liberty? In *Boumediene v. Bush*, 553 U.S. 723 (2008), the Court held that noncitizens taken into custody by the military on suspicion of being engaged in hostilities against the United States and detained at the U.S. Naval Station at Guantánamo Bay, Cuba, were constitutionally entitled to habeas review (or a constitutionally adequate and effective substitute) in federal court to test the legality of their detention. The Court confirmed several principles that were the basis for *St. Cyr*'s invocation of constitutional avoidance and elevated them to the status of formal constitutional holding, including that the Suspension Clause affirmatively guarantees an individual right to habeas corpus to U.S. citizens and noncitizens alike, and at least in some circumstances even to individuals outside the United States.

Writing a couple of years after *Boumediene* was decided, Gerald Neuman argued that together with *St. Cyr*, the Court's decision in *Boumediene* "gives further reason to doubt the constitutionality of the current regime of 'expedited removal'" under INA § 235(b), as implemented both at the border and within the interior of the United States:

[Expedited removal] does not provide a meaningful opportunity to demonstrate unlawful detention, which the Court considered an uncontroversial constitutional requisite in situations to which the Suspension Clause applies. * * *

What justifies a proceeding with so little investment in accuracy? At the border, expedited removal is founded on the doctrine that arriving aliens have no procedural due process rights with respect to their admission or exclusion from the United States, unless they are returning permanent residents. The Supreme Court adopted that doctrine in the 1950 decision *United States ex rel.*

Knauff v. Shaughnessy. * * * So long as the Supreme Court adheres to *Knauff*, that conclusion appears to be correct with regard to aliens who are not returning permanent residents and who have been stopped upon arrival—but only with regard to them.

The statute also purports to severely restrict judicial review of expedited removal orders. * * *

The consistency of these restrictions with the Suspension Clause is a harder question, and one that the *Knauff* doctrine does not address. The Supreme Court did not refuse habeas corpus in *Knauff* and its progeny—its jurisdiction was founded in habeas, and the Court carefully examined and upheld the agency’s statutory authority to detain. The Court’s discussion in *St. Cyr* did not unequivocally express the view that the Suspension Clause applies in exclusion as well as deportation, but it also did not assert the contrary, and it cited exclusion cases along with deportation cases in support of its reasoning. * * * [Moreover, in *Boumediene*] the Supreme Court found that the Guantanamo detainees were protected by the Suspension Clause without first inquiring whether they had rights under the Due Process Clause. * * *

However that may be, the expedited removal regime is no longer limited to arriving aliens. Immigration officials are actively applying expedited removal to individuals encountered [within the interior of the United States]. Current doctrines entitle those individuals to due process rights, and *St. Cyr* indicates that they have Suspension Clause rights as well. * * *

Juxtaposing the expedited removal process with the Court’s analysis in *Boumediene* suggests serious constitutional concerns about precluding review of expedited removal from the interior—both on issues of law and on issues of fact. Indeed, the Court’s account of the minimum scope of review of factual determinations suggests new criticisms of the preclusion. If the “necessary scope of habeas review in part depends upon the rigor of any earlier proceedings,” then the rudimentary character of expedited removal hearings, which give aliens no opportunity to be represented (even at their own expense), no opportunity to present witnesses, and no opportunity to obtain documents that they were not carrying when arrested, would seem to call for more intense review than in ordinary deportation proceedings, not less.

Gerald L. Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 Colum. L. Rev. 537, 571–77 (2010). Ten years later, the Court had considered some of these questions as applied to an asylum-seeker who was subjected to expedited removal within the interior of the United States, but close to the border and soon after entering.⁶⁰

⁶⁰ See *Petition for Certiorari, Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, at i (Aug. 2, 2019) (No. 19-161) (“The question presented is whether, as applied to respondent, Section 242(e)(2) is unconstitutional under the Suspension Clause”)

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140 S. Ct. 1959

■ ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, GORSUCH, and KAVANAUGH, JJ., joined. THOMAS, J., filed a concurring opinion. BREYER, J., filed an opinion concurring in the judgment, in which GINSBURG, J., joined. SOTOMAYOR, J., filed a dissenting opinion, in which KAGAN, J., joined.

[Thuraissigiam, a Sri Lankan Tamil, fled Sri Lanka in 2016. In 2017, he crossed the U.S.-Mexico border and entered the United States without inspection. Later that same night, he was arrested by a CBP officer 25 yards north of the border and four miles west of the port of entry in San Ysidro, California. While he sought to apply for asylum pursuant to the minimal procedures available under the “expedited removal” provisions set forth in INA § 235, and both the asylum officer and immigration judge found him credible, his claim was denied and he was ordered removed. He then filed a petition for a writ of habeas corpus in federal court to challenge the legality of his removal order on several constitutional, statutory, and regulatory grounds. Although the district court dismissed Thuraissigiam’s petition for lack of jurisdiction, the Ninth Circuit reversed, concluding that “as applied to Thuraissigiam,” the provision in INA § 242(e)(2) precluding judicial review of expedited removal orders was unconstitutional under the Suspension Clause.]

■ Justice ALITO delivered the opinion of the Court.

* * *

Respondent’s Suspension Clause argument fails because it would extend the writ of habeas corpus far beyond its scope “when the Constitution was drafted and ratified.” *Boumediene v. Bush*, 553 U.S. 723 (2008). Indeed, respondent’s use of the writ would have been unrecognizable at that time. Habeas has traditionally been a means to secure release from unlawful detention, but respondent invokes the writ to achieve an entirely different end, namely, to obtain additional administrative review of his asylum claim and ultimately to obtain authorization to stay in this country. * * *

I.B

The IIRIRA provision at issue in this case, § 242(e)(2), limits the review that an alien in expedited removal may obtain via a petition for a writ of habeas corpus. * * *

A major objective of IIRIRA was to “protec[t] the Executive’s discretion” from undue interference by the courts; indeed, “that can fairly be said to be the theme of the legislation.” In accordance with that aim, § 242(e)(5) provides that “[t]here shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.” And “[n]otwithstanding” any other “habeas corpus provision”—including 28 U.S.C. § 2241—“no court shall have jurisdiction to review” any other “individual determination” or “claim arising from or relating to the implementation or operation of an order of [expedited] removal.” § 242(a)(2)(A)(i). In particular, courts may not review “the determination” that an alien lacks

a credible fear of persecution. § 242(a)(2)(A)(iii); see also §§ 242(a)(2)(A)(ii), (iv) (other specific limitations). * * *

II.A

* * * In *INS v. St. Cyr*, we wrote that the [Suspension] Clause, at a minimum, “protects the writ as it existed in 1789,” when the Constitution was adopted. And in this case, respondent agrees that “there is no reason” to consider whether the Clause extends any further. We therefore proceed on that basis.

B

This principle dooms respondent’s Suspension Clause argument, because neither respondent nor his *amici* have shown that the writ of habeas corpus was understood at the time of the adoption of the Constitution to permit a petitioner to claim the right to enter or remain in a country or to obtain administrative review potentially leading to that result. The writ simply provided a means of contesting the lawfulness of restraint and securing release. * * *

In this case, however, respondent did not ask to be released.⁶¹ Instead, he sought entirely different relief: vacatur of his “removal order” and “an order directing [the Department] to provide him with a new ... opportunity to apply for asylum and other relief from removal.” * * * [T]hat relief falls outside the scope of the common-law habeas writ.

Although the historic role of habeas is to secure release from custody, the Ninth Circuit did not suggest that release, at least in the traditional sense of the term,⁶² was required. Instead, what it found to be necessary was a “meaningful opportunity” for review of the procedures used in determining that respondent did not have a credible fear of persecution. Thus, even according to the Ninth Circuit, respondent’s petition did not call for traditional habeas relief.

Not only did respondent fail to seek release, he does not dispute that confinement during the pendency of expedited asylum review, and even during the additional proceedings he seeks, is lawful. Nor could he. It is not disputed that he was apprehended in the very act of attempting to enter this country; that he is inadmissible because he lacks an entry document, see §§212(a)(7)(A), 235(b)(1)(A)(i); and that, under these circumstances, his case qualifies for the expedited review process, including “[m]andatory detention” during his credible-fear

⁶¹ [Note 13 in original] In his brief, respondent states that “he requests an entirely ordinary habeas remedy: conditional release pending a lawful adjudication. Citing the same page, the dissent argues that respondent “asked the district court to ‘[i]ssue a writ of habeas corpus’ without further limitation on the kind of relief that might entail.” However, neither on the cited page nor at any other place in the habeas petition is release, conditional or otherwise, even mentioned. And in any event, as we discuss *infra*, the critical point is that what he sought in the habeas petition and still seeks—a writ “directing [the Department] to provide [him] a new opportunity to apply for asylum”—is not a form of relief that was available in habeas at the time of the adoption of the Constitution.

⁶² [Note 14 in original] Although the Ninth Circuit never mentioned release, its opinion might be read to suggest that gaining a right to remain in this country would constitute a release from the “restraint” of exclusion. No evidence has been called to our attention that the writ was understood in 1789 to apply to any comparable form of restraint.

review, §§235(b)(1)(B)(ii), (iii)(IV). Moreover, simply releasing him would not provide the right to stay in the country that his petition ultimately seeks. Without a change in status, he would remain subject to arrest, detention, and removal. §§236(a), 240(e)(2).

While respondent does not claim an entitlement to release, the Government is happy to release him—provided the release occurs in the cabin of a plane bound for Sri Lanka. * * *

Respondent does not want anything like that. His claim is more reminiscent of the one we rejected in *Munaf* [*v. Geren*, 553 U.S. 674 (2008)]. In that case, American citizens held in U.S. custody in Iraq filed habeas petitions in an effort to block their transfer to Iraqi authorities for criminal prosecution. Rejecting this use of habeas, we noted that “[h]abeas is at its core a remedy for unlawful executive detention” and that what these individuals wanted was not “simple release” but an order requiring them to be brought to this country. Claims so far outside the “core” of habeas may not be pursued through habeas.

Like the habeas petitioners in *Munaf*, respondent does not want “simple release” but, ultimately, the opportunity to remain lawfully in the United States. That he seeks to stay in this country, while the habeas petitioners in *Munaf* asked to be brought here from Iraq, is immaterial. In this case as in *Munaf*, the relief requested falls outside the scope of the writ as it was understood when the Constitution was adopted.

III

Disputing this conclusion, respondent argues that the Suspension Clause guarantees a broader habeas right. To substantiate this claim, he points to three bodies of case law: British and American cases decided prior to or around the time of the adoption of the Constitution, decisions of this Court during the so-called “finality era” (running from the late 19th century to the mid-20th century), and two of our more recent cases. None of these sources support his argument.

A

Respondent and *amici* supporting his position have done considerable research into the use of habeas before and around the time of the adoption of the Constitution, but they have not unearthed evidence that habeas was then used to obtain anything like what is sought here, namely, authorization for an alien to remain in a country other than his own or to obtain administrative or judicial review leading to that result. All that their research (and the dissent’s) shows is that habeas was used to seek release from detention in a variety of circumstances. * * *

Respondent contends that two cases show that habeas could be used to secure the right of a non-citizen to remain in a foreign country, but neither proves his point. * * *

His second case, *Somerset v. Stewart*, Lofft. 1, 98 Eng. Rep. 499 (K.B. 1772), is celebrated but does not aid respondent. James Somerset was a slave who was “detain[ed]” on a ship bound for Jamaica, and Lord Mansfield famously ordered his release on the ground that his detention as a slave was unlawful in England. This relief, release from custody, fell within the historic core of habeas, and Lord Mansfield did not order anything else.

It may well be that a collateral consequence of *Somerset*'s release was that he was allowed to remain in England, but if that is so, it was due not to the writ issued by Lord Mansfield, but to English law regarding entitlement to reside in the country. At the time, England had nothing like modern immigration restrictions. As late as 1816, the word "deportation" apparently "was not to be found in any English dictionary."

For a similar reason, respondent cannot find support in early 19th-century American cases in which deserting foreign sailors used habeas to obtain their release from the custody of American officials. * * *

In these cases, as in *Somerset*, it may be that the released petitioners were able to remain in the United States as a collateral consequence of release, but if so, that was due not to the writs ordering their release, but to U.S. immigration law or the lack thereof. These decisions came at a time when an "open door to the immigrant was the ... federal policy." So release may have had the side effect of enabling these individuals to remain in this country, but that is beside the point.

The relief that a habeas court may order and the collateral consequences of that relief are two entirely different things. Ordering an individual's release from custody may have the side effect of enabling that person to pursue all sorts of opportunities that the law allows. For example, release may enable a qualified surgeon to operate on a patient; a licensed architect may have the opportunity to design a bridge; and a qualified pilot may be able to fly a passenger jet. But a writ of habeas could not be used to compel an applicant to be afforded those opportunities or as a means to obtain a license as a surgeon, architect, or pilot. Similarly, while the release of an alien may give the alien the opportunity to remain in the country if the immigration laws permit, we have no evidence that the writ as it was known in 1789 could be used to require that aliens be permitted to remain in a country other than their own, or as a means to seek that permission. * * *

Despite pages of rhetoric, the dissent is unable to cite a single pre-1789 habeas case in which a court ordered relief that was anything like what respondent seeks here. * * *

[O]ne concurring opinion [by Justice Breyer] * * * argu[es] that the scope of the writ guaranteed by the Suspension Clause "may change 'depending upon the circumstances'" and thus may allow certain aliens to seek relief other than release. But that is not respondent's argument* * * .

B

We now proceed to consider the second body of case law on which respondent relies, decisions of this Court during the "finality era," which takes its name from a feature of the Immigration Act of 1891 making certain immigration decisions "final." Although respondent claims that his argument is supported by "the writ as it existed in 1789," his argument focuses mainly on this body of case law, which began a century later. These cases, he claims, held that "the Suspension Clause mandates a minimum level of judicial review to ensure that the Executive complies with the law in effectuating removal." * * *

This interpretation of the "finality era" cases is badly mistaken. Those decisions were based not on the Suspension Clause but on the habeas statute and the immigration laws then in

force. The habeas statute in effect during this time was broad in scope. It authorized the federal courts to review whether a person was being held in custody in violation of any federal law, including immigration laws. Thus, when aliens claimed that they were detained in violation of immigration statutes, the federal courts considered whether immigration authorities had complied with those laws. This, of course, required that the immigration laws be interpreted, and at the start of the finality era, this Court interpreted the 1891 Act's finality provision to block review of only questions of fact. Accordingly, when writs of habeas corpus were sought by aliens who were detained on the ground that they were not entitled to enter this country, the Court considered whether, given the facts found by the immigration authorities, the detention was consistent with applicable federal law. But the Court exercised that review because it was authorized to do so by statute. The decisions did not hold that this review was required by the Suspension Clause. * * *

Holding that an Act of Congress unconstitutionally suspends the writ of habeas corpus is momentous. The Justices on the Court at the beginning of the finality era had seen historic occasions when the writ was suspended—during the Civil War by President Lincoln and then by Congress, and later during Reconstruction by President Grant. The suspension of habeas during this era played a prominent role in our constitutional history. The Justices knew a suspension of the writ when they saw one, and it is impossible to believe that the *Nishimura Ekiu* Court identified another occasion when Congress had suspended the writ and based its decision on the Suspension Clause without even mentioning that provision. * * *

According to the dissent, *Nishimura Ekiu* interpreted the 1891 Act as it did based on the doctrine of constitutional avoidance. This reading has no support in the Court's opinion, which never mentions the Suspension Clause or the avoidance doctrine and never explains why the Clause would allow Congress to preclude review of factual findings but nothing more. But even if there were some basis for this interpretation, it would not benefit respondent, and that is undoubtedly why he has not made the argument. IIRIRA unequivocally bars habeas review of respondent's claims, and he does not argue that it can be read any other way. The avoidance doctrine "has no application in the absence of ambiguity." Thus, if *Nishimura Ekiu*'s interpretation were based on constitutional avoidance, it would still not answer the interpretive question here.

When we look to later finality era cases, any suggestion of a Suspension Clause foundation becomes even less plausible. None of those decisions mention the Suspension Clause or even hint that they are based on that provision, and these omissions are telling. * * *

Respondent suggests that *Nishimura Ekiu* cannot have interpreted the 1891 Act's finality provision to apply only to factual questions because the statutory text categorically bars all review. The important question here, however, is *what the Court did* in *Nishimura Ekiu*, not whether its interpretation was correct, and in any event, there was a reasonable basis for the Court's interpretation.

The determinations that the immigration officials were required to make under the 1891 Act were overwhelmingly factual in nature. The determination in *Nishimura*'s case—that she was likely to become a public charge—seems to have been a pure question of fact, and the other grounds for exclusion under the Act involved questions that were either solely or at least primarily factual in nature.

If we were now called upon to determine the meaning of a provision like the finality provision in the 1891 Act, our precedents would provide the basis for an argument in favor of the interpretation that the *Nishimura Ekiu* Court reached. The presumption in favor of judicial review could be invoked. So could the rule that “[i]mplications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction.” Thus, respondent’s interpretation of the decision in *Nishimura Ekiu* is wrong, and the same is true of his understanding of the later finality era cases.

Rather than relying on the Suspension Clause, those cases simply involved the exercise of the authority conferred by the habeas statute then in effect. This was true of *Nishimura Ekiu*, *Gegion*, and every other finality era case that respondent cites in support of his Suspension Clause argument. Some finality era cases presented pure questions of law, while others involved the application of a legal test to particular facts. At least one involved an alien who had entered illegally. But none was based on the Suspension Clause. No majority opinion even mentioned the Suspension Clause. * * * And in all the cited cases concerning aliens detained at entry, unlike the case now before us, what was sought—and the only relief considered—was release. Indeed, in an early finality era case, the Court took pains to note that it did not “express any opinion” on whether an alien was entitled to enter.

Like the dissent, respondent makes much of certain statements in *Heikkila v. Barber*, 345 U.S. 229 (1953), which he interprets to substantiate his interpretation of *Nishimura Ekiu* and the subsequent entry cases discussed above. But he takes these statements out of context and reads far too much into them. *Heikkila* was not a habeas case, and the question before the Court was whether a deportation order was reviewable under the Administrative Procedure Act (APA). The Court held that the order was not subject to APA review because the Immigration Act of 1917 foreclosed “judicial review”—as opposed to review in habeas. Nothing in *Heikkila* suggested that the 1891 Act had been found to be partly unconstitutional, and *Heikkila* certainly did not address the scope of the writ of habeas corpus in 1789.

In sum, the Court exercised habeas jurisdiction in the finality era cases because the habeas statute conferred that authority, not because it was required by the Suspension Clause. As a result, these cases cannot support respondent’s argument that the writ of habeas corpus as it was understood when the Constitution was adopted would have allowed him to claim the right to administrative and judicial review while still in custody.

C

We come, finally, to the more recent cases on which respondent relies. The most recent, *Boumediene*, is not about immigration at all. It held that suspected foreign terrorists could challenge their detention at the naval base in Guantanamo Bay, Cuba. They had been “apprehended on the battlefield in Afghanistan” and elsewhere, not while crossing the border. They sought only to be released from Guantanamo, not to enter this country. And nothing in the Court’s discussion of the Suspension Clause suggested that they could have used habeas as a means of gaining entry. Rather, the Court reaffirmed that release is the habeas remedy though not the “exclusive” result of every writ, given that it is often “appropriate” to allow the executive to cure defects in a detention.

Respondent's other recent case is *St. Cyr*, in which the Court's pertinent holding rejected the argument that certain provisions of IIRIRA and the Antiterrorism and Effective Death Penalty Act of 1996 that did not refer expressly to habeas should nevertheless be interpreted as stripping the authority conferred by the habeas statute. In refusing to adopt that interpretation, the Court enlisted a quartet of interpretive canons: "the strong presumption in favor of judicial review of administrative action," "the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction," the rule that a "clear indication" of congressional intent is expected when a proposed interpretation would push "the outer limits of Congress' power," and the canon of constitutional avoidance. In connection with this final canon, the Court observed: "Because of [the Suspension] Clause, some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution.'"

Respondent pounces on this statement, but like the *Heikkila* statement on which it relies, it does nothing for him. The writ of habeas corpus as it existed at common law provided a vehicle to challenge all manner of detention by government officials, and the Court had held long before that the writ could be invoked by aliens already in the country who were held in custody pending deportation. *St. Cyr* reaffirmed these propositions, and this statement in *St. Cyr* does not signify approval of respondent's very different attempted use of the writ, which the Court did not consider.

IV

[Part IV of Alito's opinion is discussed in Chapter 2]

* * * Because the Ninth Circuit erred in holding that § 242(e)(2) violates the Suspension Clause and the Due Process Clause, we reverse the judgment and remand the case with directions that the application for habeas corpus be dismissed.

■ Justice THOMAS, concurring.

I join the Court's opinion, which correctly concludes that respondent's Suspension Clause argument fails because he does not seek a writ of habeas corpus. I write separately to address the original meaning of the Suspension Clause * * *. The Founders appear to have understood "[t]he Privilege of the Writ of Habeas Corpus" to guarantee freedom from discretionary detention, and a "suspen[sion]" of that privilege likely meant a statute granting the executive the power to detain without bail or trial based on mere suspicion of a crime or dangerousness. Thus, the expedited removal procedure in [IIRIRA] is likely not a suspension.⁶³
* * *

■ Justice BREYER, with whom Justice GINSBURG joins, concurring in the judgment.

The statute at issue here, INA § 242(e)(2), sets forth strict limits on what claims a noncitizen subject to expedited removal may present in federal habeas corpus proceedings. I

⁶³ [Note 1 in original] I express no view on the question whether respondent is even entitled to the privilege of the writ as an unadmitted alien.

agree that enforcing those limits *in this particular case* does not violate the Suspension Clause's constitutional command. But we need not, and should not, go further.

We need not go further because the Government asked us to decide, and we agreed to review, an issue limited to the case before us. The question presented is “whether, *as applied to respondent*, Section 242(e)(2) is unconstitutional under the Suspension Clause.” Pet. for Cert. i (emphasis added). All we must decide is whether, under the Suspension Clause, the statute at issue “is unconstitutional as applied to *this* party, in the circumstances of *this* case.”

Nor should we go further. Addressing more broadly whether the Suspension Clause protects people challenging removal decisions may raise a host of difficult questions in the immigration context. What review might the Suspension Clause assure, say, a person apprehended years after she crossed our borders clandestinely and started a life in this country? Under current law, noncitizens who have lived in the United States for up to two years may be placed in expedited-removal proceedings, but Congress might decide to raise that 2-year cap (or remove it altogether). Does the Suspension Clause let Congress close the courthouse doors to a long-term permanent resident facing removal? In *INS v. St. Cyr* 533 U.S. 289 (2001), we avoided just that “serious and difficult constitutional issue.”

Could Congress, for that matter, deny habeas review to someone ordered removed despite claiming to be a natural-born U.S. citizen? The petitioner in *Chin Yow v. United States* 208 U.S. 8 (1908), and others have faced that predicament. What about foreclosing habeas review of a claim that rogue immigration officials forged the record of a credible-fear interview that, in truth, never happened? Or that such officials denied a refugee asylum based on the dead-wrong legal interpretation that Judaism does not qualify as a “religion” under governing law?

The answers to these and other “difficult questions about the scope of [Suspension Clause] protections” lurk behind the scenes here. * * *

As for the resolution of the dispute before us, Congress, in my view, had the constitutional power to foreclose habeas review of the claims that respondent has pressed in this case. Habeas corpus, as we have said, is an “adaptable remedy,” and the “precise application and scope” of the review it guarantees may change “depending upon the circumstances.” So where the Suspension Clause applies, the “habeas court’s role” may prove more “extensive,” or less so, depending on the context at issue. Here, even assuming that the Suspension Clause guarantees respondent some form of habeas review—which is to say, even accepting for argument’s sake that the relief respondent seeks *is* “release”—the scope of that constitutionally required review would not extend to his claims. Two features of this case persuade me.

First, respondent’s status suggests that the constitutional floor set by the Suspension Clause here cannot be high. A Border Patrol agent apprehended respondent just 25 yards inside the border. Respondent was placed in expedited removal proceedings shortly thereafter, where he received the same consideration for relief from removal that Congress has afforded persons arriving at the border. Respondent has never lived in, or been lawfully admitted to, the United States.

To my mind, those are among the “circumstances” that inform the “scope” of any habeas review that the Suspension Clause might guarantee respondent. *Boumediene v. Bush*, 553 U.S. 723 (2008). He is thus in a materially different position for Suspension Clause purposes than the noncitizens in, for example, *Rowoldt v. Perfetto*, 355 U.S. 115 (1957), *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), *Bridges v. Wixon*, 326 U.S. 135 (1945), and *Hansen v. Haff*, 291 U.S. 559 (1934). They had all lived in this country for years. The scope of whatever habeas review the Suspension Clause assures respondent need not be as extensive as it might for someone in that position.

Second, our precedents demonstrate that respondent’s claims are of the kind that Congress may, consistent with the Suspension Clause, make unreviewable in habeas proceedings. Even accepting respondent’s argument that our “finality era” cases map out a constitutional minimum, his claims, on the facts presented here, differ significantly from those that we reviewed throughout this period.

To begin, respondent concedes that Congress may eliminate habeas review of factual questions in cases like this one. He has thus disclaimed the “right to challenge the historical facts” found by immigration officials during his credible-fear process. But even though respondent has framed his two primary claims as asserting legal error, substance belies that label. Both claims are, at their core, challenges to factual findings.

During his credible-fear interview, respondent said that he is an ethnic Tamil from Sri Lanka and that, one day, a group of men abducted him in a van and brutally beat him. The asylum officer believed respondent’s account, which respondent confirmed was his sole basis for seeking relief. The critical question, then, concerned the nature of the attack: Who attacked respondent and why? In written findings, the asylum officer concluded that it was “unknown who these individuals were or why they wanted to harm [respondent].” Based on those findings, the asylum officer determined that respondent had not established a credible fear of persecution or torture within the meaning of governing law.

Respondent, to be sure, casts the brunt of his challenge to this adverse credible-fear determination as two claims of legal error. But it is the factual findings underlying that determination that respondent, armed with strong new *factual* evidence, now disputes.

Respondent first asserts that the asylum officer failed to apply—or at least misapplied—the applicable legal standard under § 235(b)(1)(B)(v), which required only a “significant possibility” that respondent could establish entitlement to relief from removal. Respondent also contends that the asylum officer “demonstrated a fatal lack of knowledge” about conditions in Sri Lanka, in violation of provisions requiring that asylum officers consider “other facts as are known to the officer,” § 235(b)(1)(B)(v), and have “had professional training in country conditions,” § 235(b)(1)(E)(i).

At the heart of both purportedly legal contentions, however, lies a disagreement with immigration officials’ findings about the two brute facts underlying their credible-fear determination—again, the identity of respondent’s attackers and their motive for attacking him. Other than his own testimony describing the attack, respondent has pointed to nothing in the administrative record to support either of these claims.

As to his legal-standard claim, respondent does not cite anything affirmatively indicating that immigration officials misidentified or misunderstood the proper legal standard under § 235(b)(1)(B)(v). Rather, he argues that their credible-fear determination was so egregiously wrong that it simply *must* have rested on such a legal error. But that contention rests on a refusal to accept the facts as found by the immigration officials. * * * Respondent's quarrel, at bottom, is not with whether settled historical facts satisfy a legal standard, but with what the historical facts *are*.

Respondent's country-conditions claim is much the same. * * * [T]his claim, too, boils down to a factual argument that immigration officials should have known who respondents' attackers were and why they attacked him.

Mindful that the "Constitution deals with substance, not shadows," I accordingly view both claims as factual in nature, notwithstanding respondent's contrary characterization. For that reason, Congress may foreclose habeas review of these claims without running afoul of the Suspension Clause.

The other two claims of error that respondent has pressed assert that immigration officials violated procedures required by law. * * * Though both claims may reasonably be understood as procedural, they may constitutionally be treated as unreviewable—at least under the border-entry circumstances present in this case.

Respondent's procedural claims are unlike those that we reviewed in habeas proceedings during the finality era. Throughout that period, the procedural claims that we addressed asserted errors that fundamentally undermined the efficacy of process prescribed by law. Many of our finality era cases thus dealt with situations in which immigration officials failed entirely to take obligatory procedural steps. * * *

Respondent's procedural claims are different. He does not allege that immigration officials, say, denied him a credible-fear interview or skipped a layer of intra-agency review altogether. Nor do his allegations suggest that the asylum officer's questioning or the interpreter's translation constructively deprived him of the opportunity to establish a credible fear; indeed, he has consistently maintained that the information that *was* elicited more than sufficed. Respondent thus contends that the credible-fear process was procedurally defective for reasons that are more technical. He alleges that additional questions would have yielded further "relevant and useful" information and that "communication issues affected the interview" in some way.

Respondent's procedural claims consequently concern not the outright denial (or constructive denial) of a process, but the precise way in which the relevant procedures were administered. They raise fine-grained questions of degree—*i.e.*, whether the asylum officer made *sufficiently thorough* efforts to elicit all "relevant and useful information" and whether he took *sufficiently thorough* precautions to ensure that respondent was "[a]ble to participate effectively" in the interview.

Reviewing claims hinging on procedural details of this kind would go beyond the traditionally "limited role" that habeas has played in immigration cases similar to this one—even during the finality era. * * *

Together with respondent's status, these characteristics convince me that Congress had the constitutional power to foreclose habeas review of respondent's procedural claims. Recasting those claims as an allegation that respondent's "due process rights were violated by" immigration officials makes no material difference. * * *

■ Justice SOTOMAYOR, with whom Justice KAGAN joins, dissenting.

The majority declares that the Executive Branch's denial of asylum claims in expedited removal proceedings shall be functionally unreviewable through the writ of habeas corpus, no matter whether the denial is arbitrary or irrational or contrary to governing law. That determination flouts over a century of this Court's practice. * * *

The Court thus purges an entire class of legal challenges to executive detention from habeas review, circumscribing that foundational and "stable bulwark of our liberties," By self-imposing this limitation on habeas relief in the absence of a congressional suspension, the Court abdicates its constitutional duty and rejects precedent extending to the foundations of our common law. * * *

Today's decision handcuffs the Judiciary's ability to perform its constitutional duty to safeguard individual liberty and dismantles a critical component of the separation of powers. It will leave significant exercises of executive discretion unchecked in the very circumstance where the writ's protections "have been strongest." And it increases the risk of erroneous immigration decisions that contravene governing statutes and treaties.

The Court appears to justify its decision by adverting to the burdens of affording robust judicial review of asylum decisions. But our constitutional protections should not hinge on the vicissitudes of the political climate or bend to accommodate burdens on the Judiciary. I respectfully dissent.

I

The as-applied challenge here largely turns on how the Court construes respondent's requests for relief. Its descriptions, as well as those of one of the concurrences, skew the essence of these claims. A proper reframing thus is in order.

A

Respondent first advances a straightforward legal question that courts have heard in habeas corpus proceedings in "case after case." His habeas petition claimed that an asylum officer and Immigration Judge "appl[ied] an incorrect legal standard" by ordering him removed despite a showing of a significant possibility of credible fear to establish "eligibility for asylum, withholding of removal, and [Convention Against Torture] claims." The Government itself has characterized that claim as a challenge to the "'application of a legal standard to factual determinations ... underlying the Executive's negative credible-fear findings.'" At bottom, respondent alleged that he was unlawfully denied admission under governing asylum statutes and regulations.

The Court disagrees, flattening respondent's claim into a mere plea "ultimately to obtain authorization to stay in this country." Yet while the Court repeatedly says that

respondent seeks nothing more than admission as a matter of grace, its own descriptions of respondent's habeas petition belie its assertions. Though the Court refuses to admit as much, its descriptions of respondent's arguments illustrate, at bottom, claims that immigration officials legally erred in their review of his asylum application.

In papering over the true nature of respondent's claims, the Court transforms his assertions of legal error in the exercise of executive discretion into a naked demand for executive action. But the distinction between those forms of relief makes all the difference. The law has long permitted habeas petitioners to challenge the legality of the exercise of executive power, even if the executive action ultimately sought is discretionary. That principle has even more force today, where an entire scheme of statutes and regulations cabins the Executive's discretion in evaluating asylum applications. For that reason, the Court's observation that the ultimate "grant of asylum is discretionary" is beside the point.

For its part, one concurring opinion [by Justice Breyer] seems to acknowledge that claims that assert something other than pure factual error may constitutionally require some judicial review. It simply determines that respondent's credible-fear claims amount to nothing more than a "disagreement with immigration officials' findings about the two brute facts underlying their credible-fear determination," namely, the identity of his attackers and their motivations. It also faults respondent for failing to develop his claims of legal error with citations "indicating that immigration officials misidentified or misunderstood the proper legal standard" or that they "disregarded" or were not properly trained in identifying relevant country conditions.

But the essence of respondent's petition is that the facts as presented (that he, a Tamil minority in Sri Lanka, was abducted by unidentified men in a van and severely beaten), when considered in light of known country conditions (as required by statute), amount at least to a "significant possibility" that he could show a well-founded fear of persecution. So viewed, respondent's challenge does not quibble with historic facts, but rather claims that those "settled facts satisfy a legal standard," which this Court has held amounts to a "legal inquiry." [Justice Breyer] suggests that any conclusions drawn from the discrete settled facts here could not be "so egregiously wrong" as to amount to legal error. But the ultimate inquiry is simply whether the facts presented satisfy a statutory standard. While this concurring opinion may believe that the facts presented here do not show that respondent is entitled to relief, its view of the merits does not alter the legal nature of respondent's challenge.

B

Second, respondent contended that the inadequate procedures afforded to him in his removal proceedings violated constitutional due process. Among other things, he asserted that the removal proceedings by design did not provide him a meaningful opportunity to establish his claims, that the translator and asylum officer misunderstood him, and that he was not given a "reasoned explanation" for the decision. Again, however, the Court falls short of capturing the procedural relief actually requested. The Court vaguely suggests that respondent merely wanted more cracks at obtaining review of his asylum claims, not that he wanted to challenge the existing expedited removal framework or the process actually rendered in his case as constitutionally inadequate. That misconstrues respondent's procedural challenges to the

expedited removal proceedings, which matters crucially; a constitutional challenge to executive detention is just the sort of claim the common law has long recognized as cognizable in habeas.

One concurring opinion [by Justice Breyer], meanwhile, properly characterizes respondent's claims on this score as "procedural" challenges. Yet it concludes that those claims are not reviewable because they do not allege sufficiently serious defects. But these are simply distinctions of degree, not of kind. Respondent claimed that officials violated governing asylum regulations and deprived him of due process by conducting an inadequate interview and providing incomplete translation services. It is difficult to see the difference between those claims and the ones that the concurring opinion upholds as cognizable.

Indeed, [Justice Breyer] notes that the core question is whether a defect "fundamentally undermined the efficacy of process prescribed by law." Respondent's petition plainly posits procedural defects that violate, or at least call into question, the "efficacy of process prescribed by law" and the Constitution. The concurring opinion might think that respondent is not entitled to additional protections as a matter of law or that the facts do not show he was denied any required process. But conclusions about the merits of respondent's procedural challenges should not foreclose his ability to bring them in the first place.

C

Finally, the Court asserts that respondent did not specifically seek "release" from custody in what the Court styles as the "traditional" sense of the term as understood in habeas jurisprudence. Instead, the Court seems to argue that respondent seeks only a peculiar form of release: admission into the United States or additional asylum procedures that would allow for admission into the United States. Such a request, the Court implies, is more akin to mandamus and injunctive relief.

But it is the Court's directionality requirement that bucks tradition. Respondent asks merely to be freed from wrongful executive custody. He asserts that he has a credible fear of persecution, and asylum statutes authorize him to remain in the country if he does. That request is indistinguishable from, and no less "traditional" than, those long made by noncitizens challenging restraints that prevented them from otherwise entering or remaining in a country not their own.

The Court has also never described "release" as the sole remedy of the Great Writ. Nevertheless, respondent's petition is not limited in the way the Court claims. As it acknowledges, respondent directly asked the District Court to "[i]ssue a writ of habeas corpus" without further limitation on the kind of relief that might entail. * * * As the petition's plain language indicates, respondent raised a garden-variety plea for habeas relief in whatever form available and appropriate, including, but not limited to, release. * * *

Fairly characterized, respondent's claims allege legal error (for violations of governing asylum law and for violations of procedural due process) and an open-ended request for habeas relief. It is "uncontroversial" that the writ encompasses such claims.

II

Only by recasting respondent's claims and precedents does the Court reach its decision on the merits. By its account, none of our governing cases, recent or centuries old, recognize that the Suspension Clause guards a habeas right to the type of release that respondent allegedly seeks. An overview of cases starting from the colonial period to the present reveals that the Court is incorrect, even accepting its improper framing of respondent's claims.

A

The critical inquiry, the Court contends, is whether respondent's specific requests for relief (namely, admission into the United States or additional asylum procedures allowing for admission into the United States) fall within the scope of the kind of release afforded by the writ as it existed in 1789. This scope, it explains, is what the Suspension Clause protects "at a minimum." But as the Court implicitly acknowledges, its inquiry is impossible. The inquiry also runs headlong into precedent, which has never demanded the kind of precise factual match with pre-1789 case law that today's Court demands.

To start, the Court recognizes the pitfalls of relying on pre-1789 cases to establish principles relevant to immigration and asylum: "At the time, England had nothing like modern immigration restrictions." It notes, too, that our cases have repeatedly observed the relative novelty of immigration laws in the early days of this country.

The Court nevertheless seems to require respondent to engage in an exercise in futility. It demands that respondent unearth cases predating comprehensive federal immigration regulation showing that noncitizens obtained release from federal custody onto national soil. But no federal statutes at that time spoke to the permissibility of their entry in the first instance; the United States lacked a comprehensive asylum regime until the latter half of the 20th century. Despite the limitations inherent in this exercise, the Court appears to insist on a wealth of cases mirroring the precise relief requested at a granular level; nothing short of that, in the Court's view, would demonstrate that a noncitizen in respondent's position is entitled to the writ.

But this Court has never rigidly demanded a one-to-one match between a habeas petition and a common-law habeas analog. * * *

There is no squaring the Court's methodology today with *St. Cyr* or *Boumediene*. As those cases show, requiring near-complete equivalence between common-law habeas cases and respondent's habeas claim is out of step with this Court's longstanding approach in immigration cases.

B.1

Applying the correct (and commonsense) approach to defining the Great Writ's historic scope reveals that respondent's claims have long been recognized in habeas. * * *

The weight of historical evidence demonstrates that common-law courts at and near the founding granted habeas to noncitizen detainees to enter Territories not considered their own, and thus ordered the kind of release that the Court claims falls outside the purview of the common-law writ.

The Court argues that none of this evidence is persuasive because the writ could not be used to compel authorization to enter the United States. But that analogy is inapt. Perhaps if respondent here sought to use the writ to grant naturalization, the comparison would be closer. But respondent sought only the proper interpretation and application of asylum law (which statutorily permits him to remain if he shows a credible fear of persecution), or in the alternative, release pursuant to the writ (despite being cognizant that he could be denied asylum or rearrested upon release if he were found within the country without legal authorization). But that consequence does not deprive respondent of the ability to invoke the writ in the first instance.

For these reasons, the Court is wrong to dispute that common-law habeas practice encompassed the kind of release respondent seeks here. * * *

3

Despite exalting the value of pre-1789 precedent, the Court's key rationale for why respondent does not seek "release" in the so-called traditional sense rests on an inapposite, contemporary case: *Munaf v. Geren*, 553 U.S. 674 (2008).⁶⁴ *Munaf*, the Court claims, shows that habeas is not available to seek an order to be brought into this country. But that case is in a category of its own and has no bearing on respondent's claims here. *Munaf* addressed a one-of-a-kind scenario involving the transfer of individuals between different sovereigns. There, two United States citizens in Iraq filed habeas petitions seeking to block their transfer to Iraqi authorities after being accused of committing crimes and detained by American-led coalition forces pending investigation and prosecution in Iraqi courts. The central question, this Court repeatedly stated, was "whether United States district courts may exercise their habeas jurisdiction to enjoin our Armed Forces from transferring individuals detained within another sovereign's territory to that sovereign's government for criminal prosecution."

In concluding that habeas did not extend to the relief sought by the citizens detained in Iraq, the *Munaf* Court relied on cases involving habeas petitions filed to avoid extradition. These decisions, the Court concluded, established that American courts lack habeas jurisdiction to enjoin an extradition or similar transfer to a foreign sovereign exercising a right to prosecution. These circumstances, which today's Court overlooks, mean that *Munaf* is more like the extradition cases that the Court deems not "pertinent."⁶⁵

⁶⁴ [Note 5 in original] Oddly, the Court embraces *Munaf*—a recent decision involving detainees held outside the territorial limits of the United States who were subject to prosecution by a foreign sovereign—to support its conclusion about the availability of habeas review. Yet at the same time, it dismisses respondent's reliance on *Boumediene v. Bush* outright on the grounds that the case is "not about immigration at all."

⁶⁵ [Note 6 in original] Nor is the Court correct in dismissing common-law extradition precedents as inapposite because they show "nothing more than the use of habeas to secure release from custody." * * * These extradition-related habeas cases show that the writ was undoubtedly used to grant release in the very direction—that is, away from a foreign country and into the United States—that the Court today derides. Indeed, the same scholar the Court cites makes the point that extradition specifically allowed courts to hear challenges to the Executive's ability to "detain aliens for removal to another country at the request of [the] government." Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961, 1003 (1998).

In any event, respondent is not similarly situated to the petitioners in *Munaf*, who sought habeas to thwart removal from the United States in the face of a competing sovereign's interests. Mindful that the case implicated "sensitive foreign policy issues in the context of ongoing military operations," the *Munaf* Court observed that granting habeas relief would "interfere with Iraq's sovereign right to punish offenses against its laws committed within its borders." For that reason, it proceeded "'with the circumspection appropriate when this Court is adjudicating issues inevitably entangled in the conduct of ... international relations.'" Here, of course, no foreign sovereign is exercising a similar claim to custody over respondent during an ongoing conflict that would trigger the comity concerns that animated *Munaf*.

C

Next, the Court casually dismisses nearly 70 years of precedent from the finality era, the most relevant historic period for examining judicial review of immigration decisions. It concludes that, in case after case, this Court exercised habeas review over legal questions arising in immigration cases akin to those at issue here, not because the Constitution required it but only because a statute permitted it. That conclusion is both wrong in its own right and repeats arguments this Court rejected a half century ago when reviewing this same body of cases.

At the turn of the 20th century, immigration to the United States was relatively unrestricted. Public sentiment, however, grew hostile toward many recent entrants, particularly migrant laborers from China. In response, Congress enacted the so-called Chinese Exclusion Act of 1882, which prohibited the entry of Chinese laborers to the United States. The Scott Act, enacted in 1888, forbade reentry of Chinese laborers who had left after previously residing in this country. Although immigration officials routinely denied entry to arriving migrants on the basis of these laws, many of these decisions were overturned by federal courts on habeas review.

This did not escape Congress' attention. Congress responded by enacting the Immigration Act of 1891, which stripped federal courts of their power to review immigration denials: "All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury." By its terms, that restriction on federal judicial power was not limited to review of some undefined subset of issues, such as questions of law or fact; it made executive immigration decisions final in all respects.

The Court, however, quickly construed the statute in *Nishimura Ekiu v. United States*, 142 U.S. 651 (*Ekiu*), to preclude only review of executive factfinding. Having so construed the statute, the Court in *Ekiu*, and in case after case following *Ekiu*, recognized the availability of habeas to review a range of legal and constitutional questions arising in immigration decisions. The crucial question here is whether the finality-era Courts adopted that construction of jurisdiction-stripping statutes because it was simply the correct interpretation of the statute's terms and nothing more or because that construction was constitutionally compelled to ensure the availability of habeas review. The better view is that *Ekiu*'s construction of the 1891 statute was constitutionally compelled.

In *Ekiu*, the Court recognized that a Japanese national was entitled to seek a writ of habeas corpus to review an exclusion decision issued almost immediately upon her arrival to the United States. As the Court notes, the relevant issue in that case was whether the 1891 Act, “if construed as vesting ... exclusive authority” in the Executive to determine a noncitizen’s right to enter the United States, violated petitioner’s constitutional “right to the writ of *habeas corpus*, which carried with it the right to a determination by the court as to the legality of her detention.” That is, the *Ekiu* Court confronted whether construing the 1891 Act as precluding all judicial review of immigration decisions like the exclusion order at issue would violate the constitutional guarantee to habeas.

The Court answered that question by construing the 1891 Act as precluding judicial review only of questions of fact. “An alien immigrant,” the Court first held, who is “prevented from landing [in the United States] by any [executive] officer ... and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful.” The Court then explained that it had authority to hear the case (despite Congress’ clear elimination of judicial review) because it interpreted the 1891 Act as meaning only that an immigration official’s determination of “facts” was final and unreviewable.

After so articulating the 1891 Act’s limits on judicial review, the Court analyzed two challenges to the integrity of the proceedings, neither of which raised questions of historical fact.⁶⁶ Although the Court ultimately concluded that those legal and constitutional challenges lacked merit, what matters is that the Court evaluated the arguments and recognized them as possible grounds for habeas relief.

What, then, can *Ekiu* tell us? Today’s Court finds significant that the brief opinion makes no explicit mention of the Suspension Clause. This omission, it concludes, can only mean that the *Ekiu* Court did not think that (or had no occasion to consider whether) the Suspension Clause “imposed any limitations on the authority of Congress to restrict the issuance of writs of habeas corpus in immigration matters.” According to this theory, *Ekiu* concluded that the plain terms of the 1891 Act prohibited judicial review of executive factfinding alone, and nothing more can be said.

But this myopic interpretation ignores many salient facts. To start, the 1891 Act was enacted for the purpose of limiting all judicial review of immigration decisions, not just a subset of factual issues that may arise in those decisions. Further, the plain terms of the statute did not cabin the limitation on judicial review to historical facts found by an immigration officer. *Ekiu*, moreover, evaluated the Act’s constitutionality in view of the petitioner’s argument that the limitation on judicial review violated the constitutional “right to the writ of *habeas corpus*.” These considerations all point in one direction: Even if the *Ekiu* Court did not explicitly hold that the Suspension Clause prohibits Congress from broadly limiting all judicial review in immigration proceedings, it certainly decided the case in a manner that avoided raising this constitutional question. Indeed, faced with a jurisdiction-stripping statute, the only review left for the *Ekiu* Court was that required by the Constitution and, by extension, protected by the guarantee of habeas corpus.

⁶⁶ [Note 7 in original] These claims are uncannily reminiscent of the kinds of claims respondent advances here.

The Court also maintains that *Ekiu* concluded that “‘the act of 1891 is constitutional’” in full, not “only in part.” Yet as the Court acknowledges, it was only “after interpreting the 1891 Act” as precluding judicial review of questions of fact alone that the *Ekiu* Court deemed it constitutional. That cannot mean that *Ekiu* found the 1891 Act constitutional even to the extent that it prevented all judicial review of immigration decisions, even those brought on habeas. What it can only mean, instead, is that *Ekiu*’s construction of the 1891 Act was an answer to the constitutional question posed by the case: whether and to what extent denying judicial review under the 1891 Act would violate the constitutional “right to the writ of *habeas corpus*.”

Bolstering this interpretation is that the Court has repeatedly reached the same result when interpreting subsequent statutes purporting to strip federal courts of all jurisdiction over immigration decisions. * * * Indeed, time and again, against a backdrop of statutes purporting to bar all judicial review of executive immigration decisions, this Court has entertained habeas petitions raising a host of issues other than historic facts found by immigration authorities.

To be sure, this entrenched line of cases does not directly state that habeas review of immigration decisions is constitutionally compelled. But an alternate understanding of those cases rests on an assumption that is farfetched at best: that, year after year, and in case after case, this Court simply ignored the unambiguous texts of the serial Immigration Acts limiting judicial review altogether. The Court’s pattern of hearing habeas cases despite those statutes’ contrary mandate reflects that the Court understood habeas review in those cases as not statutorily permitted but constitutionally compelled.

In any event, we need not speculate now about whether the *Ekiu* Court, or the Courts that followed, had the constitutional right to habeas corpus in mind when they interpreted jurisdiction-stripping statutes only to preclude review of historic facts. This Court has already identified which view is correct. In *Heikkila v. Barber*, 345 U.S. 229 (1953), the Court explained that *Ekiu* and its progeny had, in fact, construed the finality statutes to avoid serious constitutional questions about Congress’ ability to strip federal courts of their habeas power. As *Heikkila* reiterated, the key question in *Ekiu* (and in later cases analyzing finality statutes) was the extent to which the Constitution allowed Congress to make administrative decisions unreviewable. And it concluded that the jurisdiction-stripping immigration statute in that case, a successor to the 1891 Act, “preclud[ed] judicial intervention in deportation cases except insofar as it was required by the Constitution.”

Heikkila thus settles the matter; during the finality era, this Court either believed that the Constitution required judicial review on habeas of constitutional and legal questions arising in immigration decisions or, at the very least, thought that there was a serious question about whether the Constitution so required. Although the Court tries to minimize that conclusion as not dispositive of the question presented, such a conclusion undoubtedly weighs against finding § 242(e)(2) constitutional in spite of its broad prohibition on reviewing constitutional and legal questions.

The Court dismisses *Heikkila* and its explanation of the finality-era cases outright. It fixates on the fact that *Heikkila* was not itself a habeas case and instead analyzed whether judicial review of immigration orders was available under the Administrative Procedure Act

(APA). *Heikkila*'s discussion of the APA does not detract from its affirmation that when the language of a jurisdiction-stripping statute precludes all judicial review, the only review that is left is that required by the constitutional guarantee of habeas corpus.⁶⁷ Most importantly, *Heikkila* concluded that APA review was not equivalent to that judicial review. Second, the Court also states that *Heikkila* never interpreted *Ekiu* as having found the 1891 Act "partly unconstitutional." But there was no need for the *Ekiu* Court to find the 1891 Act unconstitutional in part to construe it as prohibiting only review of historic facts. Instead, as *Heikkila* explained, *Ekiu* reached its decision by exercising constitutional avoidance.

By disregarding *Heikkila*, the Court ignores principles of *stare decisis* to stir up a settled debate. Cf. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1425, 1431–32 (2020) (ALITO, J., dissenting). Perhaps its view is tinted by the fact that it doubts the Suspension Clause could limit Congress' ability to eliminate habeas jurisdiction at all. The Court scoffs at the notion that a limitation on judicial review would have been understood as an unconstitutional suspension of habeas, noting and distinguishing the limited number of occasions that this Court has found a suspension of the writ of habeas corpus. The references to those major historic moments where this Court has identified a suspension only establish the outer bounds of Congress' suspension powers; it says nothing about whether, and to what extent, more limited restrictions on judicial review might also be found unconstitutional.

Indeed, the Court acknowledges that some thought it an open question during the finality era whether the Suspension Clause imposes limits on Congress' ability to limit judicial review. That this question remained unsettled suffices to support the Court's conclusion in *Heikkila*: The finality-era Courts endeavored to construe jurisdiction-stripping statutes to avoid serious constitutional questions about the extent of congressional power to limit judicial review.

At bottom, the better view of the finality-era cases is that they understood the habeas right they sustained to be, or at least likely to be, constitutionally compelled. Certainly the cases do not establish the Court's simplistic view to the contrary: That the finality-era Court entertained habeas petitions only because no statute limited its ability to do so, and no Constitutional provision required otherwise. That reading of precedent disregards significant indications that this Court persistently construed immigration statutes stripping courts of judicial review to avoid depriving noncitizens of constitutional habeas guarantees. Ignoring how past courts wrestled with this issue may make it easier for the Court to announce that there is no unconstitutional suspension today. But by sweeping aside most of our immigration history in service of its conclusion, the Court reopens a question that this Court put to rest decades ago, and now decides it differently. The cost of doing so is enormous. The Court, on its own volition, limits a constitutional protection so respected by our Founding Fathers that they forbade its suspension except in the direst of circumstances.

D

⁶⁷ [Note 10 in original] Indeed, the Government itself embraced that position in a brief to the Court during that time.

Not only does the Court cast to one side our finality-era jurisprudence, it skims over recent habeas precedent. Perhaps that is because these cases undermine today's decision. Indeed, both *INS v. St. Cyr*, 533 U.S. 289 (2001), and *Boumediene v. Bush*, 553 U.S. 723 (2008), instruct that eliminating judicial review of legal and constitutional questions associated with executive detention, like the expedited-removal statute at issue here does, is unconstitutional.

The Court acknowledges *St. Cyr*'s holding but does not heed it. *St. Cyr* concluded that "[b]ecause of [the Suspension] Clause some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution.'" "This statement affirms what the finality-era cases long suggested: that the Suspension Clause limits Congress' power to restrict judicial review in immigration cases. Nor did *St. Cyr* arrive at this conclusion simply based on canons of statutory construction. The Court spoke of deeper historical principles, affirming repeatedly that "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." The Court looked to founding era cases to establish that the scope of this guarantee extended to both the "interpretation" and "application" of governing law, including law that guided the exercise of executive discretion.

Based on that history, the Court also concluded that "a serious Suspension Clause issue would be presented" by precluding habeas review in the removal context, even where there was "no dispute" that the Government had the legal authority to detain a noncitizen like *St. Cyr*. Thus based on the same principles that the Court purports to apply in this case, the *St. Cyr* Court reached the opposite conclusion: The Suspension Clause likely prevents Congress from eliminating judicial review of discretionary executive action in the deportation context, even when the writ is used to challenge more than the fact of detention itself.

Boumediene reprised many of the rules articulated in *St. Cyr*. It first confirmed that the Suspension Clause applied to detainees held at Guantanamo Bay, repeating the "uncontroversial" proposition that "the privilege of habeas corpus entitles" an executive detainee to a "meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." Then the Court detailed the writ's remedial scope. It affirmed that one of the "easily identified attributes of any constitutionally adequate habeas corpus proceeding" is that "the habeas court must have the power to order the conditional release of an individual unlawfully detained." Notably, the Court explained that release "need not be the exclusive remedy," reasoning that "common-law habeas corpus was, above all, an adaptable remedy" whose "precise application and scope changed depending upon the circumstances." The Court noted that any habeas remedy might be tempered based on the traditional test for procedural adequacy in the due process context and thus could accommodate the "rigor of any earlier proceedings." * * *

St. Cyr and *Boumediene* confirm that at minimum, the historic scope of the habeas power guaranteed judicial review of constitutional and legal challenges to executive action. They do not require release as an exclusive remedy, let alone a particular direction of release. Rather, both cases built on the legacy of the finality era where the Court, concerned about the constitutionality of limiting judicial review, unquestionably entertained habeas petitions from arriving migrants who raised the same types of questions respondent poses here.

As discussed above, respondent requests review of immigration officials' allegedly unlawful interpretation of governing asylum law, and seeks to test the constitutional adequacy of expedited removal procedures. As a remedy, he requests procedures affording a conditional release, but certainly did not so limit his prayer for relief. His constitutional and legal challenges fall within the heartland of what *St. Cyr* said the common-law writ encompassed, and *Boumediene* confirms he is entitled to additional procedures as a form of conditional habeas relief. These precedents themselves resolve this case. * * *

The Court wrongly declares that § 242(e)(2) can preclude habeas review of respondent's constitutional and legal challenges to his asylum proceedings. So too the Court errs in concluding that Congress need not provide a substitute mechanism to supply that review. In so holding, the Court manages to flout precedents governing habeas jurisprudence from three separate eras. Each one shows that respondent is entitled to judicial review of his constitutional and legal claims. * * *

III

[Part III of Sotomayor's opinion is discussed in Chapter 2]

IV

The Court reaches its decision only by downplaying the nature of respondent's claims, ignoring a plethora of common-law immigration cases from a time of relatively open borders, and mischaracterizing the most relevant precedents from this Court. Perhaps to shore up this unstable foundation, the Court justifies its decision by pointing to perceived vulnerabilities and abuses in the asylum system. * * *

In some ways, this country's asylum laws have represented the best of our Nation. Unrestricted migration at the founding and later, formal asylum statutes, have served as a beacon to the world, broadcasting the vitality of our institutions and our collective potential. For many who come here fleeing religious, political, or ideological persecution, and for many more who have preceded them, asylum has provided both a form of shelter and a start to a better life. That is not to say that this country's asylum policy has always, or ever, had overwhelming support. Indeed, many times in our past, particularly when the Nation's future has appeared uncertain or bleak, members of this country have sought to close our borders rather than open them. Yet this country has time and again reaffirmed its commitment to providing sanctuary to those escaping oppression and persecution. Congress and the Executive have repeatedly affirmed that choice in response to serial waves of migration from other countries by enacting and amending asylum laws and regulations. In fact, a centerpiece of respondent's claim is that officials were not following these statutorily enacted procedures.

The volume of asylum claims submitted, pending, and granted has varied over the years, due to factors like changing international migration patterns, the level of resources devoted to processing and adjudicating asylum applications, and amendments to governing immigration laws. For the past few years, both new asylum applications and pending applications have steadily increased.

It is universally acknowledged that the asylum regime is under strain. It is also clear that, while the reasons for the large pending caseload are complicated,⁶⁸ delays in adjudications are undesirable for a number of reasons. At bottom, when asylum claims are not resolved in a timely fashion, the protracted decisionmaking harms those eligible for protection and undermines the integrity of the regime as a whole.

But the political branches have numerous tools at their disposal to reform the asylum system, and debates over the best methods of doing so are legion in the Government, in the academy, and in the public sphere. * * *

In the face of these policy choices, the role of the Judiciary is minimal, yet crucial: to ensure that laws passed by Congress are consistent with the limits of the Constitution. The Court today ignores its obligation, going out of its way to restrict the scope of the Great Writ and the reach of the Due Process Clause. This may accommodate congressional policy concerns by easing the burdens under which the immigration system currently labors. But it is nothing short of a self-imposed injury to the Judiciary, to the separation of powers, and to the values embodied in the promise of the Great Writ. * * *

NOTES AND QUESTIONS

1. Alito and Sotomayor differ sharply in their characterizations of Thuraissigiam's claim. Alito maintains that Thuraissigiam seeks to use habeas to "obtain authorization to stay in this country," as opposed to "release" from custody—or in a more artful formulation elsewhere in the opinion, that "the right to stay in the country" is what Thuraissigiam's petition "*ultimately* seeks" (emphasis added). Sotomayor, by contrast, emphasizes that Thuraissigiam's petition "advances a straightforward legal question that courts have repeatedly heard" on habeas review: namely, whether agency officials committed legal error in reviewing his asylum claim and ordering his removal.

Which characterization of Thuraissigiam's claim is correct? His habeas petition challenged the legality of executive officials holding him in custody for purposes of enforcing an expedited removal order against him, and requested the district court to issue an order "directing Respondents [1] to vacate the expedited removal order entered against Petitioner . . . [and] [2] to provide Petitioner a new opportunity to apply for asylum and other applicable forms of relief," along with "such further relief as the Court deems just and proper."

Is that prayer for relief properly characterized as seeking direct, immediate "authorization" to stay in the United States, as Alito suggests? If Thuraissigiam were granted the relief he sought, he might remain physically present in the United States during the pendency of that "new opportunity" to apply for asylum, which would then be either granted or denied. But should that resulting physical presence be characterized as "authorization to stay" in the United States—in a manner akin, for example, to formal admission in an immigrant

⁶⁸ [Note 13 in original] In 2018 Senate Judiciary Committee hearings, the Director of the Executive Office of Immigration Review identified factors contributing to the backlog of cases, including lengthy hiring times for new immigration judges and the continued use of paper files. The Court, meanwhile, insinuates that much of the burden on the asylum system can be attributed to frivolous or fraudulent asylum claims. But the magnitude of asylum fraud has long been debated.

or nonimmigrant category? Or would it be more appropriately characterized as a “collateral consequence,” a secondary artifact of remedying the legal error underlying his custody, to the same extent as in *Somerset v. Stewart* and the other historical cases discussed by Alito in his opinion?

In this context, consider the various ways that noncitizens can fall in between formal, authorized legal status and the absence of legal status—a “paradoxical middle ground between legality and illegality” that Geoffrey Heeren has conceptualized as “nonstatus.” Geoffrey Heeren, *The Status of Nonstatus*, 64 Am. U. L. Rev. 1115, 1119–20 (2015) (discussing a variety of temporary, tenuous, and legally “hazy” categories of noncitizens—including, for example, beneficiaries of deferred action, deferred enforced departure, extended voluntary departure, temporary protected status, withholding of removal, deferral of removal, and stays of removal—who lack formal, legal authorization to be admitted to the United States, but who also are not legally at risk of facing immediate deportation). If granted the relief he was seeking, Thuraissigiam would have been placed under analogous circumstances of immigration purgatory, while authorities considered his asylum application. Are those circumstances appropriately characterized as “authorization to stay” in the United States?

2. Strictly speaking, what is the holding of *Thuraissigiam* on whether the Suspension Clause requires the availability of habeas corpus to challenge removal orders, and how far does that holding extend? Apart from the formal holding, what are the potential implications of Alito’s reasoning in future cases?

For example, as discussed earlier in this chapter, INA § 235(b)(1)(A)(iii) authorizes the use of expedited removal for noncitizens who are physically present within the United States who cannot prove continuous physical presence during the immediately preceding two years, and the Trump presidency has sought to expand the use of expedited removal to the full extent of this statutory authorization. In light of *Thuraissigiam*, could an individual be precluded from judicial review of an expedited removal order issued upon an arrest far from the border and almost two years after the individual entered the United States? Could Congress authorize the use of expedited removal for noncitizens who have been within the United States for even longer periods of time, and then deprive judicial review from those individuals? Cf. *Castro v. U.S. Dep’t of Homeland Sec.*, 835 F.3d 422, 434 (3d Cir. 2016) (denying Suspension Clause claim of noncitizens challenging expedited removal via habeas, but expressly limiting holding to noncitizens “who have been denied initial entry or who, like Petitioners, were apprehended very near the border and, essentially, immediately after surreptitious entry into the country”). Are there other significant potential implications of either the holding or reasoning in Alito’s opinion?

3. How effectively does *Thuraissigiam* distinguish the Supreme Court’s decisions in *Boumediene*, *St. Cyr*, and *Heikkila*? Are there plausible ways to reconcile Alito’s opinion with those cases, or is his opinion better understood as inconsistent with those precedents?

4. Before the Supreme Court’s decision in *Thuraissigiam*, lower courts had divided over whether the right to habeas corpus under the Suspension Clause might depend on the extent to which the individuals seeking habeas review are protected by the Due Process Clause. Compare *Thuraissigiam v. U.S. Dep’t of Homeland Sec.*, 917 F.3d 1097, 1111–12, 1116 (9th Cir. 2019) (noting that [a]lthough often conflated, the rights protected by the Suspension Clause

are not identical to those under the Fifth Amendment’s guarantee of due process,” and rejecting the government’s argument that “Thuraissigiam’s purported lack of due process rights is determinative of whether he can invoke the Suspension Clause”), *with Castro*, 835 F.3d 422 (rejecting petitioners’ Suspension Clause claim based in part on due process precedents).

In his opinion, Alito address this question about how to interpret and apply the Suspension Clause. Instead, as discussed in Chapter 2, Alito falsely describes the Ninth Circuit as having relied upon due process as “an independent ground” for its decision (which it did not) and proceeds to discuss the extent to which noncitizens “in respondent’s position” have due process protections as if the question were independently presented before the Supreme Court (which it was not).

Which approach to the relationship between the Suspension Clause and the Due Process Clause seems legally sound and most consistent with precedent? In *Boumediene*, Justice Kennedy’s majority opinion concluded that the Guantánamo detainees were protected by the Suspension Clause without regard to the scope of the due process or other legal protections they might have—and was expressly criticized by the dissenting justices for doing so. *Compare Boumediene*, 553 U.S. at 732–33, 785, 798 (“[W]e make no judgment whether the [Guantánamo tribunals], as currently constituted, satisfy due process standards . . . [Q]uestions regarding the legality of the detention are to be resolved in the first instance by the District Court.”), *with id.* at 801–06 (Roberts, C.J., dissenting) (criticizing majority for concluding that Guantánamo detainees are entitled to habeas “without bothering to say what due process rights the detainees possess”); see also Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, *supra*, at 541–43, 546–47 (concluding that *Boumediene* confirms *St. Cyr*’s propositions that the Suspension Clause “permanently requires a right to habeas corpus, with certain minimum content, when the writ has not been suspended,” including, subject to some potential ambiguities, “independent judicial review of issues of law determining the legality of executive detention”). In practical terms, what difference might it make if the Court were to interpret the availability of habeas under the Suspension Clause using one approach instead of the other?

Page 1033, before the heading for Subsection 2 insert:

1A. SUMMARY EXPULSIONS

The Trump presidency took advantage of the novel coronavirus pandemic to institute a regime to expel large numbers of asylum-seekers and unaccompanied minors at or near the U.S.-Mexico border without regard to governing legal constraints, invoking an obscure set of statutory provisions, 42 U.S.C. §§ 261–65, which most experts did not previously even know existed. In fact, as recounted in news reports, White House officials had been searching long and hard even *before* the pandemic for opportunities to use these same provisions to restrict noncitizens from entering in circumstances in which it might be contended that they were potentially exposed to disease—a narrative echoing racist beliefs with longstanding historical roots. Caitlin Dickerson & Michael D. Shear, *Adviser’s Quest To Tie Diseases To Immigrants*, N.Y. Times, May 3, 2020, at A1, <https://www.nytimes.com/2020/05/03/us/coronavirus-immigration-stephen-miller-public-health.html> (reporting that on multiple occasions dating “[f]rom the early days of the Trump administration,” Trump adviser Stephen Miller had unsuccessfully urged administration officials to use “an obscure law designed to protect the

nation from diseases from overseas as a way to tighten the borders. The question was, which disease?”).

On March 20, 2020, the Centers for Disease Control and Prevention issued a sweeping order that authorized the expulsion of large numbers of noncitizens who come to the United States by land from Canada or Mexico without proper documents. Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17,060, 17,061 (Mar. 20, 2020) (“March 2020 Expulsion Order”). Initially instituted for a thirty-day period, the order was later extended indefinitely and renewed by both the Trump and Biden administrations on multiple occasions, subject only to periodic internal review.⁶⁹ Ultimately, almost 3 million individuals were summarily expelled from the United States under these decrees.

On its face, these so-called Title 42 expulsion orders did not directly purport to operate as an immigration exclusion measure, akin to those discussed in Chapter 5. Indeed, the orders did not purport to operate within the immigration law framework at all. Rather, the orders existed and purported to operate outside of immigration law, as measures ostensibly instituted to protect the public health against transmission of the coronavirus. The orders authorized expulsion from the United States of individuals “who would otherwise be introduced into a congregate setting” in port-of-entry or Border Patrol stations at or near the Canadian and Mexican borders, in circumstances where the risk of transmitting the virus might be high. later was extended indefinitely.

Was the public health rationale for the Title 42 expulsion orders sound? Public health experts were skeptical from the outset.⁷⁰ By the time the original Title 42 order was instituted, the coronavirus already was being transmitted within the United States to a significant extent. The orders’ many exceptions and limitations also called their rationale into question. Given their categorical exemptions—for U.S. citizens, lawful permanent residents, and their spouses and children; members of the U.S. military and associated personnel, along with their spouses and children; individuals with valid travel documents; and individuals entering under the Visa Waiver Program—the orders were drafted in a manner that was limited to noncitizens who arrived at ports of entry or crossed into the United States by land without valid travel documents. Nor did the orders apply to individuals arriving in the United States air or by sea—

⁶⁹ Amendment and Extension of Order Under Sections 362 and 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 31,503 (May 26, 2020); Notice of Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 85 Fed. Reg. 65,806 (Oct. 16, 2020).

⁷⁰ E.g., Letter from Leaders of Public Health Schools, Medical Schools, Hospitals, and Other U.S. Institutions to Alex Azar, Secretary, Dep’t of Health and Human Servs., and Robert R. Redfield, Director, Centers for Disease Control and Prevention (May 18, 2020), <https://www.publichealth.columbia.edu/publichealth-now/news/public-health-experts-urge-us-officials-withdraw-order-enabling-mass-expulsion-asylum-seekers> (“Despite its public health pretext, the CDC order fails to further public health and disregards alternative measures that can protect public health while preserving access to asylum and other protection.”).

which are modes of transportation that inherently involve travel in congregate settings where the risk of transmission may be high. What was the public health basis for targeting the covered categories of individuals, specifically, when the categories of individuals who were not covered may not have been any less likely to transmit the virus?

The orders themselves stated that DHS considered the categories of individuals most likely to be held in congregate settings at CBP facilities, and therefore at high risk of transmitting the virus, as “typically” being “aliens seeking to enter the United States at [ports of entry] who do not have proper travel documents, aliens whose entry is otherwise contrary to law, and aliens who are apprehended near the border seeking to unlawfully enter the United States between [ports of entry].” March 2020 Expulsion Order, *supra*, at 17,061. As discussed in Chapters 6 and 11, those categories of individuals are precisely the same groups that the Trump presidency already had targeted with other initiatives designed to curtail applications for asylum and other forms of relief and to facilitate streamlined removal with minimal procedural safeguards—but with mixed success due to substantial legal challenges.

In practice, the Title 42 expulsion orders established a parallel regime, both at the border and within the interior, for DHS to target and summarily remove these same individuals, free from ordinary legal constraints and with essentially no process at all—not even the bare screening process provided for under the expedited removal regime.⁷¹ While the orders contemplated individual exceptions if a CBP officer, with supervisory approval, determined that an individual should be excepted “based on the totality of the circumstances,” CBP implemented these exceptions very narrowly, providing no medical screening or care, no affirmative assessments to determine whether individuals might fear persecution and be eligible for asylum or other relief, and no opportunity to assert other potential legal claims.⁷² Early reports indicated that Border Patrol officers in the field processed and effectuated expulsions to Mexico, on average, within 96 minutes of apprehension under the order.⁷³

On what basis did the Trump administration claim legal authority to institute this summary expulsion regime? The order invoked regulations implementing a little-known provision of the Public Health Service Act, 42 U.S.C. § 265—which derives from a predecessor originally enacted in 1893—authorizing the CDC to “prohibit * * * the introduction of persons and property” from other “countries or places” if, “by reason of the existence of any communicable disease in a foreign country there is a serious danger of the introduction of such disease into the United States” that requires a “suspension of the right to introduce such persons and property * * * in the interest of the public health.” Not only had that provision never previously been used, but it also had never even been implemented through agency

⁷¹ While issued by the CDC, the orders provided for DHS to implement their restrictions on the stated basis that CDC “does not have the capability, resources, or personnel needed to do so.”

⁷² Dara Lind, *Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately—Ignoring Asylum Law*, ProPublica, Apr. 2, 2020, <https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law>.

⁷³ Arelis R. Hernández & Nick Miroff, *Facing Coronavirus Pandemic, Trump Suspends Immigration Laws and Showcases Vision for Locked-down Border*, Wash. Post (Apr. 3, 2020), https://www.washingtonpost.com/national/coronavirus-trump-immigration-border/2020/04/03/23cb025a-74f9-11ea-ae50-7148009252e3_story.html

regulations. The regulations to which the order referred were issued on the same day as the order itself as an interim final rule. Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16,559 (Mar. 20, 2020) (codified at 42 C.F.R. § 71.40).

A variety of elected officials, commentators, and civil society organizations questioned the legality of this summary expulsion regime under Title 42.⁷⁴ Lucas Guttentag described the order as constituting an impermissible “act of medical gerrymandering”:

It is crafted to override critical legal rights and safeguards in singling out only those arriving at the border without authorization and deeming that class of people a unique and unmitigable public health threat. It tries to justify an end-run around congressionally mandated procedural rights and protections essential for refugees and unaccompanied minors and it does so to achieve an impermissible goal. What’s additionally shocking here: the statutory provision does not actually give the executive branch expulsion authority. * * *

Indeed, even if one were somehow to construe the statute as an immigration authority, the provision does not include a deportation power. Removing non-citizens from the United States on any basis is a qualitatively different governmental power and a different burden on individuals that Congress would need to specifically authorize. * * *

Whatever authority [42 U.S.C. § 265] might arguably have conferred regarding noncitizens in 1944, it must now be reconciled with the subsequent enactment of the Refugee Act of 1980 and the Convention Against Torture. More specifically, any enforcement power the statute might have granted in the past cannot be contrary to the humanitarian protections that now indisputably govern the removal of noncitizens.

Lucas Guttentag, *Coronavirus Border Expulsions: CDC’s Assault on Asylum Seekers and Unaccompanied Minors*, Just Security (Apr. 13, 2020), <https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/>.

However, while the Biden administration modified Trump’s Title 42 orders to exempt unaccompanied children in the midst of litigation, it otherwise left the expulsion regime in place for well over a year.⁷⁵ When the Biden administration finally announced in April 2022 that they

⁷⁴ See, e.g., Letter from Sen. Patrick Leahy, et al. to Chad Wolf, Acting Secretary, Dep’t of Homeland Sec. (Apr. 7, 2020), https://www.leahy.senate.gov/download/4720-final-jud-letter-to-dhs-re-title-42_-signed; Letter from 125 Legal, Faith-Based, Humanitarian, Human Rights, and Community Organizations to Robert R. Redfield, Director, Ctrs. for Disease Control & Prevention, and Chad F. Wolf, Acting Secretary, Dep’t of Homeland Sec. (Apr. 16, 2020), <https://www.hrw.org/news/2020/04/16/over-125-organizations-urge-us-department-homeland-security-halt-illegal-border>.

⁷⁵ U.S. Dep’t Health & Hum. Servs., Centers for Disease Control, Public Health Determination Regarding an Exception for Unaccompanied Noncitizen Children from the Order Suspending the Right

intended to terminate the directive, a coalition of Republican governors and attorneys general immediately filed suit on behalf of their states before a Trump-appointed judge in Louisiana, Robert Summerhays, to challenge the termination. Summerhays quickly issued a temporary restraining order and preliminary injunction blocking the Biden Administration from terminating the order. *Louisiana v. Center for Disease Control & Prevention*, 603 F.Supp.3d 406 (W.D. La. 2022). Asserting that states were entitled to “special solicitude” in determining standing, the court concluded that the states had established sufficient injury because termination of the Title 42 decrees would result in increased border crossings that would cause the states to incur costs for services such as medical services, educational services, law enforcement, and the administration of driver’s programs.

Separately, a group of asylum seekers had filed a class action lawsuit in Washington, D.C., before the Biden administration announced its plans to terminate the Title 42 regime, claiming that the government lacked legal authority to issue its Title 42 orders in the first place. In a detailed opinion, Judge Emmet Sullivan concluded that the plaintiffs were likely to succeed on the merits of their claims and issued a preliminary injunction blocking the government from using Title 42 to expel class members from the United States. *Huisha-Huisha v. Mayorkas*, 560 F.Supp.3d 146 (D.D.C. 2021). The court agreed with the plaintiffs that “[n]othing in [Section] 265, or Title 42 more generally, purports to authorize any deportations, much less deportations in violation of” statutory procedures and humanitarian protections, including the right to seek asylum.” The D.C. Circuit affirmed in part, holding that although “the Executive can expel [class members] from the country” under § 265, it could not permissibly “expel them to places where they will be persecuted or tortured.” *Huisha-Huisha v. Mayorkas*, 27 F.4th 718 (D.C. Cir. 2022). On remand, the district court vacated the Title 42 orders and enjoined the government from applying them to members of the class.

Following Judge Sullivan’s second order vacating the Title 42 orders, a number of the plaintiffs in the Louisiana case sought to intervene in *Huisha-Huisha*, arguing that the Biden administration would not adequately defend the Title 42 expulsion orders on appeal. After the D.C. Circuit upheld the rejection of the motion to intervene, the Republican officials sought a stay of Judge Sullivan’s order vacating the Title 42 orders and expedited review in the Supreme Court. In a ruling on its shadow docket, the Supreme Court granted both requests—thereby extending and leaving the Title 42 orders in place indefinitely. In a dissenting opinion, Justice Gorsuch (joined by Justice Jackson) drew attention to the doubtful public health basis for leaving the Title 42 regime in place:

The D.C. Circuit’s intervention ruling takes on whatever salience it has only because of its presence in a larger underlying dispute about the Title 42 orders. And on that score, it is unclear what we might accomplish. Even if at the end of it all we find that the States are permitted to intervene, and even if the States manage on remand to demonstrate that the Title 42 orders were lawfully adopted, the emergency on which those orders were premised has long since

to Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists, 86 Fed. Reg. 38,717 (Jul. 22, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/more/pdf/NoticeUnaccompaniedChildren.pdf>; see *P.J.E.S. v. Wolf*, 502 F.Supp.3d 492 (D.D.C. 2020) (enjoining enforcement of Title 42 orders as to unaccompanied minors).

lapsed. In April 2022, the federal government terminated the Title 42 orders after determining that emergency immigration restrictions were no longer necessary or appropriate to address COVID-19. The States may question whether the government followed the right administrative steps before issuing this decision (an issue on which I express no view). But they do not seriously dispute that the public-health justification undergirding the Title 42 orders has lapsed. And it is hardly obvious why we should rush in to review a ruling on a motion to intervene in a case concerning emergency decrees that have outlived their shelf life.

The only plausible reason for stepping in at this stage that I can discern has to do with the States' second request. The States contend that they face an immigration crisis at the border and policymakers have failed to agree on adequate measures to address it. The only means left to mitigate the crisis, the States suggest, is an order from this Court directing the federal government to continue its COVID-era Title 42 policies as long as possible—at the very least during the pendency of our review. Today, the Court supplies just such an order. For my part, I do not discount the States' concerns. Even the federal government acknowledges "that the end of the Title 42 orders will likely have disruptive consequences." But the current border crisis is not a COVID crisis. And courts should not be in the business of perpetuating administrative edicts designed for one emergency only because elected officials have failed to address a different emergency. We are a court of law, not policymakers of last resort.

Arizona v. Mayorkas, 143 S.Ct. 478, 478–79 (2022) (Gorsuch, J., dissenting).⁷⁶

On April 10, 2023, Congress adopted and the President signed a joint resolution terminating the COVID-19 national emergency declaration, which had been the original predicate for the use of Title 42. Pub. L. No. 118-3, 137 Stat. 6 (Apr. 10, 2023). The Title 42 expulsion orders expired on May 11, 2023, and the Supreme Court vacated the D.C. Circuit's order denying the Republican officials' motion to intervene and ordered the lower court to dismiss the motion as moot. *Arizona v. Mayorkas*, 143 S.Ct. 1312 (2023) (mem.). Justice Gorsuch filed a separate opinion, which no other justice joined. Most of his opinion decried the broader range of public health measures instituted in response to the pandemic, which Gorsuch characterized as nothing less than "the greatest intrusions on civil liberties in the peacetime history of this country." However, Gorsuch also reiterated the view expressed in his previous dissent that the Court had "[taken] a serious misstep when it effectively allowed nonparties to this case to manipulate our docket to prolong an emergency decree designed for one crisis in order to address an entirely different one." *Id.* at 1314 (statement of Gorsuch, J.).

⁷⁶ Justices Sotomayor and Kagan separately noted their dissents without explanation.

CHAPTER 10

ENFORCEMENT

Page 1046, replace first sentence of second full paragraph with:

As discussed in section B, below, in 2018 Attorney General Jeff Sessions directed “each United States Attorney’s Office along the Southwest Border—to the extent practicable, and in consultation with DHS—to adopt immediately a zero-tolerance policy for all offenses referred for prosecution under [INA § 275(a)].”

Page 1049–55, replace Part B with:

B. IMMIGRATION-RELATED CRIMINAL OFFENSES AND CIVIL PENALTIES

In addition to making specified immigration-related misconduct a basis for removal or a barrier to discretionary relief, Congress has directly prohibited and penalized some immigration-related offenses. In some instances, Congress has made the conduct a crime. In others, Congress has chosen to make the conduct a civil offense and attached generally milder penalties.

1. UNLAWFUL ENTRY AND REENTRY

As discussed in Chapter 7, presence without admission is a ground for removal, but entry without inspection is also a criminal offense—by far the most common immigration-related basis for criminal prosecution. INA § 275(a) forbids several types of entries and attempted entries—those that occur at unauthorized places, those in which the person eludes inspection, and those that are accomplished by fraud. The crime is generally a misdemeanor, but any person who has once been removed, and who then reenters or attempts to reenter or is found in the United States without the consent of the Secretary of Homeland Security, may be charged with a felony. INA § 276.

Over the past fifteen years, the government increasingly has resorted to criminal prosecutions of immigration violators under these provisions. In fiscal year 2016, some 27% of all federal criminal prosecutions were for immigration offenses. John Gramlich, Pew Research Center, *Federal Criminal Prosecutions Fall to Lowest Level in Nearly Two Decades*, <http://www.pewresearch.org/fact-tank/2017/03/28/federal-criminal-prosecutions-fall-to-lowest-level-in-nearly-two-decades/>. An MPI enforcement study documented in 2013, “CBP now refers more cases to the US Attorneys for criminal prosecution than does the FBI . . . [and t]ogether, CBP and ICE refer more cases for criminal prosecution than do all DOJ law enforcement agencies combined.” Meissner, et al., *supra*, at 94–95. See also Ingrid V. Eagly, *Prosecuting Immigration*, 104 Nw. U. L. Rev. 1281 (2010); Jennifer Chacón, *Managing Migration Through Crime*, 109 Colum. L. Rev. Sidebar 135 (2009).

Under the Trump administration, increases in criminal prosecution of immigration-related offenses stretched the justice system thin. See Kristina Davis, *Fast-Track Misdemeanor Court Rolls Out with Confusion, Tension*, San Diego Union-Tribune (July 9, 2018), <http://www.sandiegouniontribune.com/news/immigration/sd-meborder-court-20180709-story.html>. In 2018, Attorney General Jeff Sessions directed “each United States Attorney’s

Office along the Southwest Border—to the extent practicable, and in consultation with DHS—to adopt immediately a zero-tolerance policy for all offenses referred for prosecution under [INA § 275(a)]. Jeff Sessions, Attorney General, *Memorandum for Federal Prosecutors along the Southwest Border* (April 6, 2018); see also Exec. Order No. 13841, *Affording Congress an Opportunity to Address Family Separation*, 83 Fed. Reg. 29435 (June 20, 2018) (“When an alien enters or attempts to enter the country anywhere else, that alien has committed at least the crime of improper entry and is subject to a fine or imprisonment under [INA § 275(a)]. This administration will initiate proceedings to enforce this and other criminal provisions of the INA until and unless Congress directs otherwise.”).

In implementing this zero-tolerance policy, the administration separated thousands of children from parents who were criminally charged. See, e.g., Department of Homeland Security, *Fact Sheet: Zero-Tolerance Prosecution and Family Reunification*, June 23, 2018, <https://www.dhs.gov/news/2018/06/23/fact-sheet-zero-toleranceprosecution-and-family-reunification> (noting that “CBP has reunited 522 Unaccompanied Alien Children (UAC) in their custody who were separated from adults as part of the Zero Tolerance initiative” and that 2,053 separated minors remained in government custody). However, a report issued in January 2019 by the Office of Inspector General for the Department of Health and Human Services found that the practice of separating children from their parents long predated Sessions’s May 2018 criminal prosecution directive, and in fact had begun as early as the summer of 2017. Office of Inspector Gen., Dep’t of Health & Hum. Servs., *Separated Children Placed in Office of Refugee Resettlement Care* (Jan. 2019), <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.asp>.

This policy of family separation faced considerable public outcry and multiple legal challenges. E.g., *Ms. L. v. U.S. Immigr. & Customs Enforcement*, 310 F.Supp.3d 1133 (S.D. Cal. 2018) (prohibiting separation of class members from their children in the future absent a finding the parent is unfit or presents a danger to the child, and requiring reunification of separated families once the parent is returned to immigration custody unless the parent is determined to be unfit or presents a danger to the child); *Ms. L. v. U.S. Immigr. & Customs Enforcement*, 330 F.R.D. 284 (S.D. Cal. 2019) (modifying class certification, in light of revelations in January 2019 HHS Inspector General report, to include broader class of parents). The Biden administration created a Family Reunification Task Force “to reunite families who were unjustly separated at the United States-Mexico border under the prior administration.” Dep’t of Homeland Security, *Biden Administration Begins This Week to Reunite Families Separated Under the Prior Administration* (May 3, 2021), <https://www.dhs.gov/news/2021/05/03/biden-administration-begins-week-reunite-families-separated-under-prior>. The Task Force reported that it had identified 3,913 children separated between July 1, 2017 and January 20, 2021 and determined that 2,127 of these children had not yet been reunified with a parent. Dep’t of Homeland Security, Interagency Task Force on the Reunification of Families, *Initial Progress Report* (Jun. 2, 2021), https://www.dhs.gov/sites/default/files/publications/21_0602_s1_family-reunification-task-force-120-day-progress-report.pdf.

It can be a criminal offense even for a U.S. citizen to enter the country without inspection. The customs laws require every “individual” who arrives “in the United States other than by vessel, vehicle, or aircraft” to enter at an authorized crossing point and immediately report his or her arrival to the customs officer. 19 U.S.C. § 1459(a). Offenders are

subject to civil fines and, in the case of intentional violations, criminal penalties—including imprisonment for up to a year. *Id.* § 1459(e)–(g); see also INA § 215(b) (unlawful for United States citizen “to depart from or enter, or attempt to depart from or enter, the United States” without valid passport, except as otherwise provided by President).

2. FRAUD

Another group of offenses, overlapping those just discussed, deals with fraud. The broadest provision in this group is 18 U.S.C. § 1001, which generally makes it a felony to defraud the United States government. Other provisions of the United States Criminal Code specifically cover frauds and related offenses concerned with citizenship, 18 U.S.C. §§ 1421–1429, passports, 18 U.S.C. §§ 1541–1545, and other immigration documents, 18 U.S.C. § 1546. The last-cited provision is supplemented by INA § 274C, which expands the range of document-related violations and imposes civil penalties after administrative proceedings. See generally Linton Joaquin & Charles Wheeler, Document Fraud Enforcement the Second Time Around: Will the Right Lessons Be Learned?, 78 IR 473 (Mar. 12, 2001). There are also provisions that specifically prohibit certain forms of marriage fraud and entrepreneurship fraud. INA § 275(c) & (d).

Federal prosecutors have not infrequently targeted undocumented workers for fraud-related offenses. Many unauthorized workers obtain employment by presenting false social security cards. Some of the cards contain nonexistent names and social security numbers, while other cards contain the names and social security numbers of actual people. Sometimes smugglers have supplied the card, and the undocumented immigrant does not know that the name and number belong to someone else. In cases involving other individuals’ names and numbers, federal prosecutors have brought criminal charges for “aggravated identity theft.” 18 U.S.C. § 1028A(a)(1). In the Postville, Iowa meatpacking raids of 2008, for example, the prosecutors threatened to bring that charge, which carries a mandatory two-year prison sentence, against the vast majority of the workers apprehended during the raids, unless those workers agreed to plead guilty to the lesser offense of knowingly using a false social security number and serve five months in jail. See Erik Camayd-Freixes, *Interpreting After the Largest ICE Raid in US History: A Personal Account*, N.Y. Times (June 13, 2008), <http://graphics8.nytimes.com/images/2008/07/14/opinion/14ed-camayd.pdf>. In *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), a unanimous Supreme Court interpreted the statute to require knowledge that the means of identification belonged to another person. For an informative description of the Postville investigation, raid, and prosecutions, as well as a careful argument for interpreting section 1028A(a)(1) to require knowledge that the means of identification belong to another person, see Peter R. Moyers, *Butchering Statutes: The Postville Raid and the Misinterpretation of Federal Criminal Law*, 32 Seattle L. Rev. 651 (2009).

3. FACILITATING UNLAWFUL IMMIGRATION

INA § 274(a)(1) prohibits various means of facilitating illegal immigration. Sections 274(a)(1)(A)(i)–(iv) generally cover, respectively, bringing noncitizens to the United States other than at designated ports of entry; transporting, within the United States, noncitizens who are present in violation of law (the transportation must be “in furtherance of such violation”); harboring such persons; and inducing illegal entry. The various subsections impose different

mens rea requirements. See also INA §§ 277 (importing noncitizen criminals), 278 (importing noncitizen sex workers).

None of the preceding provisions expressly bars the employment of undocumented immigrants. In fact, from the 1952 enactment of the INA until the 1986 passage of the Immigration Reform and Control Act, Pub. L. 99-603, 100 Stat. 3359 (IRCA), which created a scheme to regulate employers' hiring of immigrant workers, section 274(a) concluded with this language:

Provided, however, That for the purpose of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

(Emphasis in original.) That wording, known as the Texas Proviso after the state most prominently associated with its enactment, was repealed by IRCA § 112(a), amending INA § 274(a). Without the Texas Proviso, it remains unclear whether employment alone can constitute harboring. The interpretation of the former INS was that it does not. 52 Fed. Reg. 16216, 16217 (May 1, 1987); 63 IR 1181 (1986) (no intent to prosecute employers under harboring provision). IRCA, however, enacted a new program specifically prohibiting the employment of any noncitizens who are not authorized to work. The details of that program are the subject of section D below. As you will see, the IRCA penalties for employment are generally much less severe than the section 274 penalties for harboring; the harboring-as-employment issue, therefore, is not moot.

Among the ways the government has used § 274 has been to prosecute members of the sanctuary movement. In Chapter 11 you will read about United States asylum laws and the view of many that Salvadorans, Guatemalans, and other individuals fleeing governments strongly allied with the United States were wrongly denied asylum during the 1980s. Many churches, other private institutions, and even some state and local governments responded by declaring themselves “sanctuaries” in which undocumented immigrants who asserted eligibility for asylum were free to remain. See Jorge L. Carro, *Municipal and State Sanctuary Declarations: Innocuous Symbolism or Improper Dictates?*, 16 Pepperdine L. Rev. 297 (1989).

Some interesting case law resulted from the prosecutions. Among the defenses asserted were: (a) the shielded individuals were in fact eligible for asylum, even though it had been wrongly denied, and thus were not here in violation of law; (b) the defendants believed, rightly or wrongly, that the individuals were eligible for asylum, and thus the defendants lacked the necessary mens rea; (c) the defendants were acting out of necessity, with the lives of others at stake; (d) the government's conduct—particularly the planting of informants in church congregations—impermissibly obstructed the free exercise of religion; (e) the government was selectively prosecuting those defendants who were politically prominent; and (f) the defendants' actions were consistent with U.S. treaty obligations. Those arguments generally failed to produce dismissals. E.g., *United States v. Aguilar*, 883 F.2d 662 (9th Cir.1989); *United States v. Merkt*, 764 F.2d 266 (5th Cir.1985); *United States v. Elder*, 601 F.Supp. 1574 (S.D.Tex.1985). In some cases, however, juries acquitted particular defendants. See JoAnne C. Adlerstein, *Immigration Crimes: A Practitioner's Guide*, January 1989 Immigration Briefings at 5.

In recent years, courts have again confronted whether individuals may rely on their religious beliefs as a defense against prosecutions for harboring undocumented immigrants under § 274. Some immigrants' rights advocates have asserted religious freedom rights under the Religious Freedom Restoration Act, which prohibits the federal government from substantially burdening religious exercise—even if the burden results from a rule of general applicability—unless the government demonstrates that the burden being imposed is the least restrictive means to further a compelling governmental interest. 42 U.S.C. §2000bb-1 (2012).⁷⁷

In *United States v. Warren*, 2018 WL 4403753 (D. Ariz. 2018) (unpublished), the defendant, an advocate for immigrants and volunteer with the organization No More Deaths, was prosecuted under § 274 after providing food, water, and shelter to undocumented immigrants crossing the border. Warren moved to dismiss, asserting that RFRA protects him from prosecution because “the government cannot prosecute any individual for exercising his sincerely held religious beliefs in the necessity to provide emergency aid to fellow human beings in need.” The court denied the motion, and the case proceeded to trial.

Ultimately, the jury was deadlocked and the judge declared a mistrial. Miriam Jordan, *An Arizona Teacher Helped Migrants. Jurors Couldn't Decide If It Was a Crime*, N.Y. Times (June 11, 2019), <https://www.nytimes.com/2019/06/11/us/scott-warren-arizona-deaths.html>. The government decided to retry the case, and on November 21, 2019, the jury acquitted. Teo Armus, *After Helping Migrants in the Arizona Desert, An Activist Was Charged with a Felony. Now, He's Acquitted*, Wash. Post (Nov. 21, 2019), <https://www.washingtonpost.com/nation/2019/11/21/arizona-activist-scott-warren-acquitted-charges-helping-migrants-cross-border/>.

Should faith-based arguments be available as defenses to prosecutions under INA § 274? Does the analysis under RFRA depend on the nature of the defendant's actions (such as giving of food or water) or where they take place (near the border or further into the interior of the United States)? Does it matter if ICE specifically targets enforcement actions at religious institutions that are connected to immigrant communities? See Gabriella M. D'Agostini, *Treading on Sacred Land: First Amendment Implications of ICE's Targeting of Churches*, 118 Mich. L. Rev. 315 (2019) (arguing that targeting of churches violates rights to both free exercise of religion and free association).

Trump administration policies prompted renewed interest in the sanctuary movement and its successors. Its significance diminished in the 1990s, as Salvadorans and Guatemalans came to be protected through other means. But in some jurisdictions, sanctuary laws evolved into general ordinances that limited local collaboration with federal immigration enforcement officials to the minimum required by federal law. Cities with no ties to the original sanctuary movement also began adopting such non-cooperation laws in the 1990s. The details of this phenomenon are discussed in section C.2.c below.

⁷⁷ For further exploration of how religious freedom claims under RFRA might be used as defenses against immigration enforcement, particularly in the context of prosecutions under INA § 274, see Thomas Scott-Railton, *A Legal Sanctuary: How the Religious Freedom Restoration Act Could Protect Sanctuary Churches*, 128 Yale L.J. 408 (2018).

The federal and some state and local governments have invoked the harboring provisions in a variety of new contexts. In *United States v. Ozcelik*, 527 F.3d 88 (3d Cir. 2008), for example, the defendant was a CBP agent who had counseled an undocumented immigrant to stay out of trouble and live at a different address from the one he had reported to the then INS. The court held that harboring requires an intent to “substantially facilitate” remaining illegally and an intent “to prevent government authorities from detecting the alien’s unlawful presence.” Applying that test, the court found the defendant’s conduct insufficient to “substantially” facilitate unlawful presence and therefore reversed the conviction for attempted harboring (but affirmed a bribery conviction).

Some state and local governments have relied on the federal harboring statute to justify laws that would (a) require landlords to investigate their tenants’ immigration statuses and (b) criminalize the renting of accommodations to undocumented immigrants, even without an intent to facilitate the person’s unlawful presence or an intent to conceal the person from the federal authorities. See generally Sophie Alcorn, *Landlords Beware, You May be Renting Your Own Room . . . in Jail: Landlords Should Not Be Prosecuted for Harboring Aliens*, 7 Wash. U. Global Studs. L. Rev. 289 (2008) (arguing against construing simple rental of housing as “harboring”). Most federal courts that have heard challenges to these laws have held them to be preempted by federal immigration law, as discussed in more detail in Chapter 12.

4. SMUGGLING AND TRAFFICKING

The problems of human smuggling and trafficking, especially the trade in young girls and women, have attracted considerable law enforcement attention and been the subject of international cooperation. The term “trafficking,” in particular, generally signifies an element of coercion or at least exploitation, frequently involving prostitution, slavery, or indentured servitude.

To date, the most important international agreement to combat these various forms of slavery and trafficking has been the so-called Palermo Protocol, officially the “Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime,” Nov. 15, 2000, 2237 U.N.T.S. 319 (entered into force 2003). It requires states to take a number of enforcement, educational, and other cooperative measures, but most of the requirements are worded flexibly enough to be more precatory than binding. A subsequent report of the UN High Commissioner for Human Rights to the UN Economic and Social Council, U.N. Doc. E/2002/68/Add.1 (distributed May 20, 2002), recommends a number of ways to concretize the prescriptions of the Palermo Protocol and otherwise combat trafficking. The United States ratified both the Convention and the Palermo Protocol, effective December 3, 2005. See 82 IR 1835 (Nov. 14, 2005).

In 2000, Congress passed the Trafficking Victims Protection Act, which is described more fully in chapter 4, section E above (allowing limited numbers of nonimmigrant “T” and “U” visas for trafficking victims). Kathleen Kim has argued that analogous means could be used to combat exploitative employment of undocumented immigrants generally. Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 2009 U. Chi. Legal F. 247. Like other countries, the United States sees the problem as not only a humanitarian issue, but also one of crime and border control. Jennifer

Chacón has argued that immigration enforcement priorities have often impeded the government’s antitrafficking efforts. See Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. Pa. L. Rev. 1609 (2010).

5. CARRIER PENALTIES

Another kind of immigration penalty relevant here applies to commercial carriers. If you have flown internationally, you have probably noticed that the airline-ticketing agent at your departure airport always asks to see your passport and any required visa. In case you were wondering what business it is of theirs, the answer is that the U.S. immigration laws, like those of most countries, require common carriers (airlines, shipping lines, railroads, bus companies, etc.) to check for the necessary entry documents. If the arriving passenger somehow shows up at the port of entry without them, the carrier will generally be liable for civil fines and responsible for transporting the person back at its own expense. See, e.g., INA §§ 271–73; see generally Robert M. Jarvis, *Rusting in Drydock: Stowaways, Shipowners and the Administrative Penalty Provision of INA Section 273(d)*, 13 Tulane Maritime L.J. 25 (1988). There are, in addition, provisions authorizing the civil forfeiture of vehicles used to assist the commission of specified immigration offenses. INA § 274(b).

Page 1057, replace third full paragraph with:

While ICE acknowledged that this policy remained in effect under the Trump administration, accounts of enforcement in sensitive locations grew.⁷⁸ Enforcement actions at courthouses became a flashpoint, as ICE announced that it “does not view courthouses as a sensitive location.” In fact, a directive issued by ICE in 2018 indicated that ICE *prefers* to conduct enforcement activities inside state courthouses, noting that because “[i]ndividuals entering courthouses are typically screened by law enforcement personnel to search for weapons and other contraband,” immigration enforcement actions inside courthouses “can reduce safety risks to the public, targeted alien(s), and ICE officers and agents.”⁷⁹ According to a report issued in January 2019, arrests by ICE at state courthouses in New York have increased more than 1700 percent under the Trump administration. Immigrant Defense Project, *The Courthouse Trap: How ICE Operations Impacted New York’s Courts in 2018* (Jan. 2019), <https://www.immigrantdefenseproject.org/wp-content/uploads/TheCourthouseTrap.pdf>.

However, courts took “notice that the seemingly random targeting of immigrants is having the unintended consequence of victims not availing themselves of judicial remedies through the court system.” Veronica T. Thronson, *Executive Orders and Immigrant Victims of Domestic Violence*, 47 Mich. Fam. L.J. 7 (2017). Among others, the Chief Justices of the California and New Jersey Supreme Courts wrote to federal officials asking for an end to ICE arrests in the courts. Agreeing that “[e]xecuting civil immigration enforcement actions in or

⁷⁸ U.S. Immigr. & Customs Enf’t, *FAQ on Sensitive Locations and Courthouse Arrests*, <https://www.ice.gov/ero/enforcement/sensitive-loc#wcm-survey-target-id>.

⁷⁹ U.S. Immigr. & Customs Enf’t, Directive No. 11072.1, *Civil Immigration Enforcement Actions Inside Courthouses* (Jan. 10, 2018).

near a courthouse may chill individuals' access to courthouses and, as a result, impair the fair administration of justice," the Biden administration reversed course and revoked Directive No. 11072.1. Memorandum of Tae Johnson, Acting Director, U.S. Immigration and Customs Enforcement, *Civil Immigration Enforcement Actions in or near Courthouses*, (Apr. 27, 2021), <https://www.ice.gov/sites/default/files/documents/ciEnforcementActionsCourthouses2.pdf>.

In a lawsuit filed by the State of New York and Brooklyn District Attorney filed while the Trump administration policy was in place, a federal district court in New York concluded that ICE's courthouse enforcement directive violates the APA and exceeds its statutory authority, and enjoined the directive's enforcement. *New York v. U.S. Immigr. & Customs Enf't*, 466 F.Supp.3d 439 (S.D.N.Y. 2020) (granting summary judgment). The First Circuit rejected similar arguments and a claimed common law privilege against civil courthouse arrests. *Ryan v. U.S. Immigration and Customs Enforcement*, 974 F3d. 9 (1st Cir. 2020).

Beyond the common law privilege against courthouse arrest discussed in *Ryan* and *New York*, what other normative and legal concerns arise if ICE makes courthouse arrests? See, e.g., Sarah Rogerson, *Sovereign Resistance to Federal Immigration Enforcement in State Courthouses*, 32 Geo. Immigr. L.J. 275, 318-320 (2018) (discussing potential concerns arising from federalism and individual rights principles).

As ICE ramped up its courthouse enforcement activities, judicial administrators promulgated rules intended to restrict ICE enforcement activities that interfere with state court proceedings. In 2019, New York's Office of Court Administration implemented rules regulating activities by all law enforcement agencies in state courthouses and prohibiting ICE from arresting individuals in those courthouses without a judicial warrant or order. N.Y. Office of Court Admin., Protocol Governing Activities in Courthouses by Law Enforcement Agencies, Directive No. 1-2019 (Apr. 17, 2019), <http://www.nycourts.gov/IP/Immigration-in-FamilyCourt/PDFs/OCA%20Directive%201-2019.pdf>; see also Or. Unif. Trial Ct. R. 3.190 (Nov. 14, 2019) (providing that "no person may subject an individual to civil arrest without a judicial warrant or judicial order when the individual is in a courthouse or within the environs of a courthouse"). Judicial administrators have also promulgated similar rules at the local level. E.g., Bernalillo Ct. (N.M.) Metropolitan Court, Courthouse Access Policy (Sept. 25, 2018), <https://www.kob.com/kobtvimages/repository/cs/files/Courthouse%20Access%20Policy.pdf>; Seattle (Wash.) Mun. Ct., Arrests of Persons Based Upon Immigration Status, MCS-720-6.10 (Apr. 7, 2017), <https://www.seattle.gov/Documents/Departments/Court/ImmigrationPolicy2017.pdf>.

State legislatures and executive officials also took action seeking to restrict ICE activities that might interfere with courthouse proceedings. In 2019, California enacted a statute authorizing judicial authorities to prohibit "activities that threaten access to state courthouses and court proceedings," and to take steps to protect the "privilege from civil arrests" unless there is a valid judicial warrant. A.B. 668, 2019 Cal. Legis. Serv. Ch. 787 (West 2019) (codified at Cal. Civ. Code § 43.54 & Cal. Civ. Proc. Code § 177 (2019)). In July 2020, both houses of the New York legislature passed the Protect Our Courts Act, which expressly prohibits civil arrests without judicial warrants or orders of parties or potential witnesses in court proceedings—or their family or household members—while they are attending or traveling to and from the location of the proceeding. Protect Our Courts Act, A.B. A2176A,

2019–20 Leg. Sess. (N.Y. 2020) (as passed by Senate and Assembly),
<https://www.nysenate.gov/legislation/bills/2019/a2176/amendment/a>.

CHAPTER 11 REFUGEES

Page 1152, after first full paragraph insert:

Continuing its trend of lowering the refugee admissions authorization in each successive year, the Trump administration lowered the ceiling to 18,000 for fiscal year 2020, which represents the lowest level in the history of the U.S. refugee admissions program. Presidential Determination on Refugee Admissions for Fiscal Year 2020, Nov. 1, 2019, <https://www.whitehouse.gov/presidential-actions/presidential-determination-refugee-admissions-fiscal-year-2020/>; see Cong. Research Serv., FY2020 Refugee Ceiling and Allocations (Nov. 7, 2019), <https://fas.org/sgp/crs/homesec/IN11196.pdf> (noting that under the Trump administration, refugee ceilings have been set at “much lower [levels] than in previous years” and that the administration “has reduced the refugee ceiling each year”). The United States “has admitted about 76,200 refugees so far under the Trump administration (Jan. 20, 2017, to Sept. 30, 2019). By comparison, the U.S. admitted nearly 85,000 refugees in fiscal 2016 alone, the last full fiscal year of the Obama administration.” Jens Manuel Krogstad, Pew Research Center, *Key Facts about Refugees to the U.S.* (Oct. 7, 2019), <https://www.pewresearch.org/fact-tank/2019/10/07/key-facts-about-refugees-to-the-u-s/>.

For fiscal year 2022, the Biden administration raised the refugee admissions target to 125,000. Anthony J. Blinken, *The Presidential Determination on Refugee Admissions for Fiscal Year 2022* (Oct. 8, 2021), <https://www.state.gov/the-presidential-determination-on-refugee-admissions-for-fiscal-year-2022/>. Actual resettlement has not matched this target, as in the first six months of fiscal year 2022 only 10,742 refugees were resettled in the United States through the standard refugee resettlement channels. Center for Immigration Studies, *Low Refugee Admission So Far in FY 2022* (May 11, 2022), <https://cis.org/Rush/Low-Refugee-Admissions-So-Far-FY-2022>.

Largely through ad hoc procedures outside the normal refugee resettlement process, approximately 79,00 Afghans and 73,000 Ukrainians have arrived in the United States. Muzaffar Chishti and Jessica Bolter, Migration Policy Institute, *Welcoming Afghans and Ukrainians to the United States: A Case of Similarities and Contrasts* (July 13, 2022), <https://www.migrationpolicy.org/article/afghan-ukrainian-us-arrivals-parole>. Many of these arrivals have been granted parole as a short-term measure, and both Afghanistan and Ukraine have been designated for Temporary Protected Status. USCIS, *Countries Currently Designated for TPS*, <https://www.uscis.gov/humanitarian/temporary-protected-status>. But more lasting solutions for these populations are uncertain. *Welcoming Afghans and Ukrainians*. Moreover, differences between responses, from both the government and the public, to Afghan and Ukrainian refugees are troubling. IRAP, “*The U.S. Can Do So Much More*”: IRAP Compares Ukrainian and Afghan Protection Efforts (Apr. 26, 2022), <https://refugeerights.org/news-resources/the-u-s-can-do-so-much-more-irap-compares-ukrainian-and-afghan-protection-efforts>.

Page 1207, replace second full paragraph in Item 1 with:

In 2018, Attorney General Sessions weighed in on the availability of full asylum hearings in a peculiar manner in *Matter of E-F-H-L-*, 27 I. & N. Dec. 226 (A.G. 2018). The

Board had previously ruled that asylum applicants have the right to a full hearing, and remanded the record back to the immigration judge for such a hearing. The respondent subsequently withdrew his application for asylum and the case was administratively closed to allow the adjudication of a family petition. Although the asylum case itself was moot, Sessions stepped in to vacate the decision of the Board, removing this precedent that asylum applicants are entitled to full evidentiary hearings.

Page 1211–12 at end of Item 10 insert:

Matter of L-E-A-
Attorney General, 2019
27 I&N Dec. 581

■ BEFORE THE ATTORNEY GENERAL [WILLIAM BARR]

[On June 16, 2021, Attorney General Merrick Garland issued a decision vacating Barr’s decision in *Matter of L-E-A-* in its entirety “so as to return the immigration system to the preexisting state of affairs pending completion of ongoing rulemaking process and the issuance of a final rule addressing the definition of ‘particular social group.’” *Matter of L-E-A-*, 28 I. & N. Dec. 304 (A.G. 2021). Though vacated, Barr’s decision still provides important context and background to understand the tensions that inform the ongoing rulemaking process]

* * *

I

In 1998, the respondent, a Mexican citizen, illegally entered the United States. After a criminal conviction for driving under the influence, the Department of Homeland Security (“DHS”) initiated removal proceedings. The respondent accepted voluntary departure and returned to Mexico in May 2011. But he did not stay there long. By August 2011, the respondent had again illegally returned to the United States. DHS apprehended him and commenced removal proceedings. The respondent conceded removability, but this time sought asylum based upon a claim of persecution allegedly suffered during his brief return to Mexico.

According to the respondent, upon returning to Mexico, he had gone to live with his parents in Mexico City. His father operated a neighborhood general store there, but he had run afoul of La Familia Michoacana, a Mexican drug cartel. Because his father refused to sell the cartel’s drugs out of his store, the drug dealers evidently decided to retaliate against the respondent upon his return. About a week after returning to Mexico City, the respondent was walking a few blocks from his home when he heard gunshots coming out of a black sport-utility vehicle. He dropped down to the ground and was unharmed. Although the respondent did not initially believe that he was the target of the shooting, he later concluded that he was, based upon the cartel’s subsequent actions.

About a week later, four armed cartel members, driving the same black sport-utility vehicle, approached the respondent and asked him to agree to sell the cartel’s drugs at his father’s store. When the respondent declined, the cartel members threatened him and advised him to reconsider. Shortly thereafter, four masked men, in the same sport-utility vehicle, attempted to kidnap the respondent, but he managed to escape. After that incident, the

respondent left Mexico City for Tijuana, where two months later, he illegally crossed back into the United States and was thereafter apprehended.

In his removal proceeding, the respondent claimed persecution in Mexico based on his membership in the particular social group comprising his father's immediate family. The immigration judge denied relief on the ground that the respondent had not shown he was the victim of anything more than criminal activity.

On appeal, the Board found that the respondent's relationship with his father established membership in a particular social group, namely "his father's immediate family." In reaching that conclusion, the Board relied upon DHS's concession "that the immediate family unit of the respondent's father qualifies as a cognizable social group." * * Although it approved the claimed social group, the Board denied the respondent's asylum application because of the absence of the necessary nexus between his membership in the group and the persecution. * * *

On December 3, 2018, Acting Attorney General Whitaker directed the Board to refer its decision for review, see 8 C.F.R. § 1003.1(h)(1)(i), staying the proceedings and inviting briefing on whether, and under what circumstances, an alien may establish persecution on account of membership in a "particular social group" based on the alien's membership in a family unit. * * *

III

Turning now to the merits, I conclude that the Board erred in finding that the respondent's purported social group—the members of his father's immediate family—qualified as a "particular social group" under the INA. All particular social groups must satisfy the criteria set forth in *Matter of M-E-V-G-* and *Matter of W-G-R-*, and a proposed family-based group is no different. An applicant must establish that his specific family group is defined with sufficient particularity and is socially distinct in his society. In the ordinary case, a family group will not meet that standard, because it will not have the kind of identifying characteristics that render the family socially distinct within the society in question. The Board here did not perform the required fact-based inquiry to determine whether the respondent had satisfied his burden of establishing the existence of a particular social group within the legal requirements of the statute. The Board's summary conclusions, based on DHS's stipulation rather than its own legal analysis, must therefore be reversed.

A.

* * *

The Board first interpreted "persecution on account of membership in a particular social group" in *Acosta*. Noting that this provision "was added as an afterthought" to the CAT and that "Congress [similarly] did not indicate what it understood this ground of persecution to mean," the Board turned to the language itself:

A purely linguistic analysis of this ground of persecution suggests that it may encompass persecution seeking to punish either people in a certain relation, or having a certain degree of similarity, to one another or people of like class or kindred interests, such as shared ethnic, cultural, or linguistic origins,

education, family background, or perhaps economic activity.

Applying the doctrine of *ejusdem generis*, the Board read “particular social group” in a manner consistent with the other statutory grounds for persecution: race, religion, nationality, and political opinion. Because each of these terms describes “a characteristic that either is beyond the power of an individual to change or is so fundamental to an individual’s identity or conscience that it ought not be required to be changed,” the Board concluded that “membership in a particular social group” must similarly involve the sharing of a “common, immutable characteristic.” According to the Board, “[t]he shared characteristic might be an innate one such as sex, color, or kinship ties,” and immigration judges should engage in a case-by-case analysis to determine whether a particular innate characteristic would qualify. The Board did not clarify whether the sharing of a “common, immutable characteristic” was a sufficient, as opposed to just a necessary, condition for qualifying as a particular social group under the statutory definition of “refugee.”

In *Matter of H-*, the Board addressed the kind of kinship ties that might constitute membership in a particular social group. There, the Board found that the record established credible evidence that the Somali Marehan subclan constituted a “particular social group,” because the subclan was “distinct and recognizable” in Somali society with distinguishing “linguistic commonalities.” The Board relied on a legal opinion by the General Counsel of the Immigration and Naturalization Service, who stated that Somali “[c]lan membership is a highly recognizable, immutable characteristic;” that Somali clans are “defined by discrete criteria”; and that “membership in a clan is at the essence of a Somali’s identity in determining his or her relations to others in and outside of the clan.” The Board also recognized that annual reports issued by the Department of State spoke specifically to the “presence of distinct and recognizable clans and subclans in Somalia and the once- preferred position of the applicant’s Marehan subclan,” due to its association with former Somali President Siad Barre.

Over the decades since, the Board has refined the standard for identifying social groups that qualify for protection under the asylum statute. * * * Based upon these immigration decisions, in the ordinary case, a nuclear family will not, without more, constitute a “particular social group” because most nuclear families are not inherently socially distinct.

I recognize that a number of courts of appeals have issued opinions that recognize a family-based social group as a “particular social group” under the asylum statute. In some of these cases, the courts may have been willing (as the Board was in this case) to accept, or assume with little analysis, the existence of a particular social group because the court went on to deny asylum on other grounds. In other cases, the parties stipulated to the validity of the applicant’s particular social group definition and the applicant’s membership therein. Consequently, these cases do not reflect the thorough, case-specific analysis of the three *Matter of M-E-V-G-* factors that the Board’s precedents generally require. And I do not believe that a cursory analysis of a question that was either uncontested, or not dispositive to the outcome, should be taken to undermine the Board requirement that asylum applicants claiming “membership in a particular social group” must establish that their group shares a common immutable characteristic, is defined with particularity, and is socially distinct.

I also recognize that certain courts of appeals have considered the requisite elements

of a “particular social group” and, despite the requirements set forth in *M-E-V-G-* and *W-G-R-*, have nonetheless suggested that shared family ties alone are sufficient to satisfy the INA’s definition of “refugee”—regardless of whether the applicant’s specific family is defined with particularity or is socially distinct in his society. For instance, in *Rios v. Lynch*, the Ninth Circuit expressly observed that under the “refined framework” of *Matter of M-E-V-G-*, “the family . . . [is] the quintessential particular social group.” In addition, three other circuits have expressed the same view, but without explicitly evaluating whether that position is consistent with *Matter of M-E-V-G-* and *Matter of W-G-R-*.

These decisions do not purport to contradict the Board’s “particular social group” framework and, in my view, they have relied upon outdated dicta from the Board’s early cases. For example, the First Circuit has long relied on precedent that derives from *Matter of Acosta*’s vague statement that kinship ties “might” be the kind of innate characteristic that could form the basis of a particular social group. But the reference to “kinship ties” in *Matter of Acosta* provides no justification for a broad assumption that an applicant’s nuclear family will constitute a valid particular social group in his society. The Board there did not define what it meant by “kinship ties,” since the respondent had described his relevant social group instead as persons “engaged in the transportation industry” in his country.

Similarly, the Seventh Circuit has declined to apply the particularity and social distinction requirements, requiring only that members of particular social groups share a common, immutable characteristic, as recognized in *Matter of Acosta*. The Seventh Circuit’s refusal to reconsider its position in light of *Matter of M-E-V-G-* and *Matter of W-G-R-* has left in place circuit precedent dating from the 1990s positing, without analysis, that every family would constitute a cognizable social group under the INA.

Finally, the Fourth Circuit based its conclusion that nuclear families could be particular social groups on a passing suggestion by the Board that “[s]ocial groups based on innate characteristics such as . . . family relationship are generally easily recognizable and understood by others to constitute social groups.” But [the Board’s decision] did not concern a family-based social group, and in fact expressly cautioned against broad recognition of family-based social groups, noting that a particular social group must be recognizable as a separate, distinct group within the alien’s home country. Therefore, the Board’s passing suggestion that nuclear families always constitute “particular social group[s]” was subsequently qualified within the text of the opinion itself.

To the extent, however, that any court of appeals decision is best interpreted as adopting a categorical rule that any nuclear family could constitute a cognizable “particular social group,” I believe that such a holding is inconsistent with both the asylum laws and the long-standing precedents of the Board. Since *Matter of Acosta*, the Board has emphasized that a “particular social group” must be particular and socially distinct in the society at question, which itself requires a fact-specific inquiry based on the evidence in a particular case. The application of contradictory rules by the courts of appeals is inappropriate because whether a specific family group constitutes a “particular social group” should be determined by the immigration courts in the first instance, as an exercise of the Attorney General’s delegated authority to interpret the INA. * * *

B.

The Board has recognized that “kinship ties” may be one of the kinds of common, immutable characteristics that might form the basis for a “particular social group” under the INA. But the Board has never held that *every* type of family grouping would be cognizable as a particular social group. Here, the respondent argues that the immediate family of his father constitutes a particular social group because a local drug cartel had a dispute with his father, and the cartel chose to take that dispute out upon his family members. But the respondent did not show that anyone, other than perhaps the cartel, viewed the respondent’s family to be distinct in Mexican society. If cartels or other criminals created a cognizable family social group every time they victimized someone, then the social-distinction requirement would be effectively eliminated.

Under the *ejusdem generis* canon, the term “particular social group” must be read in conjunction with the terms preceding it, which cabin its reach, rather than as an “omnibus catch-all” for everyone who does not qualify under one of the other grounds for asylum. The INA expressly grants asylum to spouses and children of aliens who receive asylum if those family members are accompanying or following the original applicant to the United States. By contrast, the INA does not specify family ties alone as an independent basis for qualifying for asylum relief.

Further, as almost every alien is a member of a family of some kind, categorically recognizing families as particular social groups would render virtually every alien a member of a particular social group. There is no evidence that Congress intended the term “particular social group” to cast so wide a net. Moreover, INA § 101, within which the definition of “refugee” appears, uses the term family (or families) ten times in the definitions of other terms. If Congress intended for refugee status to turn on one’s suffering of persecution “on account of” family membership, Congress would have included family identity as one of the expressly enumerated covered grounds for persecution.

Thus, by the terms of the statutory definition of “refugee,” as well as according to long-standing principles set forth in BIA precedent, to qualify as a “particular social group,” an applicant must demonstrate that his family group meets each of the immutability, particularity, and social distinction requirements. While many family relationships will be immutable, some family-based group definitions may be too vague or amorphous to meet the particularity requirement—i.e., where an applicant cannot show discernible boundaries to the group. Further, many family-based social groups will have trouble qualifying as “socially distinct,” a requirement that contemplates that the applicant’s proposed group be “set apart, or distinct, from other persons within the society in some significant way.” “To have the ‘social distinction’ necessary to establish a particular social group, there must be evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group.”

Asylum applicants generally seek to establish family-based groups as “particular social groups” by raising one of two principal arguments. First, many applicants assert a specific family unit as their “particular social group.” But to qualify under the statute and Board precedent, when an applicant proposes a group composed of a specific family unit, he must show that his proposed group has some greater meaning in society. It is not enough that the family be set apart in the eye of the persecutor, because it is the perception of the relevant society—rather than the perception of the alien’s actual or potential persecutors—that

matters.

In analyzing these claims, adjudicators must be careful to focus on the particular social group *as it is defined* by the applicant and ask whether *that group* is distinct in the society in question. If an applicant claims persecution based on membership in his father's immediate family, then the adjudicator must ask whether *that* specific family is "set apart, or distinct, from other persons within the society in some significant way." It is not sufficient to observe that the applicant's society (or societies in general) place great significance on the concept of the family. If this were the case, virtually everyone in that society would be a member of a cognizable particular social group. The fact that "nuclear families" or some other widely recognized family unit generally carry societal importance says nothing about whether a *specific* nuclear family would be "recognizable by society at large." The average family—even if it would otherwise satisfy the immutability and particularity requirements—is unlikely to be so recognized.

Second, other applicants define the relevant "particular social group" as a collection of familial relatives of persons who have certain shared characteristics. Furthermore, when proposing these kinds of groups, applicants risk impermissibly defining their purported social group in terms of the persecution it has suffered or that it fears.

This opinion does not bar all family-based social groups from qualifying for asylum. To the contrary, in some societies, an applicant may present specific kinship groups or clans that, based on the evidence in the applicant's case, are particular and socially distinct. But unless an immediate family carries greater societal import, it is unlikely that a proposed family-based group will be "distinct" in the way required by the INA for purposes of asylum. 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."

Here, the Board's particular social group analysis merely cited past Board and federal court precedents recognizing family-based groups and then agreed with the parties' stipulations. The Board summarily concluded that "the facts of this case present a valid particular social group," without explaining how the facts supported this finding or satisfied the particularity and social visibility requirements. This cursory treatment could not, and did not, satisfy the Board's duty to ensure that the respondent satisfied the statutory requirements to qualify for asylum. The Board's conclusion that the respondent's proposed group presents a valid "particular social group" under the INA must be reversed.

IV

* * * For the reasons stated above, I overrule the portion of *Matter of L-E-A* discussing whether the proposed particular social group is cognizable. Furthermore, I abrogate all cases inconsistent with this opinion. * * *

NOTES AND QUESTIONS

1. What options would Barr's *L-E-A* opinion leave open for asylum claims based on family as a particular social group? It expressly notes that it "does not bar all family-based social groups from qualifying for asylum," but asserts that "most nuclear families are not inherently

socially distinct.” Does this decision purport to limit a PSG to larger kinship groups like clans or to celebrity families?

2. As in *Matter of M-E-V-G-* above, Barr’s *L-E-A-* decision relies heavily on the notion that to “have the ‘social distinction’ necessary to establish a particular social group, there must be evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group.” Does public recognition, or perhaps even notoriety, warrant a higher level of protection? As a policy matter, are the Kardashians more deserving of protection than the Jones family next door?

3. Barr asserted that if “Congress intended for refugee status to turn on one’s suffering of persecution ‘on account of’ family membership, Congress would have included family identity as one of the expressly enumerated covered grounds for persecution.” Could not the same argument be made for every potentially cognizable PSG? Indeed, as a catch-all provision, isn’t the real value of the PSG provision that it is flexible and not precisely defined, providing protection to groups that are not specifically delineated? How do the roots of the statutory language in the 1951 Convention and 1967 Protocol color how we should consider the intent of Congress in not including family as a distinct basis for asylum?

4. Does the potential number of claims based on family membership inherently mean that such groups are not cognizable? What if, as Barr feared, “virtually everyone in that society would be a member of a cognizable particular social group.” Given the other requirements for asylum, is this alone a reason to not recognize PSGs based on family?

5. In *L-E-A-*, Barr criticized the government’s use of stipulations, inherently questioning whether additional matters should have been disputed. He later went further, in *Matter of A-C-A-A-*, 28 I. & N. Dec. 84 (A.G. 2020), ruling that the Board has a duty to determine whether an asylum applicant has met all the statutory requirements independently of stipulations and immigration court findings. On July 26, 2021, Attorney General Garland vacated this decision, noting that the Board

did not address some elements of the respondent’s asylum claim because DHS had opted not to challenge those elements on appeal. * * * By prohibiting the Board from relying on stipulations or DHS’s decision not to contest certain elements on appeal, the prior decision departed from longstanding practice.... [that] helps ensure efficient adjudication by focusing the immigration courts’ limited resources on the issues that the parties actually contest.

Matter of A-C-A-A-, 28 I. & N. Dec. 351, 351–52 (A.G. 2021)

Page 1254, after the caption for *Matter of A-B-*, insert:

On June 16, 2021, Attorney General Merrick Garland issued a decision vacating Attorney General Jeff Sessions’s decision in *Matter of A-B-* in its entirety and stating that “pending rulemaking, immigration judges and the Board should follow per-*A-B-* precedent, including *Matter of A-R-C-G-*.” *Matter of A-B-*, 28 I. & N. Dec. 307 (A.G. 2021). Though overturned, Sessions’s decision still provides important context and background to understand decisions by the courts of appeals analyzing its validity. As discussed in the Notes and Questions following the case, Sessions’s decision also had significant effects on asylum

processing at the border. Finally, the issues discussed in the vacated decision will need resolution in the ongoing rulemaking process.

Pages 1264-70, replace entire Notes and Questions section with:

NOTES AND QUESTIONS

1. Putting aside the more fundamental question of why social distinction is even relevant to asylum claims at all (as to that, see the Notes and Questions following *M-E-V-G-*), was Sessions right to conclude that there is no evidence that Salvadoran society would meaningfully distinguish members of the group? Does the enactment of laws that criminalize domestic violence show that the home society does indeed attach significance to the plight of being unable to leave an abusive relationship?

2. There is no question that Sessions aimed to make asylum claims based on domestic violence a rarity. He stated that such claims “generally . . . will not qualify for asylum” and added in footnote 1 that “few” of those claims would pass even the low-level threshold of “credible fear.” Coming at the height of the “#MeToo” movement, the virtual withdrawal of protection from domestic violence victims was striking. What seems to account for Sessions’s rejection of these claims?

3. Rather than force women who are victims of domestic violence or other forms of gender-related persecution to fit the amorphous PSG criteria that case law has fashioned, would it be both more clear and more fair if Congress were simply to amend the INA to add gender to the list of protected grounds? Is there really a defensible reason to protect people from persecution based on race and religion, for example, but not gender?

4. Sessions reaffirmed that the PSG must “exist independently” of the asserted harm; i.e., “the individuals in the group must share a narrowing characteristic other than their risk of being persecuted.” Fair enough. Otherwise the claim would be “I will be persecuted on account of the fact that I will be persecuted,” a truism that would make the required nexus to one of the five protected grounds meaningless.

But notice how Sessions applied that principle to this case. Ms. A-B- did not articulate her PSG as “women who are likely to be persecuted” or “women who are likely to be victims of domestic violence.” The language she used was “women who are unable to leave their domestic relationships.” She argues that her inability to leave is precisely what makes her fear of persecution well-founded. Whatever other objections Sessions had to the definition of her proposed PSG, was this really a case where the PSG was defined by the risk of persecution, or was it a case where she is in fear of being persecuted “on account of” her inability to leave and therefore on account of her membership in the class that she argues is a PSG?

In *Grace v. Barr*, 965 F.3d 883, 904 (D.C. Cir. 2020), the court addressed this “circularity” concern:

[W]hether a group exists independently of the harm alleged is not always so apparent. Consider, for example, the group “women who fear being forced into prostitution.” Stated that way, the group is defined by the harm alleged (forced prostitution). But if the women are targeted for forced prostitution because they share a common protected characteristic, such as their political views,

then the group exists independently of the harm alleged and thus is not circular. Consider another example, Somali women who have suffered female genital mutilation. At one level, the group is circular because it is defined in part by the harm alleged (female genital mutilation). But it could also be defined independently of the harm by describing the group as Somali women or, depending on the facts, even more narrowly as “young girls in the Benadiri clan.” As these examples demonstrate, it is not fair to conclude that the group is defined by the harm or potential harm inflicted merely by the language used rather than determining what underlying characteristics account for the fear and vulnerability.

A-B- itself illustrates the difficulty in determining whether an applicant’s proposed group is circular. The asylum seeker there alleged that she had been abused by her husband on account of her membership in the group of “El Salvadoran women who are unable to leave their domestic relationships where they have children in common with their partners.” This group, like the group “women who fear forced prostitution,” appears to be defined in part by the alleged harm (being unable to leave a relationship). On closer examination, however, this is not necessarily so. If A.B.’s inability to leave her relationship stems from circumstances independent of the alleged harm—for example, legal constraints on divorce—then the group would not be circular because the “inability to leave” does not refer to harm at all. *See De Pena-Paniagua*, 957 F.3d 88, 93–94 (explaining that the “inability to leave a relationship may be the product of forces other than physical abuse,” such as “cultural, societal, religious, economic, or other factors”). . . .

[Guidance to asylum officers on implementation of A-B-] directs officers to “analyze each case on its own merits in the context of the society where the claim arises,” and warns that “analysis of a proposed social group is incomplete whenever the defining terms of the proposed group are analyzed in isolation, rather than collectively. . . .”

So far, so good. But in its brief, the government asserts that “the group must be ‘separate’ from the harm, not consisting of the harm, even in part.” As the asylum seekers point out, this statement of the rule is flatly inconsistent with both *A-B-* and the Guidance. Indeed, government counsel conceded as much at oral argument. Asked about the inaccurate statement in its brief, counsel agreed that asylum officers must not apply the social-group requirements formulaically and instead must go case-by-case. And when asked specifically about the group “Guatemalan women unable to leave their relationships,” counsel acknowledged that it is “not categorically barred, and that its validity would turn on the specific factual circumstances of an applicant’s claim. (“You could, in theory, have that group, if you checked the boxes.”).

5. Sessions also held that the PSG has to avoid “being too broad to have definable boundaries [otherwise it fails the particularity requirement] and too narrow to have larger significance in society” [otherwise it fails the social distinction requirement]. Let’s call this the

Goldilocks principle: The PSG can be neither too broad nor too narrow; it has to be “just right.”

Is it true that society cannot think of a particular class of individuals as a “group” (again, whatever is meant by “group” in the first place) if the group is narrow? Why does Sessions say, in footnote 8, that “there is reason to doubt that a nuclear family can comprise a particular social group?” As the footnote indicates, the BIA, DHS, and the Ninth Circuit had all agreed that the nuclear family can be a PSG; indeed, it might be the paradigm example of a PSG. The First Circuit agrees as well. See *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993). For the contrary proposition, Sessions cites the one dissenting judge in the Ninth Circuit case.

The dilemma that asylum seekers face in identifying a group that threads the needle between naming a group perceived as small enough to demonstrate particularity while large enough to capture the attention of society as a distinct group is evident in the Fifth Circuit’s discussion of the issue:

“Honduran women unable to leave their relationship” ... lacks particularity because broad swaths of society may be susceptible to victimization. *cf. Orellana-Monson v. Holder*, 685 F.3d 511, 521 (5th Cir. 2012) (rejecting “men who refused to join a gang” because that group was “exceedingly broad” and “encompassed a diverse cross section of society”); *Santos Mejia v. Sessions*, 717 F. App’x 257, 261 (4th Cir. 2018) (“A group consisting of ‘Honduran women evading rape and extortion’ would surely include every woman in Honduras.”).

Gonzales-Veliz has similarly failed to explain how Honduran society views women unable to leave their relationship as a socially distinct group. Gonzales-Veliz cites to several reports of a widespread *machismo* culture. However, those reports provide no guidance or aid in discerning whether or how Honduran culture “perceives, considers, or recognizes” women who are unable to leave their relationship “to be a distinct social group.”

Gonzales-Veliz v. Barr, 938 F.3d 219, 232 (5th Cir. 2019).

6. Sessions also emphasized that the well-founded fear of persecution must exist country-wide, not just in specific locations within the country. That requirement is not new. You saw it earlier in *Acosta* and again in *M-E-V-G*. Even in *A-R-C-G*-, the case that Attorney General Sessions overruled and Attorney General Garland reinstated, the Board acknowledged that requirement. In those earlier decisions, however, the Board pointed out that the burden was on the government to prove that internal relocation would be both “possible and reasonable.” Furthermore, the Board said, even if the applicant could safely and reasonably relocate in another part of the country, she might still qualify for “humanitarian asylum” based solely on past persecution, albeit with a heightened standard for the favorable exercise of discretion. Asylum based on past persecution is discussed on pages 1284, below.

Sessions, however, seemed to have reversed the burden of proof. Victims of private persecution, he said, “face the additional challenge of showing that internal relocation is not an option (or in answering DHS’s evidence that relocation is possible).”

7. In *A-B-*, Sessions also raised the bar on the issue of “nexus”—i.e., whether the persecution is “on account of” one of the five protected grounds, here PSG. Nexus is addressed in more detail in section B.2.d below. For now, note that Sessions (twice) quotes approvingly the following language from the original *R-A-* decision: The persecutor targeted the applicant “because she was his wife, not because she was a member of some broader collection of women, however defined, whom he believed warranted the infliction of harm.”

Does this reasoning miss the point? Assuming *arguendo* that the group Ms. R-A-described was indeed a PSG (a separate issue), the fact that she was the persecutor’s wife is what gave him the *ability* to persecute her. Put another way, he would not have been able to persecute her but for her membership in the alleged PSG. Does that fact mean that her membership in the alleged PSG is at least “one central reason” for the persecution? More generally, should the nexus requirement be satisfied in cases where the applicant’s membership in a PSG (or any other protected ground) is what gives the persecutor the opportunity to persecute him or her?

In Nazi Germany it was common for shopkeepers to attack Jewish competitors for commercial gain, not always because they hated Jews, but because they knew that the German Government’s refusal to protect Jews would enable the shopkeepers to get away with the attacks. Private actors, in other words, often persecuted Jews solely because their vulnerability presented the opportunity for doing so. Should victims of such persecution qualify for asylum? If so, does the same reasoning apply to women who are subjected to domestic violence solely because their relationship status is what gives their persecutors the opportunity to harm them?

Sessions added a related twist. Quoting again from *R-A-*, he said “[I]f the alleged persecutor is not even aware of the group’s existence, it becomes harder to understand how the persecutor may have been motivated by the victim’s ‘membership’ in the group to inflict the harm on the victim.” Is that a linguistic trick? Obviously the persecutor is aware that there exist women who are unable to leave their relationships. The premise that the persecutor is not aware of the group’s existence, therefore, is just another way of saying that the persecutor might not know that the home society would call the described individuals a “group.” Does that semantic observation really mean that his wife’s inability to leave the relationship cannot motivate him to persecute her?

8. A key element in Sessions’s *A-B-* opinion is that the persecutor is a private individual, not a governmental actor. How to evaluate asylum claims based on private actor persecution is a critical issue in almost all asylum cases based on domestic violence and, for that matter, almost all other forms of gender-related persecution—FGM, forced marriage, bride-burning, mass rape during wartime, etc. But the issue is also paramount in other contexts, ranging from gang violence, to threats from guerrilla armies, to persecution of LGBTQ individuals. These too inevitably involve persecution by private actors. There is a sophisticated literature on private sector persecution generally and the significance of private action in domestic violence asylum claims in particular.⁸⁰ The next few items will explore some of the key issues raised by claims of private sector persecution.

⁸⁰ See, e.g., Deborah Anker, Refugee Status and Violence Against Women in the “Domestic” Sphere: The Non-State Actor Question, 15 Geo. Immigration L.J. 391 (2001); Walter Kälin, Non-State Agents of Persecution and the Inability of the State to Protect, 15 Georgetown Immigration L.J. 415

9. The starting point is that both the international and U.S. refugee definitions clearly cover persecution by private actors. See, e.g., UNHCR Handbook, para. 65; Moore, above (refugee definition “does not identify the state as the necessary author or agent of the persecution feared”). The debate has been over whether asylum claims based on private sector persecution require any special additional showing of particular action or inaction on the part of the foreign government. According to paragraph 65 of the UNHCR Handbook, such persecution qualifies if it is “knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.” The usual formulation in the United States is that one who bases an asylum claim on persecution by a private actor must prove that the foreign government is either “unwilling or unable” to protect the applicant from persecution. That requirement might initially seem innocuous. After all, if the foreign government were *both* willing and able to protect the applicant from persecution, then by definition the persecution would not occur and any fear that the applicant had would not be well-founded. That is indeed the view of New Zealand’s Refugee Status Appeal Authority. See Refugee Appeal No. 71427/99 (1999), which upheld a domestic violence asylum claim, concluding that “the state fails to protect when it does not bring the level of risk of harm from the non-state actor to below a well-founded fear.” Contra, *Horvath v. Sec. of State for the Home Dept.* [2000] 3 W.L.R. 379, [2000] 3 All E.R. 577 (UK House of Lords) (applicant must prove state failed to operate system of protection against persecution).⁸¹

First, as a policy matter, when the applicant has a well-founded fear that he or she will be persecuted by a private actor because of one of the protected grounds, why should it be necessary to link the persecution to the state at all? Second, how would you expect Greatbatch or other feminist scholars to analyze this question? Third, which view do you find more convincing—the New Zealand approach or the UK approach? In answering this last question, try to identify the basic objectives of asylum and consider which view better promotes those objectives.

10. If the requirement that the state be unwilling or unable to provide protection is to be interpreted to require something more than actual unwillingness or inability, how stringent should the standard be? In *A-B-*, Sessions appeared to go even further than the UK House of Lords in *Horvath*, insisting on an extreme level of state irresponsibility. He observed that

(2001); Susan Kneebone, Moving Beyond the State: Refugees, Accountability and Protection, in Susan Kneebone (ed.), *The Refugee Convention 50 Years On: Globalisation and International Law*, ch. 11, at 281 et seq. (2003); Jennifer Moore, From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents, 31 Colum. Human Rights L. Rev. 81 (1999); Catherine Phuong, Persecution by Non-State Agents: Comparative Judicial Interpretations of the 1951 Refugee Convention, 4 Euro. J. Migration & L. 521 (2003).

⁸¹ Professor Laura Adams argues that in domestic violence cases the PSG should be defined as family membership and the state failure should be its policy of not intervening in intra-family matters. See Laura S. Adams, Fleeing the Family: A Domestic Violence Victim’s Particular Social Group, 49 Loyola L. Rev. 287 (2003); see also Marisa Silenzi Cianciarulo & Claudia David, Pulling the Trigger: Separation Violence as a Basis for Refugee Protection for Battered Women, 59 Amer. L. Rev. 337, 342 (2009) (urging recognition of “separation violence,” defined to cover “women who have left severely abusive relationships”).

“perfect protection” is not required. 26 I. & N. Dec. at 343. (No one argued that it was; a minimal risk won’t meet the requirement of a “well-founded” fear). But he goes far beyond the admonition that perfection cannot be expected. He requires proof that the government “condoned” the persecution “or at least demonstrated a *complete helplessness* to protect the victims” [emphasis added]. *Id.* at 337. In another passage he says the government protection must be “so lacking that their persecutors’ actions can be *attributed to the government*” [emphasis added]. *Id.* at 317. Does the statutory language authorize the Attorney General to require such a showing?

Even under those heightened standards, it is not clear why A-B-’s application failed. Sessions relied on the fact that A-B- “not only reached out to police, but received various restraining orders and had him arrested on at least one occasion.” *Id.* at 343. He did not mention the threats from her ex-husband’s brother, who was a police officer and therefore an agent of the state. Tahirih Justice Center, <https://www.tahirih.org/wp-content/uploads/2018/05/Brief-of-Tahirih-Justice-Center-et-al-Matter-of-AB.pdf>, at 24–25 (brief to AG re A.B.); *Matter of A-B-*, Slip Op. at 2–3 (BIA Aug. 18, 2017). Is the standard imposed by the Attorney General consistent with the analysis or the outcome in *Kasinga*?

In *Grace v. Barr*, 965 F.3d 883, 898-900 (D.C. Cir. 2020), the D.C. Circuit rejected the government’s argument that the statement that a government “condones” or is “completely helpless” is the same as “unwilling or unable”:

To begin with, as a matter of plain language, the two formulations are hardly interchangeable. A government that “condones” or is “completely helpless” in the face of persecution is obviously more culpable, or more incompetent, than one that is simply “unwilling or unable” to protect its citizens. Take, for example, the facts of a recent First Circuit decision, where a Mexican man sought asylum after his son was murdered by individuals he believed to be organized criminals. Evidence at the applicant’s removal hearing demonstrated that after the murder, federal police visited “the scene where [his son’s] body was recovered” and “took statements from [him] and his wife” and that “an autopsy was performed.” *Rosales Justo v. Sessions*, 895 F.3d 154, 159 (1st Cir. 2018). Although this was sufficient to establish that some “police took an immediate and active interest in [the applicant’s] son’s murder,” other evidence—corruption among state and local police, local residents’ “lack [of] faith” in police, and high homicide rates—showed that organized criminals generally operated with impunity within the applicant’s home state. Under the unwilling-or-unable standard, the applicant would qualify for asylum because, though the police investigation demonstrated his home government’s willingness to intervene, the evidence of criminal impunity demonstrated its inability to offer him effective protection. *See id.* at 167 (concluding that “country condition reports ... combined with [the applicant’s] testimony about the particular circumstances of his case[] were sufficient to support the ... finding that the police in [the applicant’s home state] would be unable to protect Rosales from persecution by organized crime”). By contrast, under the condoned-or-completely-helpless standard, the applicant’s asylum claim would fail because his home government, far from condoning the violence or

being completely helpless in response to the murder, responded to the crime scene, took statements from the asylum seeker and his wife, and autopsied the body. * * *

In short, contrary to the government’s arguments, the two standards differ. And putting all of its eggs in the “no change” basket, the government does not, in the alternative, defend the condoned-or-completely-helpless standard on the merits. That is, nowhere does it argue that even if the policy changed, the Attorney General or USCIS provided a reasoned explanation for the change. Accordingly, we have no choice but to find the standard arbitrary and capricious. Because this, by itself, requires setting aside the new standard, we need not reach the asylum seekers’ alternative argument that the new standard conflicts with the Refugee Act’s “well-founded fear” standard and IIRIRA’s “significant possibility” standard.

See also *Juan Antonio v. Barr*, 959 F.3d 778, 795 (6th Cir. 2020) (finding that asylum applicant met standard where “the supplemental material does not indicate *no* willingness on behalf of the Guatemalan government—indeed, the country has taken some steps to codify laws prohibiting violence against women—but rather, the material reinforces the country’s lack of resources and infrastructure necessary to protect indigenous Mayan women from their perpetrators”).

In an attempt to rehabilitate the language used in Sessions’s decision, Acting Attorney General Jeffrey Rosen issued a second opinion in *A-B-* in which he asserted that

Matter of A-B- did not alter the longstanding “unable or unwilling” standard or implement a new, more stringent test for determining when persecution by third parties may be attributed to the government. A government that is unwilling to control or protect against private harm can be said to “condone” it, in the ordinary sense of that word. See, e.g., *Webster’s Third New International Dictionary* 473 (1993) (condone means “to permit the continuance of”). And the “completely helpless” formulation identifies as persecutors governments that are actually unable to protect persons against private violence, while ensuring “that a government is not charged with persecution for failing to provide a particular standard of protection, or for lapses in protection.”

Matter of A-B-, 28 I. & N. Dec. 199, 201-202 (A.G. 2021) (Rosen). This second decision was also vacated by Biden administration Attorney General Garland. See *Matter of A-B-*, 28 I. & N. Dec. 307 (A.G. 2021) (Garland).

11. In cases where the applicant claims the government is unwilling, as opposed to unable, to protect against private persecution, the nexus requirement adds one more complexity: Who has to be motivated by one of the five protected grounds—the private actor or the government? In the same New Zealand case mentioned in item 9 above, the tribunal held that in such a situation it is enough that *either* the action of the private persecutor or the inaction of the government was motivated by one of the protected grounds. Accord, *Islam and Shah v.*

Sec. of State for the Home Dept. [1999] 2 A.C. 629, [1999] 2 All E.R. 545, [1999] 2 W.L.R. 1015 (U.K. House of Lords) (opinions of Lords Steyn and Hoffman). Do you agree?

12. Footnote 12 of Sessions's *A-B-* decision created a potential roadblock to many asylum claims, not just those based on PSG. Hewas quite right that INA § 208 gives adjudicators the discretion to deny asylum even when all the statutory prerequisites are satisfied. (Note that withholding of removal, in contrast, is mandatory when all the requirements are met.) Up to now, however, asylum claims based on well-founded fears of future persecution have seldom been denied on discretionary grounds, presumably because one who qualifies as a refugee and meets all the other statutory requirements will by definition have powerful positive equities. Although Sessions's "reminder" in footnote 12 is dictum (since discretion was not an issue in *A-B-*), adjudicators could well read it as an instruction to issue more discretionary denials.

The discretionary hurdle is taken up separately in section B.6 below. For now, note that Sessions quotes from the BIA's decision in the *Pula* case. The quoted passage lists *some* of the factors that the BIA said could be relevant to the exercise of discretion in asylum cases. In section B.6 you will see the fuller version of that passage. Sessions does not mention that the Board's main point in *Pula* was to *relax* the standard that one of their previous decisions had prescribed for the favorable exercise of discretion. *Matter of Pula*, 19 I. & N. Dec. 467, 473 (BIA 1987). He also omitted from his quotation several of the positive factors that the BIA included, *id.* at 473–74, as well as the final sentence of the quoted list: "In the absence of any adverse factors, however, asylum should be granted in the exercise of discretion." *Id.* at 474.

Noting this and additional language in *Pula*, at least one court immediately pushed back against a BIA discretionary denial that had been based solely on the applicant's use of a false passport to secure admission to the United States. That case, *Hussam F. v. Sessions*, 897 F.3d 707 (6th Cir. 2018), is described more fully in section B.6 on discretion below.

13. Possibly one of the most significant elements of Sessions's decision was the discussion of the applicant's burden in PSG cases. Accurately citing two BIA decisions, the Attorney General says in dictum that one who asserts a PSG "must clearly indicate, on the record and before the immigration judge, the exact delineation of any proposed particular social group." He adds that the Board "cannot sustain an asylum applicant's appeal based on a newly articulated social group not presented before or analyzed by the immigration judge."

Keep in mind (a) this means the applicant has not only the burden of proving the *facts* that establish a well-founded fear of persecution on account of membership in a PSG, but also the burden of precisely articulating the *legal theory* as to the makeup of that PSG; (b) as discussed earlier, the Board's case law governing when an alleged PSG will satisfy the "social distinction" and "particularity" requirements is so hopelessly inconsistent and confused that even experienced immigration attorneys often need to guess whether the BIA will find a given PSG formulation acceptable; (c) many asylum claimants are unrepresented (and opposed by a specialized ICE prosecutor), most do not speak English, most lack familiarity with the nuances of U.S. immigration law, most with genuine claims are traumatized by the persecution from which they are fleeing and the journey they had to undertake to get here, many have been in continuous detention, and many are children; and (d) if they guess wrong at the immigration

judge stage, there will be no opportunity to revise their PSG formulation before the BIA. Are there any problems here?

Page 1301, before subsection 6, insert new subsection 5.c:

c. DANGER TO THE SECURITY OF THE UNITED STATES

On July 9, 2020 the Trump administration proposed new regulations that would permit immigration officials to “consider emergency public health concerns based on communicable disease due to potential international threats from the spread of pandemics when making a determination as to whether ‘there are reasonable grounds for regarding [an] alien as a danger to the security of the United States’” and, thus, ineligible to be granted asylum or the protection of withholding of removal in the United States under Immigration and Nationality Act (“INA”) sections 208 and 241 and DHS and DOJ regulations.” 85 Fed. Reg. 41,201 (July 9, 2020). The proposed rule also would effectuate this ban at the credible fear screening stage.

Remarkably broad, the rule would allow denial of asylum not only for those with an actual disease, but also those who “exhibits symptoms” or “has come into contact with such disease” or even “is coming from a country * * * where such disease is prevalent or epidemic.” As Human Rights First notes:

This new mandatory bar to refugee protection would ban asylum seekers merely for having recently transited through a country where COVID-19 is prevalent, “coming into contact” with the coronavirus, including in U.S. immigration detention centers that medical experts have noted create conditions for contagion, and/or exhibiting “symptoms” possibly linked to COVID-19, like a cough or fever. The rule would also give the Department of Homeland Security (DHS) and the Department of Justice (DOJ) expansive authority to declare a potentially vast array of other treatable diseases as national security threats to deny asylum to refugees even after the coronavirus threat abates. The rule, if codified, would be used to significantly elevate the credible fear standard set by Congress making it virtually impossible for asylum seekers to pass preliminary screenings and blocking them from even requesting protection in the United States before an immigration judge.

Human Rights First, *New Asylum Ban, Recycled Pretext: Proposed Rule Would Illegally, Unjustly Bar Many Asylum Seekers on Public Health Grounds* (July 29, 2020), <https://www.humanrightsfirst.org/resource/new-asylum-ban-recycled-pretext-proposed-rule-would-illegally-unjustly-bar-many-asylum>.

Page 1324, before the last full paragraph insert:

On July 22, 2020, a federal court in Canada found that Canada’s Safe Third Country Agreement (STCA) with the United States infringed on the guarantees of the Canadian Charter of Rights and Freedoms. *Canadian Council of Refugees v. Canada (Immigration, Refugees and Citizenship)*, 2020 FC 707 at ¶ 162. Among other findings, the court noted:

[138] The Applicants have provided significant evidence of the risks and challenges faced by STCA ineligible claimants when they are returned to the

US.... The narrow focus here is the consequences that flow when a refugee claimant is returned to the US by operation of the STCA. The evidence establishes that the conduct of Canadian officials in applying the provisions of the STCA will provoke certain, and known, reactions by US officials. In my view, the risk of detention for the sake of "administrative" compliance with the provisions of the STCA cannot be justified. Canada cannot turn a blind eye to the consequences that befell Ms. Mustefa in its efforts to adhere to the STCA. The evidence clearly demonstrates that those returned to the US by Canadian officials are detained as a penalty.

[139] The penalization of the simple act of making a refugee claim is not in keeping with the spirit or the intention of the STCA or the foundational *Conventions* upon which it was built.

Id. at ¶ 138-39. The court suspended enforcement for six months to allow time for the Canadian parliament to respond. *Id.* at ¶ 163.

Page 1325–26, delete final paragraph starting on page 1325.

Page 1361, before subsection 8 insert:

C. TRUMP ADMINISTRATION ASYLUM RESTRICTIONS AND BIDEN ADMINISTRATION RESPONSES

In addition to its efforts to change the substantive rules governing asylum claims (including, as discussed above, Attorney General Sessions's decision in *Matter of A-B-* and Attorney General Barr's decision in *Matter of L-E-A-*), the Trump administration engaged in a full-scale effort to deter individuals from migrating to the United States and applying for asylum and to cause officials to deny significantly higher percentages of those applications that are filed.⁸² While some of these efforts—including the Trump administration's policies on zero tolerance, criminal prosecution of asylum-seekers, detention of children, and family separation—are discussed elsewhere in the book, a few of these initiatives warrant more specific attention and emphasis here. Some of the efforts and policies of the Trump administration have been expressly reversed by the Biden administration. But some remain in place and subject to ongoing litigation, and as discussed below, the Biden administration issued new restrictive asylum policies in 2023.

1. Credible Fear Determinations

First, the Trump administration instituted a series of measures intended to make the threshold for credible fear determinations in the expedited removal process—which, as discussed above, Congress intended to be a low standard for screening individuals *in* to normal

⁸² For a regularly updated chronology, see Nat'l Immigr. Justice Ctr., *A Timeline of the Trump Administration's Efforts to End Asylum* (last updated July 2020), <https://immigrantjustice.org/issues/asylum-seekers-refugees>; see also Am. Immigr. Council, *Policies Affecting Asylum Seekers at the Border* (Jan. 2020), <https://www.americanimmigrationcouncil.org/research/policies-affecting-asylum-seekers-border>.

asylum processes, rather than a high standard to screen them out. See *Grace v. Whitaker*, 344 F.Supp.3d 96, 109–14 (D.D.C. 2018) (describing changes in implementation of credible fear standard), *aff'd in part, rev'd in part*, 965 F.3d 883 (D.C. Cir. 2020). While Trump administration officials were unsuccessful in urging Congress to enact legislation ratcheting up the credible fear standard, they nevertheless made the credible fear process more restrictive through purely executive actions.⁸³ In *A-B-*, Sessions stated in passing that “few” asylum claims based on domestic or gang-related violence by nongovernmental actors—the claims most frequently put forward by the Central American refugees—“would satisfy the legal standard to determine whether an alien has a credible fear of persecution.” To implement Sessions’s decision, USCIS issued a Policy Memorandum on July 11, 2018 making it easier for officials to make negative credible fear determinations based on their conclusions in those limited screening interviews, that the asylum-seeker’s claim would ultimately be unsuccessful under *A-B-*:

In general, in light of [*A-B-*], claims based on membership in a putative particular social group defined by the members’ vulnerability to harm of domestic violence or gang violence committed by non-government actors will not establish the basis for asylum, refugee status, or a credible or reasonable fear of persecution.

USCIS Policy Memorandum, *Guidance for Processing Reasonable Fear, Credible Fear, Asylum and Refugee Claims in Accordance with Matter of A-B-*, <https://www.aila.org/infonet/uscis-guidance-processing-fear-matter-of-a-b-> (July 11, 2018). The agency issued a similar guidance document following Attorney General Barr’s decision in *L-E-A-*. USCIS Policy Memorandum, *USCIS Policy Memorandum, Guidance for Processing Reasonable Fear, Credible Fear, Asylum and Refugee Claims in Accordance with Matter of L-E-A-*, <https://www.aila.org/infonet/uscis-releases-policy-guidance-on-processing> (Sept. 30, 2019).

Did this guidance categorically preclude positive credible fear determinations when asylum-seekers state that they fear persecution based on domestic or gang-related violence? In *Grace v. Whitaker*, the district court concluded that *A-B-* and the Policy Memorandum impermissibly instituted a “general rule” against positive credible fear determinations in such circumstances that is contrary to the INA’s requirement that credible fear determinations rest on “individualized” determinations “based on the particular facts and circumstances of each case.” 346 F.Supp.3d at 126. However, the D.C. Circuit disagreed, concluding that that the language in both *A-B-* and the Policy Memorandum were sufficiently qualified to leave enough room for officials to continue to make those determinations on an individualized, case-by-case basis. *Grace*, 965 F.3d at 906.

Nevertheless, advocates raised concerns that in practice, this highly restrictive

⁸³ See Cong. Research Serv., Immigration: U.S. Asylum Policy 28 (Feb. 19, 2019), <https://www.everycrsreport.com/reports/R45539.html> (discussing Trump administration’s support for House bills proposing to require, in order for a positive credible fear determination to be made, that it be “more probable than not that the statements made by, and on behalf of, the alien in support of the alien’s claims are true”).

guidance would “lead to higher denial rates by asylum officers reviewing such cases in the southern border regions.” AILA, *Policy Brief: USCIS Guidance on Matter of A-B- Blocks Protections for Vulnerable Asylum Seekers and Refugees* 2 (July 23, 2018), <https://www.aila.org/infonet/uscis-matter-of-a-b-asylum-refugees> (“While the USCIS memorandum does not foreclose the possibility that some cases involving domestic abuse or gang violence will qualify for asylum, it seems likely that USCIS personnel will implement this guidance as a near-blanket preclusion of such claims.”). That prediction appears to have been well-founded. Soon after the *A-B-* ruling, asylum officers and immigration judges on the southern border began categorically finding no credible fear in gang violence cases, and thus refouling asylum applicants without allowing full hearings. Tal Kopan, *Impact of Sessions’ Asylum Move Already Felt at Border*, CNN (July 14, 2018), <https://www.cnn.com/2018/07/14/politics/sessions-asylum-impact-border/index.html>. USCIS then implemented other bureaucratic and procedural measures that contributed further to plummeting rates of positive credible fear determinations. See *L.M.-M. v. Cuccinelli*, 442 F.Supp.3d 1 (D.D.C. 2020); Amanda Holpuch, *Asylum: 90% of Claims Fall at First Hurdle After US Process Change, Lawsuit Alleges*, Guardian (Nov. 13, 2019), <https://www.theguardian.com/us-news/2019/nov/13/asylum-credible-fear-interview-immigration-women-children-lawsuit> (discussing allegations that positive credible fear determination rates at Dilley Detention Center had fallen from 97% of applicants to fewer than 10% over the course of 2019). In June 2020, as part of a sweeping set of proposed changes to the asylum regulations, DHS and DOJ sought to institute additional changes that would make it more difficult for asylum-seekers to pass the credible fear stage in the first place and provide for streamlined, “asylum-and-withholding-only” proceedings, rather than normal, full removal hearings, for those who are determined to have a credible fear of persecution. Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36,264 (Jun. 15, 2020).

As noted above, Attorney General Garland vacated the decisions in *A-B-* and *L-E-A-* on June 21, 2021. See *Matter of L-E-A-*, 28 I. & N. Dec. 304 (A.G. 2021); *Matter of A-B-*, 28 I. & N. Dec. 307 (A.G. 2021). Rolling back the overly restrictive views of asylum eligibility found in the Sessions and Barr decisions should permit asylum seekers to obtain credible fear determinations that are individualized and grounded in the INA, though ongoing monitoring is critical to ensure shifts in practice at the border. The Biden administration has not yet announced plans to revisit decisions that found the applicant lacked credible fear under the now-vacated standards.

2. Remain in Mexico Program

On December 20, 2018, the Trump administration announced the “Migrant Protection Protocols” program, also referred to as the “Remain in Mexico” program, which it began implementing the following month.⁸⁴ Under this program, after a rudimentary and

⁸⁴ Memorandum from Kirstjen M. Nielsen, Secretary, U.S. Dep’t of Homeland Sec., Policy Guidance for Implementation of the Migrant Protection Protocols, Jan. 25, 2019, https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf; Memorandum from Kevin K. McAleenan, Comm’r, U.S. Customs & Border Prot., Implementation of the Migrant Protection Protocols, Jan. 28, 2019,

inconsistently implemented screening process, DHS officials returned arriving non-Mexican asylum seekers to Mexico, where they were forced to wait while their asylum claims were adjudicated in removal proceedings in the United States. While precise numbers are unclear, by one estimate somewhere between 57,000 and 62,000 individuals were returned to Mexico under the program through January 2020. Am. Immigr. Council, *Policies Affecting Asylum Seekers at the Border*, *supra*, at 4. Based on data from EOIR, asylum-seekers diverted into the MPP program are considerably less likely to have attorneys or to appear for their proceedings. Less than 0.01 percent of these individuals have been granted asylum or other forms of relief. TRAC Immigration, *Details on MPP (Remain in Mexico) Deportation Proceedings* (July 2020), <https://trac.syr.edu/phptools/immigration/mpp/>. The operational effects of the program on immigration courts has been profound. See Fernanda Echavarri, “*A Fucking Disaster that is Designed to Fail*”: *How Trump Wrecked America’s Immigration Courts*, Mother Jones (Feb. 6, 2020), <https://www.motherjones.com/politics/2020/02/trump-immigration-court-backlog-migrant-protection-protocols/> (“MPP has further overwhelmed dockets across the country and pushed aside cases that already were up against a crippling backlog that’s a million cases deep, stranding immigration judges in a bureaucratic morass and families with little hope for closure anytime in the near future.”).

Effective January 21, 2021, DHS suspended new enrollments in the MPP program. U.S. Dep’t of Homeland Security, *DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program* (Jan. 20, 2021), <https://www.dhs.gov/news/2021/01/20/dhsstatement-suspension-new-enrollments-migrant-protection-protocols-program>. DHS subsequently announced a plan to process into the United States certain individuals who had been returned to Mexico under the MPP and who have cases pending before EOIR. See U.S. Dep’t of Homeland Security, *DHS Announces Process to Address Individuals in Mexico with Active MPP Cases* (Feb. 11, 2021), <https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases>. DHS Secretary Mayorkas then terminated the MPP program on June 1, 2021. Memorandum from Alejandro Mayorkas, Secretary, U.S. Dep’t of Homeland Sec., *Termination of the Migrant Protection Protocols Program*, Jun. 1, 2021, https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf. In terminating the program, Mayorkas noted:

The focus on speed was not always matched with sufficient efforts to ensure that conditions in Mexico enabled migrants to attend their immigration proceedings. In particular, the high percentage of cases completed through the entry of in absentia removal orders (approximately 44 percent, based on DHS

<https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/Implementation%20of%20the%20Migrant%20Protection%20Protocols.pdf>; Memorandum from Enforcement Programs Division, U.S. Customs & Border Prot., *Guiding Principles on Migrant Protection Protocols*, Jan. 28, 2019, <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf>. The roots of the MPP may be traced to one of the three immigration-related executive orders issued during the initial days of the Trump presidency. Exec. Order No. 13767, § 7, 82 Fed. Reg. 8793, 8795 (Jan. 25, 2017) (instructing the Secretary of Homeland Security to “take appropriate action . . . to ensure that aliens described in [INA § 235(b)(2)(C)] are returned to the territory from which they came pending a formal removal proceeding”).

data) raises questions for me about the design and operation of the program, whether the process provided enrollees an adequate opportunity to appear for proceedings to present their claims for relief, and whether conditions faced by some MPP enrollees in Mexico, including the lack of stable access to housing, income, and safety, resulted in the abandonment of potentially meritorious protection claims. I am also mindful of the fact that, rather than helping to clear asylum backlogs, over the course of the program backlogs increased before both the USCIS Asylum Offices and EOIR.

He concluded that “any benefits the program may have offered are now far outweighed by the challenges, risks, and costs that it presents.”

On June 24, 2021, Acting Director of EOIR Jean King issued a memorandum acknowledging that “[m]any respondents placed in the MPP for their removal proceedings were ultimately ordered removed in absentia and noting that adjudicators of motions to reopen “should be aware of the concerns the DHS Secretary expressed about the MPP” and mindful of their broad authority to reopen cases. Memorandum of Jean King, Acting Director, U.S. Dep’t of Justice, Executive Office of Immigration Review, *Migrant Protection Protocols and Motions to Reopen*, Jun. 24, 2021, <https://www.justice.gov/eoir/book/file/1405906/download>.

Was the MPP/Remain in Mexico program legally permissible? As statutory authority for its implementation, the Trump administration invoked INA § 235(b)(2)(C), which authorizes DHS to return certain noncitizens arriving from “a foreign territory contiguous to the United States” to that territory pending removal proceedings under INA § 240. The contiguous territory return provision applies to individuals who are “described in” INA § 235(b)(2)(A), which authorizes the government to initiate removal proceedings under § 240 against arriving noncitizens who are not “clearly and beyond a doubt entitled to be admitted.” However, INA § 235(b)(2)(B)(ii) provides further that § 235(b)(2)(A) “shall not apply” to noncitizens to whom the expedited removal procedures set forth in INA § 235(b)(1) *do* apply. As such, may the contiguous territory provision in § 235(b)(2)(C) permissibly be applied to noncitizens who are potentially subject to the expedited removal procedures in § 235(b)(1)—as virtually all of the individuals subject to the MPP program are—but nevertheless charged in non-expedited removal hearings under § 240? If not, then do executive officials lack statutory authority to implement the MPP program?

Earlier lawsuits challenging MPP required courts to wrestle with this question of whether the MPP program was legally authorized under § 235(b)(2)(C) and, even if it might be, whether other legal problems might arise from its implementation. In *Innovation Law Lab v. Nielsen*, 366 F.Supp.3d 1110, 1114 (N.D. Cal. 2019), the district court issued a preliminary injunction blocking the program, concluding that because the plaintiffs were asylum seekers who lacked valid admission documents—and therefore ordinarily would be subject to expedited removal proceedings under § 235(b)(1)—they accordingly were not subject to the contiguous territory return provision in § 235(b)(2)(C). The court further concluded that even if the contiguous territory provision could be lawfully applied to the individual plaintiffs and others like them, the MPP nevertheless lacked sufficient procedural safeguards to prevent individuals from being expelled or returned to a location where the asylum seeker might face persecution, in violation of the government’s obligations under both U.S. and international law. The court applied the injunction without any geographical limit, reasoning that “there is no

apparent reason that any of the places to which the MPP might ultimately be extended have interests that materially differ from those presented.”

On appeal, a divided Ninth Circuit motions panel issued an emergency stay of the district court’s preliminary injunction pending appeal.⁸⁵ *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 510 (9th Cir. 2019). However, when a subsequent Ninth Circuit panel adjudicated the merits of the government’s appeal, it concluded that the plaintiffs were likely to succeed on the merits of their claim that the MPP is inconsistent with INA § 235(b) and, as an alternative ground, their claim that the program fails to comply with the United States’s non-refoulement obligations under U.S. and international law. *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020), *petition for cert. filed* (Apr. 10, 2020) (No. 19-1212). The court, however, granted a stay of the district court’s injunction pending the government’s petition for certiorari in the Supreme Court to the extent that the injunction operated outside the geographical boundaries of the Ninth Circuit. *Innovation Law Lab v. Wolf*, 951 F.3d 986 (9th Cir. 2020).

On March 11, 2020, the Supreme Court granted the government’s application to fully stay the district court’s preliminary injunction pending certiorari.⁸⁶ *Wolf v. Innovation Law Lab*, 140 S. Ct. 1564 (2020). Litigation was ongoing at the time of the MPP rescission. Plaintiffs subsequently agreed that the preliminary injunction was moot and that the Supreme Court should dismiss the appeal. They did, however, oppose the government’s request to vacate the 9th Circuit opinion. On June 21, the Supreme Court ruled that the “judgment is vacated, and the case is remanded ... with instructions to direct the District Court to vacate as moot the April 8, 2019 order granting a preliminary injunction.” *Mayorkas v. Innovation Law Lab*, 141 S. Ct. 2842, 2842 (2021). At the time of this writing, other cases in lower federal courts raising similar claims are still pending. E.g., *Bollat Vasquez v. Wolf*, 460 F.Supp.3d 99 (D. Mass. 2020) (ordering DHS to “promptly rescind the orders returning [plaintiffs] to Mexico and ... permit their re-entry into the United States for the pendency of their immigration removal proceedings”).

Meanwhile, supporters of MPP wasted no time in filing a challenge to the Biden administration’s decision to end the policy:

⁸⁵ While concurring in the decision to temporarily stay the district court’s injunction, two of the panel’s three judges sharply criticized the MPP program in separate concurring opinions. Judge Paul Watford concurred in the panel’s conclusion that the government was likely to succeed in its claim that INA § 235(b)(2)(C) provides statutory authority for the program, but expressed concern that its implementation nevertheless was arbitrary and capricious, since its procedures “virtually guaranteed [that] some number of applicants [would be] being returned to Mexico in violation of the United States’ non-refoulement obligations” under international law. Concurring only in the result, Judge William Fletcher concluded that the MPP program lacked statutory authority—and that the government’s argument to the contrary “is wrong. Not just arguably wrong, but clearly and flagrantly wrong.”

⁸⁶ Justice Sotomayor noted without explanation that she would have denied the stay application.

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■ Chief Justice ROBERTS delivered the opinion of the Court.

In January 2019, the Department of Homeland Security—under the administration of President Trump—established the Migrant Protection Protocols. That program provided for the return to Mexico of non-Mexican aliens who had been detained attempting to enter the United States illegally from Mexico. On Inauguration Day 2021, the new administration of President Biden announced that the program would be suspended the next day, and later that year sought to terminate it. The District Court and the Court of Appeals, however, held that doing so would violate the Immigration and Nationality Act, concluding that the return policy was mandatory so long as illegal entrants were being released into the United States. The District Court also held that the attempted rescission of the program was inadequately explained in violation of the Administrative Procedure Act. While its appeal was pending, the Government took new action to terminate the policy with a more detailed explanation. But the Court of Appeals held that this new action was not separately reviewable final agency action under the Administrative Procedure Act.

The questions presented are whether the Government’s rescission of the Migrant Protection Protocols violated the Immigration and Nationality Act and whether the Government’s second termination of the policy was a valid final agency action.

I. A

* * *

MPP was implemented pursuant to express congressional authorization in the Immigration and Nationality Act (INA), which provides that “[i]n the case of an alien ... who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 240 of this title.” INA § 235(b)(2)(C). Prior to the initiation of MPP, the Department of Homeland Security (DHS) and its predecessor agency had primarily used § 235(b)(2)(C)] on an ad-hoc basis to return certain Mexican and Canadian nationals arriving at ports of entry.

A separate provision of the same section of the INA states that if “an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding ...under section 240 of this title.” § 235(b)(2)(A). Due to consistent and significant funding shortfalls, however, DHS has never had sufficient detention capacity to maintain in custody every single person described in section 235. In light of that fact, the Trump administration chose to implement MPP in part so that certain aliens attempting to enter the U. S. illegally or without documentation, including those who claim asylum, will no longer be released into the country, where they often fail to file an asylum application and/or disappear before an immigration judge can determine the merits of any claim. * * *

Following the change in Presidential administrations * * * the Biden administration sought to terminate the program. On January 20, 2021, the Acting Secretary of Homeland Security wrote that “[e]ffective January 21, 2021, the Department will suspend new enrollments in [MPP] pending further review of the program. Aliens who are not already enrolled in MPP should be processed under other existing legal authorities.” President Biden also issued Executive Order No. 14010, which directed the new Secretary of Homeland Security, Alejandro N. Mayorkas, to “promptly review and determine whether to terminate or modify the [MPP] program.”

On June 1, 2021, Secretary Mayorkas issued a memorandum officially terminating MPP (the June 1 Memorandum). In that memorandum, the Secretary noted his determination “that MPP [d]oes not adequately or sustainably enhance border management in such a way as to justify the program’s extensive operational burdens and other shortfalls.” He also emphasized that, since its inception, MPP had “played an outsized role in [DHS’s] engagement with the Government of Mexico,” given the “significant attention that it draws away from other elements that necessarily must be more central to the bilateral relationship.” For those and other reasons, the Secretary announced that he was “by this memorandum terminating the MPP program,” and “direct[ed] DHS personnel to take all appropriate actions to terminate MPP, including taking all steps necessary to rescind implementing guidance and other directives or policy guidance issued to implement the program.”

B

On April 13, 2021, the States of Texas and Missouri (respondents) initiated this lawsuit in the Northern District of Texas against Secretary Mayorkas and others. Respondents’ initial complaint challenged the Acting Secretary’s January 20 suspension of new enrollments in MPP, but following the June 1 Memorandum, they amended their complaint to challenge the Secretary’s June 1 rescission of the entire program. The amended complaint asserted that the June 1 Memorandum violated the INA and the Administrative Procedure Act (APA), and sought preliminary and permanent injunctive relief, declaratory relief, and vacatur of the rescission pursuant to the APA.

The District Court conducted a one-day bench trial and entered judgment for respondents. The court first concluded that terminating MPP would violate the INA. It reasoned that section 235 of the INA provides the government two options: mandatory detention pursuant to section 235(b)(2)(A) or contiguous-territory return pursuant to section 235(b)(2)(C). Because the Government was unable to meet its detention obligations under section 235(b)(2)(A) due to resource constraints, the court concluded, “terminating MPP necessarily leads to the systemic violation of Section 235 as aliens are released into the United States.” Second, the District Court found that the agency failed to engage in reasoned decisionmaking and therefore acted arbitrarily and capriciously in violation of the APA.

Based on these conclusions, the District Court vacated the June 1 Memorandum in its entirety and remanded to DHS for further consideration. And it imposed a nationwide injunction ordering the Government to “enforce and implement MPP in good faith until such a time as it has been lawfully rescinded in compliance with the APA and until such a time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory

detention under section 235 without releasing any aliens because of a lack of detention resources.”

The Government appealed and sought a stay of the injunction, which the District Court and the Court of Appeals each denied. The Government then applied to this Court for a stay. The Court denied the application, finding that the Government “had failed to show a likelihood of success on the claim that the [June 1 Memorandum] was not arbitrary and capricious.” The Court did not address the District Court’s interpretation of the INA. * * *

On October 29, the Secretary released a four-page memorandum that again announced the termination of MPP, along with a 39-page addendum explaining his reasons for doing so (the October 29 Memoranda). As the Secretary explained, this new assessment of MPP “examined considerations that the District Court determined were insufficiently addressed in the June 1 memo, including claims that MPP discouraged unlawful border crossings, decreased the filing of non-meritorious asylum claims, and facilitated more timely relief for asylum seekers, as well as predictions that termination of MPP would lead to a border surge, cause [DHS] to fail to comply with alleged detention obligations under the [INA], impose undue costs on states, and put a strain on U. S.-Mexico relations.”

The Secretary acknowledged what he called “the strongest argument in favor of retaining MPP: namely, the significant decrease in border encounters following the determination to implement MPP across the southern border.” But he nonetheless concluded that the program’s “benefits do not justify the costs, particularly given the way in which MPP detracts from other regional and domestic goals, foreign-policy objectives, and domestic policy initiatives that better align with this Administration’s values.” Finally, the Secretary once again noted that “[e]fforts to implement MPP have played a particularly outsized role in diplomatic engagements with Mexico, diverting attention from more productive efforts to fight transnational criminal and smuggling networks and address the root causes of migration.”

In light of those conclusions, the Secretary announced that he was once again “hereby terminating MPP.” He explained that DHS would “continue complying with the [District Court’s] injunction requiring good-faith implementation and enforcement of MPP.” But he noted that “the termination of MPP” would be “implemented as soon as practicable after a final judicial decision to vacate” that injunction. The Government then moved to vacate the injunction on the ground that the October 29 Memoranda had superseded the June 1 Memorandum, but the Court of Appeals denied the motion.

The Court of Appeals instead affirmed the District Court’s judgment in full. With respect to the INA question, the Court of Appeals agreed with the District Court’s analysis of the relevant provisions. That is, the court explained, section 235(b)(2)(A) “sets forth a general, plainly obligatory rule: detention for aliens seeking admission,” while section 235(b)(2)(C) “authorizes contiguous-territory return as an alternative.” Accordingly, the Court of Appeals reasoned, “DHS is violating (A)’s mandate, refusing to avail itself of (C)’s authorized alternative, and then complaining that it doesn’t like its options.” * * *

The Court of Appeals then criticized the Government for proceeding “without a hint of an intention to put the Termination Decision back on the chopping block and rethink things,” and for ultimately “just further defend[ing] what it had previously decided.” *Id.*, at

955. And the Court of Appeals drew a dichotomy between taking new agency action and appealing an adverse decision, asserting that “DHS chose not to take a new agency action” but “instead chose to notice an appeal and defend its Termination Decision in our court.” * * *

II

We begin with jurisdiction. The Government contends that the injunction the District Court entered was barred by INA § 242(f)(1). That provision reads as follows:

“Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [INA §§ 221–241], other than with respect to the application of such provisions to an individual alien against whom proceedings under [those provisions] have been initiated.”

As we recently held in *Garland v. Aleman Gonzalez*, section 242(f)(1) generally prohibits lower courts from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions. The District Court’s injunction in this case violated that provision. But that fact simply presents us with the following question: whether section 242(f)(1) deprives this Court of jurisdiction to reach the merits of an appeal, where the lower court entered a form of relief barred by that provision. Every federal appellate court has an obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it.”

Absent section 242(f)(1), the District Court clearly had federal question jurisdiction over respondents’ suit, which asserted claims arising under two federal statutes, the INA and the APA. The question, then, is whether section 242(f)(1) strips the lower courts of subject matter jurisdiction over these claims. The parties agree that the answer to that question is no, and so do we. That is because section 242(f)(1) withdraws a district court’s “jurisdiction or authority” to grant a particular form of relief. It does not deprive the lower courts of all subject matter jurisdiction over claims brought under sections 221 through 241 of the INA.

The text of the provision makes that clear. Section 242(f)(1) deprives courts of the power to issue a specific category of remedies: those that “enjoin or restrain the operation of” the relevant sections of the statute. A limitation on subject matter jurisdiction, by contrast, restricts a court’s “power to adjudicate a case.” Section 242(f)(1) bears no indication that lower courts lack power to hear any claim brought under sections 221 through 241. If Congress had wanted the provision to have that effect, it could have said so in words far simpler than those that it wrote. But Congress instead provided that lower courts would lack jurisdiction to “enjoin or restrain the operation of” the relevant provisions, and it included that language in a provision whose title—“Limit on injunctive relief”—makes clear the narrowness of its scope.

A second feature of the text of section 242(f)(1) leaves no doubt that this Court has jurisdiction: the parenthetical explicitly preserving this Court’s power to enter injunctive relief. § 242(f)(1) (“[N]o court (other than the Supreme Court) shall have jurisdiction or authority ...”). If section 242(f)(1) deprived lower courts of subject matter jurisdiction to adjudicate any non-individual claims under sections 221 through 241, no such claims could ever arrive at this

Court, rendering the provision's specific carveout for Supreme Court injunctive relief nugatory. Indeed, that carveout seems directed at precisely the question before us here: whether section 242(f)(1)'s "[l]imit on injunctive relief " has any consequence for the jurisdiction of this Court. Congress took pains to answer that question in the negative. Interpreting section 242(f)(1) to deprive this Court of jurisdiction under these circumstances would therefore fail to "give effect, if possible, to every clause and word of [the] statute."

Statutory structure confirms our conclusion. Elsewhere in section 242, where Congress intended to deny subject matter jurisdiction over a particular class of claims, it did so unambiguously. Section 242(a)(2), for instance, is entitled "Matters not subject to judicial review" and provides that "no court shall have jurisdiction to review" several categories of decisions, such as "any final order of removal against an alien who is removable by reason of having committed a criminal offense * * *" Congress could easily have added one more item to this list: any action taken pursuant to sections 221 through 241. Or it could have worded section 242(f)(1) similarly to the immediately adjacent section 242(g), which provides that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against [the alien]." But Congress did neither. Instead, it constructed a carefully worded provision depriving the lower courts of power to "enjoin or restrain the operation of" certain sections of the statute, and it entitled that provision a "[l]imit on injunctive relief."

Our prior cases have already embraced this straightforward conclusion. Most relevantly, the Court previously encountered a virtually identical situation in *Nielsen v. Preap*. There, as here, the plaintiffs sought declaratory as well as injunctive relief in their complaint, and there, as here, the District Court awarded only the latter. Yet this Court proceeded to reach the merits of the suit, notwithstanding the District Court's apparent violation of section 242(f)(1), by reasoning that whether the District Court had jurisdiction to enter such an injunction is irrelevant because the District Court had jurisdiction to entertain the plaintiffs' request for declaratory relief. Our disposition in *Preap* is inconsistent with an interpretation of the limitation in section 242(f)(1) that strips the lower courts of subject matter jurisdiction.³ And previous statements from this Court regarding section 242(f)(1) are in accord.

In short, we see no basis for the conclusion that section 242(f)(1) concerns subject matter jurisdiction. It is true that section 242(f)(1) uses the phrase "jurisdiction or authority," rather than simply the word "authority." But jurisdiction is a word of many, too many meanings. And the question whether a court has jurisdiction to grant a particular remedy is different from the question whether it has subject matter jurisdiction over a particular class of claims. Section 242(f)(1) no doubt deprives the lower courts of "jurisdiction" to grant classwide injunctive relief. But that limitation poses no obstacle to jurisdiction in this Court.

III

We now turn to the merits. Section 235(b)(2)(C) provides: "In the case of an alien ... who is arriving on land ... from a foreign territory contiguous to the United States, the [Secretary] may return the alien to that territory pending a proceeding under section 240." Section 235(b)(2)(C) plainly confers a discretionary authority to return aliens to Mexico during the pendency of their immigration proceedings. This Court has repeatedly observed that the

word “may” clearly connotes discretion. The use of the word “may” in section 235(b)(2)(C) thus makes clear that contiguous-territory return is a tool that the Secretary has the authority, but not the duty, to use.

Respondents and the Court of Appeals concede this point. They base their interpretation instead on section 235(b)(2)(A), which provides that, “in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 240 of this title.” Respondents and the Court of Appeals thus urge an inference from the statutory structure: Because section 235(b)(2)(A) makes detention mandatory, they argue, the otherwise-discretionary return authority in section 235(b)(2)(C) becomes mandatory when the Secretary violates that detention mandate.

The problem is that the statute does not say anything like that. The statute says “may.” And “may” does not just suggest discretion, it “clearly connotes” it. Congress’s use of the word “may” is therefore inconsistent with respondents’ proposed inference from the statutory structure. If Congress had intended section 235(b)(2)(C) to operate as a mandatory cure of any noncompliance with the Government’s detention obligations, it would not have conveyed that intention through an unspoken inference in conflict with the unambiguous, express term “may.” It would surely instead have coupled that grant of discretion with some indication of its sometimes-mandatory nature—perhaps by providing that the Secretary “may return” certain aliens to Mexico, “unless the government fails to comply with its detention obligations, in which case the Secretary must return them.” The statutory grant of discretion here contains no such caveat, and we will not rewrite it to include one.

The principal dissent emphasizes that section 235(b)(2)(A) requires detention of all aliens that fall within its terms. While the Government contests that proposition, we assume *arguendo* for purposes of this opinion that the dissent’s interpretation of section 235(b)(2)(A) is correct, and that the Government is currently violating its obligations under that provision.⁵ Even so, the dissent’s conclusions regarding section 235(b)(2)(C) do not follow. Under the actual text of the statute, Justice Alito’s interpretation is practically self-refuting. He emphasizes that “[s]hall be detained’ means ‘shall be detained,’” and criticizes the Government’s “argument that ‘shall’ means ‘may.’” But the theory works both ways. Congress conferred contiguous-territory return authority in expressly discretionary terms. “[M]ay return the alien’ means ‘may return the alien.’” The desire to redress the Government’s purported violation of section 235(b)(2)(A) does not justify transforming the nature of the authority conferred by section 235(b)(2)(C).

For this reason, Justice Alito misunderstands our analysis in insisting that our opinion authorizes the Government to release aliens subject to detention under section 235(b)(2)(A). We need not and do not decide whether the detention requirement in section 235(b)(2)(A) is subject to principles of law enforcement discretion, as the Government argues, or whether the Government’s current practices simply violate that provision.

In arguing that the Court should do so, the dissent proposes a number of hypotheticals in which a party fails to comply with a legal obligation imposed by statute and additionally refuses to exercise a discretionary alternative authorized by that statute. We wholeheartedly endorse the conclusion that the dissent draws from these hypotheticals: that “the failure to

make use of the discretionary option would not be seen as a valid excuse for non-compliance with the command that certain conduct ‘shall’ be performed.” But the question before us is not whether the Government is violating the immigration laws generally. The question is whether the INA requires the government to continue implementing MPP. And the statutory text clearly answers that question in the negative.

The historical context in which the provision was adopted confirms the plain import of its text. Section 235(b)(2)(C) was not added to the statute until 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)—more than 90 years after the Immigration Act of 1903 added the “shall be detained” language that appears in section 235(b)(2)(A). And section 235(b)(2)(C) was enacted in the immediate aftermath of a Board of Immigration Appeals (BIA) decision that specifically called into question the legality of the contiguous-territory return practice. Prior to that decision, the longstanding practice of the Immigration and Naturalization Service (INS) had been to require some aliens arriving at land border ports of entry to await their exclusion proceedings in Canada or Mexico. The BIA noted the lack of any evidence that this is a practice known to Congress and the absence of a supporting regulation. Congress responded mere months later by adding section 235(b)(2)(C) to IIRIRA and conferring on the Secretary express authority (“may”) to engage in the very practice that the BIA had questioned. And INS acknowledged that clarification shortly thereafter, explaining that section 235(b)(2)(C) and its implementing regulation simply add to the statute and regulation a long-standing practice of the Service. That modest backstory suggests a more humble role for section 235(b)(2)(C) than as a mandatory “safety valve” for any alien who is not detained under section 235(b)(2)(A).

In addition to contradicting the statutory text and context, the novelty of respondents’ interpretation bears mention. Since IIRIRA’s enactment 26 years ago, every Presidential administration has interpreted section 235(b)(2)(C) as purely discretionary. Indeed, at the time of IIRIRA’s enactment and in the decades since, congressional funding has consistently fallen well short of the amount needed to detain all land-arriving inadmissible aliens at the border, yet no administration has ever used section 235(b)(2)(C) to return all such aliens that it could not otherwise detain.

And the foreign affairs consequences of mandating the exercise of contiguous-territory return likewise confirm that the Court of Appeals erred. Article II of the Constitution authorizes the Executive to “engag[e] in direct diplomacy with foreign heads of state and their ministers.” Accordingly, the Court has taken care to avoid the danger of unwarranted judicial interference in the conduct of foreign policy, and declined to run interference in the delicate field of international relations without the affirmative intention of the Congress clearly expressed. That is no less true in the context of immigration law, where the dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation’s foreign policy.

By interpreting section 235(b)(2)(C) as a mandate, the Court of Appeals imposed a significant burden upon the Executive’s ability to conduct diplomatic relations with Mexico. MPP applies exclusively to non-Mexican nationals who have arrived at ports of entry that are located “in the United States.” § 235(a)(1). The Executive therefore cannot unilaterally return these migrants to Mexico. In attempting to rescind MPP, the Secretary emphasized that “[e]fforts to implement MPP have played a particularly outsized role in diplomatic

engagements with Mexico, diverting attention from more productive efforts to fight transnational criminal and smuggling networks and address the root causes of migration.” Yet under the Court of Appeals’ interpretation, section 235(b)(2)(C) authorized the District Court to force the Executive to the bargaining table with Mexico, over a policy that both countries wish to terminate, and to supervise its continuing negotiations with Mexico to ensure that they are conducted “in good faith.” That stark consequence confirms our conclusion that Congress did not intend section 235(b)(2)(C) to tie the hands of the Executive in this manner.

Finally, we note that—as DHS explained in its October 29 Memoranda—the INA expressly authorizes DHS to process applicants for admission under a third option: parole. See INA § 212(d)(5)(A). Every administration, including the Trump and Biden administrations, has utilized this authority to some extent. Importantly, the authority is not unbounded: DHS may exercise its discretion to parole applicants “only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.” And under the APA, DHS’s exercise of discretion within that statutory framework must be reasonable and reasonably explained. But the availability of the parole option additionally makes clear that the Court of Appeals erred in holding that the INA required the Government to continue implementing MPP.

In sum, the contiguous-territory return authority in section 235(b)(2)(C) is discretionary—and remains discretionary notwithstanding any violation of section 235(b)(2)(A). To reiterate: we need not and do not resolve the parties’ arguments regarding whether section 235(b)(2)(A) must be read in light of traditional principles of law enforcement discretion, and whether the Government is lawfully exercising its parole authorities pursuant to sections 212(d)(5) and 236A(a). We merely hold that section 235(b)(2)(C) means what it says: “may” means “may,” and the INA itself does not require the Secretary to continue exercising his discretionary authority under these circumstances. * * *

For the reasons explained, the Government’s rescission of MPP did not violate section 235 of the INA, and the October 29 Memoranda did constitute final agency action. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion. On remand, the District Court should consider in the first instance whether the October 29 Memoranda comply with section 706 of the APA.

■ Justice KAVANAUGH, concurring.

I agree with the Court that the District Court had jurisdiction over Texas’s suit. I also agree with the Court that the Government prevails on the merits of the two specific legal questions presented here. I note, moreover, that six Members of the Court agree with the Court’s merits conclusion. See Barrett, J., dissenting.

I write separately to briefly elaborate on my understanding of the relevant statutory provisions and to point out one legal issue that remains open for resolution on remand.

When the Department of Homeland Security lacks sufficient capacity to detain noncitizens at the southern border pending their immigration proceedings (often asylum proceedings), the immigration laws afford DHS two primary options.

Option one: DHS may grant noncitizens parole into the United States if parole provides a significant public benefit. Parole entails releasing individuals on a case-by-case basis into the United States subject to reasonable assurances that they will appear at all hearings. Notably, every Administration beginning in the late 1990s has relied heavily on the parole option, including the administrations of Presidents Clinton, Bush, Obama, Trump, and Biden.

Option two: DHS may choose to return noncitizens to Mexico. Consistent with that statutory authority, the prior Administration chose to return a relatively small group of noncitizens to Mexico.

In general, when there is insufficient detention capacity, both the parole option and the return-to-Mexico option are legally permissible options under the immigration statutes. As the recent history illustrates, every President since the late 1990s has employed the parole option, and President Trump also employed the return-to-Mexico option for a relatively small group of noncitizens. Because the immigration statutes afford substantial discretion to the Executive, different Presidents may exercise that discretion differently. That is Administrative Law 101.

To be sure, the Administrative Procedure Act and this Court's decision in *State Farm* require that an executive agency's exercise of discretion be reasonable and reasonably explained. For example, when there is insufficient detention capacity and DHS chooses to parole noncitizens into the United States rather than returning them to Mexico, DHS must reasonably explain why parole provides a significant public benefit. Review under that *State Farm* standard is deferential but not toothless.

The question of whether DHS's October 29 decision satisfies the *State Farm* standard is not before this Court at this time. * * *

To be clear, when there is insufficient detention capacity and the President chooses the parole option because he determines that returning noncitizens to Mexico is not feasible for foreign-policy reasons, a court applying *State Farm* must be deferential to the President's Article II foreign-policy judgment. Nothing in the relevant immigration statutes at issue here suggests that Congress wanted the Federal Judiciary to improperly second-guess the President's Article II judgment with respect to American foreign policy and foreign relations.
* * *

■ Justice ALITO, with whom Justice THOMAS and Justice GORSUCH join, dissenting.

In fiscal year 2021, the Border Patrol reported more than 1.7 million encounters with aliens along the Mexican border. When it appears that one of these aliens is not admissible, may the Government simply release the alien in this country and hope that the alien will show up for the hearing at which his or her entitlement to remain will be decided?

Congress has provided a clear answer to that question, and the answer is no. By law, if an alien is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a removal proceeding. And if an alien asserts a credible fear of persecution, he or she shall be detained for further consideration of the application for asylum. Those requirements, as we have held, are mandatory. See *Jennings v. Rodriguez*.

Congress offered the Executive two—and only two—alternatives to detention. First, if an alien is arriving on land from a foreign territory contiguous to the United States, the Department of Homeland Security (DHS) may return the alien to that territory pending a removal proceeding. Second, DHS may release individual aliens on parole, but only on a case-by-case basis for urgent humanitarian reasons or a significant public benefit.

Due to the huge numbers of aliens who attempt to enter illegally from Mexico, DHS does not have the capacity to detain all inadmissible aliens encountered at the border, and no one suggests that DHS must do the impossible. But rather than avail itself of Congress's clear statutory alternative to return inadmissible aliens to Mexico while they await proceedings in this country, DHS has concluded that it may forgo that option altogether and instead simply release into this country untold numbers of aliens who are very likely to be removed if they show up for their removal hearings. This practice violates the clear terms of the law, but the Court looks the other way. * * *

II

I agree with the majority that the injunction entered by the District Court in this case exceeded its jurisdiction or authority to enjoin or restrain the operation of the relevant statutes. That conclusion follows from a straightforward analysis of the text of § 242(f)(1), as recognized by the Court's decision in *Garland v. Aleman Gonzalez*. But that is where the majority and I part ways. * * *

III

The Court is not only wrong to reach the merits of this case, but its analysis of the merits is seriously flawed. First, the majority errs in holding that the INA does not really mean what it says when it commands that the aliens in question “shall” be detained pending removal or asylum proceedings unless they are either returned to Mexico or paroled on a case-by-case basis. According to the majority, it is fine for DHS simply to release these aliens en masse and allow them to disappear. * * *

A

* * * [T]he INA gives DHS three options regarding the treatment of the aliens in question while they await removal or asylum proceedings. They may be (1) detained in this country or (2) returned to Mexico or (3) paroled on a case-by-case basis. Congress has provided no fourth option, but the majority now creates one. According to the majority, an alien who cannot be detained due to a shortage of detention facilities but could be returned to Mexico may simply be released. That is wrong.

1

The language of INA § 235(b)(2)(A) is unequivocal. With narrow exceptions that are inapplicable here, it provides that every alien “who is an applicant for admission” and who “the examining immigration officer determines ... is not clearly and beyond a doubt entitled to be admitted ... shall be detained for a [removal] proceeding.” Six years ago, the Government argued strenuously that this requirement is mandatory, and its brief could hardly have been more categorical or emphatic in making this point. See *Brief for Petitioners in Jennings v.*

Rodriguez (“Aliens seeking admission who are not ‘clearly and beyond a doubt entitled to be admitted’ are statutorily prohibited from physically entering the United States and must be detained during removal proceedings ..., unless the Secretary exercises his discretion to release them on parole”). And here, the repeated ‘shall be detained’ clearly means what it says.”

The *Jennings* Court correctly accepted that argument, which was central to our holding. (“Read most naturally, §§ 235(b)(1) and (b)(2) thus mandate detention of applicants for admission until certain proceedings have concluded”). But now, in an about-face, the Government argues that “shall be detained” actually means “may be detained.”

The Government was correct in *Jennings* and is wrong here. “[S]hall be detained” means “shall be detained.” The Government points out that it lacks the facilities to detain all the aliens in question, and no one questions that fact. But use of the contiguous-return authority would at least reduce the number of aliens who are released in violation of the INA’s command. The District Court made a factual finding that rescinding MPP would cause additional violations of Congress’s unambiguous detention mandate. It also found that “the termination of MPP has contributed to the current border surge” by giving aliens the “perverse incentiv[e]” to cross the border illegally in hopes of being paroled and released. Thus, the Government is failing to meet the statutory detention mandate, not only because of limitations on its detention capacity but also because it refuses to use the contiguous-territory return authority.

Other than the argument that “shall” means “may,” the Government’s only other textual argument is that it is paroling aliens “on a case-by-case basis for urgent humanitarian reasons or significant public benefit,” as permitted under § 212(d)(5)(A). But the number of aliens paroled each month under that provision—more than 27,000 in April of this year—gives rise to a strong inference that the Government is not really making these decisions on a case-by-case basis. The Government argues that respondents had the burden to show that it is not making case-by-case determinations and that they have not met that burden, but information about the true nature of these proceedings is in the Government’s possession, and it has revealed little about what actually takes place. At argument, however, the Solicitor General argued that the case-by-case determination requirement can be met simply by going through a brief checklist for each alien. Even the rudimentary step of verifying that an alien does not have a criminal record is not performed in every case. Such procedures are inconsistent with the ordinary meaning of “case-by-case” review, and as the Court of Appeals pointed out, the circumstances under which § 212(d)(5)(B)) was adopted bolster that conclusion.

The majority claims that the Government’s use of its parole authority under § 212(d)(5)(A) is not before us, but the Government cites that authority as a reason why it does not need to use its contiguous-territory return authority. Moreover, the District Court’s judgment relied on factual findings regarding DHS’s abuse of its parole authority on the record that the Government provided.

For these reasons, § 212(d)(5)(A) cannot justify the release of tens of thousands of apparently inadmissible aliens each month, and that leaves the Government with only one lawful option: continue to return inadmissible aliens to Mexico.

The majority's chief defense of the Government's rejection of MPP is based on a blinkered method of statutory interpretation that we have firmly rejected. The majority largely ignores the mandatory detention requirement imposed by § 235(b)(2)(A) and, instead, reads the contiguous-return provision, § 235(b)(2)(C), in isolation. That provision says that the Secretary "may" return aliens to the country from which they entered, not that the Secretary must do so, and for the majority, that is enough to show that use of that authority is not required.

That reading ignores the statutory structure of the INA and wrongly confines itself to examining a particular statutory provision in isolation. We have an obligation to read the INA as a coherent regulatory scheme. And if we follow that canon, the majority's interpretation collapses.

Read as a whole, the INA gives DHS discretion to choose from among only three options for handling the relevant category of inadmissible aliens. The Government must either: (1) detain them, (2) return them to a contiguous foreign nation, or (3) parole them into the United States on an individualized, case-by-case basis. These options operate in a hydraulic relationship: When it is not possible for the Government to comply with the statutory mandate to detain inadmissible aliens pending further proceedings, it must resort to one or both of the other two options in order to comply with the detention requirement to the greatest extent possible.

There is nothing strange about this interpretation of how the relevant provisions of the INA work together. Consider this example. Suppose a state law provides that every school district "shall" provide a free public education to every student from kindergarten through the 12th grade and that another statute says that a district "may" arrange for its students to attend high school in an adjacent district. A small district refuses to operate its own high school because it lacks the necessary funds, and this district also declines to arrange for its students to attend a school in an adjacent district because the law says only that a district "may" take that course of action. Refusing to exercise this discretionary authority, the district throws up its hands and says to its high school students: "We're sorry. If you want to go to high school, you will have to make your own arrangements and foot the bill." If those students sue, would any court sustain what the district did?

Other examples come readily to mind. Suppose that a building code says that every multi-unit residential building "shall" have at least two means of egress from upper floors, and suppose that another provision says that such a building "may" have an external fire escape. The owner of such a building refuses to construct a second internal stairway because the cost would be prohibitive and also declines to install a fire escape because the law says that option is discretionary. Would the owner's non-compliance be permitted?

Here is one more example. A State that operates its own motor vehicle inspection facilities has a law that says that every vehicle "shall" be inspected every year. The law also says that motorists "may" have their vehicles inspected at a licensed private garage. A motorist fails to have his car inspected because he must work during the time when the state facility is open and would be fired if he took time off. This motorist also declines to have his car inspected at a private garage that is open during his off hours because the law says only that he "may" use such a facility. Would the motorist escape a citation?

The answer in each of the above examples is that the failure to make use of the discretionary option would not be seen as a valid excuse for non-compliance with the command that certain conduct “shall” be performed, and it is also hard to see the difference between those examples and the situation here.

3

The majority’s main reason for rejecting the argument just described is that the contiguous-return provision does not say expressly that it was meant to “operate as a mandatory cure of any non-compliance with the Government’s detention obligations.” But what logic compels need not be stated expressly.

The majority also relies on the fact that the contiguous- return provision was enacted 90 years after the provision requiring detention and the fact that the circumstances under which the contiguous-return provision was adopted suggest that it was intended to serve only a “humble role.” Those circumstances cannot change what the relevant provisions say or the way in which they logically work together. The Court should not use extra-textual evidence to demote one of DHS’s three lawful alternatives to the status of a historical footnote.

The majority and the concurrence fault the lower courts for intruding upon the foreign policy authority conferred on the President by Article II of the Constitution. But enforcement of immigration laws often has foreign relations implications, and the Constitution gives Congress broad authority to set immigration policy. See Art. I, § 8, cl. 4. This means, we have said, that policies pertaining to the entry of aliens are entrusted exclusively to Congress. The President has vital power in the field of foreign affairs, so does Congress, and the President does not have the authority to override immigration laws enacted by Congress. * * *

Finally, the majority emphasizes the fact that prior administrations have also failed to detain inadmissible aliens, but that practice does not change what the law demands. The majority cites no authority for the doctrine that the Executive can acquire authority forbidden by law through a process akin to adverse possession. * * *

While I would affirm the Fifth Circuit if we reached the merits, I agree with the majority that the District Court on remand should * * * assess, among other things, whether it is arbitrary and capricious for DHS to refuse to use its contiguous-territory return authority to avoid violations of the statute’s clear detention mandate; whether the deterrent effect that DHS found MPP produced in reducing dangerous attempted illegal border crossings, as well as MPP’s reduction of unmeritorious asylum claims, is adequately accounted for in the agency’s new decision; and whether DHS’s rescission of MPP is causing it to make parole decisions on an unlawful categorical basis rather than case-by-case, as the statute prescribes.

Justice BARRETT, with whom Justice THOMAS, Justice ALITO, and Justice GORSUCH join as to all but the first sentence, dissenting.

I agree with the Court’s analysis of the merits—but not with its decision to reach them. The lower courts in this case concluded that INA § 242(f)(1), a provision of the Immigration and Nationality Act sharply limiting federal courts’ “jurisdiction or authority to enjoin or restrain the operation of “ certain immigration laws, did not present a jurisdictional bar. Just

two weeks ago, however, we repudiated their reasoning in *Garland v. Aleman Gonzalez*. Because we are a court of review and not first view, I would vacate and remand for the lower courts to reconsider their assertion of jurisdiction in light of *Aleman Gonzalez*. * * *

NOTES AND QUESTIONS

1. The majority refuses to alter the discretionary nature of the “contiguous-territory return authority in section 235(b)(2)(C) . . . notwithstanding any violation of section 235(b)(2)(A).” If detention of all arriving persons pursuant to INA § 235(b)(2)(A) is simply not feasible, what options does the government have for persons it cannot detain? How do the various opinions differ in their view of parole under INA § 212(d)(5)(A) as a possible response?

2. The majority concludes that “the Government’s rescission of MPP did not violate section 235 of the INA” yet remands for resolution of a number of issues. What questions remain, and how do the majority and dissent differ in describing the task ahead for the district court? What outcome do you anticipate on remand?

3. The balance of executive and legislative power is a theme that appears in both the majority and dissenting opinions. In dissent, Alito writes that “the Constitution gives Congress broad authority to set immigration policy,” citing as authority the Naturalization Clause, Art. I, § 8, cl. 4. Is this clause an enumerated source of power to regulate treatment of noncitizens seeking asylum at the border?

3. Third Countries

The Trump presidency instituted a series of rules intended to require asylum-seekers to apply for asylum in third countries. On July 16, 2019, the Trump administration issued an interim final rule promulgating “regulations to provide that, with limited exceptions, an alien who enters or attempts to enter the United States across the southern border after failing to apply for protection in a third country outside the alien’s country of citizenship, nationality, or last lawful habitual residence through which the alien transited en route to the United States is ineligible for asylum.” 84 Fed. Reg. 33,829 (2019). This so-called “Transit Rule” was immediately challenged in two separate cases. In one, the court denied a preliminary request to block implementation of the regulation, *Capital Area Immigrants’ Rights Coalition, Inc. v. Trump*, No. 19-cv-02117, 2019 WL 3436501 (D.D.C. July 24, 2019), but later granted summary judgment for the plaintiffs, concluding that the government had impermissibly promulgated the Transit Rule without going through the APA’s notice-and-comment rulemaking process. *Capital Area Immigrants’ Rights Coalition, Inc. v. Trump*, 471 F.Supp.3d 25 (D.D.C. 2020).

In the other, the court enjoined the rule from going into effect. *East Bay Sanctuary Covenant v. Barr*, 385 F.Supp.3d 922 (N.D. Cal. 2019). In *East Bay*, the court noted that “Congress has already created a bar to asylum for an applicant who may be removed to a ‘safe third country.’ The safe third country bar requires a third country’s formal agreement to accept refugees and process their claims pursuant to safeguards negotiated with the United States.” *Id.* at 930. Moreover, noted the court, “the administrative record demonstrates abundantly why Mexico is not a safe option for many refugees.” *Id.* at 944-45. After a drawn out procedural journey, the Supreme Court stayed the nationwide injunction pending the disposition of the Government’s appeal in the Ninth Circuit. *Barr v. East Bay Sanctuary Covenant*, 140 S. Ct. 3

(2019). Justice Sotomayor, joined by Justice Ginsburg, issued a dissenting opinion, concluding that the government had not satisfied the burden necessary for a stay to be granted, but also raising concerns about the Trump administration's increasingly routine practice of applying for stays pending appeal in the Supreme Court, which the government historically had sought "rarely" and, she wrote, "should be an 'extraordinary act.'"

Two days later, the Administration announced that it had entered into an "Asylum Cooperative Agreement" with Guatemala, despite an earlier ruling from the Guatemalan high court blocking the Guatemala President from entering into a safe third country. See *Guatemalan Court Halts "Safe Third Country" Designation for Asylum Seekers*, Reuters (July 15, 2019), <https://www.reuters.com/article/us-usa-immigration-guatemala/guatemalan-court-halts-safe-third-country-designation-for-asylum-seekers-idUSKCN1UA1TK>. Agreements with El Salvador and Honduras soon followed.

On remand, the Ninth Circuit upheld a preliminary injunction against implementation of these third country agreements. Writing for the court, Judge William Fletcher noted that the agreements implicate two statutory bars to asylum: "First, an alien subject to the 'safe third country' provision may not apply for asylum. INA § 208(a)(2)(A). Second, neither the Attorney General nor the Secretary of Homeland Security may grant asylum to an alien who was 'firmly resettled' in another country prior to arriving in the United States. INA § 208(b)(2)(A)(vi)." *East Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (9th Cir. 2020).

The court observed further that "two core requirements that must be satisfied before the safe-third-country bar applies. First, there must be an agreement between the United States and another country to which the alien would be removed and in which the alien would not be subject to persecution. Second, the country with which the United States has such an agreement must allow access to a 'full and fair' procedure for determining eligibility for asylum or equivalent temporary protection." Subject to exceptions, an asylum seeker is "firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement."

As to the safe third country bar, the court concluded that the rule "creates a bar to asylum, in addition to the asylum bars that already exist in § 208." in excess of statutory limitations because it is not consistent with INA § 208. It also found the rule arbitrary and capricious because it "runs counter to the evidence before the agency" and because the agencies "entirely failed to consider an important aspect of the problem." As stated by the court:

A critical component of both bars is the requirement that the alien's "safe option" be genuinely safe. The safe-third-country bar requires that the third country enter into a formal agreement with the United States; that the alien will not be persecuted on account of a protected ground in that country; and that the alien will have access to a "full and fair" asylum procedure in that country. The requirement of a pre-existing safe-third-country agreement was an essential procedural safeguard agreed to among members of Congress to prevent arbitrary denials of asylum. The firm-resettlement bar requires the government to make an individualized determination whether an alien has truly

been firmly resettled, or, if only an offer of permanent resettlement has been made, an individualized determination whether an alien has too tenuous a tie to the country making the offer or is too restricted by that country's authorities. The safe-place requirements embedded in the safe-third-country and firm-resettlement bars ensure that if the United States denies a refugee asylum, the refugee will not be forced to return to a land where he would once again become a victim of harm or persecution—an outcome which would totally undermine the humanitarian policy underlying the regulation.

In stark contrast to the safe-third-country and firm-resettlement bars, the Rule does virtually nothing to ensure that a third country is a safe option. The sole protection provided by the Rule is its requirement that the country through which the barred alien has traveled be a “signatory” to the 1951 Convention and the 1967 Protocol. This requirement does not remotely resemble the assurances of safety built into the two safe-place bars of INA § 208. A country becomes a signatory to the Convention and the Protocol merely by submitting an instrument of accession to the U.N. Secretary General. It need not submit to any meaningful international procedure to ensure that its obligations are in fact discharged. Many of the aliens subject to the Rule are now in Mexico. They have fled from Guatemala, Honduras, and El Salvador. All four of these countries are parties to the Convention and Protocol.

The Rule superficially resembles the safe-third-country bar in that aliens subject to the Rule are in a third country, and they must apply for asylum in that country (Mexico) or must have previously applied for asylum in another third country (Guatemala). Similarly, the safe-third-country bar under INA § 208(a)(2)(A) allows the United States to deny asylum on the ground that the alien may be removed to and apply for asylum in a safe third country. But entirely absent from the Rule are the requirements under INA § 208(a)(2)(A) that there be a formal agreement between the United States and the third country, and that there be a “full and fair” procedure for applying for asylum in that country.

The Rule does not even superficially resemble the firm-resettlement bar. The firm-resettlement bar denies asylum to aliens who have either truly resettled in a third country, or have received an actual offer of firm resettlement in a country where they have ties and will be provided appropriate status. Aliens subject to the Rule cannot conceivably be regarded as firmly resettled in Mexico. They do not intend to settle in Mexico. They have been there only for the time necessary to reach our border and apply for asylum. Nor have they received an offer of resettlement. Even if they were to receive such an offer, they have no ties to Mexico. The Supreme Court has long recognized that the firm-resettlement bar does not bar aliens who have merely traveled through third countries, since many refugees make their escape to freedom from persecution in successive stages and come to this country only after stops along the way. The BIA has likewise understood that denial of asylum cannot be predicated solely on an alien's transit through a third country.

Moreover, the rule does not exempt unaccompanied minors, who since 2008 are subject to extra protections when seeking asylum. Trafficking Victims Protection Reauthorization Act, Pub. L. No. 110–457, 122 Stat. 5044 (2008). First, unaccompanied minors are expressly exempted from the safe-third-country bar. INA § 208(a)(2)(E). Second, they are entitled to present their asylum claims in the first instance to an asylum officer in a non-adversarial interview instead of to an immigration court. INA § 208(b)(3)(C). The court found that in “failing to explain why the Rule provides no special protection for unaccompanied minors, the agencies entirely failed to consider an important aspect of the problem.”

Finally, as to the geographic scope of the injunction, the circuit court found that “the district court did not abuse its discretion in entering an injunction covering the four states along our border with Mexico.”⁸⁷

On December 17, 2020, DHS issued a final transit rule, to be effective on January 19, 2021, just one day before the change of administrations. *Asylum Eligibility and Procedural Modifications*, 85 Fed. Reg. 82,260 (Dec. 17, 2020). The district court found that the final rule “is functionally equivalent to the interim rule that this Court preliminarily enjoined (and another court vacated)... [because it] categorically denies asylum to most persons entering the United States at the southern border who did not first apply for asylum in Mexico or another country.” *East Bay Sanctuary Covenant v. Barr*, 519 F.Supp.3d 663, 664 (N.D. Cal. 2021). The district court enjoined the final rule from taking effect, finding it “invalid because it is inconsistent with existing asylum laws.” Further, the court noted “that the Final Rule is likely unlawful because Chad Wolf did not have the authority to issue the Final Rule... [given] Wolf’s lack of statutory authority to serve as Acting Secretary and the resulting invalidity of actions he took during that service.” *Id.* at 668.

On February 6, 2021, the Biden administration announced that the “United States has suspended and initiated the process to terminate the Asylum Cooperative Agreements with the Governments of El Salvador, Guatemala, and Honduras as the first concrete steps on the path to greater partnership and collaboration in the region laid out by President Biden.” Anthony Blinken, Secretary of State, *Press Statement: Suspending and Termination the Asylum Cooperative Agreements with the Governments of El Salvador, Guatemala, and Honduras* (Feb. 6, 2021), <https://www.state.gov/suspending-and-terminating-the-asylum-cooperative-agreements-with-the-governments-el-salvador-guatemala-and-honduras/>.

Backtracking on earlier moves to ensure that asylum seekers are able to have their claims heard, the Biden administration promulgated a rule effective May 11, 2023 that reintroduced many of the most severe aspects of the Trump Transit Rule. See *Circumvention of Lawful Pathways*, 88 Fed. Reg. 31314 (May 16, 2023). Under this rule, asylum seekers “must enter under specified ‘lawful pathways’—either a valid visa; narrow, country-specific parole programs; or a pre-scheduled CBP One appointment—or be subject to a sweeping ban that

⁸⁷ In a concurring opinion, Judge Richard Clifton stated that he joined the court’s conclusion about the scope of the injunction only insofar as the panel was bound by circuit precedent, but not in the opinion’s reasoning. Judge Eric Miller, a recent Trump appointee who joined the Ninth Circuit in February 2019, concurred in part and dissented in part, agreeing with the court’s conclusion that the rule was invalid but maintaining that the scope of the injunction should be limited to “asylum seekers having a bona fide client relationship with the plaintiff organizations.”

renders them ineligible for asylum.”⁸⁸ As described by Human Rights First:

The Biden asylum ban renders nearly all asylum seekers who traveled through another country on their way to the U.S. southern border ineligible for asylum unless they (1) applied for and were denied asylum in one of those countries (regardless of their safety there, or the unrealistic requirement of waiting there for an asylum denial) or (2) managed to secure one of the highly limited ‘pre-scheduled’ appointments to enter at an official port of entry (via CBP One, a glitchy, inequitable smartphone app operated by Customs and Border Protection (CBP) like a daily lottery).⁸⁹

The presumption of ineligibility for asylum may be rebutted, but only upon a showing of exceptionally compelling circumstances. The ban does not apply to

1) people who are unaccompanied children at the time they enter the United States and 2) people who came to the United States directly from their home country without traveling through another country (i.e. Mexican nationals or stateless people whose last habitual residence was Mexico). The ban also does not cover people who arrive in the United States by plane or elsewhere, such as the U.S.-Canada border.⁹⁰

Because of these geographic carveouts to the ban, advocates have charged that in practice the Biden administration’s “lawful pathways” rule is akin to the Title 42 expulsion regime discussed in Chapter 9: “a blatant attempt to target people seeking asylum protection at the southern border, who are primarily people of color and do not have the resources or ability to travel to the United States by plane.”⁹¹ Advocates have been particularly concerned about the safety of vulnerable groups turned back at the southern border:

Black, Indigenous, and LGBTQ+ people waiting to seek asylum in the United States, as well as those without financial resources, face particular and egregious barriers, dangers and disparities in seeking asylum due to the asylum ban. Anti-Black violence and discrimination in Mexico have been extensively documented. Haitian people seeking asylum in Nogales, Ciudad Juárez, Reynosa, and Matamoros described feeling unsafe and at risk of harm by Mexican authorities or cartels, and a Venezuelan couple recently witnessed police in Tijuana brutally beating Haitians. Guatemalan and Mexican Indigenous people seeking asylum at the Nogales DeConcini port of entry struggle for months to get an appointment through the CBP One app, which is

⁸⁸ National Immigration Project, *Facing an Impossible Choice* (July 24, 2023), https://nipnlg.org/sites/default/files/2023-07/2023_Facing-An-Impossible-Choice.pdf.

⁸⁹ Human Rights First, *Refugee Protection Travesty: Biden Asylum Ban Endangers and Punishes At-Risk Asylum Seekers* (July 2023), <https://humanrightsfirst.org/library/refugee-protection-travesty/>.

⁹⁰ Human Rights First, *Biden Administration Asylum Ban: Widely Opposed Misstep Violates Law and Fuels Wrongful Deportation of Refugees*, (June 2023) https://humanrightsfirst.org/wp-content/uploads/2023/06/Asylum_Ban_Final_Rule_Factsheet_6.28.pdf.

⁹¹ *Id.* at 3.

not available in Indigenous languages, and could be subjected to the asylum ban’s penalties if they seek asylum without an appointment. LGBTQ+ persons face well-documented violence in Mexico. For example, a Colombian LGBTQ+ asylum seeker recounted to Human Rights First that she was sexually assaulted by a Mexican officer, and a Venezuelan LGBTQ+ asylum seeker explained that LGBTQ+ people are targeted and violated while waiting in the Matamoros encampment.⁹²

Advocacy groups quickly filed suit to challenge the Biden asylum ban, alleging that “[i]n practice, the Rule will function just like the enjoined [Trump] entry ban, because the Rule’s other requirements are virtually impossible for most asylum seekers to meet. While the prior transit rule was in effect, more than 98% of asylum seekers were unable to satisfy its conditions because of danger and overwhelmed or nonexistent asylum systems in transit countries.” See, e.g., Complaint, *East Bay Sanctuary Covenant v. Biden*, No. 18-cv-06810-JST (N.D. Cal. May 11, 2023). On July 25, 2023, the district court granted plaintiffs’ motion for summary judgment and vacated the rule, remanding to the agencies involved. Order, *East Bay Sanctuary Covenant v. Biden*, No. 18-cv-06810-JST (N.D. Cal. May 11, 2023). The court was “not persuaded that the existence of other exceptions or the opportunity to rebut the presumption materially distinguishes this Rule” from Trump administration bans that were previously invalidated. As the court noted, “[r]egulations imposing additional conditions on asylum must be consistent with the core principle of the safe-third-country and firm-resettlement bars. This Rule is not.” The court concluded that

the Rule is contrary to law because it presumes ineligible for asylum noncitizens who enter between ports of entry, using a manner of entry that Congress expressly intended should not affect access to asylum. The Rule is also contrary to law because it presumes ineligible for asylum noncitizens who fail to apply for protection in a transit country, despite Congress’s clear intent that such a factor should only limit access to asylum where the transit country actually presents a safe option. * * *

The Rule is arbitrary and capricious for at least two reasons. First, it relies on the availability of other pathways for migration to the United States, which Congress did not intend the agencies to consider in promulgating additional conditions for asylum eligibility. Second, it explains the scope of each exception by reference to the availability of the other exceptions, although the record shows that each exception will be unavailable to many noncitizens subject to the Rule.

Meanwhile, Republican elected officials seeking to further restrict migration also have challenged the Biden administration’s asylum rule on behalf of their states with a different, factually questionable set of allegations that the asylum bar actually encourages migration because it does not apply to some migrants, such as unaccompanied children, and permits opportunities for some individuals to rebut the presumption of ineligibility for asylum:

⁹² Human Rights First, *supra* note 89, at 6.

In a farcical attempt to address the invasion of illegal aliens across the southern border following the end of Title 42, the Biden Administration published a new Final Rule inviting migrants to download an app to schedule a convenient time and place to cross the border illegally. Neither the app nor the border patrol officers at the southern border ask if the illegal aliens are seeking asylum, nor do they validate any claim for protection. The Biden Administration is inviting tens of thousands of aliens into Texas, releasing them into the country, and inflicting serious costs on the State of Texas.

Complaint, *Texas v. Mayorkas*, No. 2:23-cv-00024 (W.D. Tex. May 23, 2023); see also *Indiana v. Mayorkas*, No. 1:23-cv-00106-CRH (D. N.D. May 31, 2023).

Page 1333, after second paragraph of subsection vii insert:

On June 26, 2020, USCIS issued a final rule that further restricts employment authorization documents for many asylum seekers. Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. 38532 (June 26, 2020). Among the increased barriers to employment authorization for asylum seekers are a longer waiting period for initial employment authorization, 365 days, a prohibition on granting employment authorization to asylum seekers who entered or attempted to enter the United States at a place and time other than lawfully through a port of entry on or after August 25, termination of employment authorization upon an administratively final asylum denial, and a the introduction of administration discretion in issuance of employment authorization.

Page 1382, at end of Item 4 insert:

The Attorney General weighed in to clarify the “acting in an official capacity” aspect of the definition of torture. *Matter of O-F-A-S-*, 28 I&N Dec. 35 (A.G. 2020). He notes that an act constitutes “torture” only if it is inflicted or approved by a public official or other person “acting in an official capacity,” 8 C.F.R. § 1208.18(a)(1), and this official capacity requirement limits the scope of the Convention to actions performed “under color of law.” In *O-F-A-S-*, the respondent citizen of Guatemala alleged that he would be tortured if removed to Guatemala, citing a prior incident in which five men wearing police uniforms and wielding high-caliber handguns forced their way into his home, assaulted him, stole his money, and threatened further harm to him and his family. The immigration judge and BIA agreed that such actions were not “under color of law” because they involved either non-state actors or “rogue officials.” The Attorney General wrote:

The “under color of law” standard draws no categorical distinction between the acts of low- and high-level officials. A public official, regardless of rank, acts “under color of law” when he exercises power possessed by virtue of law and made possible only because he was clothed with the authority of law. * * * Every federal court of appeals to consider the question has [agreed] that action “in an official capacity” means action “under color of law.” * * * [T]hose courts have held that “an act is under color of law when it constitutes a misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.” But some immigration judges have eschewed the “under color of law” rubric and instead focused on * * * language distinguishing between “authoritative” and “rogue” officials. Reviewing

courts have interpreted those immigration court decisions as applying a distinct “rogue official” test, under which the “extrajudicial” acts of “corrupt, low-level agents” will not constitute torture if government authorities would neither condone nor acquiesce in the low-level agents’ behavior. * * * Relying solely on the “rogue agent” discussion, * * * the immigration judge held that the CAT does not cover “rogue agents acting outside the scope of law, motivated by personal gain.”

The Board agreed with the immigration judge’s conclusion that the respondent’s assailants were not acting “in an official capacity” and dismissed the respondent’s appeal, but reached that conclusion through different reasoning. * * * [T]he Board emphasized that “‘in an official capacity’ means ‘under color of law’”—a phrase absent from the immigration judge’s decision. The Board explained that, because action “under color of law” characteristically involves misuse of power possessed by virtue of law, certain acts motivated by personal objectives can fall within the CAT’s scope. The Board clarified that an act that is motivated by personal objectives is under color of law when an official uses his official authority to fulfill his personal objectives. In an apparent attempt to resolve any confusion about the “under color of law” and “rogue official” standards and whether those standards establish different tests, the Board explained that “under the treaty and its implementing regulation, torturous conduct committed by a public official who is acting ‘in an official capacity,’ that is, ‘under color of law’ is covered by the Convention Against Torture, but such conduct by an official who is not acting in an official capacity, also known as a ‘rogue official,’ is not covered by the Convention.”

To the extent the Board used “rogue official” as shorthand for someone not acting in an official capacity, it accurately stated the law. By definition, the actions of such officials would not form the basis for a cognizable claim under the CAT. But continued use of the “rogue official” language by the immigration courts going forward risks confusion, not only because it suggests a different standard from the “under color of law” standard, but also because “rogue official” has been interpreted to have multiple meanings. * * *

I agree with the Board that the “under color of law” standard is correct, and that it is the only standard that immigration courts should apply when evaluating claims for protection under the CAT. The relevant judicial backdrop, the CAT’s ratification history, and subsequent judicial interpretation all support a single standard: public officials or other persons act “in an official capacity” when they act “under color of law.” As explained by the Supreme Court in another context, acts are performed “under the color of law” when the actor misuses power possessed by virtue of law and made possible only because the actor was clothed with the authority of law. * * *

I agree and now reaffirm * * * that “in an official capacity” means “under color of law.” This standard does not categorically exclude corrupt, low-level officials from the CAT’s scope. Rather, regardless of rank, a public official acts under color of law when he exercises power possessed by virtue of

law and made possible only because he is clothed with the authority of law. Whether any particular official's actions ultimately satisfy this standard is a fact-intensive inquiry that depends on whether the official's conduct is fairly attributable to the State. * * * By immunizing extrajudicial action by low-level officials from the CAT's scope, a freestanding "rogue official" rule would appear to disqualify much of what the "under color of law" rule might otherwise qualify as "torture."

CHAPTER 12

UNDOCUMENTED IMMIGRANTS

Page 1433, at the end of Item 2 insert:

As discussed in Chapter 13, the Supreme Court in a 5-4 opinion held in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), that Secretary of Commerce Wilbur Ross’s decision to include the citizenship question was pretextual and remanded the issue back to the agency for further consideration. On July 2, 2019, Secretary Ross announced that it would print the 2020 Census without the citizenship question. Shortly thereafter, President Trump announced that for reapportionment purposes he would not report counts of persons not in lawful immigration status. See discussion in Chapter 13.

Page 1471, after second paragraph of Item 9 insert:

Other states have joined California in allowing undocumented immigrants and DACA beneficiaries to apply for admission to practice law. *Ruling in Utah Opens Doors for Some Immigrants to be Lawyers*, Associated Press (Jan. 30, 2020), <https://apnews.com/7f1aef5124f4290066777d32552eb8ca>; Bruce Goldman, *How Unauthorized Immigrants are Fighting to Practice Law*, Law360.com (Aug. 11, 2019), <https://www.law360.com/articles/1186579/how-unauthorized-immigrants-are-fighting-to-practice-law> (noting that Arizona, Florida, Illinois, Nebraska, New Jersey, New York, Oregon, Pennsylvania, and Wyoming allow unauthorized immigrants to practice law).

Relatedly, a number of states, including California, Illinois, New Mexico and Nevada, have passed laws allowing noncitizens, to be eligible to apply for professional and occupational licenses regardless of immigration status. Three of these states—California, Illinois and Nevada—allow the use of Individual Tax Identification Number (ITIN) as a substitute for Social Security Number. Some states allow DACA beneficiaries to apply for licenses for certain professions, including Arkansas (nurses), Mississippi (professional counselors), New York (teaching certifications and licenses in fifty other professions, including physicians, nurses, dentists, and pharmacists). On July 30, 2020, the New Jersey legislature passed a bill that would remove immigration status as a barrier to obtaining professional or occupational licenses. At this writing, the bill has not been signed by the governor.

10. The coronavirus pandemic has drawn attention to the significant extent to which immigrant workers, many of whom are undocumented, are highly represented in economic sectors deemed “essential.” See Donald Kerwin, Mike Nicholson, Daniela Alulema, and Robert Warren, *US Foreign-Born Essential Workers by Status and State, and the Global Pandemic*, Center for Migration Studies (May 1, 2020), <https://cmsny.org/publications/us-essential-workers/> (stating that based on the 2018 census data, 19.8 million immigrants work in “essential critical infrastructure” and “5.5 million are undocumented” and of this group, 74 percent are “essential infrastructure workers”). As the report notes:

Undocumented immigrants work—by essential industry—in construction (1,320,500), restaurants (846,100), agriculture and farms (310,800), landscaping (277,600), building cleaners (268,400), food processing and manufacturing (193,900), transportation (181,000), grocery stores (147,300),

hotels and other accommodations (137,000), and warehousing, distribution, and fulfillment of online orders (103,000).

Highlighting the significant roles that undocumented immigrants have played in these “essential” sectors in the midst of the pandemic, Alfredo Corchado has suggested that “[i]t’s time to offer all essential workers a path to legalization”:

In the past, the United States has rewarded immigrant soldiers who fought our wars with a path to citizenship. Today, the fields — along with the meatpacking plants, the delivery trucks and the grocery store shelves — are our front lines, and border security can’t be disconnected from food security. * * *

It might seem hard to imagine this happening during the “Build the wall” presidency, when Congress can barely agree on emergency stimulus measures. Many Republicans no longer support even DACA, the program that protected Dreamers who grew up here and that could be revoked by the Supreme Court this week. But the pandemic scrambles our normal politics.

“We have started talking about essential workers as a category of superheroes,” said Andrew Selee, the president of the nonpartisan Migration Policy Institute and author of “Vanishing Frontiers.” If the pandemic continues for a year or two, he said, we should think “in a bold way about how do we deal with essential workers who have put their life on the line for all of us but who don’t have legal documents.”

Maybe, he said, “they should be in the pipeline for fast-track regularization, just like those with DACA” are, for now.

Alfredo Corchado, *A Former Farmworker on American Hypocrisy*, N.Y. Times (May 6, 2020), <https://www.nytimes.com/2020/05/06/opinion/sunday/coronavirus-essential-workers.html>. Do you agree? How should immigration reform debates account for the extent to which undocumented workers play important roles in economic sectors deemed “essential”?

11. Even as many immigrants are essential workers, immigrants

are also over-represented in some of the industries that are now seeing huge declines in demand due to efforts to slow the spread of the pandemic. * * * MPI finds that 20 percent of the U.S. workers in vulnerable industries facing massive layoffs are immigrants. These 6 million individuals are coincidentally about the same number as the immigrant workers in industries vital to the coronavirus response, meaning that collectively 12 million foreign-born workers are at the leading edge of the response to and impacts from the pandemic.

Julia Gelatt, *Immigrant Workers Vital to the U.S. COVID-19 Response, Disproportionately Vulnerable*, Migration Pol’y Inst. (Mar. 2020), <https://www.migrationpolicy.org/research/immigrant-workers-us-covid-19-response>.

Page 1473, at the end of the section insert:

Federal legislative responses to the economic impact of the pandemic include the Coronavirus Aid, Relief, and Economic Security (CARES) Act⁹³ and the Paycheck Protection Program and Health Care Enhancement Act.⁹⁴ These measures “provide economic relief and health care options amidst the growing COVID-19 pandemic. * * * Nevertheless, these bills fall short of meeting the most basic health care and economic needs of millions of Americans, including immigrant workers and families who are on the frontlines of caring for our communities during this pandemic, providing crucial services while others are able to shelter at home. Nat’l Immigr. Law Ctr., *Understanding the Impact of Key Provisions of COVID-19 Relief Bills on Immigrant Communities* (updated May 27, 2020), <https://www.nilc.org/wp-content/uploads/2020/04/COVID19-relief-bills-understanding-key-provisions.pdf>.

For example, as regards health and nutrition, these laws “did not alter Medicaid eligibility for immigrants; therefore, many immigrants remain excluded * * *. *Id.* Also, the CARES Act provides funding of some state requests to increase Supplemental Nutrition Assistance Program (SNAP, formerly Food Stamps). Unauthorized immigrants are not eligible for SNAP benefits and therefore do not qualify for this aid. Cong. Research Serv., *Unauthorized Immigrants’ Eligibility for COVID-19 Relief Benefits: In Brief* (May 7, 2020).

In the workplace, the unemployment assistance and insurance provisions work through programs that require employment work authorization, such that unauthorized immigrants are not eligible for any of these. Even immigrants who have employment authorization face hurdles, as closures of USCIS offices and delays in processing make it difficult for many immigrants to obtain or renew employment authorizations that must be in place both at the time of filing relief claim and for the period of time for which they are claiming relief. ACLU, *COVID-19 Doesn’t Discriminate—Neither Should Congress’ Response* (Apr. 2, 2020), <https://www.aclu.org/news/immigrants-rights/covid-19-doesnt-discriminate-neither-should-congress-response/>

Page 1504, after the first paragraph insert:

In 2019, the Supreme Court again considered whether a state law seeking to limit illegal immigration was preempted by IRCA, reviewing a Kansas criminal law provision that penalized unauthorized noncitizen workers who used other persons’ Social Security numbers on state and federal tax-withholding forms on their employment records. The law was challenged on preemption grounds and in a 5-4 opinion, the Supreme Court held in *Kansas v. Garcia*, 140 S. Ct. 791 (2019), that IRCA does not preempt the Kansas law.

Kansas v. Garcia

Supreme Court of the United States, 2019
140 S. Ct. 791

■ ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, GORSUCH, and KAVANAUGH, JJ., joined. THOMAS, J., filed a concurring opinion, in

⁹³ Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020).

⁹⁴ Pub. L. No. 116-139 134 Stat. 620 (Apr. 24, 2020).

which GORSUCH, J., joined. BREYER, J., filed an opinion concurring in part and dissenting in part, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined.

■ Justice ALITO delivered the opinion of the Court.

Kansas law makes it a crime to commit “identity theft” or engage in fraud to obtain a benefit. Respondents—three aliens who are not authorized to work in this country—were convicted under these provisions for fraudulently using another person’s Social Security number on state and federal tax-withholding forms that they submitted when they obtained employment. The Supreme Court of Kansas held that a provision of the Immigration Reform and Control Act of 1986 (IRCA), expressly preempts the Kansas statutes at issue insofar as they provide a basis for these prosecutions. We reject this reading of the provision in question, as well as respondents’ alternative arguments based on implied preemption. We therefore reverse.

I.A.

* * *

[IRCA makes it unlawful to hire a noncitizen knowing that he or she is unauthorized to work in the United States. INA § 274A(a)(1)(A).] To enforce this prohibition, IRCA requires employers to comply with a federal employment verification system. Using a federal work-authorization form (I-9), employers “must attest” that they have “verified” that an employee “is not an unauthorized alien” by examining approved documents such as a United States passport or alien registration card. This requirement applies to the hiring of any individual regardless of citizenship or nationality. Employers who fail to comply may face civil and criminal sanctions. INA §§ 274A(e)(4), (f); 8 C.F.R. § 274a.10.

IRCA concomitantly imposes duties on all employees, regardless of citizenship. No later than their first day of employment, all employees must complete an I-9 and attest that they fall into a category of persons who are authorized to work in the United States. INA § 274A(b)(2); 8 C.F.R. §§ 274a.2(b)(1)(i)(A). In addition, under penalty of perjury, every employee must provide certain personal information—specifically: name, residence address, birth date, Social Security number, e-mail address, and telephone number. It is a federal crime for an employee to provide false information on an I-9 or to use fraudulent documents to show authorization to work. 18 U.S.C. §§ 1028, 1546.

While IRCA imposes these requirements on employers and employees, it also limits the use of I-9 forms. A provision entitled “Limitation on use of attestation form,” provides that I-9 forms and “any information contained in or appended to such form[s] may not be used for purposes other than for enforcement of “ the INA or other specified provisions of federal law, including those prohibiting the making of a false statement in a federal matter, identity theft, immigration-document fraud, and perjury (18 U.S.C. § 1621). In addition, INA § 274A(d)(2)(F) prohibits use of “the employment verification system” “for law enforcement purposes,” apart from the enforcement of the aforementioned federal statutes.

* * * A federal regulation provides that all employees must furnish their employers with a signed withholding exemption certificate when they start a new job, but federal law apparently does not require the discharge of an employee who fails to do so. The submission of a fraudulent

W-4, however, is a federal crime. 26 U.S.C. § 7205.

Kansas uses a tax-withholding form (K-4) that is similar to the federal form. * * *

Finally, IRCA contains a provision that expressly “preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) *upon those who employ, or recruit or refer for a fee for employment*, unauthorized aliens.” INA § 274A(h)(2) (emphasis added). * * *

B.

* * * The Kansas identity-theft statute criminalizes the “using” of any “personal identifying information” belonging to another person with the intent to “[d]efraud that person, or anyone else, in order to receive any benefit.” Kansas courts have interpreted the statute to cover the use of another person’s Social Security number to receive the benefits of employment.

Kansas’s false-information statute criminalizes, among other things, “making, generating, distributing or drawing” a “written instrument” with knowledge that it “falsely states or represents some material matter” and “with intent to defraud, obstruct the detection of a theft or felony offense or induce official action.”

The respondents in the three cases now before us are aliens who are not authorized to work in this country but nevertheless secured employment by using the identity of other persons on the I-9 forms that they completed when they applied for work. They also used these same false identities when they completed their W-4’s and K-4’s. All three respondents were convicted under one or both of the Kansas laws just mentioned for fraudulently using another person’s Social Security number on tax-withholding forms. * * *

D.

In all three cases, respondents argued before trial that IRCA preempted their prosecutions. They relied on INA § 274A(b)(5), which, as noted, provides that I-9 forms and “any information contained in or appended to such form[s] may not be used for purposes other than for enforcement of “ the INA or other listed federal statutes. [The State maintained, however, that § 274A (b)(5) did not apply to the respondents’ use of false Social Security numbers on the tax-withholding forms and entered the K-4’s and W-4’s into evidence.] * * *

Respondents were convicted, and three separate panels of the Kansas Court of Appeals affirmed their convictions.

A divided Kansas Supreme Court reversed, concluding that “the plain and unambiguous language of § 274A(b)(5), expressly prohibits a State from using “any information contained within [an] I-9 as the bas[i]s for a state law identity theft prosecution of an alien who uses another’s Social Security information in an I-9.” * * * In deciding the appeal on these grounds, the court appears to have embraced the proposition that any fact to which an employee attests in an I-9 is information that is “contained in” the I-9 and is thus subject to the restrictions imposed by § 274A(b)(5) namely, that this fact cannot be used by anyone for any purpose other than the few listed in that provision. * * *

II

The Supremacy Clause provides that the Constitution, federal statutes, and treaties constitute “the supreme Law of the Land.” Art. VI, cl. 2. If federal law “imposes restrictions or confers rights on private actors” and “a state law confers rights or imposes restrictions that conflict with the federal law,” “the federal law takes precedence and the state law is preempted.” * * *

In these cases, respondents do not contend that the Kansas statutes under which they were convicted are preempted in their entirety. Instead, they argue that these laws must yield only insofar as they apply to an unauthorized alien’s use of false documents on forms submitted for the purpose of securing employment. * * *

III

We begin with the argument that the state criminal statutes under which respondents were convicted are expressly preempted.

As noted, IRCA contains a provision that expressly preempts state law, but it is plainly inapplicable here. That provision applies only to the imposition of criminal or civil liability on *employers* and those who receive a fee for recruiting or referring prospective employees. INA § 274A(h)(2). * * *

The Kansas Supreme Court did not base its holding on this provision but instead turned to INA § 274A(b)(5), which is far more than a preemption provision. This provision broadly restricts *any use* of an I-9, information contained in an I-9, and any documents appended to an I-9. Thus, unlike a typical preemption provision, it applies not just to the States but also to the Federal Government and all private actors.

The Kansas Supreme Court thought that the prosecutions in these cases ran afoul of this provision because the charges were based on respondents’ use in their W-4’s and K-4’s of the same false Social Security numbers that they also inserted on their I-9’s. Taken at face value, this theory would mean that no information placed on an I-9— including an employee’s name, residence address, date of birth, telephone number, and e-mail address—could ever be used by any entity or person for any reason.

This interpretation is flatly contrary to standard English usage. A tangible object can be “contained in” only one place at any point in time, but an item of information is different. It may be “contained in” many different places, and it is not customary to say that a person uses information that is contained in a particular source unless the person makes use of that source. * * *

Suppose that John used his e-mail address five years ago to purchase a pair of shoes and that the vendor has that address in its files. Suppose that John now sends an e-mail to Mary and that Mary sends an e-mail reply. No one would say that Mary has used information contained in the files of the shoe vendor. * * *

Accordingly, the mere fact that an I-9 contains an item of information, such as a name or address, does not mean that information “contained in” the I-9 is used whenever that name or address is later employed.

If this were not so, strange consequences would ensue. * * *

Apparently recognizing this, respondents turn to INA § 274A(d)(2)(F), which prohibits use of the federal employment verification system “for law enforcement purposes other than” enforcement of IRCA and the same handful of federal statutes mentioned in INA § 274A(b)(5); 18 U.S.C. § 1001 (false statements), § 1028 (identity theft), § 1546 (immigration-document fraud), and § 1621 (perjury).

This argument fails because it rests on a misunderstanding of the meaning of the federal “employment verification system.” The sole function of that system is to establish that an employee is not barred from working in this country due to alienage. * * *

The federal employment verification system does not include things that an employee must or may do to satisfy requirements unrelated to work authorization. And completing tax-withholding documents plays no part in the process of determining whether a person is authorized to work. Instead, those documents are part of the apparatus used to enforce federal and state income tax laws.

For all these reasons, there is no express preemption in these cases.

IV

We therefore proceed to consider respondents’ alternative argument that the Kansas laws, as applied, are preempted by implication. * * *

A

* * *

In order to determine whether Congress has implicitly ousted the States from regulating in a particular field, we must first identify the field in which this is said to have occurred. * * *

At some points in their brief, respondents define the supposedly preempted field more broadly as the “field *relating to* the federal employment verification system,” *id.*, at 42 (emphasis added); see also *id.*, at 40, but this formulation does not rescue the argument. [The submission of tax withholding forms is *fundamentally unrelated* to the federal employment verification system because those forms serve entirely different functions.] The employment verification system is designed to prevent the employment of unauthorized aliens, whereas tax-withholding forms help to enforce income tax laws. And using another person’s Social Security number on tax forms threatens harm that has no connection with immigration law * * *

It is true that employees generally complete their W-4’s and K-4’s at roughly the same time as their I-9’s, but IRCA plainly does not foreclose all state regulation of information that must be supplied as a precondition of employment. New employees may be required by law to provide all sorts of information that has nothing to do with authorization to work in the United States, such as information about age (for jobs with a minimum age requirement), educational degrees, licensing, criminal records, drug use, and personal information needed for a background check.

Respondents suggest that federal law precludes their prosecutions because both the Kansas identity-theft statute and the Kansas false-information statute require proof that the accused engaged in the prohibited conduct for the purpose of getting a “benefit.” Their

argument is as follows. Since the benefit alleged by the prosecution in these cases was getting a job, and since the employment verification system concerns authorization to work, the theory of respondents' prosecutions is related to that system.

This argument conflates the benefit that results from complying with the federal employment verification system (verifying authorization to work in the United States) with the benefit of actually getting a job. Submitting W-4's and K-4's helped respondents get jobs, but this did not in any way assist them in showing that they were authorized to work in this country. Thus, respondents' "relating to" argument must be rejected, as must the even broader definitions of the putatively preempted field advanced by respondents at earlier points in this litigation.

Contrary to respondents' suggestion, IRCA certainly does not bar all state regulation regarding the "use of false documents ... when an unauthorized alien seeks employment." . . . Nor does IRCA exclude a State from the entire "field of employment verification." *Id.*, at 22. For example, IRCA certainly does not prohibit a public school system from requiring applicants for teaching positions to furnish legitimate teaching certificates. * * *

Respondents argue that field preemption in these cases "follows directly" from our decision in *Arizona*, 567 U.S. at 387, but that is not so. In *Arizona*, relying on our prior decision in *Hines v. Davidowitz*, 312 U.S. 52 (1941), we held that federal immigration law occupied the field of alien registration. 567 U.S. at 400-402. "Federal law," we observed, "makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders." But federal law does not create a comprehensive and unified system regarding the information that a State may require employees to provide.

In sum, there is no basis for finding field preemption in these cases.

B.

We likewise see no ground for holding that the Kansas statutes at issue conflict with federal law. It is certainly possible to comply with both IRCA and the Kansas statutes, and respondents do not suggest otherwise. They instead maintain that the Kansas statutes, as applied in their prosecutions, stand as "an obstacle to the accomplishment and execution of the full purposes" of IRCA * * *. Allowing Kansas to bring prosecutions like these, according to respondents, would risk upsetting federal enforcement priorities and frustrating federal objectives, such as obtaining the cooperation of unauthorized aliens in making bigger cases. * * *

Respondents analogize these cases to our holding in *Arizona*, 567 U.S. at 404-407—that a state law making it a crime for an unauthorized alien to obtain employment conflicted with IRCA, which does not criminalize that conduct—but respondents' analogy is unsound. In *Arizona*, the Court inferred that Congress had made a considered decision that it was inadvisable to criminalize the conduct in question. In effect, the Court concluded that IRCA implicitly conferred a right to be free of criminal (as opposed to civil) penalties for working illegally, and thus a state law making it a crime to engage in that conduct conflicted with this federal right.

Nothing similar is involved here. In enacting IRCA, Congress did not decide that an

unauthorized alien who uses a false identity on tax-withholding forms should not face criminal prosecution. On the contrary, federal law makes it a crime to use fraudulent information on a W-4.

The mere fact that state laws like the Kansas provisions at issue overlap to some degree with federal criminal provisions does not even begin to make a case for conflict preemption. * * * Our federal system would be turned upside down if we were to hold that federal criminal law preempts state law whenever they overlap, and there is no basis for inferring that federal criminal statutes preempt state laws whenever they overlap. Indeed, in the vast majority of cases where federal and state laws overlap, allowing the States to prosecute is entirely consistent with federal interests.

In the present cases, there is certainly no suggestion that the Kansas prosecutions frustrated any federal interests. * * * The Supremacy Clause gives priority to “the Laws of the United States,” not the criminal law enforcement priorities or preferences of federal officers. * * *

■ Justice THOMAS, with whom Justice GORSUCH joins, concurring.

[Thomas’s concurring opinion is omitted]

■ Justice BREYER, with whom Justice GINSBURG, Justice SOTOMAYOR, and Justice KAGAN join, concurring in part and dissenting in part.

I agree with the majority that nothing in the Immigration Reform and Control Act of 1986 expressly preempts Kansas’ criminal laws as they were applied in the prosecutions at issue here. But I do not agree with the majority’s conclusion about implied preemption.

When we confront a question of implied preemption, the words of the statute are especially unlikely to determine the answer by themselves. Nonetheless, in my view, IRCA’s text, together with its structure, context, and purpose, make it “‘clear and manifest’” that Congress has occupied at least the narrow field of policing fraud committed to demonstrate federal work authorization. * * *

IRCA also contains two carefully calibrated sets of sanctions for noncompliance. On the employer side, the Act makes it unlawful for employers to hire someone without complying with the I-9 process, INA § 274A(a)(1)(B), or to recruit, hire, or employ someone the employer knows to be unauthorized, INA §§ 274A(a)(1)(A), (a)(2). The Act subjects employers who violate these prohibitions to an escalating series of civil and criminal penalties. INA §§ 274A(e)(4)-(5), (f).

On the employee side, IRCA is somewhat more lenient. Employees, unlike employers, are not subject to punishment for mere failure to complete the paperwork that the Act requires. INA § 274A(e)(5). And while employees who work without authorization may suffer adverse immigration consequences, unauthorized work does not by itself trigger federal criminal prosecution. Rather, the Act makes it a federal crime for anyone to commit fraud “for the purpose of satisfying” the Act’s requirements. 18 U.S.C. § 1546(b).

Our precedent demonstrates that IRCA impliedly preempts state laws that trench on

Congress’ detailed and delicate design. In *Arizona*, we invalidated a state law that made it a crime for an unauthorized alien to work. * * *

Congress, we explained, “made a deliberate choice not to impose criminal penalties on aliens who” merely “seek, or engage in, unauthorized employment.” * * *

We ultimately held in *Arizona* that the States thus may not make criminal what Congress did not, for any such state law “would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens.” * * *

State laws that police fraud committed to demonstrate federal work authorization are similarly preempted. Even though IRCA criminalizes that conduct, the Act makes clear that only the Federal Government may prosecute people for misrepresenting their federal work-authorization status. This is so for two reasons.

First, the Act takes from the States the most direct means of policing work-authorization fraud. It prohibits States from using for that purpose both the I-9 and the federal employment verification system more generally. *See* INA §§ 274A (b)(5), (d)(2)(F). Those two provisions strongly suggest that the Act occupies the field of policing fraud committed to demonstrate federal work authorization. Otherwise, their express prohibitions would not constrain the States in any meaningful way. States could evade the Act simply by creating their own work-authorization form with the same requirements as the I-9, requiring employees to submit that form at the same time as the I-9, and prosecuting employees who make misrepresentations on the state form. No one contends that the States may do *that*.

Second, consider another part of our decision in *Arizona*. We also addressed in that case a different federal statute, one establishing a federal alien-registration system. Pointing to that statute’s “full set of standards governing alien registration, including the punishment for noncompliance,” we concluded that Congress had enacted “a comprehensive and unified system to keep track of aliens within the Nation’s borders.” The statute therefore left no room for a state law designed to police violations of the federal alien-registration system. Similarly, IRCA’s intricate procedures and penalties create a comprehensive and unified system to keep track of who is authorized to work within the Nation’s borders. . . . This too shows that criminal enforcement falls to the Federal Government alone.

Nor does it matter that the state statutes invalidated in *Arizona* had expressly targeted aliens. In preemption cases, we must consider not just what a state law says, but also what it does. For this reason, even generally applicable and facially neutral state laws may be preempted when applied in a particular factual context in a particular way. * * * And here, Kansas applied its criminal laws to do what IRCA reserves to the Federal Government alone— police fraud committed to demonstrate federal work authorization. That is true even though Kansas prosecuted respondents based on their tax-withholding forms, rather than their I-9s. * * *

For these reasons, I would hold that federal law impliedly preempted Kansas’ criminal laws as they were applied in these cases. * * *

NOTES AND QUESTIONS

1. With *Arizona v. United States*, discussed in chapter 2, and *Chamber of Commerce v.*

Whiting and *Kansas v. Garcia*, the Supreme Court reached conclusions about the legality of many of the state and local provisions enacted in recent years to regulate immigration, articulating a preemption framework for the immigration context. Do you think *Arizona*, *Whiting*, and *Kansas* together present a coherent theory of preemption? Are they consistent with one another, either in outcome or methodology?

CHAPTER 13

CITIZENSHIP

Page 1514, replace second paragraph with:

Before taking on that ponderous question, you should be aware of one technical point. In addition to citizens and “aliens,” U.S. law recognizes a third category of persons—noncitizen nationals. Neither “citizens” nor “aliens,” see INA § 101(a)(3),⁹⁵ this small group today consists mainly of those born in American Samoa and Swains Island. INA §§ 308(1) (persons born in “outlying possessions” including American Samoa and Swains Island). Noncitizen nationals are similar to U.S. citizens in that they are free from immigration controls, may freely travel from and to the United States, and cannot be removed. However, the rights of citizens and noncitizen nationals are *not* coextensive. Noncitizen nationals cannot vote, petition for their immediate relatives, serve on a jury, or apply for jobs that are limited to U.S. citizens.

Page 1518, replace first paragraph with:

The Fourteenth Amendment does not define the phrase “United States,” and issues have sometimes arisen concerning the citizenship of persons born in current or former U.S. territories. The current statute provides that “the term ‘United States’ . . . means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands.” INA § 101(a)(38). By statute, the only territories in which birth does not confer U.S. citizenship are American Samoa and Swains Island; as mentioned earlier, persons born there become noncitizen nationals. INA §§ 101(a)(29), 308(1).

Since the 1990s individuals have filed lawsuits—mostly unsuccessfully—claiming that their birth in current or former U.S. territories in which the statute does not confer citizenship at birth nevertheless should have led to their acquisition of U.S. citizenship under the Citizenship Clause. Relying on *Downes v. Bidwell*, 182 U.S. 244 (1901) and subsequent cases (which have collectively been referred to as the *Insular Cases*), courts have held that the Citizenship Clause does not extend to the U.S. territories.⁹⁶ As such, persons born in the U.S. territories acquire U.S. citizenship by congressional statute. By contrast, as discussed earlier, the Supreme Court held in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) that persons born in the United States acquire citizenship at birth under the Citizenship Clause of the Fourteenth Amendment.

However, one district court held that the Citizenship Clause applies in American Samoa and thus individuals born there are U.S. citizens at birth. In *Fitisemanu v. United States*,

⁹⁵ This provision defines the word “alien” as “any person not a citizen or national of the United States.” The reference to “citizen” is redundant because, under INA § 101(a)(22), citizens are a subset of nationals.

⁹⁶ See, e.g., *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2014) (holding that under the doctrine of territorial incorporation, the Citizenship Clause does not extend to American Samoa and thus persons born there do not acquire citizenship under the Citizenship Clause).

426 F.Supp.3d 1155 (D. Utah 2019), three individuals argued that their designation as noncitizen nationals violates the Citizenship Clause, and that they are accordingly entitled to birthright citizenship because American Samoa is “in the United States” and “subject to the jurisdiction thereof.” Finding that *Wong* and not *Downes* is the controlling precedent, the district court agreed and held that the Citizenship Clause must be interpreted according to the common law doctrine of jus soli, which states that nationality is acquired by birth within the territory of a state. An application of this rule, according to the court, required it to “hold that American Samoa is in the United States” for purposes of the Citizenship Clause. Further, the court explained that the Fourteenth Amendment’s repudiation of the *Dred Scott* case also supports the argument that jus soli governs citizenship by birth. The U.S. Court of Appeals for the Tenth Circuit reversed. *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021) (holding that “neither constitutional text nor Supreme Court precedent demands the district court’s interpretation of the Citizenship Clause of the Fourteenth Amendment”). The court “instead recognize[d] that Congress plays the preeminent role in the determination of citizenship of unincorporated territorial lands.” *Id.* at 864.

Page 1538, after item 3 insert:

3A. In striking down INA § 309’s gender-based imposition of different and more onerous physical presence requirements on unwed fathers than unwed mothers rules, the Court recognized in *Morales-Santana* that those requirements were rooted in “archaic gender stereotypes” that were not compatible with equal protection law. However, the Court did not address the equal protection implications of the provision’s differential treatment of nonmarital children and children whose parents are married. Under § 309, the child of an unwed father must formally establish paternity, such as by legitimation, and agree in writing to provide financial support. Proving a blood relationship is not sufficient for a nonmarital child. A father’s actual provision of financial support is not sufficient in the absence of an agreement to do so in writing. That is, the parent-child relationship must be recognized. See also INA § 101(c) (defining child to include one who has been “legitimated” by the father). By contrast, the child of a married couple does not need to go through such “legitimation” hurdles, but rather is presumed “legitimate,” thereby making citizenship more easily acquired.

Should distinctions on the basis of a child’s parents’ marital status be understood to violate equal protection law? Leticia Saucedo and Rose Cuison Villazor contend that they should, pointing out that since the 1970s, the Supreme Court has struck down on equal protection grounds state laws that distinguished a child’s eligibility for benefits or privileges based on the marital status of that child’s parents. Leticia Saucedo and Rose Cuison Villazor, *Illegitimate Citizenship Rules*, 97 Wash. U. L. Rev. 1179, 1190 (2020). They argue that because of *Morales-Santana*, citizenship rules should do away with the additional requirements for nonmarital children. Does this conclusion seem correct? Are there defensible policy reasons why Congress requires unwed fathers (but not unwed mothers) to “legitimate” their children as a requirement for obtaining citizenship? Recall the Court’s remedy in *Morales-Santana*, determining to hold mothers to the more stringent provisions of INA § 309(a) rather than relieving fathers of these requirements. If the Court struck down the differential treatment of children based on their parents’ marital status, what remedy would apply?

Page 1540-41, at the end of the chart insert:

<u>Year</u>	<u>Petitions Filed</u>	<u>Persons Naturalized</u>
2017	986,851	707,265
2018	837,168	761,901
2019	830,560	843,593
2020	967,755	628,254
2021	789,119	813,861

Page 1600, after Item 8 insert:

8A. From the late 1960s through the end of the 2000s, the government pursued denaturalization cases to a highly limited extent, focusing to a considerable extent on suspected war criminals who allegedly provided false information when they immigrated. However, under the Obama administration, the government began to increase its capacity to identify larger numbers of naturalized citizens who might be subject to denaturalization, assisted by technological tools that permit officials to analyze fingerprint and other government records more efficiently and on a large scale. With the benefit of this increased capacity—and prompted by a national security-based focus on individuals from “special interest countries” of particular concern—the number of denaturalization cases pursued by the government began to increase under the Obama administration. As Cassandra Burke Robertson and Irina Manta discuss, while the Obama administration pursued more denaturalization cases than its modern predecessors, it could have pursued even more cases had it not exercised prosecutorial discretion to prioritize only those cases with suspected connections to terrorism or national security concerns. Cassandra Burke Robertson and Irina D. Manta, *Litigating Citizenship*, 73 Vand. L. Rev. 757, 780 (2020).

The Trump administration has made denaturalization a higher enforcement priority across a broader range of circumstances, not limited to suspected links to terrorism or national security concerns and has sought to investigate and prosecute denaturalization cases in a more proactive, coordinated manner. USCIS, ICE, and DOJ have all devoted more resources to investigation and pursuit of potential denaturalization cases, and since 2017, the number of cases referred to DOJ for possible prosecution has increased 600 percent. Approximately 40 percent of the 228 denaturalization cases filed by the government since 2008 were filed under the Trump administration. In its 2019 budget request to Congress, the Trump administration requested hundreds of millions of dollars in additional funds specifically to investigate denaturalization cases, and in February 2020, DOJ announced the creation of a new standalone Denaturalization Section, within its Civil Division, to investigate and bring denaturalization cases against naturalized citizens under INA § 340. Katie Benner, *Justice Dept. Establishes Office to Denaturalize Immigrants*, N.Y. Times (Feb. 26, 2020), <https://www.nytimes.com/2020/02/26/us/politics/denaturalization-immigrants-justice-department.html>; AILA, *Featured Issue: Denaturalization Efforts by USCIS* (May 18, 2020), <https://www.aila.org/advo-media/issues/all/featured-issue-denaturalization-efforts-by-uscis> (discussing trends and collecting sources).

Page 1645, at the end of the page insert:

10. Under the Enumeration Clause of the U.S. Constitution, the government must conduct a census every ten years. U.S. Const. art. I, § 2, cl. 3; amdt. XIV, § 2. The results of this census are highly consequential for many decisions, including apportionment of seats in the House of Representatives and allocations of many public funds and benefits. Stakes are high, and the manner in which the census is conducted is often highly contentious. In the past, the government has sometimes included a question regarding citizenship of the responders, but it had not done so since 1950. It has included the citizenship question in a subsequent questionnaire that it sends to a sample of U.S. households.

In March 2018, Secretary of Commerce Wilbur Ross announced that he would reinstate the citizenship question on the 2020 census. Ross asserted that he was doing so at the request of the Department of Justice, to better enforce the Voting Rights Act and prevent voter dilution of minority voters. Contesting this abrupt change and the purported rationale, several states and non-profit organizations filed lawsuits against the Department of Commerce, contending that the stated reason was pretextual and that Ross abused his discretion by including the citizenship question.

In *New York v. United States Department of Commerce*, 315 F.Supp.3d 766, 775 (S.D.N.Y. 2018), the district court held, among other things, that although Ross had authority under the Enumeration Clause to direct the inclusion of the citizenship question, his “proffered rationale for the decision . . . may have been pretextual.” The federal government appealed to the U.S. Court of Appeals for the Second Circuit but also filed a writ of certiorari with the Supreme Court:

Department of Commerce v. New York
Supreme Court of the United States, 2019
139 S. Ct. 2551

■ ROBERTS, C.J., delivered the opinion for a unanimous Court with respect to Parts I and II, and the opinion of the Court with respect to Parts III, IV-B, and IV-C, in which THOMAS, ALITO, GORSUCH, and KAVANAUGH, JJ., joined; with respect to Part IV-A, in which THOMAS, GINSBURG, BREYER, SOTOMAYOR, KAGAN, and KAVANAUGH, JJ., joined; and with respect to Part V, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which GORSUCH and KAVANAUGH, JJ., joined. BREYER, J., filed an opinion concurring in part and dissenting in part, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in part and dissenting in part.

■ Chief Justice ROBERTS delivered the opinion of the Court.

* * *

The Secretary of Commerce decided to reinstate a question about citizenship on the 2020 census questionnaire. A group of plaintiffs challenged that decision on constitutional and statutory grounds. We now decide whether the Secretary violated the Enumeration Clause of the Constitution, the Census Act, or otherwise abused his discretion.

I.A

In order to apportion Members of the House of Representatives among the States, the Constitution requires an “Enumeration” of the population every 10 years, to be made “in such Manner” as Congress “shall by Law direct.” Art. I, §2, cl. 3; Amdt. 14, §2. In the Census Act, Congress delegated to the Secretary of Commerce the task of conducting the decennial census “in such form and content as he may determine.” 13 U. S. C. §141(a). The Secretary is aided in that task by the Census Bureau, a statistical agency housed within the Department of Commerce. See §§ 2, 21. * * *

There have been 23 decennial censuses from the first census in 1790 to the most recent in 2010. Every census between 1820 and 2000 (with the exception of 1840) asked at least some of the population about their citizenship or place of birth. Between 1820 and 1950, the question was asked of all households. Between 1960 and 2000, it was asked of about one-fourth to one-sixth of the population. * * *

In 2010, the year of the latest census, the format changed again. All households received the same questionnaire, which asked about sex, age, race, Hispanic origin, and living arrangements. The more detailed demographic questions previously asked on the long-form questionnaire, including the question about citizenship, were instead asked in the American Community Survey (or ACS), which is sent each year to a rotating sample of about 2.6% of households.

The Census Bureau and former Bureau officials have resisted occasional proposals to resume asking a citizenship question of everyone, on the ground that doing so would discourage noncitizens from responding to the census and lead to a less accurate count of the total population.

B

In March 2018, Secretary of Commerce Wilbur Ross announced in a memo that he had decided to reinstate a question about citizenship on the 2020 decennial census questionnaire. The Secretary stated that he was acting at the request of the Department of Justice (DOJ), which sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act (or VRA)— specifically the Act’s ban on diluting the influence of minority voters by depriving them of single-member districts in which they can elect their preferred candidates. DOJ explained that federal courts determine whether a minority group could constitute a majority in a particular district by looking to the citizen voting-age population of the group. * * *

The Secretary ultimately asked the Census Bureau to * * * reinstate a citizenship question on the census questionnaire. * * *

The Secretary “carefully considered” the possibility that reinstating a citizenship question would depress the response rate. But after evaluating the Bureau’s “limited empirical evidence” on the question— evidence drawn from estimated non-response rates to previous American Community Surveys and census questionnaires—the Secretary concluded that it was not possible to “determine definitively” whether inquiring about citizenship in the census would materially affect response rates.

C

Shortly after the Secretary announced his decision, two groups of plaintiffs filed suit in Federal District Court in New York, challenging the decision on several grounds. The first group of plaintiffs included 18 States, the District of Columbia, various counties and cities, and the United States Conference of Mayors. They alleged that the Secretary's decision violated the Enumeration Clause of the Constitution and the requirements of the Administrative Procedure Act. The second group of plaintiffs consisted of several non-governmental organizations that work with immigrant and minority communities. They added an equal protection claim. The District Court consolidated the two cases. Both groups of plaintiffs are respondents here.

The Government moved to dismiss the lawsuits, arguing that the Secretary's decision was unreviewable and that respondents had failed to state cognizable claims under the Enumeration Clause and the Equal Protection Clause. The District Court dismissed the Enumeration Clause claim but allowed the other claims to proceed. * * *

In August and September 2018, the District Court issued orders compelling depositions of Secretary Ross and of the Acting Assistant Attorney General for DOJ's Civil Rights Division. * * *

III

The Enumeration Clause of the Constitution does not provide a basis to set aside the Secretary's decision. The text of that clause "vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration,'" and Congress "has delegated its broad authority over the census to the Secretary." Given that expansive grant of authority, we have rejected challenges to the conduct of the census where the Secretary's decisions bore a "reasonable relationship to the accomplishment of an actual enumeration." * * *

We look * * * to Congress's broad authority over the census, as informed by long and consistent historical practice. All three branches of Government have understood the Constitution to allow Congress, and by extension the Secretary, to use the census for more than simply counting the population. Since 1790, Congress has sought, or permitted the Secretary to seek, information about matters as varied as age, sex, marital status, health, trade, profession, literacy, and value of real estate owned. * * *

That history matters. Here, as in other areas, our interpretation of the Constitution is guided by a Government practice that "has been open, widespread, and unchallenged since the early days of the Republic." In light of the early understanding of and long practice under the Enumeration Clause, we conclude that it permits Congress, and by extension the Secretary, to inquire about citizenship on the census questionnaire. * * *

IV.B

At the heart of this suit is respondents' claim that the Secretary abused his discretion in deciding to reinstate a citizenship question. We review the Secretary's exercise of discretion under the deferential "arbitrary and capricious" standard. * * *

The District Court set aside the Secretary's decision for two independent reasons: His

course of action was not supported by the evidence before him, and his stated rationale was pretextual. We focus on the first point here and take up the question of pretext later.

The Secretary examined * * * various ways to collect improved citizenship data and explained why he thought the best course was to both reinstate a citizenship question and use citizenship data from administrative records to fill in the gaps. * * * Asking a citizenship question of everyone, the Secretary reasoned, would eliminate the need to estimate citizenship for many of those people. * * *

The evidence before the Secretary supported that decision. As the Bureau acknowledged, each approach—using administrative records alone, or asking about citizenship and using records to fill in the gaps—entailed tradeoffs between accuracy and completeness. Without a citizenship question, the Bureau would need to estimate the citizenship of about 35 million people; with a citizenship question, it would need to estimate the citizenship of only 13.8 million. Under either approach, there would be some errors in both the administrative records and the Bureau’s estimates. * * *

The Secretary justifiably found the Bureau’s analysis inconclusive. Weighing that uncertainty against the value of obtaining more complete and accurate citizenship data, he determined that reinstating a citizenship question was worth the risk of a potentially lower response rate. That decision was reasonable and reasonably explained, particularly in light of the long history of the citizenship question on the census.

[His] decision was not arbitrary and capricious. As he explained, administrative records would not, in his judgment, provide the more complete and accurate data that DOJ sought. He thus could not, “consistent with” the kind and quality of the “statistics required,” use administrative records instead of asking about citizenship directly. Respondents’ arguments to the contrary rehash their disagreement with the Secretary’s policy judgment about which approach would yield the most complete and accurate citizenship data. For the reasons already discussed, we may not substitute our judgment for that of the Secretary here.

Justice BREYER would conclude otherwise, but only by subordinating the Secretary’s policymaking discretion to the Bureau’s technocratic expertise. * * *

V

We now consider the District Court’s determination that the Secretary’s decision must be set aside because it rested on a pretextual basis, which the Government conceded below would warrant a remand to the agency. * * *

Th[e] evidence showed that the Secretary was determined to reinstate a citizenship question from the time he entered office; instructed his staff to make it happen; waited while Commerce officials explored whether another agency would request census-based citizenship data; subsequently contacted the Attorney General himself to ask if DOJ would make the request; and adopted the Voting Rights Act rationale late in the process. In the District Court’s view, this evidence established that the Secretary had made up his mind to reinstate a citizenship question “well before” receiving DOJ’s request, and did so for reasons unknown but unrelated to the VRA.

The Government, on the other hand, contends that there was nothing objectionable or

even surprising in this. And we agree—to a point. It is hardly improper for an agency head to come into office with policy preferences and ideas, discuss them with affected parties, sound out other agencies for support, and work with staff attorneys to substantiate the legal basis for a preferred policy. The record here reflects the sometimes involved nature of Executive Branch decision making, but no particular step in the process stands out as inappropriate or defective.

And yet, viewing the evidence as a whole, we share the District Court’s conviction that the decision to reinstate a citizenship question cannot be adequately explained in terms of DOJ’s request for improved citizenship data to better enforce the VRA. Several points, considered together, reveal a significant mismatch between the decision the Secretary made and the rationale he provided.

The record shows that the Secretary began taking steps to reinstate a citizenship question about a week into his tenure, but it contains no hint that he was considering VRA enforcement in connection with that project. The Secretary’s Director of Policy did not know why the Secretary wished to reinstate the question, but saw it as his task to “find the best rationale.” The Director initially attempted to elicit requests for citizenship data from the Department of Homeland Security and DOJ’s Executive Office for Immigration Review, neither of which is responsible for enforcing the VRA. After those attempts failed, he asked Commerce staff to look into whether the Secretary could reinstate the question without receiving a request from another agency. The possibility that DOJ’s Civil Rights Division might be willing to request citizenship data for VRA enforcement purposes was proposed by Commerce staff along the way and eventually pursued.

Even so, it was not until the Secretary contacted the Attorney General directly that DOJ’s Civil Rights Division expressed interest in acquiring census-based citizenship data to better enforce the VRA. And even then, the record suggests that DOJ’s interest was directed more to helping the Commerce Department than to securing the data. The December 2017 letter from DOJ drew heavily on contributions from Commerce staff and advisors. Their influence may explain why the letter went beyond a simple entreaty for better citizenship data—what one might expect of a typical request from another agency—to a specific request that Commerce collect the data by means of reinstating a citizenship question on the census. Finally, after sending the letter, DOJ declined the Census Bureau’s offer to discuss alternative ways to meet DOJ’s stated need for improved citizenship data, further suggesting a lack of interest on DOJ’s part.

Altogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision. In the Secretary’s telling, Commerce was simply acting on a routine data request from another agency. Yet the materials before us indicate that Commerce went to great lengths to elicit the request from DOJ (or any other willing agency). And unlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the VRA enforcement rationale—the sole stated reason—seems to have been contrived.

We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency’s priorities and decision making process. It is rare to review a record as extensive as the one before us when evaluating informal agency action— and it should be. But having done so for the sufficient reasons we have explained, we cannot ignore the disconnect between the decision made and the explanation

given. Our review is deferential, but we are “not required to exhibit a naiveté from which ordinary citizens are free.” The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.

In these unusual circumstances, the District Court was warranted in remanding to the agency, and we affirm that disposition. * * *

■ Justice THOMAS, with whom Justice GORSUCH and Justice KAVANAUGH join, concurring in part and dissenting in part.

* * *

For the first time ever, the Court invalidates an agency action solely because it questions the sincerity of the agency’s otherwise adequate rationale. Echoing the din of suspicion and distrust that seems to typify modern discourse, the Court declares the Secretary’s memorandum “pretextual” because, “viewing the evidence as a whole,” his explanation that including a citizenship question on the census would help enforce the Voting Rights Act (VRA) “seems to have been contrived.” * * *

The Court’s holding reflects an unprecedented departure from our deferential review of discretionary agency decisions. And, if taken seriously as a rule of decision, this holding would transform administrative law. It is not difficult for political opponents of executive actions to generate controversy with accusations of pretext, deceit, and illicit motives. Significant policy decisions are regularly criticized as products of partisan influence, interest-group pressure, corruption, and animus. Crediting these accusations on evidence as thin as the evidence here could lead judicial review of administrative proceedings to devolve into an endless morass of discovery and policy disputes not contemplated by the Administrative Procedure Act (APA). * * *

■ Justice BREYER, with whom Justice GINSBURG, Justice SOTOMAYOR, and Justice KAGAN join, concurring in part and dissenting in part.

* * * I agree with the Court that the Secretary of Commerce provided a pretextual reason for placing a question about citizenship on the short-form census questionnaire and that a remand to the agency is appropriate on that ground. But I write separately because I also believe that the Secretary’s decision to add the citizenship question was arbitrary and capricious and therefore violated the Administrative Procedure Act (APA).

There is no serious dispute that adding a citizenship question would diminish the accuracy of the enumeration of the population—the sole constitutional function of the census and a task of great practical importance. The record demonstrates that the question would likely cause a disproportionate number of noncitizens and Hispanics to go uncounted in the upcoming census. That, in turn, would create a risk that some States would wrongfully lose a congressional representative and funding for a host of federal programs. And, the Secretary was told, the adverse consequences would fall most heavily on minority communities. The Secretary decided to ask the question anyway, citing a need for more accurate citizenship data.

But the evidence indicated that asking the question would produce citizenship data that is *less* accurate, not more. And the reason the Secretary gave for needing better citizenship data in the first place—to help enforce the Voting Rights Act of 1965—was not convincing.

In short, the Secretary’s decision to add a citizenship question created a severe risk of harmful consequences, yet he did not adequately consider whether the question was necessary or whether it was an appropriate means of achieving his stated goal. The Secretary thus failed to “articulate a satisfactory explanation” for his decision, “failed to consider ... important aspect[s] of the problem,” and “offered an explanation for [his] decision that runs counter to the evidence,” all in violation of the APA. These failures, in my view, risked undermining public confidence in the integrity of our democratic system itself. I would therefore hold that the Secretary’s decision—whether pretextual or not—was arbitrary, capricious, and an abuse of discretion. * * *

■ Justice ALITO, concurring in part and dissenting in part.

* * *

To put the point bluntly, the Federal Judiciary has no authority to stick its nose into the question whether it is good policy to include a citizenship question on the census or whether the reasons given by Secretary Ross for that decision were his only reasons or his real reasons. Of course, we may determine whether the decision is constitutional. But under the considerations that typically guide this Court in the exercise of its power of judicial review of agency action, we have no authority to decide whether the Secretary’s decision was rendered in compliance with the Administrative Procedure Act (APA).

I

* * * I conclude that the decision of the Secretary of Commerce to add core demographic questions to the decennial census questionnaire is committed to agency discretion by law and therefore may not be challenged under the APA. * * *

III

* * *

Respondents and some of their *amici* contend that the Secretary’s decision is at least amenable to judicial review for consistency with the APA’s reasoned-explanation requirement. Thus, the argument goes, even if no statute sets out a standard that can be used in reviewing the particular agency action in question, a court may review an agency’s explanation of the reasons for its action and set it aside if the court finds those reasons to be arbitrary or irrational. * * *

IV

* * * [N]either respondents nor my colleagues have been able to identify any relevant, judicially manageable limits on the Secretary’s decision to put a core demographic question back on the census. And without an “adequate standard of review for such agency action,” courts reviewing decisions about the “form and content” of the census would inevitably be drawn into second-guessing the Secretary’s assessment of complicated policy tradeoffs,

another indicator of “general unsuitability” for judicial review.

Indeed, if this litigation is any indication, widespread judicial review of the Secretary’s conduct of the census will usher in an era of “disruptive practical consequences,” and this too weighs against review.

Respondents protest that the importance of the census provides a compelling reason to allow APA review. But this argument overlooks the fact that the Secretary is accountable in other ways for census-related decisionmaking. If the Secretary violates the Constitution or any applicable statutory provision related to the census, his action is reviewable. The Secretary is also accountable to Congress with respect to the administration of the census since he has that power only because Congress has found it appropriate to entrust it to him. And the Secretary is always answerable to the President, who is, in turn, accountable to the people. * * *

Whether to put a citizenship question on the 2020 census questionnaire is a question that is committed by law to the discretion of the Secretary of Commerce and is therefore exempt from APA review. The District Court had the authority to decide respondents’ constitutional claims, but the remainder of their complaint should have been dismissed. * * *

NOTES AND QUESTIONS

1. After the Supreme Court issued its opinion blocking the inclusion of the citizenship question, government lawyers reported that they would drop the citizenship question. While President Trump initially repudiated that position, announcing on Twitter that “[w]e are absolutely moving forward” with adding the question, he announced two weeks later that his administration was indeed ending its efforts to add the question on the 2020 census. Rebecca Ballhaus & Brent Kendall, *Trump Drops Effort to Put Citizenship Question on Census*, Wall St. J. (July 11, 2019), <https://www.wsj.com/articles/trump-to-hold-news-conference-on-census-citizenship-question-11562845502>.

2. In dissent, Justice Alito maintains that the judiciary has no role in reviewing this “discretionary” decision, relying in part on the assertion that agencies are accountable to Congress and the “President, who is accountable to the people.” Are these checks on administrative power sufficient to counter arbitrary agency actions?

3. While this case was pending before the Supreme Court, the plaintiffs acquired new evidence that

shed more light on the genesis of Secretary Ross’s decision and cast doubt on certain representations made, and testimony given, in this case. Most significantly, they obtained documents through an unrelated lawsuit suggesting that a redistricting specialist named Dr. Thomas Hofeller may have provided a paragraph [for] the letter that DOJ sent to the Department of Commerce purporting to request the addition of a citizenship question on the decennial census questionnaire. * * * The paragraph in question, like the final version of the Gary Letter that DOJ sent to the Department of Commerce, argued that adding a citizenship question to the decennial census questionnaire would help DOJ enforce the Voting Rights Act. Other evidence obtained by the NGO Plaintiffs, however, suggested that Dr. Hofeller’s true motive in promoting a

census citizenship question was to facilitate redistricting strategies that would, in his words, be “advantageous to Republicans and non-Hispanic Whites.”

New York v. U.S. Dep’t of Commerce, 461 F.Supp.3d 80, 86 (S.D.N.Y. 2020). The court noted that “this was not DOJ’s finest hour. At best, DOJ failed to produce more than ten percent of the documents that Defendants were required to produce as part of this litigation.” The government subsequently “produced [] non-privileged materials that were improperly withheld, ultimately totaling at least 900 previously unproduced documents.” While the Hofeller revelations garnered significant news coverage and were formally brought to the Supreme Court’s attention, they are not discussed in any of the justices’ opinions. Do these developments validate the Court’s approach to exercising judicial review in contrast to the restraint urged by the dissenting opinions?

4. On July 23, 2020, the President published a memorandum declaring that “[f]or purpose of the reapportionment of Representative following the 2020 census, it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status * * * to the maximum extent feasible and consistent with the discretion delegated to the executive branch.” Presidential Memorandum, *Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census*, 85 Fed. Reg. 44679. As Marty Lederman points out, the announcement proposes to change how the executive branch plans to report census results to Congress in a manner that may violate statutory requirements to report the number of whole persons in each state. Marty Lederman, *Trump’s Memorandum on Not Counting Undocumented Immigrants for Purposes of House Reapportionment Calculations*, Balkinization (July 25, 2020), <https://balkin.blogspot.com/2020/07/trumps-memorandum-on-not-counting.html>. Almost immediately, a number of states and cities filed suit seeking to block this change from being implemented, and at this writing litigation is ongoing. *New York v. Trump*, No. 20-cv-5770 (S.D.N.Y. July 24, 2020). Legality aside, why is the Trump administration seeking to make this change? What practical and political consequences might ensue if the executive branch were to implement this proposed change in how census results are reported to Congress?