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FALL 2024 UPDATE for
IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY (9th Edition)
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This Update includes materials on major developments since the Ninth Edition of *Immigration and Citizenship: Process and Policy* went to press in late 2020. This Update is cumulative, including any material in the 2021, 2022, and 2023 Updates that remains current.

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

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

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

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

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CHAPTER ONE

FOUNDATIONS OF IMMIGRATION AND CITIZENSHIP LAW

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

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

The Biden administration changed course and increased the refugee admissions authorization to 62,500 for FY 2021, 125,000 for FY 2022, 125,000 for FY 2023, and 125,000 for FY 2024. *See Emergency Presidential Determination on Refugee Admissions for Fiscal Year 2021*, 86 Fed. Reg. 24475 (2021); *Presidential Determination on Refugee Admissions for Fiscal Year 2022*, 86 Fed. Reg. 57527 (2021); *Presidential Determination on Refugee Admissions for Fiscal Year 2023*, 87 Fed. Reg. 60547 (2022); *Presidential Determination on Refugee Admissions for Fiscal Year 2024*, 88 Fed. Reg. 73521 (2023). But many fewer refugees than the number authorized have been admitted each year: 11,411 in FY 2021, 25,465 in FY 2022, 60,014 in FY 2023, and 68,291 in the first nine months of FY 2024. *See* Data Hub, *U.S. Annual Refugee Resettlement Ceilings and Number of Refugees Admitted, 1980 to Present* (Migration Pol’y Inst. 2024); U.S. Dep’t of State, Refugee Processing Center, *Refugee Admissions Report*, May 31, 2024. The United States projects that it will resettle more than 90,000 refugees by the end of FY 2024, *see* Kevin Appleby, *Marking the Biden Administration’s Progress in Restoring the US Refugee Admissions Program*, Center for Migration Studies, June 12, 2024. This would be the most refugees admitted in any year since 1995.

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

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

8. On February 24, 2021, President Biden revoked the Trump administration’s suspension of immigrant visa issuance set forth in Proclamation 10014 of April 22, 2020. *See Proclamation on Revoking Proclamation 10014*, 86 Fed. Reg. 11847 (2021). Proclamation 10052, which the Trump administration had issued to suspend the entry of nonimmigrant workers in major nonagricultural categories, remained in effect until it expired by its own terms on March 31, 2021. *See DOS Announces Processing Update in Light of the Expiration of P.P. 10052*, 98 Interp. Rel. 14-2 (Apr. 5, 2021).

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

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

Presidential Proclamation 10294, *Advancing the Safe Resumption of Global Travel During the COVID-19 Pandemic*, 86 Fed. Reg. 59603 (2021), revoked four prior geographic travel bans that had limited admission from certain specific countries and replaced them with a global requirement. "Noncitizens who are nonimmigrants" arriving by air still had to show proof of full vaccination against COVID-19, with limited exceptions. This vaccination requirement did not apply to U.S. citizens, nationals, green card holders, and immigrant visa holders. This requirement was subject to limited exceptions, including for admission in the national interest, citizens of a country with limited vaccine availability, noncitizens under 18, noncitizens for who vaccination is contraindicated or inappropriate, and nonimmigrants physically present in Ukraine as of February 10, 2022. Exempted individuals had to take a test within 3-5 days of entry to the United States, quarantine until the test was negative, and be fully vaccinated against COVID-19 within 60 days of arrival.

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

page 68, at the end of the new paragraphs and before the Exercise, add:

Title 42

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

States during a declared public health emergency. The Trump administration's order was the first use of Title 42 for border closure of this sort. The text of § 265 is as follows:

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

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

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

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

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

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

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

Court challenges to the Title 42 order argued that the order, though nominally a public health measure, was a pretext to cut off access to protections for forced migrants as provided by federal statutes and regulations. In January 2021, the Biden administration took office. It chose to maintain the Title 42 order, much to the disappointment of those who had expected Biden to reverse this key feature of Trump immigration policy.

On April 1, 2022, the CDC announced that the availability of vaccines and rapid tests to detect COVID-19 had eliminated the need for the Title 42 order, and that the order would end on May 23, 2022. *See* Centers for Disease Control & Prevention, U.S. Dep’t of Health & Human Servs., *Public Health Determination and Order Regarding the Right to Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists* (2022). Shortly after this CDC announcement, a federal district judge in Louisiana ruled that the CDC’s decision violated the Administrative Procedure Act for failure to seek notice and comment. The court issued a nationwide preliminary injunction keeping the order in place. *See Louisiana v. Centers for Disease Control*, 603 F. Supp. 3d 406 (W.D. La. 2022). The Biden administration appealed this order, but did not seek a stay.

Court challenges to the Title 42 order itself continued. In November 2022, the federal district court for the District of Columbia ruled that the Title 42 order was “arbitrary and capricious in violation of the Administrative Procedure Act.” *See Huisha-Huisha v. Mayorkas*, 642 F. Supp. 3d 1 (D.D.C. 2022).

In January 2023, the Biden administration announced that the declared COVID-19 public health emergency would end on May 11, 2023. *See* Sharon LaFraniere and Noah Weiland, *U.S. Plans to End Public Health Emergency for Covid in May*, N.Y. Times, Feb. 3, 2023. With the end of the declared emergency, the Title 42 order expired. *See* U.S. Dep’t of Homeland Sec., *Fact Sheet: U.S Government Announces Sweeping New Actions to Manage Regional Migration*, Apr. 27, 2023.

With the Title 42 order no longer in effect, border processing returned to the basic framework set out in the Immigration and Nationality Act in Title 8 of the U.S. Code. But a final regulation effective on May 11, 2023, significantly modified the asylum application process on the southern border. *See* U.S. Dep’t of Homeland Sec., *Circumvention of Lawful Pathways*, 88 Fed. Reg. 31314 (2023). The regulation created a rebuttable presumption of ineligibility for asylum for migrants who “neither avail themselves of a lawful, safe, and orderly pathway to the United States nor seek asylum or other protection in a country through which they travel.” The regulation does not apply to unaccompanied minors. It exempts from the presumption against eligibility any migrants who use the “CBP One” mobile app to schedule an appointment at a port of entry “can make claims for asylum and other forms of protection. They can rebut the presumption if they demonstrate exceptionally compelling circumstances, such as medical emergency, imminent and extreme threat to life

and safety at the time of entry into the United States or being victims of severe forms of trafficking. Migrants who are not barred are vetted and screened, and assuming no public safety or national security concerns, may be eligible to apply for employment authorization as they await resolution of their cases. *See* U.S. Dep’t of Homeland Sec., *Circumvention of Lawful Pathways*, 88 Fed. Reg. 31314 (2023).

The changes have prompted substantial criticism, including claims that the new regulation replicates Trump-era policies, contravenes federal law, and effectively forecloses asylum for many forced migrants. *See, e.g.,* Miriam Jordan, *Biden Administration Announces New Border Crackdown*, N.Y. Times, Feb. 21, 2023. A federal district court for the Northern District of California vacated the new regulation, finding that it contravened the INA, was arbitrary and capricious in violation of the APA, and that DHS promulgated it without proper procedures. *East Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025 (N.D. Cal. 2023). On appeal, the Ninth Circuit left the regulation in effect pending settlement talks. *See East Bay Sanctuary Covenant v. Biden*, 93 F.4th 1130, 1131 (9th Cir. 2024). Another lawsuit challenging the regulation is *M.A. v. Mayorkas*, 2023 WL 5321924 (D.D.C. July 6, 2023). Separately, the state of Texas sued to block implementation of the regulation on the ground that it encouraged unlawful migration in contravention of the statutory authority of the Secretary of Homeland Security. *See Texas v. Mayorkas*, Complaint, 2:23-CV-00024 (W.D. Tex. May 23, 2023).

In June 2024, the Biden administration published an interim final rule on “Securing the Border” that went further in restricting movement across the southern border of the United States and thereby restricting access to the U.S. asylum system. The administration invoked INA § 212(f) as the authority for a Proclamation that permits DHS to suspend consideration of asylum claims. The Proclamation also changed the standard for evaluating asylum claims when the number of encounters at the southern border return to a consecutive seven-day average of fewer than 1,500 encounters. *See Securing the Border*, Proclamation 10773, 89 Fed. Reg. 48487 (June 3, 2024); *see also* U.S. Dep’t of Homeland Sec. & U.S. Dep’t of Justice, *Securing the Border*, 89 Fed. Reg. 48710 (June 7, 2024) (interim final rule implementing Proclamation). Immigrant advocacy groups have challenged the Proclamation and the accompanying interim final rule as violations of the INA and the APA. *See Las Americas Immigrant Advocacy Center v. U.S. Dep’t of Homeland Sec.*, Complaint, No. 1:24-CV-01702 (D.D.C. June 12, 2024); *see also* Hamed Aleaziz, *A.C.L.U. Sues to Stop Biden’s Asylum Ban on the U.S.-Mexico Border*, N.Y. Times, June 12, 2024. For a fuller overview, see this Update to pages 742-43.

page 77, before subsection 3, add:

(iv) The End of Chevron Deference

A central issue in federal administrative law has been whether the approach to statutory interpretation in *Chevron*—as modified by *Mead* and *Brand X*—gives too much authority to administrative agencies in the federal executive branch. Skepticism of *Chevron* deference led the U.S. Supreme Court to reverse course in June 2024 in *Loper Bright*

Enterprises v. Raimondo, 144 S. Ct. 2242 (2024). The case involved commercial fishing regulations adopted by the Department of Commerce. The issue was whether those regulations were consistent with the governing federal statute. The Court granted certiorari, limiting the question to whether *Chevron* should be overruled or clarified.

The Court overruled *Chevron*. Chief Justice Roberts wrote for a six-Justice majority, finding that *Chevron* deference is inconsistent with section 706 of the Administrative Procedure Act, under which courts “decide all relevant questions of law.” This command, according to the Roberts, is consistent with the description of the judicial role in *Marbury v. Madison*: “[i]t is emphatically the province and duty of the judicial department to say what the law is.” 1 Cranch 137, 177, 2 L.Ed. 60 (1803). The majority cited with approval the pre-*Chevron* decision in *Skidmore*, discussed more fully on page 75 of the casebook. *Skidmore* called not for “deference” to agencies, but rather for “respect” for an agency’s “body of experience and informed judgment.” Part of the opinion cast doubt on the soundness of *Chevron* and minimized its practical impact by noting that significant exceptions and limitations had emerged in actual practice under *Chevron*. These included requirements before deference would apply, as well as the “major questions” doctrine, under which *Chevron* does not apply if the question at issue is one of “deep ‘economic and political significance.’” The Court noted that judicial precedents based on *Chevron* deference are still valid under *stare decisis* unless and until any precedent is overruled.

Justices Thomas and Gorsuch filed separate concurring opinions, both of which expressed the view that *Chevron* deference is inconsistent with not just the APA, but also with separation of powers under the Constitution.

Justice Kagan dissented, starting by characterizing *Chevron* as “a cornerstone of administrative law,” as “part of the warp and woof of modern government,” and as “rooted in a presumption of legislative intent” that Congress had accepted as to the interpretation of federal statutes. Kagan viewed APA § 706 as “perfectly compatible with *Chevron* deference,” and that she characterized limitations on *Chevron* as signs of its soundness. Kagan also noted that *stare decisis* supported maintaining *Chevron* deference, noting that reliance on *Chevron* was pervasive, not just in litigated cases but throughout federal regulation. The dissent ended by characterizing *Loper Bright* as reflecting “the view of some Justices that they and other judges should have more power,” and by including it among prominent recent decisions reversing settled law, among them *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215 (2022) (reversing *Roe v. Wade*).

The Court issued *Loper Bright* in late June 2024, so administrative agencies, lower courts, and lawyers and their clients are only starting to navigate the changed landscape as this Update goes to press in late July 2024. Questions about how much respect courts should give to BIA decisions, USCIS regulations, Department of Labor policies, and the actions of the myriad of other federal agencies with immigration-related authority will play out over the years to come.

(v) The Requirement of Standing to Sue

The requirement that plaintiffs in federal court must have standing to sue has emerged as a crucial element of immigration litigation. Immediately upon taking office, President Biden revoked President Trump's executive order on interior enforcement and directed the Department of Homeland Security to revise its civil immigration enforcement priorities. DHS issued new guidance. See Memorandum from Sec'y of Homeland Sec. Alejandro Mayorkas to ICE, CBP, USCIS Directors, *Guidelines for the Enforcement of Civil Immigration Laws* (Sept. 30, 2021). This new guidance directs enforcement agents to use their discretion to focus on high priority cases, including national security threats, immediate threats to public safety, and threats to border security. It further instructs officers to use a totality of circumstances approach to determining whether to proceed against a particular noncitizen.

In July 2022, the U.S. Supreme Court granted certiorari in *United States v. Texas*, a lawsuit challenging the enforcement guidelines. Among the questions raised was whether state plaintiffs had standing to challenge the guidelines. On June 23, 2023, the Court held that the states lacked standing to challenge the enforcement priorities and therefore federal courts lacked jurisdiction to review the claims. *United States v. Texas*, 599 U.S. 670, 677, 143 S. Ct. 1964, 1970 (2023) (Kavanaugh, J., joined by Roberts, C.J., Sotomayor, Kagan, Jackson, J.J.) ("The states have not cited any precedent, history, or tradition of courts ordering the Executive Branch to change its arrest or prosecution policies so that the Executive Branch makes more arrests or initiates more prosecutions.").

The application of this holding to other challenges to executive branch authority remains uncertain, but standing has become a key element in the Supreme Court's responses to court challenges to federal government decisions. A prominent decision, issued after *United States v. Texas*, is *Food & Drug Admin. v. Alliance for Hippocratic Medicine*, 144 U.S. 1540 (2024). The Court unanimously held that the plaintiffs – four anti-abortion medical associations and several individual doctors – lacked standing to challenge FDA approval and other regulatory decisions regarding mifepristone, a drug used to terminate pregnancies.

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

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

Thirteen states sought to defend the Trump public charge regulation by moving to intervene in court challenges to the regulation that DHS was no longer defending. The U.S. Supreme Court granted certiorari, see *Arizona v. City & County of San Francisco*, 142 S. Ct. 417 (2021), to decide if the states could intervene. In February 2022, DHS published a Notice

of Proposed Rulemaking as a step toward a new regulation that would largely return to the pre-Trump interpretation of the public charge rule. *See* 87 Fed. Reg. 10570 (2022). In June 2022, the Court unanimously dismissed certiorari as improvidently granted, see *Arizona v. City and County of San Francisco*, 142 S. Ct. 1926 (2022). The new regulation became final on September 9, 2022, 87 Fed. Reg. 10570 (2022), and took effect on December 23, 2022, to apply to all applications postmarked on or after that date.

The new rule codifies, in many respects, the 1999 field guidance that governed public charge determinations until the Trump administration attempted to redefine it. Under the new rule, the government will not consider receipt of noncash benefits and healthcare benefits other than long-term institutionalization at government expense in making its determination. In addition, the new rule narrows its application only to those likely to become “primarily” dependent on the covered benefits. *See* U.S. Dep’t of Homeland Sec., *Public Charge Ground of Inadmissibility Final Rule*, 87 Fed. Reg. 55472 (Sept. 9, 2022).

page 87, delete note 3.

CHAPTER TWO

IMMIGRANTS AND NONIMMIGRANTS: ADMISSION CATEGORIES AND THE UNDOCUMENTED

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

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

In early November 2021, the United States also lifted COVID-justified border closures under Title 42 along the Canadian and Mexican border. *See Notification of Temporary Travel Restrictions Applicable to Ports of Entry and Ferries Service Between the United States and Mexico*, 87 Fed. Reg. 24041 (2022); *Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Canada*, 87 Fed. Reg. 24048 (2022). However, litigation kept the border closures in place until May 11, 2023, when the Biden administration officially terminated the COVID-19 public health emergency. *See Louisiana v. Centers for Disease Control & Prevention*, 603 F. Supp. 3d 406 (W.D. La. May 20, 2022); *Administration Announces Measures for End of COVID-19 Public Health Exclusion*, 100 Interp. Rel. 18 (May 1, 2023). The U.S. Supreme Court dismissed as moot an effort to keep the Title 42 border closures in place. *Arizona v. Mayorkas*, 143 S. Ct. 1312 (2023); *see Adam Liptak, Supreme Court Dismisses Case on Pandemic-Era Immigration Measure*, N.Y. Times, May 18, 2023.

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

The Biden administration revoked most of these restrictions on visa issuance and entry into the United States. President Biden issued Proclamation 10141, revoking Executive Order 13780 (Mar. 6, 2017) and Presidential Proclamations 9645 (Sept. 17, 2017), 9723 (Apr. 10, 2018), and 9983 (Jan. 31, 2020), which together were the foundation for the Muslim ban or “travel ban” that the U.S. Supreme Court upheld in *Trump v. Hawaii*. *See Ending*

Discriminatory Bans on Entry to the United States, Proclamation 10141, 86 Fed. Reg. 7005 (2021).

On February 24, 2021, President Biden revoked the suspension of immigrant visa issuance that President Trump had ordered in Proclamation 10014 of April 22, 2020. *See Proclamation on Revoking Proclamation 10014*, 86 Fed. Reg. 11847 (2021); *Biden Proclamation Revokes Suspension of Immigrant Visa Issuance*, 98 Interp. Rel. 9 (Mar. 1, 2021). Proclamation 10052, which the Trump administration had issued to suspend the entry of nonimmigrant workers in major nonagricultural categories, remained in effect until it expired by its own terms on March 31, 2021. *See DOS Announces Processing Update in Light of the Expiration of P.P. 10052*, 98 Interp. Rel. 14 (Apr. 5, 2021). Finally, on May 14, 2021, President Biden revoked Proclamation 9945, which had required noncitizens to show health insurance or independent financial means. *See Revoking Proclamation 9945*, Proclamation 10209, 86 Fed. Reg. 27015 (2021).

On a larger scale, President Biden's February 2021 executive order established a cross-agency Task Force on New Americans to coordinate the federal government's efforts to welcome and support immigrants. The order also directed the Secretary of State, the Attorney General, and the Secretary of Homeland Security to identify agency policies and actions that impeded access to immigration benefits or failed to promote access to the legal immigration system, and to recommend steps to revise or rescind those agency policies and actions. *See Exec. Order 14012, Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans*, 86 Fed. Reg. 8277 (2021).

Despite the lifting of travel and visa restrictions, nonimmigrant admissions fell before rising again. In 2021, nonimmigrant admissions were down 59 percent from 2020, and down 80 percent from the average number of annual admissions between 2009 and 2019. However, in 2022 nonimmigrant admissions rebounded, increasing 174 percent from 2021. Office of Homeland Sec. Statistics, *Annual Flow Report: U.S. Nonimmigrant Admissions 2022*; Office of Homeland Sec. Statistics, *Annual Flow Report: U.S. Nonimmigrant Admissions 2021*; Office of Homeland Sec. Statistics, *Annual Flow Report: U.S. Nonimmigrant Admissions 2019*; Office of Homeland Sec. Statistics, *Annual Flow Report: U.S. Nonimmigrant Admissions 2018*. A continued climb in the numbers of visas issued for nonimmigrant categories suggests that this rising trend in nonimmigrant admissions will continue. The State Department issued over 10.4 million nonimmigrant visas in 2023 compared with 6.8 million in 2022 and fewer than three million in 2021. *See U.S. Dep't of State, Nonimmigrant Visa Statistics, Table XV(B): Nonimmigrant Visas Issued by Classification (Including Border Crossing Cards) Fiscal Years 2019-2023*.

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

This number has risen as a result of the Biden administration's reinstatement of higher caps on refugee admissions starting in 2021. *See Refugee Ceiling Set at 125,000 for Fiscal Year 2022*, 98 Interp. Rel. 40 (Oct. 18, 2021); *Presidential Determination on Refugee Admissions for Fiscal Year 2024*, 88 Fed. Reg. 73521 (2023) (maintaining the 125,000 cap). *See Data Hub*,

U.S. Refugee Resettlement Ceiling and Annual Number of Admitted Refugees Fiscal Years 1975–2024 (Migration Pol’y Inst. 2024).

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

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

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

For the FY 2022 lottery, the State Department added Honduras to the list of disqualified countries, and included Hong Kong SAR in the disqualification of mainland China. *See* U.S. Dep’t of State, Instructions for the 2022 Diversity Immigrant Visa Program (DV-2022). Guatemalans became eligible for the 2023 lottery, while Venezuelans were disqualified. *See* U.S. Dep’t of State, Instructions for the 2023 Diversity Immigrant Visa Program (DV-2023). For FY 2025, the State Department added the U.K. (and its dependent territories) to the list of countries for the 2025 lottery. *See* U.S. Dep’t of State, Instructions for the 2025 Diversity Immigrant Visa Program (DV-2025).

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

By the beginning of 2021, the combination of administrative delays, Trump-era restrictions, and COVID impacts meant that the Biden administration inherited a near-shutdown of marriage-based visa applications. *See* Nisha Venkat, *Trump Policies and COVID Have Left Immigrant Couples Trying to Get Marriage-Based Visas in Limbo*, BuzzFeed, May 7, 2021. As of June 2024, consular backlogs persist. According to the Department of State, there were 394,836 backlogged immigrant visa applicants at U.S. consular locations globally. Compare with 2019, when 60,866 applicants were pending on average each month. *See* National Visa Center (NVC) Immigrant Visa Interview-Ready Backlog Report (June 2024).

page 177, at the end of the last full paragraph, add:

In December 2023, the Department of Labor announced that it was considering adding occupations in science, technology, engineering and mathematics (STEM) as well as other non-STEM occupations to Schedule A, and invited public commentary via a request for information. *See* U.S. Dep’t of Labor, *Labor Certification for Permanent Employment of Foreign Workers in the United States; Modernizing Schedule A To Include Consideration of Additional Occupations in Science, Technology, Engineering, and Mathematics (STEM) and Non-STEM Occupations*, 88 Fed. Reg. 88290 (2023).

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

After the EB-5 Immigrant Investor Regional Center Program lapsed in 2021, Congress reauthorized and reformed it in 2022, allowing processing of EB-5 visa applications to resume. *See EB-5 Reform and Integrity Act of 2022*, Pub. L. No. 117-103, Div. BB, § 101, 136 Stat. 1070 (2022); U.S. Dep’t of State, Visa Bulletin No. 90, Volume X (June 2024).

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

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

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

In January 2021, President Biden revoked Executive Order 13768, which had restricted visa issuance based on failure to cooperate in the return of a country's nationals. *See* Exec. Order 13993, *Revision of Civil Immigration Enforcement Policies and Priorities*, 86 Fed. Reg. 7051 (2021). Proclamation 10052, which the Trump administration had issued to suspend the entry of nonimmigrant workers in major nonagricultural categories, remained in effect until it expired by its own terms on March 31, 2021. *See DOS Announces Processing Update in Light of the Expiration of P.P. 10052*, 98 Interp. Rel. 14 (Apr. 5, 2021). In June 2024, the Biden Administration announced plans to facilitate employment-based nonimmigrant visas for eligible DACA recipients and undocumented people who have graduated from higher education in the United States. *Fact Sheet: DHS Announces New Process to Promote the Unity and Stability of Families*, U.S. Dep't of Homeland Sec. (June 17, 2024).

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

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

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

The Biden administration withdrew the proposed rescission of the rule on January 25, 2021, pursuant to a memo freezing most pending agency rules. *See* Ronald A. Klain, Assistant to the President & Chief of Staff, Memorandum for the Heads of Executive Departments and Agencies, 86 Fed. Reg. 7424 (2021). *See also Practice Alert: Proposed H-4 EAD Rescission Rule Withdrawn from Review at OMB*, Amer. Immigr. Lawyers Ass'n, Jan. 28, 2021. Separately, in April 2023, a federal district court dismissed a long-running lawsuit challenging the rule allowing for H-4 work authorization, leaving the rule in place. *See Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 664 F. Supp. 3d 143 (D.D.C. 2023); *District Court Preserves Work Authorization for H-4 Spouses*, 100 Interp. Rel. 17 (Apr. 24, 2023). The proclamation that had blocked spouses and children of H-1B visa holders from entering the United States and working expired by its own terms on March 31, 2021. *See DOS Announces Processing Update in Light of the Expiration of P.P. 10052*, 98 Interp. Rel. 14 (Apr. 5, 2021).

page 194, end of second full paragraph, add:

Demand for H-1B visas has remained high, far exceeding the statutory caps. The number of H-1B registrations climbed precipitously after 2021 before leveling off. For 2024, USCIS received a record 780,884 H-1B lottery registrations, up by nearly 300,000 from the 483,927 lottery registrations in 2023. For FY 2025, however, USCIS received 479,953

registrations. *See H-1B Electronic Registration Process*, U.S. Citizenship & Immigr. Servs. (last updated Apr. 29, 2024). This considerable drop in registration numbers for FY 2025 followed implementation of a January 2024 USCIS rule eliminating multiple registrations for the same individual by different employers and imposing other measures to reduce fraud. *See Improving the H-1B Registration Selection Process and Program Integrity*, 89 Fed. Reg. 7456 (2024).

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

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

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

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

Litigation blocked or delayed some of these reforms before the change in presidential administrations. *See Chamber of Com. of the United States v. U.S. Dep’t of Homeland Sec.*, 504 F. Supp. 3d 1077 (N.D. Cal. 2020). Proclamation 10052 expired by its own terms in 2021, and the Biden administration withdrew the proposed regulations. *See Strengthening the H-1B Nonimmigrant Visa Classification, Implementation of Vacatur*, 86 Fed. Reg. 27027 (2021); *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Immigrants and Non-Immigrants in the United States, Implementation of Vacatur*, 86 Fed. Reg. 70729 (2021).

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

In October 2020, the State Department imposed a moratorium on new au pair sponsors and placed caps on the admission of au pairs. *See Exchange Visitor Program—Moratorium on Growth in the Au Pair Program*, 85 Fed. Reg. 64213 (2020). In October 2023, the State Department proposed a rule to strengthen au pair protections via limitations on child-care hours, changes to the compensation structure and educational component, and a revised process for re-matching au pairs with new host families, among other protections. *See Exchange Visitor Program-Au Pairs*, 88 Fed. Reg. 74071 (2023).

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

The proclamation remained in effect until it expired by its own terms on March 31, 2021. *See DOS Announces Processing Update in Light of the Expiration of P.P. 10052*, 98 Interp. Rel. 14 (Apr. 5, 2021).

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

The New York Times reported similar results:

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

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

page 217, in the first full paragraph, replace the material beginning “In 2018” to the end of the paragraph with the following:

The number of H-2A visas issued steadily increased over the following years, most notably by over 40,000 from 2021 to 2022. In 2023, USCIS issued close to 310,000 visas. *See* U.S. Dep’t of State, *Nonimmigrant Visa Statistics, Table XV(B): Nonimmigrant Visas Issued by Classification (Including Border Crossing Cards) Fiscal Years 2019-2023*.

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

In January 2021, the Department of Labor withdrew the proposed regulation for further review. The following year, the agency finalized a regulation that did not implement the proposed wage cuts. Instead, it imposed safety and health protections for workers in rental housing, updated the methodology for prevailing wage determinations, sought to improve meal quality, and expanded liability for violations of the H-2A regulatory scheme, among other changes. *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States*, 87 Fed. Reg. 61660 (2022).

page 219, after the first full paragraph, add:

In June 2024, the Labor Department issued a regulation addressing abusive working conditions by, among other things, strengthening H-2A workers ability to take collective action, providing protections for termination without cause, establishing wage and safety protections, and deterring abuse and exploitation by employers. *See* U.S. Dep’t of Labor,

Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. 33898 (2024).

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

Since 2021, the federal government has issued several additional allotments of H-2B visas, with each allotment snapped up quickly after USCIS received more petitions than the number of H-2B visas available. In December 2021, DHS and DOL made 20,000 additional H-2B visas available for the first half of FY 2022, the first time ever that additional H-2B visas were made available in the first half of the fiscal year. Most of the additional visas were made available to returning workers, with a portion of the remaining additional visas reserved for nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica. Additional allotments for 2023 and 2024 almost doubled the number of available H-2B visas. *See DHS to Supplement H-2B Cap with Additional Visas*, 99 Interp. Rel. 1 (Jan. 4, 2022); *Additional Returning Worker H-2B Visas Cap Reached*, 99 Interp. Rel. 22 (June 6, 2022). U.S. Dep’t of Homeland Sec., *DHS to Supplement H-2B Cap with Nearly 65,000 Additional Visas for Fiscal Year 2023*, Press Release, October 12, 2022; U.S. Citizenship & Immigr. Servs., *Temporary Increase in H-2B Nonimmigrant Visas for FY 2024; Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2024 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 88 Fed. Reg. 80394 (2023).

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

For 2023, DHS identified 87 countries that are eligible for H-2B visa programs. *See Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H-2A and H-2B Nonimmigrant Worker Programs*, 87 Fed. Reg. 67930 (2022). For 2024, DHS added nationals of Bolivia. *See U.S. Dep’t of Homeland Sec., Identification of Foreign Countries Whose Nationals are Eligible to Participate in the H-2A and H-2B Nonimmigrant Workers Programs*, 88 Fed. Reg. 77343 (2023).

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

The proclamation remained in effect until it expired by its own terms on March 31, 2021. *See DOS Announces Processing Update in Light of the Expiration of P.P. 10052*, 98 Interp. Rel. 14 (Apr. 5, 2021).

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

The Wall Street Journal reported that despite the pandemic-inspired economic crisis, employers were unable to hire the workers they needed and so “scaled back production, cut hours or sent jobs overseas.” Alicia A. Caldwell, *Ban on New Foreign Workers Left U.S. Jobs Unfilled, Even in Covid Downturn*, Wall St. J., Feb. 15, 2021. The *Journal* affirmed in early 2022 that the slowdown in immigration continued to impact the U.S. labor market, as job openings continued to outstrip available workers. *See Michelle Hackman, Add Declining Immigration to Problems Weighing on the Labor Market*, Wall St. J., Apr. 5, 2022. By 2023, foreign-born workers’ share of the labor market had increased despite the pandemic

slowdown in immigration. See Gabriel T. Rubin & Rosie Ettenheim, *Immigrants' Share of the U.S. Labor Force Grows to a New High*, Wall St. J., May 22, 2023.

page 232, at the end of note 1, add a new paragraph:

In 2020, international student visas saw an 18 percent decrease from 2019. International student enrollment in K-12 programs dropped nearly 25 percent, and the number of students obtaining work authorization for optional practical training dropped by 12 percent. Visas for Asian students saw the greatest decrease, with enrollments of mainland Chinese students plummeting by 99 percent, those of students in India dropping by 88 percent, and Japanese and South Korean student visas dropping by 87 percent. Enrollments of Mexican students sunk by 60 percent. The decrease slowed in 2021, though the total number of F-1 and M-1 students dropped another 1.2 percent from 2020. See U.S. Immigration & Customs Enft, *SEVIS by the Numbers: Annual Report on International Student Trends* (2020).

The following year, the number of international students enrolled in K-12 programs decreased 16 percent from 2020 to 2021. The rates of Asian, Australian, and Pacific Islanders again experienced the greatest impact in 2021, with the highest overall decline in students from those areas. See U.S. Immigration & Customs Enft, *SEVIS by the Numbers: Annual Report on International Student Trends* (2021). All other continents (other than Antarctica), however, saw an increase in 2021.

Data from 2022 showed that the downward trend in student admissions to the U.S. was reversing. The number of international students in the U.S. in 2022 increased by 10 percent from 2021. All U.S. regions saw an increase in international students, with California hosting the largest proportion. Most international students in 2022 came from Asian countries, although the number of Chinese students continued to drop from 2021 levels. See U.S. Immigr. & Customs Enft, *SEVIS by the Numbers: Annual Report on International Student Trends* (2022).

In 2023, numbers rose further, increasing 10.4 percent over 2022 and coming within 2 to 3 percent of pre-pandemic levels in 2018 and 2019. Once more, Asia was the largest sending continent. China reversed its downward trend and sent almost 2 percent more students than in 2022, and India sent over 27 percent more students than in 2022, though combined these numbers are more than 8 percent lower than pre-pandemic levels. California again hosted the largest numbers of international students. Compare U.S. Immigr. & Customs Enft, *SEVIS by the Numbers: Annual Report on International Student Trends* (2018); U.S. Immigr. & Customs Enft, *SEVIS by the Numbers: Annual Report on International Student Trends* (2019) with U.S. Immigr. & Customs Enft, *SEVIS by the Numbers: Annual Report on International Student Trends* (2022); U.S. Immigr. & Customs Enft, *SEVIS by the Numbers: Annual Report on International Student Trends* (2023).

page 233, at the end of note 3, replace the material starting with “A second lawsuit” with the following:

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

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

Although Proclamation 10053, suspending entry to nonimmigrant categories that included J visas, expired in March 2021, the Biden administration has not terminated Proclamation 10043, which remained in effect as this Update goes to press in late July 2024. *See* Stuart Anderson, *Chinese Students Still Denied Visas Under Trump Immigration Order*, *Forbes*, Apr. 11, 2023; Jeffrey Mervis, *A Valid U.S. Visa Didn’t Stop These Chinese Graduate Students from Being Deported*, *Science Insider*, Mar. 1, 2024.

page 234, at the end of note 6, add:

USCIS addressed this question in December 2023 when it announced a policy change establishing that an F or M student “may be the beneficiary of a permanent labor certification application or immigrant visa petition and may still be able to demonstrate their intention to depart after a temporary period of stay.” *See* U.S. Citizenship & Immigr. Servs., *Policy Alert*, December 20, 2020. Does USCIS’s policy change answer this question completely?

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

In February 2021, President Biden had introduced in Congress the proposed U.S. Citizenship Act. The Act would have created an eight-year path to citizenship for most unlawfully present noncitizens and a three-year path for DACA recipients and some agricultural workers. The bill would have expanded family-based immigration and allow temporary admission for family members eligible for immigrant visas. It would have eliminated the per-country caps on employment-based immigration, facilitate admission for those with advanced STEM degrees from a U.S. institution, and provide work authorization for spouses and children of H-1B visa holders. U.S. Citizenship Act, S. 348, 117th Cong. (2021). *See also Biden-Supported Citizenship Act Introduced in Congress*, 98 Interp. Rel. 8 (Feb. 22, 2021). As this Update goes to press in late July 2024, the bill had not been voted on.

In early 2023, several comprehensive immigration reform bills were introduced in Congress. The House of Representatives passed a bill that would require DHS to resume southern border wall construction, mandate that all employers use E-Verify, require noncitizens seeking asylum either to be detained or in Mexico, and apply expedited removal to unaccompanied minors. *See* Secure the Border Act of 2023, H.R. 2, 118th Cong. (2023). The bill had little chance of approval in the Senate, and President Biden threatened to veto the legislation. *See* Karoun Demirjian, *House Approves Stringent G.O.P. Border Bill, Attacking Biden on Immigration*, *N.Y. Times*, May 11, 2023. Separately, a bipartisan bill introduced in the House would, among other things, provide a pathway to permanent residency and citizenship for undocumented children and others living in the U.S. without status while

increasing funding for CBP and taking other measures to address unauthorized entries to the U.S. This bill also faced steep odds. *See* Dignity Act of 2023, H.R. 3599, 118th Cong. (2023); Camilo Montoya-Galvez, *Bipartisan Immigration Bill Would Boost Border Funds, Expand Lawful Migration and Legalize Some Immigrants*, CBS News, May 23, 2023. In early 2024, the Senate defeated a bipartisan bill that had proposed 50,000 new immigrant admissions per year for five years, along with significant restrictions on unauthorized border crossing and narrowing of pathways to asylum. Of those 50,000 immigrant visas, the bill would have conferred 32,000 family-based and 18,000 employment-based admissions. *See* Emergency Nat'l Sec. Supplemental Appropriations Act of 2024, H.R. 815, 118th Cong. (2024).

Measures short of congressional reform exist for addressing concerns about limitations on family unity. In June 2024, the Biden administration announced a new process that would confer “parole in place” under INA § 212(d)(5) to noncitizens without lawful immigration status who are married to U.S. citizens and have accrued ten years of continuous presence as of June 17, 2024. Obtaining parole would allow them to adjust their status within the United States to lawful permanent resident as immediate relatives of U.S. citizens. By qualifying for adjustment in the United States, they could avoid a departure from the United States, and thus avoid application of the inadmissibility grounds for unlawful presence that impose three or ten-year bars to admission as well as avoiding separation from children and spouses in the United States. *See* INA § 212(a)(9)(B).

Noncitizens approved for parole in place would be eligible for work authorization and afforded a three-year period to become lawful permanent residents. Noncitizen children (typically stepchildren from a prior marriages) would also qualify. The action would benefit approximately 500,000 noncitizen spouses and 50,000 noncitizen children. *Fact Sheet: President Biden Announces New Actions to Keep Families Together*, The White House, June 18, 2024.

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

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

page 272, at the bottom of the page, add a new paragraph:

In 2024, the Migration Policy Institute estimated the 2021 unauthorized immigrant population at 11.2 million, reflecting “larger annual growth than at any point since 2015.” The Institute noted that the increase was “partially explained by increased irregular arrivals at the U.S.-Mexico border. These border arrivals represented a growing mix of nationalities from the Americas and, increasingly, from beyond the hemisphere. The growth also stems from rising numbers of Europeans who overstayed their nonimmigrant visas.” See Jennifer Van Hook, Julia Gelatt & Ariel G. Ruiz Soto, *A Turning Point for the Unauthorized Immigrant Population in the United States* (Migration Pol’y Inst. 2024).

page 277, after the first full paragraph:

In 2024, the federal government revised the definition of “lawful presence” to allow recipients of Deferred Action for Childhood Arrivals (DACA) to access health insurance and other affordability measures under the Affordable Care Act. See Dep’t of Health and Hum. Servs. & Ctrs for Medicare & Medicaid Servs., *Clarifying the Eligibility of Deferred Action for Childhood Arrivals (DACA) Recipients and Certain Other Noncitizens for a Qualified Health Plan through an Exchange, Advance Payments of the Premium Tax Credit, Cost-Sharing Reductions, and a Basic Health Program*, 89 Fed. Reg. 39392 (May 8, 2024).

page 287, in note 3, after “insights?,” add:

Does the Biden administration’s approach—continuing some border control measures and reducing access to asylum, while at the same time expanding access to immigrant admissions and temporary work visas and increasing support for Northern Triangle countries—address Motomura’s critiques?

page 293, at the end of the first paragraph of subsection d(ii) of section A, add:

In 2023, DHS designated Israel for the Visa Waiver Program. See U.S. Dep’t of Homeland Sec., *Designation of Israel for the Visa Waiver Program*, 88 Fed. Reg. 67063 (2023).

CHAPTER THREE

ADMISSION PROCEDURES

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

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

page 293, at the end of the second full paragraph, add:

In September 2021, Croatia became the 40th country in the Visa Waiver Program. In October 2023, Israel became the 41st country.

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

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

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

Parole in the Biden Administration

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

Several instances have been modest in scope. In May 2021, the Biden administration withdrew the 2018 proposed rule that would have eliminated the International Entrepreneur Parole Program. *See Removal of International Entrepreneur Parole Program*, 86 Fed. Reg. 25809 (2021). The Biden administration re-started the Central American Minors (CAM) refugee and parole program with expanded eligibility to reunite children from El Salvador,

Guatemala, and Honduras with their parents legally present in the United States. *See* 88 Fed. Reg. 21694 (2023); Mark Greenberg, Stephanie Heredia, *et al.*, *Relaunching the Central American Minors Program: Opportunities to Enhance Child Safety and Family Reunification* (Migration Pol’y Inst. 2021).

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

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

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

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

of the Uniting for Ukraine Parole Process, 87 Fed. Reg. 25040 (2022); Muzaffar Chishti & Jessica Bolter, *Welcoming Afghans and Ukrainians to the United States: A Case in Similarities and Contrasts* (Migration Pol’y Inst. 2022).

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

The CHNV program shares many of the features first used in the Ukrainian program. People in the United States who are willing to commit financial support may sponsor a parolee. The application process operates online, and there is no fee. Approved parolees must have a valid passport and travel by air to the United States. They must come from one of the four listed countries, which combined to account for the majority of arrivals on the U.S.-Mexico border in the period immediately before the programs were announced. Once in the United States, noncitizens who enter on parole may work. The Federal Register notices for Cuba, Haiti, Nicaragua, and Venezuela are at 88 Fed. Reg. 26329 (2023) (Cuba); 88 Fed. Reg. 1243 (2023) (Haiti); 88 Fed. Reg. 1255 (2023) (Nicaragua); and 87 Fed. Reg. 63507 (2022) (Venezuela).

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

Several Republican-led states filed a court challenge to the legality of these parole programs for Cuba, Haiti, Nicaragua, and Venezuela, arguing that this use of parole exceeded executive branch authority under INA § 212(d)(5), and that arrival of new migrants would impose on states new fiscal burdens for health care, education, and law enforcement. *See* Miriam Jordan, *Biden Opens a New Back Door on Immigration*, N.Y. Times, Apr. 23, 2023. The federal district court for the Southern District of Texas dismissed this challenge, reasoning that the plaintiff states could not show any harm from the CHNV program, and that they therefore lacked standing. As this Update goes to press in late July 2024, an appeal is pending in the U.S. Court of Appeals for the Fifth Circuit. *See Texas v. U.S. Dep’t of Homeland Sec.*, No. 6:23-CV-00007, 2024 WL 1021068 (S.D. Tex. Mar. 8, 2024), *appeal filed*, No. 24-40160, filed March 12, 2024.

In the first several months of the program, the federal government received more than 1.5 million applications from would-be sponsors. *See* Camilo Montoya-Galvez, *1.5 Million Apply for U.S. Migrant Sponsorship Program With 30,000 Monthly Cap*, CBS News, May 22, 2023. The number using the parole program have been significant. Through March 2024, about 404,000 Cubans, Haitians, Nicaraguans, and Venezuelans entered the United States via the parole program. *See* Muzaffar Chishti, Kathleen Bush-Joseph & Julian Montalvo, *Title 42 Postmortem: U.S. Pandemic-Era Expulsions Policy Did Not Shut Down the Border* fig. 4 (Migration Pol’y Inst. Apr. 2024). And the program appears to have greatly reduced the number of asylum seekers arriving at the U.S. southern border. *See id.*; Edward Alden, *Biden’s New Southern Border Plan Might Just Work*, Foreign Policy, Apr. 5, 2023.

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

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

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

Implementation of a Family Reunification Parole Process for Guatemalans, 88 Fed. Reg. 43581 (2023). *See also* U.S. Dep’t of Homeland Sec., *DHS Announces Family Reunification Parole Processes for Columbia, El Salvador, Guatemala, and Honduras*, July 7, 2023.

On June 18, 2024, the Biden Administration announced its intention to rely on its parole authority under INA § 212(d)(5) to grant “parole in place” to noncitizens without lawful immigration status who are married to U.S. citizens. The practical effect of parole would be to satisfy the “admitted or paroled” requirement for eligibility for adjustment of status to

lawful permanent resident in the United States. A departure from the country might trigger the three- and ten-year inadmissibility grounds based on unlawful presence under INA § 212(a)(9)(B). Departure would also mean separation from family while going through the process of acquiring an immigrant visa from outside the United States. *Fact Sheet: President Biden Announces New Actions to Keep Families Together*, The White House, June 18, 2024.

Eligibility would be limited to those who have resided in the United States for at least ten years as of June 17, 2024, are legally married to a U.S. citizen as of that date, and are not otherwise legally barred from admission. Those approved would be eligible for work authorization and have a three-year period to apply to become lawful permanent residents. Noncitizen children (typically stepchildren from a prior marriages) would also qualify.

According to the White House, approximately 500,000 noncitizen spouses and 50,000 noncitizen children would benefit. The implementing regulations and process are anticipated by late summer 2024. See Zolan Kanno-Youngs, Miriam Jordan, Jazmine Ulloa & Hamed Aleaziz, *Biden Gives Legal Protections to Undocumented Spouses of U.S. Citizens*, N.Y. Times, June 18, 2024.

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

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

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

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

On February 2, 2021, President Biden signed an Executive Order that, among other things, suspended the 2019 expansion and ordered the Secretary of Homeland Security to report on whether to modify or revoke the Trump administration’s extension of expedited removal throughout the U.S. interior. *See* Exec. Order 14010, *Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, § 4(b), 86 Fed. Reg. 8267 (2021). On March 21, 2022, DHS formally rescinded the July 2019 expansion of expedited removal. *Rescission of the Notice of July 23, 2019, Designating Aliens for Expedited Removal*, 87 Fed. Reg. 16022 (2022).

page 338, after note 4, add notes 5 and 6:

5. The 2024 U.S. Supreme Court decision in *Department of State v. Muñoz*, 144 S. Ct. 1812 (2024), raised and resolved questions regarding procedural due process in the context of consular processing. We have included *Muñoz* in the next subsection on procedures outside the United States, but the discussion in *Muñoz* of landmark decisions establishing and applying the plenary power doctrine may be consistent with the Court’s treatment of the same and similar precedents in *Thuraissigiam*.

6. In *Mendoza Linares v. Garland*, 51 F.4th 1146 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 1392 (2024), the Ninth Circuit applied the provision in INA § 242 that bars the federal courts from reviewing expedited removal orders. The Ninth Circuit denied rehearing en banc, with a statement by Judge Marsha Berzon, joined by 12 other judges, that the majority was “turn[ing] a blind eye” to possible constitutional violations in application of the expedited removal statute. *See* 71 F.4th 1201 (9th Cir. 2024) (denying rehearing en banc). For further discussion of the bar to court review of expedited removal, see casebook pages 896-913,

page 339, after the heading for subsection 5, add:

In 2024, the U.S. Supreme Court returned to many of the issues in earlier procedural due process decisions, including the effect of family ties and location, the doctrine of consular nonreviewability, and what evidence or information the government must share with a U.S. citizen when denying a spouse’s visa application. Sandra Muñoz, a U.S. citizen and resident, alleged that a consular officer’s denial of her husband’s visa application violated her constitutional right to live in the United States with her husband. The officer cited INA § 212(a)(3)(A)(ii), as the statutory basis for the denial, without informing Muñoz of the underlying reasons for the denial. INA § 212(a)(3)(A)(ii) makes inadmissible a noncitizen whom the officer “knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in” certain specified offenses or “any other unlawful activity.” The Court ruled against Muñoz.

DEPARTMENT OF STATE V. MUÑOZ

Supreme Court of the United States, 2024.
114 S. Ct. 1812

JUSTICE BARRETT delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, ALITO, and KAVANAUGH, JJ., joined. GORSUCH, J., filed an opinion concurring in the judgment. SOTOMAYOR, J., filed a dissenting opinion, in which KAGAN and JACKSON, JJ., joined.

Luis Asencio-Cordero seeks to enter the United States to live with Sandra Muñoz, his wife. A consular officer denied his application, however, after finding that Asencio-Cordero is affiliated with MS-13, a transnational criminal gang. Because of national security concerns, the consular officer did not disclose the basis for his decision. And because Asencio-Cordero, as a noncitizen, has no constitutional right to enter the United States, he cannot elicit that information or challenge the denial of his visa.

Muñoz, on the other hand, is a citizen, and she filed her own challenge to the consular officer's decision. She reasons as follows: The right to live with her noncitizen spouse in the United States is implicit in the “liberty” protected by the Fifth Amendment; the denial of her husband’s visa deprived her of this interest, thereby triggering her right to due process; the consular officer violated her right to due process by declining to disclose the basis for finding Asencio-Cordero inadmissible; and this, in turn, enables judicial review, even though visa denials are ordinarily unreviewable by courts.

Muñoz’s argument fails at the threshold. Her argument is built on the premise that the right to bring her noncitizen spouse to the United States is an unenumerated constitutional right. To establish this premise, she must show that the asserted right is “deeply rooted in this Nation’s history and tradition.” *Washington v. Glucksberg*, 521 U.S. 702, 720-721, 117 S. Ct. 2258, 138 L.Ed.2d 772 (1997). She cannot make that showing. In fact, Congress’s longstanding regulation of spousal immigration—including through bars on admissibility—cuts the other way.

I
A

To be admitted to the United States, a noncitizen typically needs a visa. 66 Stat. 181, INA § 211 * * * Visa decisions are made by the political branches. *Trump v. Hawaii*, 585 U.S. 667, 702-703, 138 S. Ct. 2392, 201 L.Ed.2d 775 (2018) * * *

Congress has streamlined the visa process for noncitizens with immediate relatives in the United States. The citizen-relative must first file a petition with U.S. Citizenship and Immigration Services (USCIS), an agency housed within the Department of Homeland Security, to have the noncitizen classified as an immediate relative. * * * If USCIS approves the petition, then the noncitizen may apply for a visa. INA §221(a). As part of this process, the noncitizen submits written materials and interviews with a consular officer abroad.

Ordinarily, a consular officer who denies a visa application “because the officer determines the alien to be inadmissible” must “provide the alien with a timely written notice that ... (A) states the determination, and (B) lists the specific provision or provisions of law under which the alien is inadmissible.” INA § 212(b)(1). The statute requires no explanation, however, “to any alien inadmissible” on certain grounds related to crime and national security. INA § 212(b)(3). This case involves a noncitizen to whom this statutory exception applies.

B

Sandra Muñoz, an American citizen, married Luis Asencio-Cordero, a Salvadoran citizen, in 2010. Several years later, the couple began taking steps to obtain an immigrant visa for Asencio-Cordero. Muñoz filed a petition to classify her husband as an immediate relative, which USCIS granted. INA §§ 201(b)(2)(A)(i), 204 (a)(1)(A). Because Asencio-Cordero had entered the United States unlawfully, he was required to return to El Salvador and submit his visa application at a consulate there. See §§ 204(b), 222. He met with a consular officer in San Salvador and underwent several interviews.

In December 2015, the officer denied Asencio-Cordero’s application, citing INA 212(a)(3)(A)(ii). That provision renders inadmissible a noncitizen whom the officer “knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in” certain specified offenses or “any other unlawful activity.” The officer provided no additional details—but, given the reason for the visa denial, even the statutory citation was more information than Asencio-Cordero was entitled to receive. INA §212(b)(3).

[Justice Barrett explained that Asencio-Cordero guessed accurately that he was denied a visa because the officer determined, based at least in part on his tattoos, that he was a member of MS–13, a transnational criminal gang. Asencio-Cordero and Muñoz denied that he was affiliated with MS–13 or any other gang and sought reconsideration. Unsuccessful at the consulate, the couple appealed to the Department of State, submitting evidence that the “tattoos were innocent.” After multiple reviews, the Department of State affirmed the consular officer’s finding of inadmissibility.]

Asencio-Cordero and Muñoz sued the Department of State, the Secretary of State, and the United States consul in San Salvador[,] * * * collectively [referred to here as] the State Department. They alleged, among other things, that the State Department had abridged Muñoz’s constitutional liberty interest in her husband’s visa application by failing to give a sufficient reason why Asencio-Cordero is inadmissible under the “unlawful activity” bar.

The District Court agreed and ordered discovery. In a sworn declaration, an attorney adviser from the State Department explained that Asencio-Cordero was deemed inadmissible because he belonged to MS–13 * * * “based on the in-person interview, a criminal review of . . . Asencio[-]Cordero, and a review of [his] tattoos.” * * * [The] State Department [also] provided the District Court with confidential law enforcement information * * * identifying

Ascencio-Cordero as a member of MS–13. Satisfied, the District Court granted summary judgment to the State Department.

The Ninth Circuit vacated the judgment and remanded the case. [The Ninth Circuit, following *Kleindienst v. Mandel*, 408 U. S. 753, 766–770, 92 S. Ct. 2576, 33 L.Ed.2d 683 (1972), held that Muñoz, as a citizen, had a constitutionally protected liberty interest in her husband’s visa application and that the Due Process Clause required the State Department to give her a “facially legitimate and bona fide reason” for denying her husband’s visa. It found that the State Department’s initial statutory citation did not qualify, and that the later affidavit was untimely. Noting that visa denials are insulated from judicial review by the doctrine of consular nonreviewability, the Ninth Circuit concluded that by declining to give Muñoz more information earlier in the process, the State Department forfeited its entitlement “to shield its visa decision from judicial review.” Accordingly, the court remanded to the District Court to consider the merits of Muñoz’s suit and to order the State Department to readjudicate Asencio-Cordero’s application.]

II

“For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a ‘fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.’” [*Trump v. Hawaii*, 585 U.S. 667, 702 (2018)](quoting *Fiallo v. Bell*, 430 U.S. 787, 792, 97 S. Ct. 1473, 52 L.Ed.2d 50 (1977)). Congress may delegate to executive officials the discretionary authority to admit noncitizens “immune from judicial inquiry or interference.” *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-591, 72 S. Ct. 512, 96 L.Ed. 586 (1952). When it does so, the action of an executive officer “to admit or to exclude an alien” “is final and conclusive.” *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543, 70 S. Ct. 309, 94 L.Ed. 317 (1950); see also *Dept. of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 138-139, 140 S. Ct. 1959, 207 L.Ed.2d 427 (2020); *Mandel*, 408 U.S. at 765-766; *Nishimura Ekiu v. United States*, 142 U.S. 651, 659-660, 12 S. Ct. 336, 35 L.Ed. 1146 (1892). The Judicial Branch has no role to play “unless expressly authorized by law.” *Knauff*, 338 U.S., at 543, 70 S. Ct. 309. The Immigration and Nationality Act (INA) does not authorize judicial review of a consular officer’s denial of a visa; thus, as a rule, the federal courts cannot review those decisions. * * * This principle is known as the doctrine of consular nonreviewability.

We have assumed that a narrow exception to this bar exists “when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen.” *Trump*, 585 U.S., at 703, 138 S. Ct. 2392. In that event, the Court has considered whether the Executive gave a “facially legitimate and bona fide reason” for denying the visa. *Kerry v. Din*, 576 U.S. 86, 103-104, 135 S. Ct. 2128, 192 L.Ed.2d 183 (2015) (Kennedy, J., concurring in judgment) (quoting *Mandel*, 408 U.S., at 770, 92 S. Ct. 2576). If so, the inquiry is at an end—the Court has disclaimed the authority to “look behind the exercise of that discretion,” much less to balance the reason given against the asserted constitutional right. *Din*, 576 U.S., at 104, 135 S. Ct. 2128.

Asencio-Cordero cannot invoke the exception himself, because he has no “constitutional right of entry to this country as a nonimmigrant or otherwise.” *Mandel*, 408 U.S., at 762, 92 S. Ct. 2576. Thus, so far as Asencio-Cordero is concerned, the doctrine of consular nonreviewability applies. Muñoz, however, is an American citizen, and she asserts that the denial of her husband’s visa violated *her* constitutional rights, thereby enabling judicial review. Specifically, she argues that the State Department abridged her fundamental right to live with her spouse in her country of citizenship—and that it did so without affording her the fair procedure guaranteed by the Fifth Amendment.

* * * In *Din*, this Court considered but did not resolve the question. A plurality concluded that a citizen does not have a fundamental right to bring her noncitizen spouse to the United States. 576 U.S., at 96, 135 S. Ct. 2128. Two Justices chose not to reach the issue, explaining that even if the right existed, the statutory citation provided by the Executive qualified as a facially legitimate and bona fide reason. *Id.*, at 105, 135 S. Ct. 2128 (opinion of Kennedy, J.). Since *Din*, the existence of the right has continued to divide the Circuits.

Today, we resolve the open question. Like the *Din* plurality, we hold that a citizen does not have a fundamental liberty interest in her noncitizen spouse being admitted to the country.

III

The Due Process Clause of the Fifth Amendment requires the Government to provide due process of law before it deprives someone of “life, liberty, or property.” Under our precedent, the Clause promises more than fair process: It also “provides heightened protection against government interference with certain fundamental rights and liberty interests.” *Glucksberg*, 521 U.S., at 720, 117 S. Ct. 2258. When a fundamental right is at stake, the Government can act only by narrowly tailored means that serve a compelling state interest. *Id.*, at 721, 117 S. Ct. 2258. Identifying unenumerated rights carries a serious risk of judicial overreach, so this Court “exercise[s] the utmost care whenever we are asked to break new ground in this field.” *Id.*, at 720, 117 S. Ct. 2258. * * * To that end, *Glucksberg*’s two-step inquiry disciplines the substantive due process analysis. First, it insists on a “careful description of the asserted fundamental liberty interest.” * * * Second, it stresses that “the Due Process Clause specially protects” only “those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition.” *Id.*, at 720-721, 117 S. Ct. 2258. * * *

* * * Muñoz invokes the “fundamental right of marriage,” but the State Department does not deny that Muñoz (who is already married) has a fundamental right to marriage. Muñoz claims something distinct: the right to *reside with her noncitizen spouse in the United States*. That involves more than marriage and more than spousal cohabitation—it includes the right to have her noncitizen husband enter (and remain in) the United States.

It is difficult to pin down the nature of the right Muñoz claims. The logic of her position suggests an entitlement to bring Asencio-Cordero to the United States—how else could Muñoz enjoy the asserted right to live with her noncitizen husband in her country of

citizenship? Yet Muñoz disclaims that characterization, insisting that “[she] does not advance a substantive right to immigrate one’s spouse.” Brief for Respondents 19, n.10. This concession is wise, because such a claim would ordinarily trigger strict scrutiny—and it would be remarkable to put the Government to the most demanding test in constitutional law in the field of immigration, an area unsuited to rigorous judicial oversight. *Fiallo*, 430 U.S., at 792, 97 S. Ct. 1473 (“Our cases ‘have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control’”).

Though understandable, Muñoz’s concession makes characterizing the asserted right a conceptually harder task. Here is her formulation: a “marital right . . . sufficiently important that it cannot be unduly burdened without procedural due process as to an inadmissibility finding that would block her from residing with her spouse in her country of citizenship.” Brief for Respondents 19, n.10. So described, the asserted right is neither fish nor fowl. It is fundamental enough to be implicit in “liberty;” but, unlike other implied fundamental rights, its deprivation does not trigger strict scrutiny. See *Din*, 576 U.S., at 99, 135 S. Ct. 2128. * * This right would be in a category of one: a substantive due process right that gets only procedural due process protection.

We need not decide whether such a category exists, because Muñoz cannot clear the second step of *Glucksberg*’s test: demonstrating that the right to bring a noncitizen spouse to the United States is “deeply rooted in this Nation’s history and tradition.” 521 U.S., at 721, 117 S. Ct. 2258. On the contrary, the through line of history is recognition of the Government’s sovereign authority to set the terms governing the admission and exclusion of noncitizens. And Muñoz points to no subsidiary tradition that curbs this authority in the case of noncitizen spouses.

From the beginning, the admission of noncitizens into the country was characterized as “of favor [and] *not of right*.” J. Madison, Report of 1800 (Jan. 7, 1800), in 17 Papers of James Madison 319 (D. Mattern, J. Stagg, J. Cross, & S. Perdue eds. 1991) (emphasis added); see also 2 Records of the Federal Convention of 1787, p. 238 (M. Farrand ed. 1911) (recounting Gouverneur Morris’s observation that “every Society from a great nation down to a club ha[s] the right of declaring the conditions on which new members should be admitted”); Debate on Virginia Resolutions, in *The Virginia Report of 1799–1800*, p. 31 (1850) (“[B]y the law of nations, it is left in the power of all states to take such measures about the admission of strangers as they think convenient”). Consistent with this view, the 1798 Act Concerning Aliens gave the President complete discretion to remove “all such aliens as he shall judge dangerous to the peace and safety of the United States.” 1 Stat. 571 (emphasis deleted). The Act made no exception for spouses—or, for that matter, other family members.

The United States had relatively open borders until the late 19th century. But once Congress began to restrict immigration, “it enacted a complicated web of regulations that erected serious impediments to a person’s ability to bring a spouse into the United States.” *Din*, 576 U.S., at 96, 135 S. Ct. 2128 (plurality opinion). One of the first federal immigration statutes, the Immigration Act of 1882, required executive officials to “examine”

noncitizens and deny “permi[ssion] to land” to “any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge.” 22 Stat. 214. The Act provided no exception for citizens’ spouses. * * *

There are other examples. The Page Act of 1875, which functioned as a restriction on Chinese female immigration, contained no exception for wives. 18 Stat. 477–478[.] * * * Or consider the Emergency Quota Act of 1921, which capped the number of immigrants permitted to enter the country each year. 42 Stat. 5–6. Although the Act gave preferential treatment to citizens’ wives, “once all the quota spots were filled for the year, the spouse was barred without exception.” *Din*, 576 U.S., at 97, 135 S. Ct. 2128 (plurality opinion).⁶ In 1924, Congress, showing favor to men rather than marriage, lifted the quotas for male citizens with noncitizen wives, but did not similarly clear the way for female citizens with noncitizen husbands. *Abrams* 12. This gender disparity did not change until 1952. *Id.*, at 13–14.

That is not to say that Congress has not extended special treatment to marriage—it has. For instance, the War Brides Act of 1945 provided that the noncitizen spouses of World War II veterans would be exempt from certain admissibility bars and documentary requirements. Ch. 591, 59 Stat. 659. Closer to home, Asencio-Cordero’s visa application rested on his marriage to Muñoz, which made him eligible for immigrant status. INA § 204 But while Congress has made it easier for spouses to immigrate, it has never made spousal immigration a matter of right. On the contrary, qualifications and restrictions have long been the norm. See, e.g., Act of Aug. 9, 1946, ch. 945, 60 Stat. 975 (granting nonquota status to Chinese wives of American citizens, but only for those with longstanding marriages).

Of particular relevance to Muñoz, Congress has not exempted spouses from inadmissibility restrictions like the INA’s unlawful-activity bar. * * * In *Knauff*, a United States citizen (and World War II veteran) found himself similarly situated to Muñoz: His noncitizen wife was denied admission for security reasons, based on “information of a confidential nature, the disclosure of which would be prejudicial to the public interest.” 338 U.S., at 541, 544, 70 S. Ct. 309. We held that the War Brides Act did not supersede the statute on which the Attorney General had relied. *Id.*, at 546–547, 70 S. Ct. 309. * * * So, “[a]s all other aliens, petitioner had to stand the test of security.” *Id.*, at 547, 70 S. Ct. 309. Nor was she entitled to a hearing, because “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.” *Id.*, at 544, 70 S. Ct. 309. The Attorney General’s decision was “final and conclusive,” and he did not have to divulge the reason for it. *Id.*, at 543, 70 S. Ct. 309. * * *

Knauff thus reaffirmed the longstanding principle “that the United States can, as a matter of public policy . . . forbid aliens or classes of aliens from coming within their borders,” and “[n]o limits can be put by the courts upon” that power. *Wong Wing v. United States*, 163 U.S. 228, 237, 16 S. Ct. 977, 41 L.Ed. 140 (1896). * * * While “families of putative immigrants

⁶ Given the then-existing law of coverture, the Act was relevant to noncitizen wives—a citizen wife with a noncitizen husband was forced to assume her husband’s nationality. K. Abrams, What Makes the Family Special? 80 U. Chi. L. Rev. 7, 11 (2013). * * *

certainly have an interest in their admission,” it is a “fallacy” to leap from that premise to the conclusion that United States citizens have a “fundamental right” that can limit how Congress exercises “the Nation’s sovereign power to admit or exclude foreigners.” *Fiallo*, 430 U.S., at 795, n.6, 97 S. Ct. 1473.

To be sure, Congress can use its authority over immigration to prioritize the unity of the immigrant family. *Din*, 576 U.S., at 97, 135 S. Ct. 2128 (plurality opinion). * * * But the Constitution does not *require* this result; moreover, Congress’s generosity with respect to spousal immigration has always been subject to restrictions, including bars on admissibility. This is an area in which more than family unity is at play: Other issues, including national security and foreign policy, matter too. Thus, while Congress may show special solicitude to noncitizen spouses, such solicitude is “a matter of legislative grace rather than fundamental right.” *Din*, 576 U.S., at 97, 135 S. Ct. 2128 (plurality opinion). Muñoz has pointed to no evidence suggesting otherwise.

IV

As the State Department observes, Muñoz’s claim to a procedural due process right in *someone else’s* legal proceeding would have unsettling collateral consequences. Consider where her logic leads: Could a wife challenge her husband’s “assignment to a remote prison or to an overseas military deployment, even though prisoners and service members themselves cannot bring such challenges”? Could a citizen assert procedural rights in the removal proceeding of her spouse? Muñoz’s position would usher in a new strain of constitutional law * * * .

* * * Muñoz has suffered harm from the denial of Asencio-Cordero’s visa application, but that harm does not give her a constitutional right to participate in his consular process.

Lest there be any doubt, *Mandel* does *not* hold that citizens have procedural due process rights in the visa proceedings of others. The Ninth Circuit seems to have read *Mandel* that way, but that is a misreading.

In *Mandel*, the Attorney General refused to waive inadmissibility and grant Ernest Mandel, a self-described “revolutionary Marxist,” a temporary visa to attend academic conferences in the United States. 408 U.S., at 756, 92 S. Ct. 2576. A group of professors sued on the ground that the Executive’s discretion to grant a waiver was limited by their First Amendment right to hear Mandel speak; they insisted that “the First Amendment claim should prevail, at least where no justification is advanced for denial of a waiver.” *Id.*, at 769, 92 S. Ct. 2576. In response, the Attorney General asserted that “Congress has delegated the waiver decision to the Executive in its sole and unfettered discretion, and any reason or no reason may be given.” *Ibid.*

But because “the Attorney General *did* inform Mandel’s counsel of the reason for refusing him a waiver,” the Court chose not to resolve this statutory argument. *Ibid.* (emphasis added). Instead, it said that so long as the Executive gives a “facially legitimate and bona fide reason” for denying a waiver under § 212(a)(28) of the INA—the statutory

provision at issue—“the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.” *Id.*, at 770, 92 S. Ct. 2576. The Court expressly declined to address whether a constitutional challenge would “be available for attacking [an] exercise of discretion for which no justification whatsoever is advanced.” *Id.*

Thus, the “facially legitimate and bona fide reason” in *Mandel* was the justification for avoiding a difficult question of statutory interpretation; it had nothing to do with procedural due process. * * * To make an argument logically analogous to that of the professors, Muñoz would have to claim that the denial of Asencio-Cordero’s visa violated her substantive due process right to bring her noncitizen spouse to the United States—thereby triggering the State Department’s obligation to demonstrate why denying him the visa is the least restrictive means of serving the Government’s interest in national security. But, as we have explained, Muñoz has disavowed that argument, which cannot succeed in any event because the asserted right is not a longstanding and “‘deeply rooted’ ” tradition in this country. *Glucksberg*, 521 U.S., at 721, 117 S. Ct. 2258.

The bottom line is that procedural due process is an odd vehicle for Muñoz’s argument, and *Mandel* does not support it. Whatever else it may stand for, *Mandel* does not hold that a citizen’s independent constitutional right (say, a free speech claim) gives that citizen a procedural due process right to a “facially legitimate and bona fide reason” for why someone else’s visa was denied. And Muñoz is not constitutionally entitled to one here.

* * *

The judgment of the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GORSUCH, concurring in the judgment.

A consular officer denied Sandra Muñoz’s husband a visa to come to and live lawfully in the United States. * * * In doing so, the officer simply cited INA § 212(a)(3)(A)(ii), a provision of the Immigration and Nationality Act that makes inadmissible any person a consular officer “has reasonable ground to believe ... seeks to enter the United States to engage ... in ... any other unlawful activity.”

Over the course of this litigation, the United States has given Ms. Muñoz what she requested. As the Ninth Circuit recognized, the United States has now revealed the factual basis for its decision to deny her husband a visa.* * * In this Court, too, the government has assured Ms. Muñoz that she has a chance to use and respond to that information. She can again seek her husband’s admission to this country, the government says—and this time she will be armed with an understanding of why the government denied the last application.

Those developments should end this case. With no more information to uncover and no bar to trying for admission again, nothing is left for a court to address through this litigation. In particular, the constitutional questions presented by the government no longer

have any practical relevance here. Whether or not Ms. Muñoz had a constitutional right to the information she wanted, the government gave it to her. I therefore would reverse the Ninth Circuit's decision without reaching the government's constitutional arguments. At the same time, I do not cast aspersions on the motives of my colleagues who do reach the government's arguments. They may see the case differently than I do, but their decision and rationales are essentially those the Solicitor General and the Department of State urged this Court to adopt.

JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN and JUSTICE JACKSON join, dissenting.

"The right to marry is fundamental as a matter of history and tradition." *Obergefell v. Hodges*, 576 U.S. 644, 671, 135 S. Ct. 2584, 192 L.Ed.2d 609 (2015). After U.S. citizen Sandra Muñoz and her Salvadoran husband spent five years of married life in the United States, the Government told her that he could no longer reenter the country. If she wanted to live together with him and their child again, she would have to move to El Salvador. The reason? A consular officer's bare assertion that her husband, who has no criminal record in the United States or El Salvador, planned to engage in "unlawful activity." INA § 212(a)(3)(A)(ii). Muñoz argues that the Government, having burdened her fundamental right to marriage, owes her one thing: the factual basis for excluding her husband.

The majority could have resolved this case on narrow grounds under longstanding precedent. This Court has already recognized that excluding a noncitizen from the country can burden the constitutional rights of citizens who seek his presence. See *Kleindienst v. Mandel*, 408 U.S. 753, 765-770, 92 S. Ct. 2576, 33 L.Ed.2d 683 (1972). Acknowledging the Government's power over admission and exclusion, the *Mandel* Court held that "a facially legitimate and bona fide reason" for the exclusion sufficed to justify that burden. *Id.*, at 770, 92 S. Ct. 2576. In this case, after protracted litigation, the Government finally explained that it denied Muñoz's husband a visa because of its belief that he had connections to the gang MS-13. Regardless of the validity of that belief, it is a "facially legitimate and bona fide reason." * * * Under this Court's precedent, that is enough.

Instead, the majority today chooses a broad holding on marriage over a narrow one on procedure. * * * It holds that Muñoz's right to marry, live with, and raise children alongside her husband entitles her to nothing when the Government excludes him from the country. Despite the majority's assurance two Terms ago that its eradication of the right to abortion "does not undermine . . . in any way" other entrenched substantive due process rights such as "the right to marry," "the right to reside with relatives," and "the right to make decisions about the education of one's children," the Court fails at the first pass. *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 256-257, 142 S. Ct. 2228, 213 L.Ed.2d 545 (2022). Because, to me, there is no question that excluding a citizen's spouse burdens her right to marriage, and that burden requires the Government to provide at least a factual basis for its decision, I respectfully dissent.

A

Marriage is not an automatic ticket to a green card. A married citizen-noncitizen couple must jump through a series of administrative hoops to apply for the lawful permanent residency that marriage can confer. Noncitizen spouses coming from abroad must apply for a visa to enter the United States. In certain cases, however, the law requires even couples who meet and marry in the United States to send the noncitizen spouse back to his country of origin to do the same thing. In doing so, the couple must take an enormous risk to pursue the stability of lawful immigration status: the risk that when the noncitizen spouse tries to reenter the United States, he will face unexpected exile.

* * *

Recognizing this difficult choice, USCIS allows a noncitizen spouse to apply for a waiver of inadmissibility for any accrued unlawful presence before departing the United States for his consular interview. To obtain such a waiver, the noncitizen spouse must show that the citizen spouse will suffer “extreme hardship” if her noncitizen spouse is not admitted. INA § 212(a)(9)(B)(v). Then, once the noncitizen spouse returns to his country of origin, if a consular officer approves his visa application, he can reenter free from the inadmissibility bar.

Consular officers fall under the State Department, not DHS, which oversees USCIS[.] Even though DHS officers and consular officers make admission determinations under the same substantive laws, * * * a noncitizen seeking admission via consular processing faces a far higher risk of arbitrary denial with far less opportunity for review than a noncitizen seeking admission from DHS.

DHS officers are constrained by a framework of required process that does not apply to consular processing. * * *

In contrast, a noncitizen denied admission via consular processing is entitled to nothing more than a cite to the statute under which the consular officer decided to exclude him. He has no opportunity for administrative or judicial review, and can only submit more evidence and request reconsideration. Former consular officers tell this Court that this lack of accountability, coupled with deficient information and inconsistent training, means decisions often “rely on stereotypes or tropes,” even “bias or bad faith.” Brief for Former Consular Officers as *Amici Curiae* 8. Visa applicants may “experience disparate outcomes based on nothing more than the luck or misfortune of which diplomatic post and consular officer . . . they happen to be assigned.” *Id.*, at 8–9. The State Department’s Office of the Inspector General has documented numerous deficiencies in consular processing across several continents. See, e.g., ISP–I–19–14, Inspection of Embassy Bogota, Colombia, p.16 (Apr. 2019) (finding consular managers in Bogota required visa adjudicators to maintain an average of 30 in-person interviews per hour).

When the Government requires one spouse to leave the country to apply for immigration status based on his marriage, it therefore asks him to give up the process he would receive in the United States and subject himself to the black box of consular processing.

B

* * *

Asencio-Cordero has no criminal record, but he does have several tattoos from his teenage years. They depict a range of subjects, including “Our Lady of Guadalupe, Sigmund Freud, a ‘tribal’ pattern with a paw print, and theatrical masks with dice and cards.” [Here, Justice Sotomayor explains that amici filed briefs stating that some of the tattoo images have “deep significance in Latin American culture,” some “appear on gang members” and some are “of common Catholic imagery” that law enforcement officials sometimes regard “as indicia of gang membership”)]. * * * Muñoz and her husband included additional evidence from a court-approved gang expert in their letter to the State Department [who] reviewed Asencio-Cordero’s tattoos and concluded that none were “related to any gang or criminal organization in the United States or elsewhere.” * * * The consulate followed up in May 2016 * * * noting that “there is no appeal.”

It was only after Muñoz and her husband sued the Government in Federal District Court that they finally received the factual basis for the denial. * * *

II

There was a simple way to resolve this case. I agree with Justice Gorsuch that “the United States has now revealed the factual basis for its decision to deny [Muñoz’s] husband a visa,” and she has thus received whatever process she was due. That could and should have been the end of it. Instead, the majority swings for the fences. It seizes on the Government’s invitation to abrogate the right to marriage in the immigration context and sharply limit this Court’s longstanding precedent.

Muñoz has a constitutionally protected interest in her husband’s visa application because its denial burdened her right to marriage. She petitioned USCIS to recognize their marriage so that her husband could remain lawfully beside her and their child in the United States. It was the extreme hardship Muñoz faced from her husband’s exclusion that formed the basis for USCIS’s waiver of his inadmissibility. For the majority, however, once Muñoz’s husband left the country in reliance on those approvals, their marriage ceased to matter. Suddenly, the Government owed her no explanation at all.

The constitutional right to marriage is not so flimsy. The Government cannot banish a U. S. citizen’s spouse and give only a bare statutory citation as an excuse. By denying Muñoz the right to a factual basis for her husband’s exclusion, the majority departs from longstanding precedent and gravely undervalues the right to marriage in the immigration context.

A

The constitutional right to marriage has deep roots. “[M]arriage,” this Court said over a century ago, “is something more than a mere contract.” *Maynard v. Hill*, 125 U.S. 190, 210-211, 8 S. Ct. 723, 31 L.Ed. 654 (1888). It is “the most important relation in life,” * * * and “the foundation of the family,” *id.*, at 211, 8 S. Ct. 723. Court has described it in one breath as the

right “to marry, establish a home and bring up children,” a right “long recognized at common law as essential to the orderly pursuit of happiness by free men.” *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 67 L.Ed. 1042 (1923).

* * *

Muñoz may be able to live in El Salvador alongside her husband or at least visit him there, but not everyone is so lucky. The majority’s holding will also extend to those couples who * * * depend on American law for their marriages’ validity. Same-sex couples may be forced to relocate to countries that do not recognize same-sex marriage, or even those that criminalize homosexuality. American husbands may be unable to follow their wives abroad if their wives’ countries of origin do not recognize derivative immigration status from women (as was the case in this country for many years. The majority’s failure to respect the right to marriage in this country consigns U. S. citizens to rely on the fickle grace of other countries’ immigration laws to vindicate one of the “ ‘basic civil rights of man’ ” and live alongside their spouses. *Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L.Ed.2d 1010 (1967).

B

Given that the Government has burdened Muñoz’s right to marriage by excluding her husband from the country, the question is the remedy for that burden. Muñoz argues that this burden triggers procedural due process protections in her husband’s visa denial. * * * This Court already set the ground rules for when the Government’s exercise of its extensive power over the exclusion of noncitizens burdens a U. S. citizen’s constitutional rights. See [*Mandel*, 408 U.S.] at 770, 92 S. Ct. 2576. In short, a fundamental right may trigger procedural due process protections over a noncitizen’s exclusion, but such protections are limited. See *ibid*.

Noncitizens who apply for visas from outside the United States have no constitutional entitlement to enter the country, and therefore typically have no constitutional process protections in the visa application themselves. See *Landon v. Plasencia*, 459 U.S. 21, 32, 103 S. Ct. 321, 74 L.Ed.2d (1982). In contrast, noncitizens who already live in the United States whom the Government seeks to remove have procedural due process protections during that removal. See *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S. Ct. 1064, 30 L.Ed. 220 (1886); *Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S. Ct. 2491, 150 L.Ed.2d 653 (2001).

Government sought to remove Muñoz’s husband when they were living together in the United States, he would have had his own constitutional protections in those proceedings. Instead, because the Government forced him to leave the country and reenter in order to adjust his immigration status, he lost them.

Not only do noncitizens seeking to enter the United States lack constitutional process rights in their visa applications. This Court has further insulated the Government’s visa determinations from review by declining to evaluate them at all. This judge-made “doctrine of consular nonreviewability” reflects the Judicial Branch’s recognition that the “ ‘admission and exclusion of foreign nationals’ ” is an area of unusually heightened congressional and executive power. When the denial of a noncitizen’s visa burdens a U. S. citizen’s

constitutional rights, however, this Court has had to reconcile the importance of those rights with its recognition of Government authority over visa determinations. In *Mandel*, it set the remedy. The *Mandel* Court held that when a visa denial “implicate[s]” a citizen’s rights, a court will not look behind a “facially legitimate and bona fide” reason for the denial. 408 U.S., at 765, 769, 92 S. Ct. 2576.

* * *

That minimal requirement ensures that courts do not unduly intrude on “the Government’s sovereign authority to set the terms governing the admission and exclusion of noncitizens,” while also ensuring that the Government does not arbitrarily burden citizens’ constitutional rights.

This Court has repeatedly relied on *Mandel*’s test in the immigration context. * * * Indeed, less than a decade ago, six Justices ruling on the exact legal question the Court confronts today would have held that *Mandel* controlled or extended its protections even further in the marriage context. See *Kerry v. Din*, 576 U.S. 86, 103-104, 135 S. Ct. 2128, 192 L.Ed.2d 183 (2015) (Kennedy, J., concurring in judgment) * * *

Applying *Mandel* * * * here, the remedy is clear. The Government’s exclusion of Muñoz’s husband entitles her at least to the remedy required in *Mandel*: a “facially legitimate and bona fide reason” for the exclusion. 408 U.S., at 770, 92 S. Ct. 2576.

C

The majority resists this conclusion by worrying about its “unsettling collateral consequences.” The majority poses a series of hypotheticals that it fears will result from recognizing the limited right Muñoz proposes. These fears are groundless.

First, the majority’s concern that applying *Mandel* to Muñoz’s right to marriage in this case will result in a slippery slope of constitutional challenges is unfounded. Muñoz’s right triggers limited process protections in part because her husband lost his own procedural protections when the Government required him to leave the country. Muñoz’s right to marriage raises that floor from zero process to some by requiring the Government to provide a “facially legitimate and bona fide reason” when her husband receives no process. * * *

In sum, the majority’s concerns are unwarranted. There are few circumstances where the limited relief sought by Muñoz would be available.

III

A “facially legitimate and bona fide” reason may seem like a meager remedy for burdening a fundamental right. Yet even the barest explanation requirement can be powerful. The majority relies heavily on *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 70 S. Ct. 309, 94 L.Ed. 317 (1950). * * * A closer look at the story of Ellen Knauff, however, illustrates the importance of putting the Government to a minimal evidence requirement when a visa denial burdens a constitutional right.

Knauff's U.S. citizen husband sought to bring her to the United States after they married during his deployment to Germany. After this Court upheld her exclusion on undisclosed national security grounds, there was a public outcry. Eventually, Knauff won her case before the BIA when the Government failed to prove up its national security concerns. She was finally admitted as a lawful permanent resident.

* * *

Knauff's story illustrates why the right to marriage deserves more. By leaving U. S. citizens without even a factual basis for their spouses' exclusion, the majority paves the way for arbitrary denials of a right this Court has repeatedly held among the most important to our Nation.

* * *

I respectfully dissent.

NOTES AND QUESTIONS ON *DEPARTMENT OF STATE V. MUÑOZ*

1. In *Muñoz*, the Supreme Court held that “a U.S. citizen does not have a fundamental liberty interest in her noncitizen spouse being admitted to the country.” 114 S. Ct. 1812, 1821 (2024). In so doing, it addressed a question unresolved in *Kerry v. Din*, 576 U.S. 86, 135 S. Ct. 2128, 192 L.Ed.2d 183 (2015)—whether a U.S. citizen has a “fundamental right to live with [one’s] spouse” in the United States. As Justice Barrett explained in *Muñoz*:

[A] plurality in *Din* held that a “citizen does not have a fundamental right to bring her noncitizen spouse to the United States.” 576 U.S., at 96, 135 S. Ct. 2128. Two Justices chose not to reach the issue, explaining that even if the right existed, the statutory citation provided by the Executive qualified as a facially legitimate and bona fide reason. *Id.* at 105, 135 S. Ct. 2128 (opinion of Kennedy, J.). Since *Din*, the existence of the right has continued to divide the Circuits * * * Today, we resolve the open question. Like the *Din* plurality, we hold that a citizen does not have a fundamental liberty interest in her noncitizen spouse being admitted to the country.

Muñoz, 114 S. Ct. at 1821.

2. The *Muñoz* decision revisits other cases as well, including *Knauff* and *Mandel*. Are you persuaded by the majority’s analysis of these cases? Are there ways to distinguish *Muñoz* from those cases?

3. The majority and dissenting opinion disagree as to the impact of *Muñoz* on the right to marriage. In her dissent in *Muñoz*, Justice Sotomayor explained that the Court’s opinion will burden the U.S. citizen’s “right to marriage” and, as such, “that burden requires the Government to provide at least a factual basis for its decision.” 114 S. Ct. at 1829 (Sotomayor, J., dissenting). To support her opinion, Justice Sotomayor cited cases in which the Supreme Court invalidated barriers to the right to marry, including *Obergefell v. Hodges*, 576 U.S. 644, 135 S. Ct. 2584, 192 L.Ed.2d 609 (2015) (striking down laws that restricted the right to marry to one man and one woman), *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L.Ed.2d 64

(1987) (invalidating Missouri's state law that prohibited imprisoned individuals from marrying) and *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L.Ed.2d 1010 (1967) (striking down as unconstitutional Virginia's anti-miscegenation law). In response to Justice Sotomayor's statements about the implications of the *Muñoz* opinion on the right to marry, Justice Barrett, in a footnote, wrote:

To be clear: Today's decision does not remotely call into question any precedent of this Court, including those protecting marriage as a fundamental right. By contrast, the dissent would upend more than a century's worth of this Court's precedent regarding the doctrine of consular nonreviewability, not to mention equally longstanding congressional and Executive Branch practice.

Muñoz, 144 S. Ct. at 1825.

Which position do you find more persuasive? Are the cases that Justice Sotomayor cites distinguishable from *Muñoz*? Does it matter that this case arises in the context of a visa denial?

4. Justice Gorsuch would have reversed the Ninth Circuit's decision without addressing the government's constitutional arguments because the constitutional questions presented "no longer have any practical relevance." *Muñoz*, 144 S. Ct. at 1827 (Gorsuch, J., concurring). Justice Gorsuch opined that because the federal government explained to Ms. Muñoz the "factual basis for its decision to deny her husband a visa" and she can once "again seek her husband's admission to this country," then those developments should have ended the case. *Muñoz*, 144 S. Ct. at 1827 (Gorsuch, J., concurring). Suppose Ms. Muñoz opts to resubmit a petition to sponsor her husband to immigrate to the United States as an immediate relative. Now that she knows the reasons for the denial of the petition the first time it was filed, what additional evidence could she and her husband provide to the consular officer to help overcome the previous consular officer's concerns that Mr. Asencio-Cordero is inadmissible under INA 212(a)(3)(A)(ii). Suppose that despite the additional evidence submitted, the consular officer denies the application a second time on a *mistaken* belief that Mr. Asencio-Cordero is a member of a gang. What result under *Muñoz*?

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

In January 2021, the U.S. Supreme Court granted the government's petition for review in *Padilla*, vacated the Ninth Circuit's decision, and remanded to the Ninth Circuit to consider whether the U.S. Constitution requires bond hearings in light of *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 207 L. Ed. 2d 427 (2020). On further remand, the federal district court found that *Thuraissigiam* did not impair the plaintiffs' claims, *See Padilla v. ICE*, 2023 WL 8370157 (W.D. Wash. Dec. 4, 2023), *appeal filed*, 2024 WL 1049898 (9th Cir. May 2, 2024).

page 349, after the carryover paragraph, add a new paragraph:

In late 2021 and early 2022, in the transition away from the border restrictions under the authority of Title 42, the Biden administration adopted two policies that allowed

noncitizens arriving in the United States to be paroled into the country rather than being detained pending removal proceedings. Florida sued to block the first policy, which called for the use of parole and alternatives to detention for arriving noncitizens. The court vacated the policy after finding it contrary to law, arbitrary and capricious, and a change, issued without Administrative Procedure Act (APA) notice and comment, from Trump administration standards. *See Florida v. United States*, 660 F. Supp. 3d 1239 (S.D. Fla. 2023). The administration issued a second, similar policy, “Parole with Conditions.” The same federal district judge applied similar reasoning to issue a temporary restraining order blocking this policy as well. *See Florida v. Mayorkas*, 672 F. Supp. 3d 1206 (N.D. Fla. 2023). A consolidated appeal to the Eleventh Circuit is pending as this Update goes to press in late July 2024.

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

On January 26, 2021, Acting Attorney General Monty Wilkinson issued a Department of Justice memorandum formally rescinding the zero-tolerance policy. *See* U.S. Dep’t of Justice, Office of the Att’y Gen., *Memorandum for all Federal Prosecutors, Rescinding the Zero-Tolerance Policy for Offenses Under 8 U.S.C. § 1325(a)*, Jan. 26, 2021. On the Trump administration’s zero-tolerance policy, see William A. Kandel, *The Trump Administration’s “Zero Tolerance” Immigration Enforcement Policy* (Cong. Res. Serv. 2021). On the number of people held in immigration detention in the first month of the Biden administration, see *Immigrant Detention Numbers Fall Under Biden, But Border Book-Ins Rise*, TRAC Immigration (2021).

page 352, after the second full paragraph, add a new paragraph:

As the detained population increased in mid-2021 in the direction of prepandemic levels, from 14,000 in April 2021 to 26,000 in mid-July 2021, the number of COVID-19 infections among detainees also rose dramatically. The vaccination rate remained low as of mid-July 2021 at about 20 percent of detainees passing through immigration detention centers. *See* Maura Turcotte, *Virus Cases Are Surging at Crowded Immigration Detention Centers in the U.S.*, N.Y. Times, July 6, 2021. *See also* Maria Sacchetti, *Covid Infections Surge in Immigration Detention Facilities*, Wash. Post, Feb. 1, 2022. As of June 2024, the number of detainees in ICE and CBP custody combined was 38,525. TRAC, *Immigration Detention Quick Facts* (2024).

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

According to a February 2022 report by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, the number of noncitizens monitored by ICE’s Alternatives to Detention (ATD) program had more than doubled since the start of the Biden administration. The number was about 87,000 in January 2021 and almost 183,000 in February 2022. TRAC reported that all of the growth was attributable to the use of SmartLINK technology, which uses facial recognition and other technologies to confirm the identity and location of the noncitizens in the program. *See* Transactional Records Access Clearinghouse (TRAC), *Over 180,000 Immigrants Now Monitored by ICE’s Alternatives to Detention Program* (Feb. 28, 2022). As of June 2024, ICE’s ATD programs monitored 181,499

noncitizens. See Transactional Records Access Clearinghouse (TRAC), Immigration Detention Quick Facts (2024). See also U.S. Gov't Accountability Office, *Alternatives to Detention: ICE Needs to Better Assess Program Performance and Improve Contract Oversight* (June 2022).

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

Presidential candidate Biden promised to end “the federal government’s use of private prisons” and “make clear that the federal government should not use private facilities for any detention, including detention of undocumented immigrants.” In January 2021, the Biden administration issued an executive order to end the use of private prisons by the Department of Justice, but the order did not extend to the Department of Homeland Security, which has authority over immigration detention. As of late July 2024, the administration has taken no action to end immigration detention in private facilities. For critiques, see César Cuauhtémoc García Hernández, *Migrant Detention, Corporate Profit* (Am. Bar Ass’n, Apr. 12, 2023); Editorial Board, *Biden’s Pledge to Close Private Migrant Prisons Remains Unfulfilled*, Wash. Post, Nov. 29, 2022.

Some states have enacted legislation to limit or eliminate the operation of private detention facilities in that state. California AB 32 banned private prisons and detention centers and required the phase-out of five immigration detention centers in the state. The GEO Group, a major private prison contractor, and the federal government filed a legal challenge in federal court to California’s AB 32. A federal district court rejected the challenge, but a divided three-judge panel of the Ninth Circuit reversed, and then a divided Ninth Circuit, hearing the case en banc, reached the same conclusion — that the California law is invalid because it is conflict preempted by federal law and because it violates the doctrine of intergovernmental immunity by offering exemptions to state agencies that are unavailable to the federal government. See *GEO Group, Inc. v. Newsom*, 50 F.4th 745 (9th Cir. 2022) (en banc).

Legislation adopted in 2021 in the state of Washington banned for-profit detention facilities in the state as of the year 2025. See Rachel La Corte, *Washington State Governor Oks Bill Banning For-profit Jails*, Assoc. Press, Apr. 14, 2021. After the Ninth Circuit decided *GEO Group, Inc. v. Newsom*, the state of Washington conceded that *GEO Group* rendered its state law unconstitutional. The state then adopted a different approach, enacting HB 1470, which imposed various standards on private detention facilities within the state. Its purpose was “to ensure private detention facilities comply with measurable standards providing sanitary, hygienic, and safe conditions for detained persons.” In 2024, a federal district court issued a preliminary injunction blocking many but not all of its provisions. See *GEO Group, Inc. v. Inslee*, 2024 WL 1012888 (W.D. Wash. Mar. 8, 2024).

In New Jersey, legislation signed by Governor Murphy in August 2021 prohibited state and local entities in New Jersey and private detention facilities from entering into new contracts to detain noncitizens. See Patrick Reilly, *NJ Bans Jails From Contracting with ICE to Hold Immigration Detainees*, N.Y. Post, Aug. 21, 2021. In New Jersey, a federal district

court invalidated this state law. Citing *GEO Group, Inc. v. Newsom*, the court invalidated the NJ statute on two independent grounds. First, it found that the state statute violated the intergovernmental immunity doctrine, which as the court put it, “prohibit[s] States from interfering with or controlling the operations of the Federal Government.” It also struck down the statute for another reason: because it “conflicts not just with the federal government’s determination of the *manner* of detention but also on its decision whether or not to detain someone at all” and therefore is preempted by federal law. *CoreCivic v. Murphy*, 690 F. Supp. 3d 467 (D.N.J. 2023) (emphasis in original), *appeal filed* (3d Cir. Sept. 7, 2023).

The Maryland legislature passed a similar ban on private immigration detention, which became law after the legislature overrode Governor Hogan’s veto. See Brian Witte, *Maryland Lawmakers Override Immigrant Detention Bill Veto*, Assoc. Press, Dec. 7, 2021.

Lawsuits by detainees and the state of Washington led to awards in 2021 totaling \$23.2 million against the GEO Group because it had not paid the detainees the local minimum wage for work in the facility. The GEO Group appealed, and the Ninth Circuit heard oral argument in the case in October 2022 and certified questions of Washington state law to the Washington Supreme Court, which held that detainees in a private detention facilities are employees and entitled to the state minimum wage. See *Nwauzor v. GEO Group*, 62 F.4th 509 (9th Cir. 2023); 2 Wash.3d 505 (2023).

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

In February 2021, President Biden signed an Executive Order establishing an Interagency Task Force on Reunification of Families to identify and reunite children separated from the families by the Trump administration. By June 2021, the task force identified 3,913 children who had been separated from their families and reunified 1,786 of them. The task force reported in November 2021 that the number of reunited children had risen to 2,248.

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

The Biden administration has said that any family separations that continue to take place are not separations of the sort that resulted from Trump administration policy, but a court-appointed juvenile care monitor found in November 2023 that family separations have continued under Biden. See Alyssa Aquino, *CBP Still Separating Detained Families, Report Says*, Law360, Nov. 14, 2023. See also Immigrants’ Rights Pol’y Clinic, Center for Immigration Law and Policy, *Cruel Indifference: Family Separation at the U.S.-Mexico Border Before and After Zero Tolerance* (2024).

In the meantime, several media outlets reported that the Biden administration was considering compensation of up to \$450,000 for families who had been separated at the

border. But in December 2021, the administration shut down settlement talks in lawsuits filed on behalf of families seeking compensation for separations. *See* Ben Fox, *US Pulls out of Settlement Talks in Family Separation Suits*, Assoc. Press, Dec. 16, 2021; Caroline Simon, *Government Talks on Migrant Family Settlements Break Down*, Roll Call, Dec. 16, 2021.

In October 2023, the federal government settled a lawsuit filed by the ACLU on behalf of more than 5000 migrant families separated under the Trump administration. The settlement required the government to provide these families with housing, medical assistance, and work authorization. This settlement did not include monetary compensation. *See Settlement Reached in Ms. L. Family Separation Case*, 100 Interp. Rel. 41-4 (Oct. 23, 2023). Several dozen lawsuits by separated families for compensation are ongoing as of late July 2024. *See* Brian Dowling, *Immigrant Children Settle ICE Border Separation Claims*, Law360, Apr. 8, 2024.

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

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

In April 2024, the Biden administration issued a final regulation, to take effect on July 1, 2024. It would supersede the *Flores* settlement and its health and safety standards for minors in immigration detention as they have applied to the Department of Health and Human Services (including the Office of Refugee Resettlement). The *Flores* settlement would remain in place as to DHS. *See* 89 Fed. Reg. 34384 (Apr. 30, 2024). In the federal government’s view, the regulation goes beyond the protections that the *Flores* settlement provided. *See* Britain Eakin, *HHS Formalizes Flores Protections for Immigrating Minors*, Law360, Apr. 23, 2024. Advocates for children have voiced concerns. *See* Rebecca Santana & Acacia Coronado, *The Flores Agreement Has Protected Migrants Children for Nearly 3 Decades. Changes May Be Coming*, Assoc. Press, May 10, 2024. Judge Gee of the Central District of California partially terminated the *Flores* settlement with regard to HHS, but she left the settlement in effect as to DHS, including CBP and ICE. *See Flores v. Garland*, No. CV 85-4544-DMGG (AGRx) (C.D. Cal. June 28, 2024).

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

8. In *Johnson v. Guzman Chavez*, 594 U.S. 523, 141 S. Ct. 2271, 210 L.Ed.2d 656 (2021), the U.S. Supreme Court addressed the detention of noncitizens who had been removed from the United States and later reentered without authorization. The noncitizens were subject to reinstated orders of removal but sought withholding of removal based on fear of persecution in the countries designated in their removal orders. The central question in the case was whether their detention was governed by INA § 236, which applies “pending a

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

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

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

9. In *Johnson v. Arteaga-Martinez*, 596 U.S. 573, 142 S. Ct. 1827, 213 L.Ed.2d 125 (2022), the U.S. Supreme Court found that INA § 241(a)(6) does not provide a bond hearing to a noncitizen held under § 241(a) who has been ordered removed but whose application for withholding of removal is pending in immigration court. Writing for a majority of eight, Justice Sotomayor found the statutory text clear enough that the canon of constitutional avoidance did not allow reading a limit on detention into the statute, citing *Jennings v. Rodriguez*, 583 U.S. 281, 138 S. Ct. 830, 200 L. Ed. 2d 122 (2018), and declining to apply *Zadvydas v. Davis*, 533 U.S. 678, 212 S. Ct. 2491, 150 L. Ed. 2d 653 (2001). The Court did not decide whether prolonged detention in such a case would violate the U.S. Constitution, instead remanding to the lower courts to consider this issue.

CHAPTER FOUR

CITIZENSHIP AND ITS SIGNIFICANCE

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

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

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

The Tenth Circuit reversed, holding that the Citizenship Clause of the Fourteenth Amendment did not confer birthright U.S. citizenship on American Samoans, and distinguishing *Wong Kim Ark* as inapplicable to unincorporated territories. *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021). *See also* Natasha Frost, *The Only U.S. Territory Without U.S. Birthright Citizenship*, N.Y. Times, Nov. 25, 2022.

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

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

Between 2021 and 2023, the Interagency Taskforce to Promote Naturalization increased its outreach budget from \$10 million to \$25 million in grant money for citizenship preparation programs, public education and awareness campaigns, and recognition of outstanding new citizens. *See* U.S. Citizenship & Immigr. Servs., *DHS Announces Expansion of Citizenship and Integration Grant Program and Open Application Period*, June 27, 2022;

U.S. Citizenship & Immigr. Servs., *Executive Order 14012 Anniversary, Interagency Strategy for Promoting Naturalization: Second Anniversary Accomplishment Highlights July 2022-July 2023*.

In 2022, USCIS naturalized 974,000 individuals, reporting that this was the largest number of naturalizations in nearly 15 years and that the agency had reduced the backlog of naturalization applications by 62 percent. U.S. Citizenship & Immigr. Servs., *Completing an Unprecedented 10 Million Immigration Cases in Fiscal Year 2023, USCIS Reduced Its Backlog for the First Time in Over a Decade*, Feb. 29, 2024. In 2023, USCIS naturalized 878,500 individuals. U.S. Citizenship & Immigr. Servs., *Naturalization Statistics*, November 2023. U.S. Citizenship & Immigr. Servs., Press Release, *USCIS Celebrates Independence Day 2023 and Continues its Commitment to Naturalization*, June 30, 2023.

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

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

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

In 2021, USCIS rolled back a 2020 revision of the civics test in response to critique that USCIS had implemented the revised test without enough advance notice to provide sufficient time for study and preparation of training materials and resources. The agency reverted to the test that had been in place since 2008 after determining that the 2020 civics test development process, content, testing procedures, and implementation schedule had the potential to burden the naturalization process, and was therefore inconsistent with Executive Order 14012 on *Restoring Faith in Our Legal Immigration Systems* requiring the agency to promote and streamline naturalization. See *USCIS Civics Test*, 98 Interp. Rel. 9 (Mar. 1, 2021). In 2023, USCIS began a five-month nationwide trial of proposed changes to the current naturalization test. The changes would revise the English-speaking portion and the content and format of the civics portion of the naturalization test. See U.S. Citizenship & Immigr. Servs., *Trial Testing of Redesigned Naturalization Test for Naturalization Applications*, 87 Fed. Reg. 76634 (2022); U.S. Citizenship & Immigr. Servs., *Naturalization Test Redesign Development 2022* (2023).

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

In a February 2021 executive order, President Biden mandated a review of “policies and practices regarding denaturalization and passport revocation to ensure that these authorities are not used excessively or inappropriately.” See Exec. Order 14012, *Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans*, 86 Fed. Reg. 8277 (2021). In December 2022, the U.S. Department of Justice adopted a new denaturalization policy that prioritizes cases against individuals who pose a potential danger to national security, engaged in war crimes or human rights

violations, or committed very serious felonies not disclosed during naturalization. *See* U.S. Dep’t of Justice, *Revocation of Naturalization*, 4 Justice Manual 7.200 (2022).

page 479, after “D. The Significance of Citizenship,” add the following after the second sentence, and move the sentence starting with “Perhaps most fundamentally” to the beginning of the paragraph following this insert:

One core difference, for example, is the citizen’s ability to sponsor certain family members to gain admission to the United States and become lawful permanent residents. Such privileged family members include noncitizen spouses, children, or parents who may be admitted as immediate relatives of U.S. citizens. *See* INA § 201(b)(2)(A)(i). U.S. citizens may also sponsor their unmarried sons and daughters, married sons and daughters, and siblings to immigrate to the United States as family-based preference immigrants. *See* INA § 203(a). To be sure, lawful permanent residents may also petition their noncitizen spouses and unmarried sons and daughters. *See* INA § 203(b). However, unlike U.S. citizens, lawful permanent residents do not have the ability to sponsor their parents or their married sons or daughters.

These privileges, accorded only to U.S. citizens, reflect Congress’s long-held policy of promoting family unification between U.S. citizens and their noncitizen family members, especially their noncitizen spouses. *See* Kerry Abrams, *What Makes the Family Special*, 80 U. Chi. L. Rev. 7, 12-13 (2013) (explaining that by 1924, Congress had established that U.S. citizens had the power to sponsor their immigrant spouses, who held preferential status over other immigrants, to immigrate to the United States). It should be noted, however, that U.S. citizens’ claims to family unification have had mixed success. For instance, in *Kerry v. Din* (discussed in Chapter Three), the Supreme Court rejected a U.S. citizen’s claim that the consular denial of her husband’s immigrant visa violated her rights under the Due Process Clause. *See* 576 U.S. 86, 135 S. Ct. 2128, 192 L. Ed. 183 (2015). More recently, in June 2024, the Supreme Court in *Department of State v. Muñoz* held that a U.S. citizen “does not have a fundamental liberty interest in her noncitizen spouse being admitted to the country.” 144 S. Ct. 1812 (2024).

Indeed, the Supreme Court has provided U.S. citizens a minimal level of constitutional scrutiny when the government denies the admission of their noncitizen relatives. In *Fiallo v. Bell*, for example, the Supreme Court required only a facially legitimate and bona fide reason to justify classifications of U.S. citizen stepparents and stepchildren that discriminated based on gender and legitimacy. 430 U.S. 787, 97 S. Ct. 1473, 52 L. Ed. 2d 50 (1977). Similarly, in *Trump v. Hawaii*, the Court applied merely rational basis review to admissions restrictions on noncitizen spouses and other relatives of U.S. citizens, as described in Chapter One. *See* 585 U.S. 667, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018).

Overall, *Muñoz* and related cases raise questions about the value of citizenship in the context of marriage-based and family-based immigration. Nevertheless, the fact that U.S. citizens today have certain rights that noncitizens do not have, such as constitutionally

protected rights to vote and serve on a jury, highlights the ongoing significance that citizenship makes.

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

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

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

In 2022, New York City passed a law allowing lawful permanent residents and work-authorized noncitizens, dubbed “municipal voters,” to vote in municipal elections. The law also conferred eligibility to enroll in political parties. In 2024, a New York appeals court concluded that the law violated the New York state constitution, holding that the use of the word “citizen” in the constitution excluded noncitizens from the right to vote in New York elections. *See Fossella v. Adams*, 225 A.D.3d 98, 206 N.Y.S.3d 611 (2024). A California appeals court rebuffed a similar challenge, opening the way to noncitizen voting eligibility in San Francisco school board elections for all parents and guardians of school-age children. The court rejected the argument that the California state constitution prohibits a charter city, including the City and County of San Francisco, from allowing noncitizen voting. *See Lacy v. City & Cnty. of San Francisco*, 94 Cal. App. 5th 238 (2023).

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

The Supreme Court dismissed the case on ripeness and standing grounds without reaching the merits. *Trump v. New York*, 592 U.S. 125, 134, 141 S. Ct. 530, 208 L. Ed. 2d 365 (2020). In January 2021, President Biden issued an executive order reversing his predecessor’s order to exclude undocumented immigrants. Exec. Order 13986, *Ensuring a Lawful and Accurate Enumeration and Apportionment Pursuant to the Decennial Census*, 86 Fed. Reg. 7015 (2021).

page 511, after the end of note 5 (top of the page), add note 6.

6. Bosniak’s articulation of alienage law as residing in the hybrid of two worlds—the domain of borders and membership and the world of social relationships and equal personhood—is exemplified in debates surrounding recently enacted state laws that affect the ability of certain noncitizens to own property. In 2023, several states passed or introduced legislation restricting noncitizens from certain countries from owning land. For example, on May 9, 2023, the state of Florida passed S.B. 264, which restricts “real property ownership by foreign principals” who are associated with “foreign countries of concern.” Foreign countries of concern include “the People’s Republic of China, the Russian Federation, the Islamic Republic of Iran, the Democratic People’s Republic of Korea, the Republic of Cuba, the Venezuelan regime of Nicolás Maduro, and the Syrian Arab Republic.” S.B. 264, § 4. The law also prohibits ownership of land by “the People’s Republic of China, the Chinese

Communist Party, or any official or member of the People’s Republic of China or the Chinese Communist Party.” *Id.* § 7. Other states, including Alabama, Indiana, and Montana have passed similar legislation. *See Asian Americans Advancing Justice, Discriminatory Land Bills 2023 (States)*, <https://www.quorum.us/spreadsheet/external/KscrjHCRzvqUdRtMcgpX/>. Supporters of Florida’s law have contended that S.B. 264 focuses on protecting national security and preventing “the purchase of our farmland and land near our military bases and critical infrastructure by Chinese agents.” Staff of Ron DeSantis, *News Release: Governor Ron DeSantis Cracks Down on Communist China* (May 8, 2023) <https://www.flgov.com/2023/05/08/governor-ron-desantis-cracks-down-on-communist-china/>. Opponents of S.B. 264, however, have argued that the law, among other things, discriminates on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment, and that the law is preempted by federal law. *See Complaint at 2-3, Shen v. Simpson*, 687 F. Supp. 3d 1219 (N.D. Fla. 2023) (No. 4:23-cv-208).

In *Shen v. Simpson*, 687 F. Supp. 3d 1219 (N.D. Fla. 2023), the district court found that the plaintiffs had standing. However, it held that they were unlikely to prevail on their claim that the law discriminated against them in violation of the Equal Protection Clause. The court rejected the argument that the law must be subject to strict scrutiny, stating that the Fourteenth Amendment did not remove from the states the power to prohibit noncitizens from owning land within their borders. *See id.*, at 1236-1237. Accordingly, the court applied the rational basis standard and concluded that the state had reasonable grounds for restricting ownership of land by people domiciled in countries of concern such as China. *See id.*

Plaintiffs appealed to the Eleventh Circuit and moved for an injunction pending appeal. *See Plaintiffs-Appellants’ Time-Sensitive Motion for Injunction Pending Appeal and Motion for Expedited Appeal, Shen v. Comm’r, Fla. Dep’t of Agric.*, No. 23-12737 (11th Circ. Feb. 1, 2024). The Eleventh Circuit enjoined S.B. 264 in part as applied to certain non-citizens, holding that the plaintiffs/appellants had shown a substantial likelihood of success that S.B. 264 is preempted by federal law. *See Order of the Ct. at 2, Shen v. Comm’r, Fla. Dep’t of Agric.*, No. 23-12737 (11th Circ. Feb. 1, 2024). As this Update goes to press in late July 2024, the Eleventh Circuit had yet to issue a ruling on the merits.

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

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

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

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

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

As noted in the Update to page 66 in Chapter One, the federal government rescinded both the public charge and health insurance bars after President Biden took office. An attempt by thirteen states to reinstate the Trump-era public charge rule failed. *City & Cnty. of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 992 F.3d 742 (9th Cir. 2021). In September 2022, the Biden administration issued a replacement public charge rule, which essentially reverts to the pre-2019 public charge criteria that limited its application to receipt of government cash benefits for income or long-term institutionalization at government expense. *See Public Charge Ground of Inadmissibility*, 87 Fed. Reg. 55472 (2022). As before, relatively few immigrants would be subject to the proposed public charge rule. *See U.S. Citizenship & Immigr. Servs., Public Charge Resources* (Apr. 6, 2023).

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

As of May 2024, 37 states had done so. As a result, some noncitizen children and pregnant noncitizens became eligible for both Medicaid and CHIP as long as they are “lawfully residing in the United States.” *See Kaiser Family Found., Medicaid/CHIP Coverage of Lawfully-Residing Immigrant Children and Pregnant Women*, May 1, 2024.

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

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

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

In May 2024, the federal government revised the definition of “lawful presence” to allow recipients of Deferred Action for Childhood Arrivals (DACA) to obtain health insurance through Medicaid or a Patient Protection and Affordable Care Act marketplace. *See Clarifying the Eligibility of Deferred Action for Childhood Arrivals (DACA) Recipients and Certain Other Noncitizens for a Qualified Health Plan through an Exchange, Advance Payments of the Premium Tax Credit, Cost-Sharing Reductions, and a Basic Health Program*, 89 Fed. Reg. 39392 (2024).

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

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

CHAPTER FIVE

INADMISSIBILITY AND DEPORTABILITY

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

Soon after Alejandro Mayorkas was confirmed as DHS Secretary, the agency rescinded ICE's authority to impose civil financial penalties on noncitizens who fail to leave the country. U.S. Dep't of Homeland Sec., *DHS Announces Rescission of Civil Penalties for Failure-to-Depart*, Press Release, Apr. 23, 2021.

page 521, at the end of the second full paragraph, add:

Most recently, President Biden invoked INA § 212(f) authority as the basis for a Proclamation that permits DHS to suspend consideration of asylum claims and otherwise makes it more difficult for migrants to establish eligibility for asylum. *See Securing the Border*, Proclamation 10773, 89 Fed. Reg. 48487 (June 3, 2024); *see also* U.S. Dep't of Homeland Sec. & U.S. Dep't of Justice, *Securing the Border*, 89 Fed. Reg. 48710 (June 7, 2024) (interim final rule implementing *Securing the Border* Proclamation). As per the interim final rule, DHS is empowered to impose these limitations once the number of migrant encounters between ports of entry reaches a seven-day average of 2,500 or more and would continue in effect until fourteen days after there is a seven-day average of less than 1,500 encounters. *Id.* If recent migration trends continue, these thresholds would mean the policy would be in effect nearly all the time. Ben Johnson, et. al., *Policy Brief: Analysis of Proclamation and Interim Final Rule on "Securing the Border"*, American Immigration Lawyers Association (June 5, 2024) (noting that since February 2021, daily migrant encounters have exceeded the threshold numbers in the interim final rule). Immigrant advocacy groups challenged the Proclamation and accompanying interim final rule as violations of the INA and the APA. *Las Americas Immigrant Advocacy Center v. U.S. Dep't of Homeland Sec.*, Complaint, No. 1:24-CV-01702 (D.D.C. June 12, 2024); *see also* Hamed Aleaziz, *A.C.L.U. Sues to Stop Biden's Asylum Ban on the U.S.-Mexico Border*, N.Y. Times, June 12, 2024.

[The *Securing the Border* Proclamation and Interim Final Rule are discussed in greater depth in the Update to pages 742-43 in Chapter Seven.]

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

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

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

As noted in the Update to page 87 in Chapter One, DHS announced that it would not defend the Trump-era public charge rule in court. Citing the Biden administration's decision, thirteen states sued to defend the Trump-era rule. After the Ninth Circuit Court of Appeals rejected their attempt to intervene, the Supreme Court granted certiorari and scheduled oral argument on the question whether the states could step in to defend the Trump-era rule. Ultimately, the Supreme Court dismissed certiorari as improvidently granted. *Arizona v. City & County of San Francisco*, 142 S. Ct. 417 (2022).

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

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

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

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

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

As noted in the Updates to pages 68 in Chapter One and pages 736 and 747 in Chapter Seven, the Trump administration also used Title 42 orders as a general border regulation tool, using the COVID-19 pandemic as the basis for a wide-ranging deterrent to asylum claimants and other would-be entrants at the southern border. *See* Centers for Disease

Control & Prevention, U.S. Dep't of Health & Human Servs., *Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists*, 85 Fed. Reg. 65806 (2020).

The Biden administration kept the order in place initially, but in April 2022, attempted to terminate the Title 42 orders. Centers for Disease Control & Prevention, U.S. Dep't of Health & Human Servs., *Public Health Determination and Order Regarding the Right to Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists* (2022). Subsequent litigation prevented the administration from implementing its termination of the Title 42 orders. *See, e.g., Louisiana v. Centers for Disease Control & Prevention*, 603 F. Supp. 3d 406 (W.D. La. 2022). While a case addressing the legality of the termination was pending before the Supreme Court, however, the Biden administration announced that the public-health emergency for COVID-19 would end on May 11, 2023. Sharon LaFraniere & Noah Weiland, *U.S. Plans to end Public Health Emergency for Covid in May*, N.Y. Times, Feb. 3, 2023. In light of that development, the Court canceled oral argument and later dismissed the case. *See Arizona v. Mayorkas*, 143 S. Ct. 1312 (2023) (vacating and remanding with instructions to dismiss the case as moot); Amy Howe, *Court Dismisses Title 42 Case*, SCOTUSBlog, May 18, 2023. Without an ongoing, declared public-health emergency, the statutory prerequisite for Title 42 orders ceased to exist, and thus the orders expired on the same day as the emergency declaration was lifted. U.S. Dep't of Homeland Sec., *Fact Sheet: U.S Government Announces Sweeping New Actions to Manage Regional Migration*, Apr. 27, 2023.

With Title 42 orders no longer applicable, migrant processing at the border returned to the rules and procedures generally used for immigration control in Title 8. Recent regulations by the Biden administration, however, significantly changed the Title 8 asylum process at the border from that which governed previously. *See* U.S. Dep't of Homeland Sec. & U.S. Dep't of Justice, *Securing the Border*, 89 Fed. Reg. 48710 (June 7, 2024) (interim final rule); U.S. Dep't of Homeland Sec., *Circumvention of Lawful Pathways*, 88 Fed. Reg. 31314 (2023). The Circumvention of Lawful Pathways rule created a presumption against eligibility for asylum for migrants who cross the border unlawfully and have not sought asylum in a third country through which they traveled on their way to the United States. In addition, the rule requires migrants to schedule appointments at U.S. Border Patrol sites through an online application available on mobile phones (the "CBP One" app). The rule has faced substantial criticism, including the claim that it replicates Trump-era policies, contravenes federal law, and effectively forecloses asylum for many asylum-seekers. *See, e.g.,* Miriam Jordan, *Biden Administration Announces New Border Crackdown*, N.Y. Times, Feb. 21, 2023.

A federal district court in California vacated the Circumvention of Lawful Pathways rule, finding that it contravened the INA, was arbitrary and capricious in violation of the APA, and that DHS promulgated it without proper procedures. *East Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025 (N.D. Cal. 2023). The Ninth Circuit, over a vigorous dissent by Judge VanDyke, stayed the district court's order while the government appealed the ruling. *East Bay Sanctuary Covenant*, 2023 WL 11662094 (9th Cir. Aug. 3, 2023). As of this

Update, the *Circumvention of Lawful Pathways* rule remains in effect. Most recently, a panel majority granted the parties' joint motion to place the appeal in abeyance pending settlement negotiations. *East Bay Sanctuary Covenant*, 93 F.4th 1130, 1131 (9th Cir. Feb. 21, 2024). Again, Judge VanDyke issued a scathing dissent, arguing that there was no legal basis for the abeyance, and accusing the government of "colluding" with its "frenemies on the other side of the case" to avoid the political fallout from the court issuing a decision on a politically fraught rule during an election year. *Id.* at 1132 (VanDyke, J., dissenting).

As noted in the Update to page 521 of this Chapter, litigation seeking to halt implementation of the recently promulgated Securing the Border interim final rule has just commenced as this Update goes to press in late July 2024.

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

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

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

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

page 610, replace the final sentence of the carryover paragraph with:

A recent final rule from the Department of Justice clarifies that *Matter of Thomas & Thompson* does not apply retroactively to sentencing modifications sought prior to the date of that decision. U.S. Dep't of Justice, *Efficient Case and Docket Management in Immigration Proceedings*, 89 Fed. Reg. 46742 (May 29, 2024); *see also*, *FAQs: New DOJ Regulations on Efficient Case and Docket Management in Immigration Proceedings* at 8-9, Catholic Legal Immigr. Network (June 2024).

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

The Ninth Circuit ruled that the BIA was entitled to *Chevron* deference on its view that if a noncitizen has been admitted into the U.S. more than once, and the most recent admission accounts for the noncitizen's presence in the country at the time of the crime, that more recent admission restarts the five-year clock under § 237(a)(2)(A)(i). *Route v. Garland*, 996 F.3d 968 (9th Cir. 2021) (reaffirming *Matter of Alyazji*). In *Route*, the circuit court declined to overturn the BIA's decision to remove a nonimmigrant who was admitted initially in 2005 but was later readmitted as a nonimmigrant in 2015 after a brief vacation and convicted of a crime involving moral turpitude three years after that second admission.

As noted in the Update to page 77 in Chapter One, the Supreme Court in *Loper Bright*

Enterprises v. Raimondo, 144 S. Ct. 2244 (June 28, 2024) overruled *Chevron*. The effect of *Loper Bright* on BIA decisions remains to be seen.

page 634, at the end of the last paragraph, add:

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

CHAPTER SIX

RELIEF FROM REMOVAL

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

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

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

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

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

Subsequent BIA rulings have qualified the scope of this “one-document” rule. In *Matter of J-L-L*, 28 I & N Dec. 684 (BIA 2023), the BIA held that *Pereira* and *Niz-Chavez* were inapplicable to removals that occurred before 1996, when the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which first specified the relevant requirements, was enacted. Pre-IIRIRA statutes did not require time-and-place language in charging documents for triggering the stop-time rule. See also *Gutierrez-Alm v. Garland*, 62 F.4th 1186, 1196 (9th Cir. 2023) (*Pereira* does not apply to charging documents issued before IIRIRA “under a separate statutory framework with distinct requirements”). *Matter of Nchifor*, 28 I & N Dec. 585 (BIA 2022) ruled that, with respect to cancellation of removal, a petitioner cannot benefit from the one-document rule if she raises it for the first time on a motion to reopen. There, the petitioner had been served with an NTA in 2019 and subsequent notices had supplied her

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

page 666, for the carryover paragraph from 665, note the modifications to *Pereira v. Sessions* by *Niz-Chavez v. Garland* and subsequent BIA rulings, referenced in the Update to page 660, above. Note also the Update to page 830 in Chapter Eight, discussing the relationship between *Niz-Chavez* and *Pereira to Campos-Chaves v. Garland*, 144 S. Ct. 1637 (June 14, 2024).

page 696, after the first full paragraph, add:

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

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

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

On July 15, 2021, U.S. Attorney General Merrick Garland overruled *Matter of Castro-Tum* in its entirety. *Matter of Cruz-Valdez*, 28 I & N Dec. 326 (AG 2021). *Cruz-Valdez* restored the authority of IJs to grant administrative closure consistent with the legal standards in place prior to *Castro-Tum*. The opinion also noted that the DOJ, in the last weeks of the Trump administration, had attempted to promulgate rules to codify *Castro-Tum*, but were enjoined from doing so by a district court. See *Centro Legal de La Raza v. Exec. Office for Immigration Review*, 524 F. Supp. 3d 919 (N.D. Cal. 2021) (preliminarily enjoining, for failure to comply with the APA, the final rule on administration closure); see U.S. Dep't of Justice, *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 Fed. Reg. 81588 (2020). Consistent with these developments, the EOIR issued a memorandum encouraging immigration judges “to use all docketing tools available to them to ensure fair and timely resolution of cases before them.” Acting Director of Executive Office of Immigration Review Jean King, Policy Memorandum 21-25, *Effect of Department of Homeland Security Enforcement Priorities*, June 11, 2021. On May 29, 2024, the Department of Justice formally rescinded the Trump administration’s enjoined rule, and codified IJs’ authority to administratively close cases. See U.S. Dep’t of Justice, *Efficient Case and Docket Management in Immigration Proceedings*, 89 Fed. Reg. 46742 (2024).

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

Immediately upon taking office, President Biden revoked President Trump’s executive order on interior enforcement and directed the Department of Homeland Security to revise its civil immigration enforcement priorities. Exec. Order 13993, *Revision of Civil Immigration Enforcement Policies and Priorities*, 86 Fed. Reg. 7051 (2021) (revoking Executive Order 13768 of Jan. 25, 2017). Concurrently, Biden’s Acting Secretary of DHS issued new interim enforcement priorities. See Memorandum from Acting Sec. of Homeland Sec. David Pekoske, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Jan. 20, 2021). These interim priorities signaled a return to the priorities of the Obama administration, and a rejection of the Trump administration’s approach. As part of the new directive, DHS had planned to implement a “100-day Pause on Removals.” That moratorium on removals was challenged by a group of states and enjoined by a federal district court. *Texas v. United States*, 524 F. Supp. 3d 598 (S.D. Tex. 2021) (finding state had standing to challenge federal policy and issuing nationwide injunction). A subsequent ruling by the same district judge enjoined the enforcement priorities in the interim memo. 555 F. Supp. 3d 351 (S.D. Tex. 2021).

While litigation over the interim priorities was pending, DHS issued new guidance to replace the interim memorandum. Memorandum from Sec. of Homeland Sec. Alejandro Mayorkas to ICE, CBP, USCIS directors, *Guidelines for the Enforcement of Civil Immigration Laws* (Sept. 30, 2021). This new guidance directs enforcement agents to use their discretion to focus on high priority cases, including national security threats, immediate threats to public safety, and threats to border security. It further instructs officers to use a totality of circumstances approach to determining whether to proceed against a particular noncitizen. Drew Tipton, the same federal judge who enjoined the interim priorities, vacated Secretary Mayorkas’ guidance memorandum. *Texas v. United States*, 606 F. Supp. 3d 437 (S.D. Tex. 2022).

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

On June 23, 2023, the Supreme Court held on the first question that states lacked standing to challenge the enforcement priorities and therefore federal courts lacked jurisdiction to review the claims. *United States v. Texas*, 599 U.S. 670, 677 (2023) (“The states have not cited any precedent, history, or tradition of courts ordering the Executive Branch to

change its arrest or prosecution policies so that the Executive Branch makes more arrests or initiates more prosecutions.”). The majority opinion cited to both *Reno v. AADC* [covered in greater detail on pages 647-59 in Chapter Five, and pages 702-04 in Chapter Six of the Casebook] and *Arizona v. United States* [covered in greater detail on pages 1050-65 in Chapter Nine of the Casebook] for the proposition that “enforcement discretion over arrests and prosecutions extends to the immigration context.” 599 U.S. at 678. The majority was careful, however, to note that because plaintiffs lacked standing, its ruling expressed no opinion on whether the President and the Executive Branch were complying with removal statutes. *Id.* at 679. Three Justices (Thomas, Gorsuch, Barrett, J.J.) concurred only in the judgment. Justice Alito was the sole dissenter, arguing that Texas had standing because the enforcement priorities “inflict[] substantial harm on the State and its residents by releasing illegal aliens with criminal convictions for serious crimes.” *Id.* at 1989 (Alito, J., dissenting).

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

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

page 728, at the end of note 6, delete the last sentence and add new paragraphs:

On July 16, 2021, District Judge Andrew Hanen, who previously had enjoined the Deferred Action for Parents of Americans (DAPA) program, held that the creation and continued operation of DACA violated the Administrative Procedure Act. *Texas v. United States*, 549 F. Supp. 3d 572 (S.D. Tex. 2021). The court held that DACA violated the procedural dictates of the APA because it was not promulgated with notice-and-comment rulemaking. Further, Judge Hanen opined that any rules authorizing DACA in its current form would likely violate the APA because they would run counter to the substantive provisions of the INA. The court order, however, only enjoined DHS’s ability to approve applications from those who had not previously obtained DACA. Citing the reliance interests of the hundreds of thousands of current DACA recipients, Hanen stayed his injunction as it pertained to current holders.

While the case was pending appeal at the Fifth Circuit, the Biden administration published a final rule codifying the program created by the 2012 DACA memorandum, including maintaining the program’s eligibility criteria. U.S. Dep’t of Homeland Sec., *Deferred Action for Childhood Arrivals*, 87 Fed. Reg. 53152 (2022). On appeal, the Fifth Circuit kept the district court’s stay in place (allowing current DACA recipients to continue and renew their status) but affirmed the district court’s ruling that the 2012 DACA memorandum was unlawful. *Texas v. United States*, 50 F.4th 498 (5th Cir. 2022). In addition, the appellate court remanded the legality of the newly promulgated DACA rule back to the district court. On September 13, 2023, the district court held that the newly promulgated DACA rule was unlawful but continued to permit current DACA recipients to renew their status. *Texas v. United States*, 2023 WL 5950808 (S.D. Tex. Sept. 13, 2023). As this Update

goes to press in late July 2024, the Fifth Circuit has not issued its decision on the appeal of the district court's most recent ruling.

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

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

page 728, after note 7, add new note 8:

8. With DHS's 2022 DACA rule in litigation and in legal jeopardy [see Update to page 728, note 6 above], the Biden Administration announced other executive actions to benefit both DACA recipients and unlawfully present individuals.

On May 3, 2024, the Biden Administration made current DACA recipients eligible to enroll in Affordable Care Act coverage. *See* Dept. of Health and Human Servs., *Clarifying the Eligibility of Deferred Action for Childhood Arrivals (DACA) Recipients and Certain Other Noncitizens for a Qualified Health Plan through an Exchange, Advance Payments of the Premium Tax Credit, Cost-Sharing Reductions, and a Basic Health Program*, 89 Fed. Reg. 39392 (2024).

On June 18, 2024, the Biden Administration announced its intention to promulgate rules to allow noncitizens without lawful immigration status who are married to U.S. citizens to apply for lawful permanent residency without leaving the country. *Fact Sheet: President Biden Announces New Actions to Keep Families Together*, The White House, June 18, 2024. Eligibility for the program would be limited to those who have resided in the U.S. for ten or more years as of June 17, 2024, are legally married to a U.S. citizen, and are not otherwise legally barred from admission. Those approved would be eligible for work authorization and afforded a three-year period to apply for LPR status. The actions would also protect noncitizen children in those families. *Id.* According to the White House, the action would benefit approximately 500,000 noncitizen spouses and 50,000 noncitizen children. *Id.* As noted in the Update to page 301 in Chapter Three, these anticipated regulations likely would rely on the President's parole authority under INA § 212(d)(5). By removing the necessity for eligible noncitizens to leave the United States and allowing them to adjust their status within the country, the anticipated rule would allow those noncitizens to avoid triggering the three- and ten-year inadmissibility bars. *See* INA § 212(a)(9)(B).

As part of that same announcement, the Biden Administration also declared that it plans to ease the pathway for "DACA recipients and other Dreamers, who have earned a degree at an accredited U.S. institution of higher education . . . and who have received an

offer of employment from a U.S. employer in a field related to their degree, to more quickly receive work visas.” *Fact Sheet: President Biden Announces New Actions to Keep Families Together*, The White House, June 18, 2024.

The implementing regulations and process for both aspects of the *Keeping American Families Together* announcement are anticipated by late summer 2024. Zolan Kanno-Youngs, Miriam Jordan, Jazmine Ulloa & Hamed Aleaziz, *Biden Gives Legal Protections to Undocumented Spouses of U.S. Citizens*, N.Y. Times, June 18, 2024.

CHAPTER SEVEN

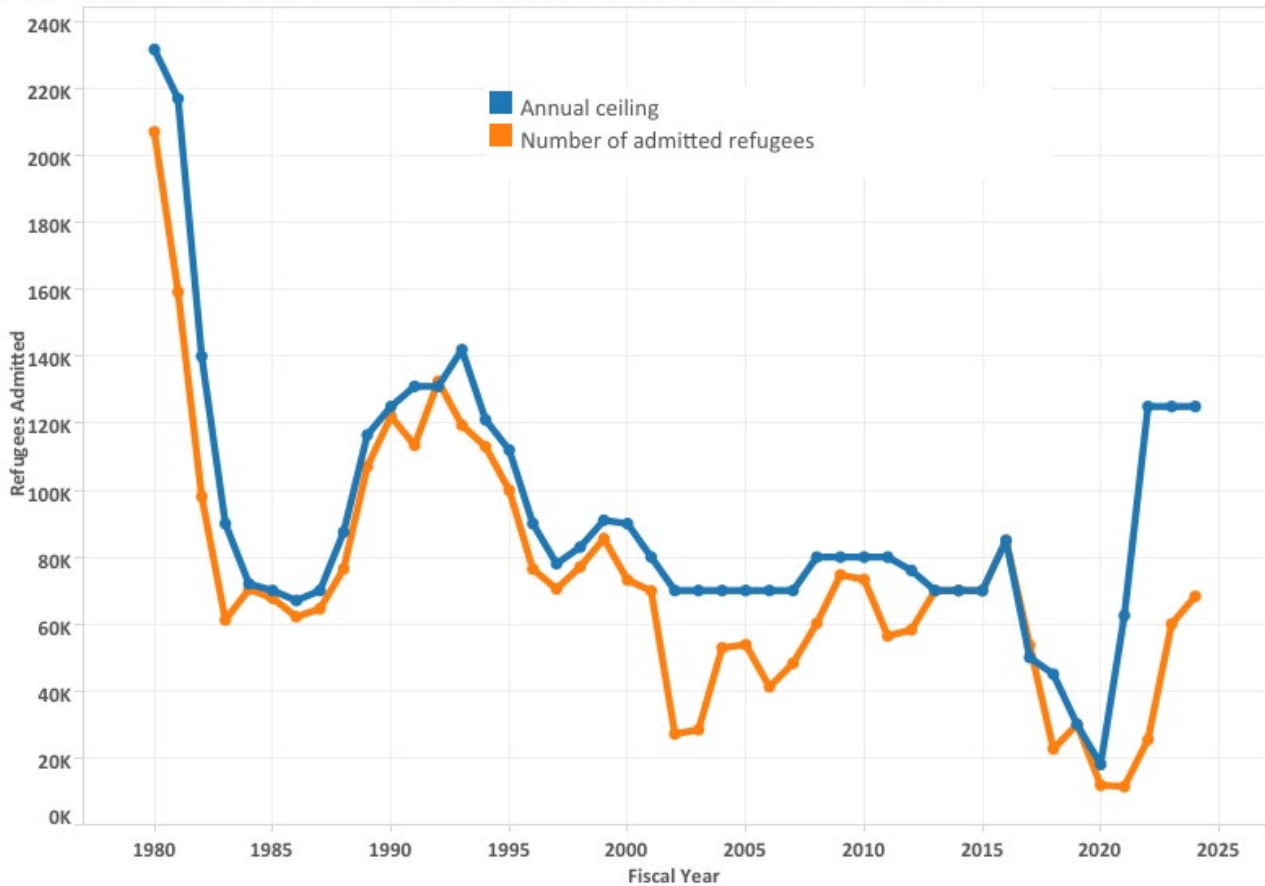
ASYLUM AND OTHER HUMANITARIAN PROTECTIONS

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

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

As noted in the Update to page 65 in Chapter One, President Biden changed course and increased the refugee admissions authorization to 62,500 for FY 2021, followed by 125,000 per year for FY 2022, FY 2023, and FY 2024. *See Emergency Presidential Determination on Refugee Admissions for Fiscal Year 2021*, 86 Fed. Reg. 24475 (2021); *Presidential Determination on Refugee Admissions for Fiscal Year 2022*, 86 Fed. Reg. 57527 (2021); *Presidential Determination on Refugee Admissions for Fiscal Year 2023*, 87 Fed. Reg. 60547 (2022); *Presidential Determination on Refugee Admissions for Fiscal Year 2024*, 88 Fed. Reg. 73521 (2023). The numbers of refugees actually resettled each year have remained low, but are increasing: 11,411 in FY 2021, 25,465 in FY 2022, 60,014 in FY 2023, and more than 68,291 in the first nine months of FY 2024. *See Data Hub, U.S. Annual Refugee Resettlement Ceilings and Number of Refugees Admitted, 1980 to Present* (Migration Pol’y Inst. 2024); U.S. Dep’t of State, Refugee Processing Center, *Refugee Admissions Report*, May 31, 2024. The United States projects that it will resettle more than 90,000 refugees by the end of FY 2024, *see* Kevin Appleby, *Marking the Biden Administration’s Progress in Restoring the US Refugee Admissions Program*, Center for Migration Studies, June 12, 2024, which would constitute the largest annual group of refugee admissions since 1995. The graph below, from Data Hub, *U.S. Annual Refugee Resettlement Ceilings and Number of Refugees Admitted, 1980-Present* (Migration Pol’y Inst. 2024), presents a snapshot of the refugee admissions authorizations and actual numbers of refugees resettled in the United States during the past forty-five years.

U.S. Refugee Admissions & Refugee Resettlement Ceilings, FY 1980-2024*



Migration Policy Institute (MPI) Data Hub
<http://migrationpolicy.org/programs/data-hub>

As it has substantially increased the numbers of refugees resettled from overseas, the Biden administration has worked to augment the portion of refugees resettled from Africa and Latin America. For example, the Trump administration resettled 10,379 refugees from Africa in FY 2020 and FY 2021, while the Biden administration will have resettled 70,000 by the end of FY 2024. The Trump administration resettled 1,348 refugees from Latin America during FY 2020 and 2021; in contrast, the Biden administration is on track to resettle close to 23,000 in FY 2023 and FY 2024. Appleby, *Marking the Biden Administration's Progress in Restoring the US Refugee Admissions Program*, *supra*. A related initiative, Safe Mobility Offices (SMOs), established offices in Costa Rica, Colombia, Ecuador, and Guatemala to review refugee resettlement applications. See Kathleen Bush-Joseph, *Outmatched: The U.S. Asylum System Faces Record Demands* 35 (Migration Pol'y Inst. February 2024) In their first year of operation, they approved 23,000 resettlement applications, and 9,000 refugees entered the United States. Appleby, *Marking the Biden Administration's Progress in Restoring the US Refugee Admissions Program*, *supra*.

As noted in the Update to page 301 in Chapter Three, the Biden administration also re-started the Central American Minors (CAM) refugee and parole program to reunite children from El Salvador, Guatemala, and Honduras with their parents who are legally present in the United States. *See* 88 Fed. Reg. 21694 (2023); Mark Greenberg, Stephanie Heredia, *et al.*, *Relaunching the Central American Minors Program: Opportunities to Enhance Child Safety and Family Reunification* (Migration Pol’y Inst. December 2021). This allows parents in the United States to petition for their children who are at risk in their home countries. Parents in many different circumstances—temporary protected status (TPS), deferred enforced departure, deferred action, withholding of removal, paroled into the United States, or permanent residents—are eligible to participate if they are nationals of El Salvador, Guatemala, or Honduras. *See* U.S. Citizenship & Immigr. Servs., *Central American Minors (CAM) Refugee and Parole Program*. DNA relationship testing is required to verify familial ties. *See* U.S. Dep’t of State, *Central American Minors (CAM) Program*. Reliable statistics are difficult to obtain, but there are reports that more than 600 individuals were interviewed via the CAM program in FY 2023. *See* Bush-Joseph, *Outmatched*, *supra*; Rachel Schmidtke & Yael Schacher, *Mixed Blessing: Guatemalan Experiences under the New Central American Minors Program*, Refugees International, March 15, 2023.

The Welcome Corps Initiative, an important new refugee program launched in 2023, allows private groups to sponsor refugees. Modeled after a longstanding Canadian sponsorship program, sponsors agree to raise \$2,425 per refugee, go through background checks, and submit plans to assist refugees to obtain access to housing, education, medical care, and public benefits. *See* Bush-Joseph, *Outmatched*, *supra*, at 32. In the first year of the program, 15,000 volunteered to be sponsors for 7,000 refugees. Appleby, *Marking the Biden Administration’s Progress in Restoring the US Refugee Admissions Program*, *supra*. Refugees may also qualify for other avenues of protection in the United States that do not require proof of refugee status. Humanitarian parole, special visa programs, and TPS are all discussed later in this Chapter.

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

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

USCIS announced on February 8, 2022, that it would no longer (1) bar employment authorization for asylum seekers who did not enter at a port of entry or (2) impose a 365-day waiting period on asylum seekers requesting work authorization. These decisions reinstated the earlier practice; asylum seekers can file applications for work authorization 150 days after filing their asylum application and are eligible to work when a total of 180 days have passed since the filing. *See* U.S. Citizenship & Immigr. Servs., *USCIS Stopped Applying June 2020 Rules Pursuant to Court Order in Asylumworks v. Mayorkas*, Sept. 21, 2022. In response to a backlog in processing applications to renew work authorization, USCIS put in place temporary rules providing automatic 540-day extensions to those who have filed renewal

applications. See *Temporary Increase of the Automatic Extension Period of Employment Authorization and Documentation for Certain Employment Authorization Document Renewal Applicants*, 89 Fed. Reg. 24628 (2024); *Temporary Increase of the Automatic Extension Period of Employment Authorization and Documentation for Certain Renewal Applicants*, 87 Fed. Reg. 26614 (2022).

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

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

Simultaneously with the implementation of new regulations and administrative practices restricting access to asylum, the Trump administration relied on the COVID-19 pandemic to suspend indefinitely all asylum applications at the border. From March 2020 through the end of April 2022, the federal government expelled more than 1.8 million individuals under the Title 42 public health rule barring the entry of asylum seekers. See *A Guide to Title 42 Expulsions at the Border*, Amer. Immigr. Council, May 25, 2022. In total, border officials carried out 2,960,000 expulsions under Title 42. Muzaffar Chishti, Kathleen Bush-Joseph & Julian Montalvo, *Title 42 Postmortem, U.S. Pandemic Era Expulsions Policy Did Not Shut Down the Border* (Migration Pol’y Inst. Apr. 25, 2024).

As noted in the Update to page 68 in Chapter One and to page 545 in Chapter Five, the Biden administration’s April 2022 decision to revoke the rule based on Title 42 was preliminarily enjoined by a federal district judge in Louisiana. *Louisiana v. Centers for Disease Control*, 603 F. Supp. 3d 406 (W.D. La. 2022). The government appealed, but the Title 42 policy remained in effect until May 11, 2023, when the Biden administration ended the public health emergency concerning COVID-19. See Section B2 of this Chapter (pages 742-48) for further discussion of the Title 42 policy change and other recent developments along the U.S.-Mexico border. For an overview of the changes and impact of the Title 42 policy, see Muzaffar Chishti, Kathleen Bush-Joseph & Julian Montalvo, *Title 42 Postmortem: U.S. Pandemic Era Expulsions Policy Did Not Shut Down the Border* (Migration Pol’y Inst. Apr. 25, 2024); Muzaffar Chishti & Kathleen Bush-Joseph, *U.S. Border Asylum Policy Enters New Territory Post-Title 42* (Migration Pol’y Inst. May 25, 2023).

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

The backlog has continued to worsen. EOIR reported 1,408,669 pending immigration cases at the end of FY 2021, 1,791,832 in FY 2022, and 2,471,618 in FY 2023. *See* EOIR, *Workload and Adjudication Statistics: Pending Cases* (Jan. 18, 2024.) In the first quarter of 2024, EOIR stated that the backlog of pending cases grew to 2,780,777, *id.*, while other analyses reported more than three million pending cases at the end of December 2023. *See* Transactional Records Access Clearinghouse (TRAC), *Immigration Court Backlog Tops 3 Million; Each Judge Assigned 4,500 Cases*, Dec. 18, 2023.

Focusing solely on asylum claims, in December 2023 there were 1,565,966 pending cases, with 787,882 claims awaiting immigration court hearings and 778,084 claims awaiting hearings before USCIS asylum officers. *See* TRAC, *A Sober Assessment of the Growing U.S. Asylum Backlog*, Dec. 22, 2022; Bush-Joseph, *Outmatched*, *supra*. To put the backlog in context, asylum applicants on average wait four years for their initial asylum hearing, with a final decision frequently taking several more years. *See* Muzaffar Chishti, Doris Meissner, Stephen Yale-Loehr, Kathleen Bush-Joseph & Christopher Levesque, *At the Breaking Point: Rethinking the U.S. Immigration Court System* (Migration Pol’y Inst. July 2023).

page 740, after Figure 7.3 and its source information, add this new paragraph:

The most recent data available show that USCIS received 431,000 affirmative asylum applications in FY 2023, while EOIR received more than 316,000 defensive applications. Bush-Joseph, *Outmatched*, *supra*, at 3. This is an enormous increase from a decade earlier, when there were 44,000 affirmative applications and 24,000 defensive applications in FY 2013. *Id.* at 4. DHS granted asylum to 60,000 individuals in FY 2023, a marked increase from the 36,000 grants of asylum in FY 2022, *id.* at 4, 17,700 in FY 2021, the 31,000 in FY 2020, and 46,000 in FY 2019. *See* Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States* (Migration Pol’y Inst. March 13, 2024); Nicole Ward & Jeanne Batalova, *Refugees and Asylees in the United States* 10 (Migration Pol’y Inst. June 15, 2023).

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

As noted in the Update to page 327 in Chapter Three, on February 2, 2021, President Biden signed an executive order that, among other things, suspended the 2019 expansion and ordered the Secretary of Homeland Security to report on whether to modify or revoke the Trump administration’s extension of expedited removal throughout the U.S. interior. *See* Exec. Order 14010, *Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, § 4(b), 86 Fed. Reg. 8267 (2021). On March 21, 2022, DHS formally rescinded the July 2019 expansion of expedited removal. *See Rescission of the Notice of July 23, 2019 Designating Aliens for Expedited Removal*, 87 Fed. Reg. 16022 (2022).

page 741: in the second full paragraph, replace the last sentence, and add a subsequent paragraph, as follows:

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

DHS and EOIR planned to implement the APR gradually, as they slowly increased capacity. As of December 2023, 5,860 applications had been processed under the APR. Of these, 2,620 had established credible fear and 410 were granted asylum. *See* Dep't of Homeland Sec., Office of the Citizenship and Immigr. Servs. Ombudsman, *2023 Annual Report to Congress*; Dep't of Homeland Sec., *Asylum Processing Rule Cohort Report* (December 2023). The APR remains in effect, but in April 2023 DHS paused referring asylum seekers to asylum officers for asylum merits interviews under the rule as the agency diverted asylum officers away from full asylum adjudications in order to conduct credible fear interviews. *See* Hamed Aleaziz, *Signature Biden Asylum Reform Policy Is Now On Hold*, L.A. Times, Apr. 12, 2023; Human Rights First, *Asylum Processing Rule At One Year* (June 2023). DHS restarted the APR in October 2023, but resource constraints have prevented its application to large numbers of migrants. *See* Bush-Joseph, *Outmatched*, *supra*, at 12.

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

As noted above in the Update to page 741 in this Chapter, the 2022 asylum regulation, *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, 87 Fed. Reg. 18078 (2022), enhances the responsibilities of asylum officers in credible fear hearings. It does not rely on Border Patrol agents, but instead authorizes asylum officers both to carry out credible fear hearings and subsequently to provide nonadversarial asylum interviews to those determined to have a credible fear. 8 CFR § 208.16(a).

page 742: at the end of the second full paragraph, add the following sentence:

The aftermath of the Trump administration border policies and the most recent Biden administration regulatory changes to the border procedures are discussed in the subsections below. *See* U.S. Dep't of Homeland Sec. & U.S. Dep't of Justice, *Securing the Border*, 89 Fed.

Reg. 48710 (2024) (interim final rule); U.S. Dep't of Homeland Sec., *Circumvention of Lawful Pathways*, 88 Fed. Reg. 31314 (2023).

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

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

On February 2, 2021, President Biden signed an executive order that, among other things, ordered the Attorney General and the Secretary of Homeland Security to review the port-of-entry requirements. The executive order calls on them to “review and determine whether to rescind” the Trump administration’s November 2018 interim final rule making noncitizens ineligible for asylum if they entered in violation of a presidential proclamation barring their entry. *See* Exec. Order 14010, *Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, § 4(a)(ii)(C), 86 Fed. Reg. 8267 (2021). One year later, USCIS announced that it no longer considered manner of entry into the United States in adjudication of asylum applications and requests for employment authorization. *See* U.S. Dep’t of Homeland Sec., *USCIS Stops Applying Certain EAD Provisions for Asylum Applicants*, Feb. 8, 2022.

As noted in the Update to page 545 in Chapter Five, a 2023 Biden administration regulation creates a presumption against eligibility for asylum for migrants who cross the border unlawfully and have not sought asylum in a third country through which they traveled on their way to the United States. *See* U.S. Dep’t of Homeland Sec., *Circumvention of Lawful Pathways*, 88 Fed. Reg. 31314 (2023). The regulation essentially requires migrants to schedule appointments at U.S. Border Patrol sites through an online application available on mobile phones (the “CBP One” app). Unaccompanied minors are exempted from this requirement. Other asylum seekers can rebut the presumption of ineligibility if they can show that it was impossible, due to language barrier, illiteracy, technical failure, or another serious obstacle to make an appointment via the CBP One app.). In addition, they can rebut the presumption if they demonstrate exceptionally compelling circumstances, such as medical emergency, imminent and extreme threat to life and safety at the time of entry into the United States, or if they show they are victims of severe forms of trafficking.

Many have criticized this rule, which went into effect on the day the Title 42 public health order exclusion order expired, for replicating Trump-era policies. *See, e.g.,* Miriam Jordan, *Biden Administration Announces New Border Crackdown*, N.Y. Times, Feb. 21, 2023. Immigrant advocacy groups sued to enjoin its implementation, arguing that it unlawfully restricted asylum availability in contravention of the INA. *See* Amended and Supplemental Complaint for Declaratory Relief, *East Bay Sanctuary Covenant, et. al. v. Biden*, 683 F. Supp. 3d 654 (N.D. Cal. 2023). On July 25, 2023, the federal district court for the Northern District

of California vacated the new regulation, though it stayed its ruling for two weeks, allowing the federal government to seek review in the Ninth Circuit. The Ninth Circuit, over a vigorous dissent, stayed the district court's order, leaving the regulation in effect. *East Bay Sanctuary Covenant v. Biden*, 2023 WL 11662094 (9th Cir. Aug. 3, 2023). After oral argument in November 2023, the parties filed a joint motion to hold the appeal in abeyance while the parties discussed compromise. The Ninth Circuit granted the joint motion in February 2024, again over a strong dissent. *East Bay Sanctuary Covenant v. Biden*, 93 F.4th 1130, 1131 (9th Cir. 2024).

Meanwhile, the state of Texas sued the Biden administration in federal court in Texas, arguing that different aspects of the same proposed rule encourage unlawful migration. *Texas v. Mayorkas*, Complaint, 2:23-CV-00024 (W.D. Tex. May 23, 2023). In August 2023, the Biden Administration moved to dismiss the case, which led Texas to file an amended complaint. *Texas v. Mayorkas*, 2:23-CV-00024 (W.D. Tex. Aug. 30, 2023). As this Update goes to press in late July 2024, the parties are briefing the motion to dismiss the amended complaint, and the federal district court in Texas has yet to issue a ruling. The Update to page 744 in this Chapter also notes the significance of the Circumvention of Lawful Pathways regulation.

More sweeping than the Circumvention of Lawful Pathways barriers was the June 3, 2024 decision to suspend consideration of asylum claims and to change the standard for evaluating asylum claims in periods when the number of migrants encountered at the border reaches certain thresholds. *See Securing the Border*, Proclamation 10773, 89 Fed. Reg. 48487 (2024); see also, U.S. Dep't of Homeland Sec. & U.S. Dep't of Justice, *Securing the Border*, 89 Fed. Reg. 48710 (2024) (interim final rule implementing *Securing the Border* Proclamation). President Biden's proclamation declared an emergency due to the record levels of unauthorized entry at the U.S.-Mexico border and suspended the entry of asylum seekers even at ports-of-entry during the emergency. The interim final rule (IFR) to implement the Proclamation specified that the emergency would end only after the numbers of encounters at the southern border return to a consecutive seven-day average of fewer than 1,500 encounters.

This regulation does not apply to U.S. citizens and permanent residents, or noncitizens with valid visas. Nor does it apply to the following noncitizens:

- Unaccompanied minors
- Victims of severe forms of trafficking
- Noncitizens whom immigration officers believe should be permitted entry based on public safety, law enforcement, public health, or urgent humanitarian considerations.

Otherwise, the IFR specifies that individuals who cross the southern border of the United States during the emergency period will only be eligible for asylum if they can show by a preponderance of evidence that they or a family member with whom they are traveling:

- Faced an acute medical emergency

- Faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder.

U.S. Dep't of Homeland Sec. & U.S. Dep't of Justice, *Securing the Border*, 89 Fed. Reg. 48710 (2024). Litigation challenging the IFR began immediately. See *Las Americas Immigrant Advocacy Center v. U.S. Dep't of Homeland Sec.*, Complaint, No. 1:24-CV-01702 (D.D.C. June 12, 2024); see also Hamed Aleaziz, *A.C.L.U. Sues to Stop Biden's Asylum Ban on the U.S.-Mexico Border*, N.Y. Times, June 12, 2024. The Updates to page 521 in Chapter Five and page 945 in Chapter Nine also address the significance of this IFR.

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

“Metering” continued at the United States-Mexico border until March 20, 2020, when U.S. authorities relied on the COVID-19 pandemic to halt the entry of asylum seekers at land borders. See discussion on p. 746 of the casebook. It appears that most “metering” lists stopped accepting new entries after that date, so that asylum seekers arriving at the border throughout the rest of 2020 and 2021 had no option other than waiting for the border to reopen. See *Metering and Asylum Turnbacks*, Amer. Immigr. Council, Mar. 8, 2021. By late 2020, the “metering” lists contained 15,690 individuals who continued to wait in Mexico. After President Biden took office in January 2021, the general COVID-19 suspension remained in effect, and the “metering” waitlists grew to include at least 20,600. See *Human Rights Travesty: Biden Administration Embrace of Trump Asylum Expulsion Policy Endangers Lives, Wreaks Havoc*, Human Rights First, Aug. 2021. Many asylum seekers who arrived after the “metering” lists had closed waited near the border to see if the waitlists would reopen. *Id.* For a fuller discussion of “metering,” see Hillel R. Smith, *The Department of Homeland Security's “Metering” Policy: Legal Issues* (Cong. Res. Serv. 2022).

On November 1, 2021, DHS rescinded Trump administration memoranda regarding “metering” and issued new guidance that Customs and Border Protection (CBP) units must increase capacity to process asylum seekers at the border and allow individuals to wait in line to present their claims for protection. CBP officers may not “instruct travelers that they must return to the POE [Port of Entry] at a later time.” U.S. Customs & Border Prot., *Guidance for Management and Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry*, Nov. 1, 2021. Nonetheless, until May 11, 2023, most asylum seekers continued to be barred from entering the United States based on the 2020 issuance of a public health ruling pursuant to Title 42. See Update to pages 746-47 of this Chapter for further discussion of the Title 42 policy change. Related discussions of the Title 42 public health bar can be found in the 2024 Update to pages 68, 545, 736, and 746 of the casebook.

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

On the day that President Biden took office in January 2021, DHS announced it would suspend new enrollments in the MPP pending a review of the policy. In February 2021, DHS began processing asylum seekers with pending cases under the MPP, setting up a website to allow these individuals to register online to enter the United States for their asylum

procedures. By December 2021, 13,000 MPP asylum seekers had been admitted to the United States. See Camilo Montoya-Galvez & Sean Gallitz, *Family Reunites Under Biden Program That Has Let 10,000 Asylum Seekers Enter U.S.*, CBS News, May 10, 2021; *The “Migrant Protection Protocols,”* American Immigr. Council, Feb. 1, 2024.

On June 1, 2021, DHS announced the termination of the MPP program, but a lawsuit filed by Texas and Missouri led U.S. District Judge Kacsmaryk of the Northern District of Texas to reject the federal government’s action, vacate the DHS decision, and issue a nationwide injunction against terminating MPP. *Texas v. Biden*, 554 F. Supp. 3d 818 (N.D. Tex. 2021). On October 29, 2021, DHS issued a new decision to terminate MPP, accompanied by an expanded memorandum and explanation for the decision. The Fifth Circuit rejected the government’s procedural and substantive arguments and affirmed the trial court. *Texas v. Mayorkas*, 20 F. 4th 928 (5th Cir. 2021). The U.S. Supreme Court granted certiorari, 142 S. Ct. 1098 (Mem.) (2022), provided expedited review, and reversed. *Texas v. Biden*, 142 S. Ct. 2528 (2022). The majority opinion by Justice Roberts concluded that the DHS October 2021 decision to terminate MPP was reviewable under the Administrative Procedure Act (APA) as final agency action, and that the Secretary of Homeland Security had discretion to end the policy of returning noncitizens to Mexico. The Court remanded the case to the district court to determine whether the October 2021 DHS decision complied with the APA. On December 15, 2022, Judge Kacsmaryk granted the motion filed by Texas and Missouri to postpone the termination of the MPP pending the court’s ruling on the APA challenge to the DHS decision. *Texas v. Biden*, 646 F. Supp. 3d 753 (N.D. Tex. 2022). DHS appealed to the Fifth Circuit, but several months later dismissed this appeal in order to return to the district court to seek a final judgment. *Id.*

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

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

As noted in the Update to page 545 in Chapter Five, the 2023 Circumvention of Lawful Pathways regulation again raises the issue of applying for asylum in transit countries. This rule creates a presumption against eligibility for asylum for migrants who cross the border unlawfully and have not sought asylum in a third country through which they traveled on

their way to the United States. See U.S. Dep't of Homeland Sec., *Circumvention of Lawful Pathways*, 88 Fed. Reg. 31314 (2023). The Update to pages 742-43 of this Chapter describes in greater detail the regulation, its exceptions, and the litigation that has ensued. As this Update goes to press in late July 2024, the regulation remains in effect.

page 744-45, at the end of the carryover paragraph, add:

In June 2023, the Supreme Court of Canada upheld the U.S.-Canada Agreement against constitutional challenges that it violated the right to life, liberty, and security. The Court remanded the dispute to the trial court to determine whether the U.S. approach to gender violence asylum claims would place Canadian officials implementing the agreement in breach of the equal protection guarantee of the Canadian Charter of Rights and Freedoms. *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17 (June 16, 2023). As this Update goes to press in late July 2024, the case is still pending at the trial court in Canada, and Canada continues to be the only nation with which the United States has a safe third country agreement.

page 745, at the beginning of the first full paragraph, change to past tense by replacing the first four sentences as follows:

No matter the future developments in the Canadian litigation, the agreements with the Northern Triangle governments differed in important respects from the agreement with Canada. The 2019 agreements were short and lacked detailed procedures. More importantly, they authorized the United States to send asylum seekers to these cooperating countries, whether or not the asylum seekers had ever set foot in them or had any connection with them. For example, they permitted U.S. officials to send asylum seekers from China or Iraq to Guatemala, even if the asylum seekers had entered the United States in New York and had never visited Central America.

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

Although arriving migrants were not allowed to apply for asylum, there was cursory screening to see if the individual had a fear of torture or of persecution that would threaten her life or freedom. The majority of asylum seekers were returned to Mexico in less than two hours. Asylum seekers from other countries were delivered to ICE, which rapidly returned them to their homelands. See Ben Fox, *U.S. Extends Heightened Border Enforcement During Coronavirus Crisis*, Assoc. Press, May 19, 2020. During the first two years of the Title 42 policy, the Border Patrol carried out 1.87 million expulsions. From March 2020 through September 2021, only 3,217 individuals received a screening for torture; 272 were allowed to apply for asylum. See *A Guide to Title 42 Expulsions at the Border* 3-4, Amer. Immigr. Council, May 25, 2022. From FY 2021 to FY 2023, border officials expelled individuals at the Southwest border 2.7 million times. See Bush-Joseph, *Outmatched*, *supra*, at 37.

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

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

As discussed in the Update to page 68 in Chapter One, in July 2021 the Centers for Disease Control and Prevention (CDC) modified the COVID-19 public health order to allow unaccompanied noncitizen children to enter the United States, *Public Health Determination Regarding an Exception for Unaccompanied Noncitizen Children from the Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists*, 86 *Fed. Reg.* 38717 (2021), but the general COVID-19 suspension remained in force. *See* Daniel Slotnick, Vijosa Isai & Maria Abi-Habib, *U.S. Reaffirms Its Land Border Restrictions as Canada Relaxes Its Own*, *N.Y. Times*, July 21, 2021. In the spring of 2022, the D.C. Circuit ruled that it was unlawful to turn away families without allowing an opportunity to seek protection from persecution. *Huisha-Huisha v. Mayorkas*, 27 F. 4th 718 (D.C. Cir. 2022).

On April 1, 2022, the CDC announced that the availability of vaccines and rapid tests to detect COVID-19 had created circumstances in which a ban on asylum seekers was not necessary, and declared that the Title 42 policy would end on May 23, 2022. *See A Guide to Title 42 Expulsions at the Border*, *Amer. Immigr. Council*, May 25, 2022. Litigation prolonged the ban for another year until the Biden administration announced in January 2023 that it would not renew the public-health emergency for COVID-19 when it expired on May 11, 2023. *See* Sharon LaFraniere & Noah Weiland, *U.S. Plans to end Public Health Emergency for Covid in May*, *N.Y. Times*, Feb. 3, 2023. Without an ongoing, declared public-health emergency, the statutory prerequisite for Title 42 orders ceased to exist, and thus the orders expired on the same day as the emergency declaration was lifted. *U.S. Dep’t of Homeland Sec., Fact Sheet: U.S. Government Announces Sweeping New Actions to Manage Regional Migration*, Apr. 27, 2023.

With Title 42 orders no longer applicable, migrant processing at the border returned to the rules and procedures generally used for immigration control in Title 8. The Circumvention of Lawful Pathways regulation, which went into effect when the Title 42 order expired, erected major new barriers to access, however. As described in the Update to pages 742-43 of this Chapter, it obliged most migrants to use the CBP One app, an online application available on mobile phones, to schedule appointments at U.S. Border patrol sites. It created a presumption against eligibility for asylum for migrants who cross the border

unlawfully. *See* U.S. Dep’t of Homeland Sec., *Circumvention of Lawful Pathways*, 88 Fed. Reg. 31314 (2023). The Update to pages 742-43 of this Chapter explains in more detail the regulation, its exceptions, and the subsequent litigation. As this Update goes to press in late July 2024, the regulation remains in effect.

page 747, replace the first sentence of the second full paragraph with the following:

Unaccompanied children are in a particularly precarious situation as they lack adult family support to navigate the barriers at the U.S.-Mexico border.

page 747, after the second full paragraph, add the following new paragraph:

The numbers continued to grow, although they have decreased somewhat in the last three years. There were 56,154 pending cases of unaccompanied minors at the end of FY 2020, 64,187 at the end of FY 2021, 60,216 at the end of FY 2022, 45,595 at the end of FY 2023, and 40,355 pending cases of unaccompanied minors at the end of the second quarter of 2024. *See* EOIR, *Workload and Adjudication Statistics: Pending Unaccompanied Alien Child (UAC) Cases*, July 10, 2024. Immigration judges issued 9,186 decisions concerning unaccompanied children during the first two quarters of 2024. *See* EOIR, *Workload and Adjudication Statistics: UAC Statistics*, July 10, 2024.

page 748, in the first full paragraph, third sentence, change two verbs to past tense as shown in italics:

Detention of children *was* still occurring . . .

which led to renewed litigation . . .

page 748, after the first full paragraph, add a new paragraph:

As noted in the Update to page 351 in Chapter Three, on January 26, 2021, Acting Attorney General Monty Wilkinson issued a Department of Justice memorandum formally rescinding the zero-tolerance policy. *See* U.S. Dep’t of Justice, Office of the Attorney General, *Memorandum for all Federal Prosecutors, Rescinding the Zero-Tolerance Policy for Offenses Under 8 U.S.C. § 1325(a)*, Jan. 26, 2021. Unaccompanied children continued to arrive at the U.S. borders, which led the Centers for Disease Control and Prevention (CDC) to modify the COVID-19 public health order. In July 2021, the CDC determined that the Title 42 ban should not prevent unaccompanied noncitizen children from entering the United States. *See Public Health Determination Regarding an Exception for Unaccompanied Noncitizen Children from the Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists*, 86 Fed. Reg. 38717 (2021).

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

The infliction of harm by non-state actors arises in many gender-related claims for asylum. Cases based on claims of female genital mutilation generally focus on family members who insist on compliance with the custom. Many cases raising claims of domestic violence allege that the spouse or intimate partner inflicted the harm, and frequently note

that the police do not respond to reports of domestic violence. As described in this Update regarding Note 1 on page 801, in 2018 then-Attorney General Jeff Sessions issued a lengthy opinion casting doubt on asylum claims based on persecution by nongovernment actors. *Matter of A-B-*, 27 I & N Dec. 316 (AG 2018). After the Biden administration took office in 2021, Attorney General Merrick Garland vacated *Matter of A-B-*, pending rulemaking, in order to provide “all interested parties a full and fair opportunity to participate” in assessing the settings in which private violence qualifies as persecution and the circumstances in which individuals should be considered as members of a particular social group. *See Matter of A-B-*, 28 I & N Dec. 307, 308 (AG 2021). In the interim, Garland directed immigration judges and the BIA to follow pre-*Matter of A-B-* precedent. *Id.* at 309.

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

After the Biden administration took office in 2021, Attorney General Merrick Garland vacated *Matter of A-B-* and *Matter of L-E-A-*, pending rulemaking, in order to provide “all interested parties a full and fair opportunity to participate” in assessing the circumstances in which individuals should be considered as members of a particular social group. *See Matter of A-B-*, 28 I & N Dec. 307, 308 (AG 2021); *Matter of L-E-A-*, 28 I & N Dec. 304 (AG 2021). In the interim, Garland directed immigration judges and the BIA to follow pre-*Matter of A-B-* precedent. *Id.* at 309. Section F (pages 789-819) of this Chapter will examine these issues in greater detail.

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

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

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

In November 2020 then-Attorney General William Barr issued an opinion concluding that there is no duress exception to the persecutor bar. *See Matter of Negusie*, 28 I & N Dec. 120 (AG 2020). Acknowledging that “some of these applicants have endured unimaginable harm” at the hands of persecutors, Barr asserted that “the absence of a duress exception . . . does not mean that [a noncitizen] who assisted in persecution under duress will necessarily lack protection.” *Id.* at 152. “[The noncitizen] may still obtain deferral of removal under the CAT.” *Id.* One year later Attorney General Merrick Garland referred the 2020 BIA decision to himself for review, automatically staying the decision pending the review. *Matter of Negusie*, 28 I & N Dec. 399 (AG 2021). As this Update goes to press in late July 2024, there were no further decisions.

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

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

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

MATTER OF A-R-C-G-

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

ADKINS-BLANCH, VICE CHAIRMAN:

In a decision dated October 14, 2009, an Immigration Judge found the respondents removable and denied their applications for asylum and withholding of removal under [INA] sections 208(a) and 241(b)(3). The respondents have appealed from that decision, contesting only the denial of their applications for relief from removal. We find that the lead respondent, a victim of domestic violence in her native country, is a member of a particular social group composed of “married women in Guatemala who are unable to leave their relationship.” The record will be remanded to the Immigration Judge for further proceedings.

I. FACTUAL AND PROCEDURAL HISTORY

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

The Immigration Judge found the respondent to be a credible witness, which is not contested on appeal. It is undisputed that the respondent, who married at age 17, suffered repugnant abuse by her husband. This abuse included weekly beatings after the respondent had their first child.⁹ On one occasion, the respondent’s husband broke her nose. Another time, he threw paint thinner on her, which burned her breast. He raped her.

The respondent contacted the police several times but was told that they would not interfere in a marital relationship. On one occasion, the police came to her home after her husband hit her on the head, but he was not arrested. Subsequently, he threatened the respondent with death if she called the police again. The respondent repeatedly tried to leave the relationship by staying with her father, but her husband found her and threatened to kill her if she did not return to him. Once she went to Guatemala City for about 3 months, but he followed her and convinced her to come home with promises that he would discontinue the abuse. The abuse continued when she returned. The respondent left Guatemala in December 2005, and she believes her husband will harm her if she returns.

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

The Immigration Judge found that the respondent did not demonstrate that she had suffered past persecution or has a well-founded fear of future persecution on account of a particular social group comprised of “married women in Guatemala who are unable to leave their relationship.” The Immigration Judge determined that there was inadequate evidence that the respondent’s spouse abused her “in order to overcome” the fact that she was a “married woman in Guatemala who was unable to leave the relationship.” He found that the respondent’s abuse was the result of “criminal acts, not persecution,” which were perpetrated “arbitrarily” and “without reason.” He accordingly found that the respondent did not meet her burden of demonstrating eligibility for asylum or withholding of removal under the Act.

On appeal, the respondent asserts that she has established eligibility for asylum as a victim of domestic violence. * * *

In response to our request for supplemental briefing, the DHS now concedes the respondent established that she suffered past harm rising to the level of persecution and that the persecution was on account of a particular social group comprised of “married women in Guatemala who are unable to leave their relationship.” However, the DHS seeks remand, arguing that “further factual development of the record and related findings by the Immigration Judge are necessary on several issues” before the asylum claim can be properly resolved. The respondent opposes remand and maintains that she has met her burden of proof regarding all aspects of her asylum claim. We accept the parties’ position on the existence of harm rising to the level of past persecution, the existence of a valid particular social group, and the issue of nexus under the particular facts of this case. We will remand the record for further proceedings.

II. ANALYSIS

A. Particular Social Group

The question whether a group is a “particular social group” within the meaning of the Act is a question of law that we review de novo. The question whether a person is a member of a particular social group is a finding of fact that we review for clear error.

* * *

B. Respondent’s Claim

The DHS has conceded that the respondent established harm rising to the level of past persecution on account of a particular social group comprised of “married women in Guatemala who are unable to leave their relationship.” The DHS’s position regarding the existence of such a particular social group in Guatemala under the facts presented in this case comports with our recent precedents clarifying the meaning of the term “particular social group.” In this regard, we point out that any claim regarding the existence of a particular social group in a country must be evaluated in the context of the evidence presented regarding the particular circumstances in the country in question.

In *Matter of W-G-R-* and *Matter of M-E-V-G-*, we held that an applicant seeking asylum based on his or her membership in a “particular social group” must establish that the

group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. The “common immutable characteristic” requirement incorporates the standard set forth in *Matter of Acosta*. The “particularity” requirement addresses “the question of delineation.” That is, it clarifies the point that “not every ‘immutable characteristic’ is sufficiently precise to define a particular social group.” The “social distinction” requirement renames the former concept of “social visibility” and clarifies “the importance of ‘perception’ or ‘recognition’ to the concept of the particular social group.”

In this case, the group is composed of members who share the common immutable characteristic of gender. Moreover, marital status can be an immutable characteristic where the individual is unable to leave the relationship. A determination of this issue will be dependent upon the particular facts and evidence in a case. A range of factors could be relevant, including whether dissolution of a marriage could be contrary to religious or other deeply held moral beliefs or if dissolution is possible when viewed in light of religious, cultural, or legal constraints. In evaluating such a claim, adjudicators must consider a respondent’s own experiences, as well as more objective evidence, such as background country information.

The DHS concedes that the group in this case is defined with particularity. The terms used to describe the group—“married,” “women,” and “unable to leave the relationship”—have commonly accepted definitions within Guatemalan society based on the facts in this case, including the respondent’s experience with the police. In some circumstances, the terms can combine to create a group with discrete and definable boundaries. We point out that a married woman’s inability to leave the relationship may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation. See *Matter of W-G-R*, 26 I&N Dec. at 214 (observing that in evaluating a group’s particularity, it may be necessary to take into account the social and cultural context of the alien’s country of citizenship or nationality); Committees on Foreign Relations and Foreign Affairs, 111th Cong., *Country Reports on Human Rights Practices for 2008* 2598 (Joint Comm. Print 2010) (“*Country Reports*”) (discussing sexual offenses against women as a serious societal problem in Guatemala); Bureau of Human Rights, Democracy, and Labor, U.S. Dep’t of State, *Guatemala Country Reports on Human Rights Practices—2008* (Feb. 25, 2009).¹⁴ In this case, it is significant that the respondent sought protection from her spouse’s abuse and that the police refused to assist her because they would not interfere in a marital relationship.

The group is also socially distinct within the society in question. To have “social distinction,” there must be “evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group.” The group’s

¹⁴ Notably, the group is not defined by the fact that the applicant is subject to domestic violence. See *Matter of W-G-R*, 26 I&N Dec. at 215 (noting that circuit courts “have long recognized that a social group must have ‘defined boundaries’ or a ‘limiting characteristic,’ other than the risk of being persecuted”).

recognition is “determined by the perception of the society in question, rather than by the perception of the persecutor.”¹⁵

When evaluating the issue of social distinction, we look to the evidence to determine whether a society, such as Guatemalan society in this case, makes meaningful distinctions based on the common immutable characteristics of being a married woman in a domestic relationship that she cannot leave. Such evidence would include whether the society in question recognizes the need to offer protection to victims of domestic violence, including whether the country has criminal laws designed to protect domestic abuse victims, whether those laws are effectively enforced, and other sociopolitical factors. *Cf. Davila-Mejia v. Mukasey*, 531 F.3d 624, 629 (8th Cir. 2008) (finding that competing family business owners are not a particular social group because they are not perceived as a group by society).

Supporting the existence of social distinction, and in accord with the DHS’s concession that a particular social group exists, the record in this case includes unrebutted evidence that Guatemala has a culture of “machismo and family violence.” *See Guatemala Failing Its Murdered Women: Report*, Canadian Broad. Corp. (July 18, 2006). Sexual offenses, including spousal rape, remain a serious problem. *See Country Reports, supra*, at 2608. Further, although the record reflects that Guatemala has laws in place to prosecute domestic violence crimes, enforcement can be problematic because the National Civilian Police “often failed to respond to requests for assistance related to domestic violence.” *Id.* at 2609.

We point out that cases arising in the context of domestic violence generally involve unique and discrete issues not present in other particular social group determinations, which extends to the matter of social distinction. However, even within the domestic violence context, the issue of social distinction will depend on the facts and evidence in each individual case, including documented country conditions; law enforcement statistics and expert witnesses, if proffered; the respondent’s past experiences; and other reliable and credible sources of information

C. Remaining Issues

The DHS stipulates that the respondent suffered mistreatment rising to the level of past persecution. The DHS also concedes in this case that the mistreatment was, for at least one central reason, on account of her membership in a cognizable particular social group. We note that in cases where concessions are not made and accepted as binding, these issues will be decided based on the particular facts and evidence on a case-by-case basis as addressed by the Immigration Judge in the first instance. In particular, the issue of nexus will depend on the facts and circumstances of an individual claim.

We will remand the record for the Immigration Judge to address the respondent’s statutory eligibility for asylum in light of this decision. Under controlling circuit law, in order for the respondent to prevail on an asylum claim based on past persecution, she must

¹⁵ The perception of the persecutor, however, is critical to the question whether a person is persecuted “on account of membership in a particular social group.” *See Matter of M-E-V-G-*, 26 I&N Dec. at 242; *Matter of W-G-R-*, 26 I&N Dec. at 218.

demonstrate that the Guatemalan Government was unwilling or unable to control the “private” actor.

If the respondent succeeds in establishing that the Government was unwilling or unable to control her husband, the burden shifts to the DHS to demonstrate that there has been a fundamental change in circumstances such that the respondent no longer has a well-founded fear of persecution. Alternatively, the DHS would bear the burden of showing that internal relocation is possible and is not unreasonable. The Immigration Judge may also consider, if appropriate, whether the respondent is eligible for humanitarian asylum.^a

* * *

page 801, after concluding the new *Matter of A-R-C-G-* excerpt, replace the heading [MATTER OF A-B-] with NOTES AND QUESTIONS ON ASYLUM CLAIMS BASED ON DOMESTIC VIOLENCE.

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

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

2. The pathbreaking case involving asylum based on domestic abuse is *Matter of R-A*, 22 I & N Dec. 906 (BIA 1999), filed by a woman from Guatemala who had been repeatedly beaten by her husband and whose pleas to the local police had been unavailing. After the BIA decision, subsequent proceedings lasted more than a decade and involved three presidential administrations. In 2000, the Department of Justice published proposed amendments to the asylum regulations, with the intent to make the regulations more amenable to domestic violence claims. *Asylum and Withholding Definitions*, 65 Fed. Reg. 76588 (2000). Attorney General Janet Reno then vacated *Matter of R-A*, thus removing its precedential value, and remanded the case to the BIA with directions to reconsider the case in the light of the new regulations. When final regulations had not appeared by 2009, DHS agreed that R-A- was eligible for asylum, and the immigration judge granted her asylum. *See Paul Elias, Domestic*

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

Violence Victim Granted Asylum in U.S., Assoc. Press, Dec. 18, 2009; Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching toward Recognition of Women's Claims*, 29 Ref. Surv. Q. 49, 56-60 (2010).

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

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

page 809, replace note 3 with the following text:

3. **Deference to agency decisionmaking.** *Henriquez-Rivas* expressly relied on the *Chevron* doctrine that courts should defer to agency interpretation of ambiguous statutory terms. *Chevron U.S.A., Inc. v Natural Resources Defense Council*, 4467 U.S. 837 (1984). As described in the Update to page 77 in Chapter One, in June 2024 the U.S. Supreme Court overturned *Chevron* in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). The Court noted, however, that courts may still be persuaded by the rationales underlying agency interpretations. The en banc *Henriquez-Rivas* opinion concluded that the perceptions of persecutors were highly relevant to determining whether a particular social group was visible within a society. One year later, in *Matter of M-E-V-G-*, 26 I & N Dec. 227 (BIA 2014), the BIA rejected the salience of the persecutor's perspective in favor of the perspective of the whole society. In light of *Loper Bright*, what arguments would advocates make in order to persuade the Ninth Circuit to adopt the view of *M-E-V-G-* rather than that of *Hernandez-Rivas*?

pages 809-10, delete note 4.

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

In 2015, one year after *Matter of M-E-V-G-*, 26 I & N Dec. 227 (BIA 2014), rejected a particular social group composed of Honduran youth who resisted gang recruitment, the Fourth Circuit considered the asylum claim of a mother threatened by gang members for her opposition to their recruitment of her son.

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

HERNANDEZ-AVALOS V. LYNCH

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

SHEDD, CIRCUIT JUDGE:

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

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

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

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

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

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

* * *

[I]n this case Mara 18 threatened Hernandez in order to recruit her son into their ranks, but they also threatened *Hernandez*, rather than another person, because of her family connection to her son. Thus, * * * there were multiple central reasons for the threats Hernandez received.

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

* * *

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

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

page 818, after concluding the *Hernandez-Avalos* excerpt , replace the heading [MATTER OF L-E-A-] with NOTES AND QUESTIONS ON ASYLUM CLAIMS BASED ON FAMILY MEMBERSHIP.

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

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

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

3. **Actions by the Attorneys General.** In 2016 the BIA invited supplemental briefing and amicus briefs on the circumstances in which persecution of a family member supports the applicant's particular social group claim. DHS filed a supplemental brief contending that it would be sufficient for an applicant to provide evidence that her membership in her immediate family was a central reason for the persecution she feared,

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

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

4. **Landowning families.** Prior BIA decisions referred to the likelihood that landowners can qualify as a potential particular social group in some settings. *See Matter of Acosta*, 19 I & N Dec. 211 (BIA 1985) (landownership); *Matter of M-E-V-G-*, 26 I & N Dec. 227 (BIA 2014) (landowners in underdeveloped oligarchical society). Faced with recent asylum claims by families of landowners in Guatemala, the BIA rejected the proposed social group as too amorphous and—because the landowners abandoned the land in response to the drug cartel's lethal violence—lacking immutability. *Matter of E-R-A-L-*, 27 I & N Dec. 767 (BIA 2020). In addition to rejecting the proffered social group, the BIA characterized the asylum seeker in *Matter of E-R-A-L-* as an unfortunate victim of private criminal activity. In late 2020 the Ninth Circuit vacated *Matter of E-R-A-L-* and remanded the case to the BIA for further consideration, including additional briefing. *Albizures-Lopez v. Barr*, 2020 WL 7406164 (9th Cir. Dec. 10, 2020). As this Update goes to press in late July 2024, the BIA has not issued a new decision in this case.

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

In recognition of the potential overlap in eligibility for CAT protection and asylum, applicants for protection under the CAT file their claims on the I-589 form, the same form used for asylum claims. Generally, immigration judges, not asylum officers, decide applications for protection under the CAT. Immigration judges typically examine all the

requests for protection together and determine the applicability of CAT protection only if the person fails to qualify for asylum or regular withholding.

The expedited removal procedure, discussed in Chapter Three, incorporates consideration of claims of torture, as well as persecution, into the credible fear determinations. New asylum regulations that became effective on May 31, 2022, grant asylum officers authority to decide protection claims under the CAT (as well as asylum and withholding of removal pursuant to § 241(b)(3)) in expedited removal cases when asylum seekers are determined to have a credible fear of persecution. *See* 8 C.F.R. § 208.16(a). Asylum officers who grant CAT protection, after concluding that the asylum and withholding claims are not successful, must refer the asylum seekers to immigration judges for removal hearings, *see* 8 C.F.R. § 208.14(c), and the immigration judge will adjudicate all the claims for protection. *See* 8 C.F.R. § 208.16(a). As noted in the Update to page 741 of this Chapter, DHS paused the application of this regulation from April to October 2023 as it assigned asylum officers other tasks rather than carrying out credible fear interviews.

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

In 2018, only 1,334 of 70,000 claims for protection under the CAT were successful. *See* EOIR *Statistics Yearbook*, tbl. 16 (FY 2018). EOIR has not published more recent statistics concerning CAT protection.

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

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

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

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

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

In the first half of 2022 President Biden designated three more countries for TPS protection, with estimates that close to 150,000 individuals currently residing in the United States may now be eligible: Ukraine (60,000), Afghanistan (72,500), and Cameroon (12,000). As this Update goes to press in late July 2024, 16 countries are currently designated for TPS in the United States. *See* USCIS, *Temporary Protected Status*.

As noted in the Update to page 304 in Chapter Three and to page 659 in Chapter Six, on July 1, 2022, USCIS announced a new policy that may allow many more TPS-holders to seek adjustment of status under INA § 245. In a nutshell, USCIS will no longer use the advance parole mechanism for TPS-holders traveling abroad, but instead provide a new TPS travel authorization document. TPS-holders returning to the United States pursuant to the new travel authorization will be deemed to have been “inspected and admitted” into TPS status, which may, in turn, satisfy one of the requirements for adjustment of status. *See* USCIS Policy Memorandum, *Rescission of Matter of Z-R-Z-C- as an Adopted Decision; Agency Interpretation of Authorized Travel by TPS Beneficiaries*, July 1, 2022. *See* Kjerstin Lewis, *USCIS Restores Pathway to a Green Card for TPS Holders*, Amer. Immigr. Council, July 11, 2022.

Parole

Perhaps the most significant recent developments in humanitarian protection have been the “humanitarian parole” programs launched as a complement to TPS. The Biden administration has established short-term protection via several new country-specific programs that allow individuals with private sponsors to enter the United States with permission to reside and work for two years. Approved parolees must have a valid passport and must travel by air to the United States. For an overview of the multiple settings in which

the Biden administration has deployed its parole authority, see the Update to page 301 in Chapter Three.

In April 2022, the Biden administration initiated the Uniting for Ukraine parole program. By the end of the first year of the Russian military attack on Ukraine, close to 300,000 Ukrainians had entered the United States, and more than 200,000 Americans had sought to serve as sponsors. *See* Julia Ainsley, *U.S. Has Admitted 271,000 Ukrainian Refugees Since Russian Invasion, Far Above Biden's Goal of 100,000*, NBC NEWS, Feb. 24, 2023; Appleby, *Marking the Biden Administration's Progress in Restoring the US Refugee Admissions Program*, *supra*. In the spring of 2022, the administration also announced a pilot humanitarian parole program for Afghans outside the United States. For a comparison of the multiple dimensions in which the humanitarian parole offered to Ukrainians was more favorable than that offered to Afghans, *see* Muzaffar Chishti & Jessica Bolter, *Welcoming Afghans and Ukrainians to the United States: A Case in Similarities and Contrasts* (Migration Pol'y Inst. July 13, 2022). In addition to the humanitarian parole avenue, the Biden administration increased the capacity of the Special Immigrant Visa (SIV) program for Afghan and Iraqi nationals whose work for the United States put them at serious risk of harm in their homelands. By March 2024, the United States had accepted more than 20,000 parolees, and anticipated accepting 30,000 by the end of FY 2024. Appleby, *Marking the Biden Administration's Progress in Restoring the US Refugee Admissions Program*, *supra*.

In October 2022, the administration launched a humanitarian parole program for Venezuela, and in spring 2023, the administration consolidated that program into a parole program for up to 30,000 people per month from Cuba, Haiti, Nicaragua, and Venezuela combined. More than 1.5 million Americans expressed interest in being sponsors. *See* Camilo Montoya-Galvez, *1.5 Million Apply for U.S. Migrant Sponsorship Program With 30,000 Monthly Cap*, CBS NEWS, May 22, 2023. The Federal Register notices for Cuba, Haiti, Nicaragua, and Venezuela are at 88 Fed. Reg. 26329 (2023) (Cuba); 88 Fed. Reg. 1243 (2023) (Haiti); 88 Fed. Reg. 1255 (2023) (Nicaragua); and 87 Fed. Reg. 63507 (2022) (Venezuela). *See also* Nicole Ward & Jeanne Batalova, *Refugees and Asylees in the United States* (Migration Pol'y Inst. June 15, 2023). By the end of April 2024, more than 435,000 individuals from these four countries had been paroled into the United States. *See* Appleby, *Marking the Biden Administration's Progress in Restoring the US Refugee Admissions Program*, *supra*.

CHAPTER SIX

REMOVAL PROCEEDINGS AND JUDICIAL REVIEW

page 830, after the third full paragraph, add new paragraphs:

If a noncitizen receives proper notice of a removal hearing under § 239 but does not appear for their hearing, the IJ may issue an *in absentia* removal order. *See* INA § 240(b)(5). In June 2024, in a 5-4 decision, the Court decided that the government may satisfy the notice required under INA § 239(a) for *in absentia* removal orders by using multiple consecutive documents to convey all the information required by the statute, rather than provide all the information in a single document. *Campos-Chaves v. Garland*, 144 S. Ct. 1637 (June 14, 2024). Specifically, the Court approved the federal government’s practice of serving an initial notice to appear without a time and place for proceedings, but later providing that information in a subsequent filing. *Id.*; *see also* Lydia Wheeler, *Supreme Court Sides with U.S. in Deportation Notice Dispute*, *Bloomberg Law*, June 14, 2024. Justice Alito’s majority opinion reasoned that notice under § 239(a) is satisfied either by the government providing all necessary information in an NTA under § 239(a)(1) or by later filing a “Notice of change in time or place or proceedings” permitted under § 239(a)(2) with the time and place of the hearing. As per the majority, once the government provides information about the time or place in that subsequent filing, the government has complied with its notice obligations under § 240(b)(5) and noncitizen can be removed *in absentia* for failing to appear at the time and place specified in the subsequent filing. *Id.* at 1650-51

Justice Jackson’s dissent, joined by Justices Sotomayor, Kagan, and Gorsuch, argued that the Court already had ruled against the government’s issuance of incomplete NTAs in *Niz-Chavez v. Garland*, 593 U.S. 155 (2021) (requiring notice in one document for application of the “stop-time” rule for cancellation of removal) and *Pereira v. Sessions*, 585 U.S. 198 (2018) [discussed respectively in the Update to pages 660 and 666 in Chapter Six, and pages 666 and 830 of the Casebook]. *Campos-Chaves*, 144 S. Ct. at 1651, 1658-60 (Jackson, J., dissenting). The dissent noted that the text of INA § 239 put “the burden on Government to send complete NTAs to noncitizens facing removal every time it initiates a removal proceeding.” *Id.* at 1663. According to the dissent, the text of § 239(a)(2) permits the government to “change” a noticed time and place with a “new” time or place but cannot be used to remedy the government’s “chronic failure” to provide complete NTAs in the first instance. Justice Jackson noted the tension between the majority’s interpretation of the INA and the statutory text, stating “it seems wildly counterintuitive for this Court to adopt the Government’s permissive reading of the statute—in contravention of its plain text—so as to help the Government avoid the prescribed consequences of its chronic non-compliance with Congress’s mandates.” *Id.* at 1662.

[*In absentia* removal orders are discussed on pages 868-873 of Chapter Eight of the Casebook.]

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

One media report notes that President Trump filled two-thirds of the 520 IJ positions that existed at the end of his administration (which would amount to over 340 appointments). *See* Reade Levinson, Kristina Cooke & Mica Rosenberg, *Special Report: How Trump Administration Left Indelible Mark on U.S. Immigration Courts*, Reuters, Mar. 8, 2021. The report suggests that IJs appointed by Trump have disproportionately issued deportation orders. *Id.* (reporting that judges hired under Trump ordered deportation in 69 percent of cases, compared to 58 percent for judges hired by presidents before him, dating back to the Reagan administration). As of January 2023, the Biden administration had seated 117 judges, an increase of 23 percent from 2020. *See* Maria Ramirez Uribe, *Biden still hasn't doubled number of immigration judges, but more judges have been seated*, Politifact, Jan. 17, 2023. As of December 2023, EOIR records reveal 682 IJs, with each averaging around 975 closed cases during the prior fiscal year. *See* Transactional Records Access Clearinghouse (TRAC), *Immigration Court Backlog Tops 3 Million; Each Judge Assigned 4,500 Cases*, Dec. 18, 2023.

page 833, replace the remainder of the carryover paragraph starting at the sentence beginning with “The total backlog...” with:

The total backlog has accelerated recently, growing from over one million cases in 2019 to over three million cases by the end of December 2023. *See* Transactional Records Access Clearinghouse (TRAC), *Immigration Court Backlog Tops 3 Million; Each Judge Assigned 4,500 Cases*, Dec. 18, 2023. Immigration courts are now calendaring hearings years into the future. *See* Transactional Records Access Clearinghouse (TRAC), *Immigration Court Backlog*, June 2024; Transactional Records Access Clearinghouse (TRAC), *A Mounting Asylum Backlog and Growing Wait Times*, Dec. 22, 2021.

page 843, replace carryover paragraph from bottom of page 843 to top of page 844 with:

Average representation rates for all noncitizens fell from 65 percent in 2019 to 30 percent in 2024. *See* Transactional Records Access Clearinghouse (TRAC), *Too Few Immigration Attorneys: Average Representation Rates Fall from 65% To 30%*, Jan. 24, 2024. Perhaps not surprisingly, the representation rate for detained noncitizens is even lower than the 30 percent representation rate for all noncitizens. *See* Aditi Shah & Eunice Hyunhye Cho, *No Fighting Chance: ICE's Denial of Access to Counsel in U.S. Immigration Detention Centers* at 6, n.8, ACLU Research Report (2022) (noting that TRAC data for FY 2022 revealed that only 21.3 percent of detained noncitizens had counsel).

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

In November 2022, Rep. Donald McEachin (D-Va.) introduced the Funding Attorneys for Indigent Removal (FAIR) Proceedings Act, H.R. 9304, 117th Cong. (2022), which would require counsel for children and certain vulnerable individuals during removal proceedings. If the DOJ failed to provide counsel, the statute would exempt those noncitizens from

subsequent filing deadlines (such as for a motion to reopen removal proceedings) where applicable. The matter was referred to the House Committee on the Judiciary for further consideration. Congress, however, took no further action on the bill.

In April 2023, Rep. Norma J Torres (D-CA) introduced an even broader bill for noncitizen representation in immigration court. The Fairness to Freedom Act, H.R. 2697, 118th Congress (2023), would establish a legal right to representation in certain immigration proceedings, at the government's expense, for those who cannot afford representation. Congress has not taken further action on the bill as of July 2024.

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

Other states and localities have recently established legal representation programs for noncitizens in immigration proceedings. Colorado H.R. 21-199, signed into law in 2021, established an immigrant legal defense fund to expand the availability of free legal services and representation to low-income individuals in immigration proceedings, with a priority on noncitizens in immigration detention and on noncitizens who are not detained and are in Colorado but outside the Denver Metro area. *See also San Diego County Will Provide Immigrants with Lawyers*, Assoc. Press, May 4, 2021. The Vera Institute of Justice website offers a map depicting other publicly funded local and state deportation defense programs (the "SAFE Network") across the United States. *See* <https://www.vera.org/ending-mass-incarceration/reducing-incarceration/detention-of-immigrants/advancing-universal-representation-initiative>.

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

In Feb. 2022, Representative Zoe Lofgren introduced The Real Courts, Rule of Law Act of 2022, which would constitute immigration courts as Article I courts outside the executive branch. H.R. 6577, 117th Cong. (2022). As this Update goes to press in late July 2024, the bill has not been put up for a floor vote. In the wake of continued congressional inaction, the Migration Policy Institute released an in-depth report diagnosing the ever-increasing workload and strains on the immigration court system, and suggesting administrative and technological recommendations that might help achieve more timely and fair adjudications. Muzaffar Chishti, Doris Meissner, Stephen Yale-Loehr, Kathleen Bush-Joseph & Christopher Levesque, *The Breaking Point: Rethinking the U.S. Immigration Court System*, Migration Pol'y Inst. (July 2023).

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

On July 15, 2021, U.S. Attorney General Merrick Garland overruled *Matter of Castro-Tum* in its entirety. *See Matter of Cruz-Valdez*, 28 I & N Dec. 326 (AG 2021). *Cruz-Valdez* restored the authority of IJs to grant closure consistent with the legal standards in place prior to *Castro-Tum*. The opinion also noted that the DOJ, in the last weeks of the Trump administration, had attempted to promulgate rules to codify *Castro-Tum*, but was enjoined from doing so by a district court. *See Centro Legal de La Raza v. Exec. Office for Immigration*

Review, 524 F. Supp. 3d 919 (N.D. Cal. 2021) (preliminarily enjoining, for failure to comply with the APA, the final rule on administration closure). Consistent with these developments, the EOIR issued a memorandum encouraging immigration judges “to use all docketing tools available to them to ensure fair and timely resolution of cases before them.” Acting Director of Executive Office of Immigration Review Jean King, Policy Memorandum 21-25, *Effect of Department of Homeland Security Enforcement Priorities*, June 11, 2021.

On November 17, 2022, citing the same reasons given for overruling *Castro-Tum*, Attorney General Garland overruled *Matter of S-O-G & F-D-B-*, 27 I & N Dec. 462 (AG 2018). See *Matter of Coronado Acevedo*, 28 I & N Dec. 648 (BIA 2022). In *Coronado Acevedo*, the noncitizen had been granted an immigrant visa petition while an appeal of her removal proceedings was pending before the Board. The Board refused to dismiss the removal proceedings, concluding that *S-O-G-* meant it had no “inherent authority to terminate or dismiss” the proceedings. Overruling *S-O-G-*, AG Garland noted that IJs must be permitted this authority “in these types of limited circumstances” and that the DOJ expects “to issue a notice of proposed rulemaking that would address the authority of immigration judges and the Board to terminate removal proceedings.” *Id.* at 651. In May 2024, the DOJ issued a final rule clarifying and codifying the authority for IJs to manage their dockets, including through administrative closure and termination of removal proceedings. U.S. Dep’t of Justice, *Efficient Case and Docket Management in Immigration Proceedings*, 89 Fed. Reg. 46742 (May 29, 2024).

Still, the extent of IJs’ authority to terminate proceedings initiated prior to *Coronado Acevedo* remains contested. Compare *Garcia v. Garland*, 64 F.4th 62 (2d Cir. 2023) (holding BIA decision that IJs lack authority to administratively close cases warranted *Chevron* deference, was not an abuse of discretion, and that *Castro-Tum* reflects a reasonable interpretation of ambiguous authority that controlled at the time of the BIA’s decision) with *Umana-Escobar v. Garland*, 62. F.4th 1223 (9th Cir. 2023) (remanding for the agency to reassess its decision, made before *Castro-Tum* was overruled, that it lacked authority to administratively close cases).

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

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

page 881, after note 4 in *Notes and Questions on Reinstatement of Removal*, add note 5:

5. There is a circuit split over when a reinstated removal order constitutes a “final order of removal” that would trigger the 30-day deadline for filing a petition for review. The Second

and Fourth Circuits interpret *Nasrallah v. Barr*, 140 S. Ct. 1683 (2020), and *Johnson v. Guzman Chavez*, 141 S. Ct. 2271 (2021) [discussed in the Update to page 386 in Chapter Three] to mean that a reinstated removal order is final at the moment it is reinstated, and therefore begins a noncitizen’s 30-day period to file an appeal regardless whether withholding of removal proceedings have been completed. See *Martinez v. Garland*, 86 F.4th 561 (4th Cir. 2023); *Bhaktibhai-Patel v. Garland*, 32 F.4th 180 (2d Cir. 2022). The Fifth, Sixth, Seventh, Ninth, and Tenth Circuits, however, have held that a reinstated removal order only becomes final—and therefore starts the 30-day period to seek review—at the conclusion of withholding of removal, reasonable fear, or CAT proceedings which often post-date the reinstatement of removal order. See, e.g., *F.J.A.P. v. Garland*, 94 F.4th 620 (7th Cir. 2024); *Argueta-Hernandez v. Garland*, 87 F.4th 698 (5th Cir. 2023); *Alonso-Juarez v. Garland*, 80 F.4th 1039 (9th Cir. 2023).

page 887, after the first full paragraph, add:

The U.S. Supreme Court further constrained judicial review of removal decisions in *Patel v. Garland*, 142 S. Ct. 1614 (2022). Mr. Patel entered the country unlawfully in the 1990s, but later applied for adjustment of status under INA § 245(i). While his adjustment application was pending, he also applied for a state driver’s license. On that license application, he checked a box stating that he was a U.S. citizen. USCIS denied Patel’s adjustment application, concluding that his misrepresentation on the license application made him statutorily ineligible to adjust. Later, DHS sought to remove him based on his unlawful entry. Patel conceded his removability but repeated his request for adjustment as a form of relief. He testified that he had mistakenly checked the “citizen” box and therefore lacked the mental state required to establish misrepresentation and bar him from adjustment. The IJ did not believe his testimony, however, and ordered his removal. Importantly, because the IJ concluded Patel was statutorily ineligible, the IJ did not have to decide whether Patel warranted a favorable exercise of discretion.

On petition for review, both a panel and the Eleventh Circuit *en banc*, held that it lacked jurisdiction to hear Patel’s claim, holding that § 242(a)(2)(B)(i) prohibited a federal court from reviewing “any judgment regarding the granting of relief” of various INA provisions, including § 245. In May 2022, a 5-4 majority of the Supreme Court affirmed the judgment, reading § 242 as foreclosing judicial review of Patel’s appeal. 142 S. Ct. at 1627. As a result of the case, Patel, who has lived in the United States for nearly thirty years with his spouse and three children, one of whom is a citizen and two of whom are permanent residents, could face deportation because he checked the wrong box on a driver’s license application.

In reaching this result, the majority rejected both litigating parties’ interpretations of § 242. *Id.* at 1623-25. Indeed, the federal government agreed with Patel’s position that § 242 did not foreclose his appeal, albeit for slightly different reasons. Patel maintained that § 242’s bar only applied to the ultimate decision of the immigration judge whether to grant relief, and not any underlying decision upon which that final judgment might be based. The government, in comparison, argued that the “judgment” foreclosed by § 242 only referred to

discretionary decisions, but would have classified the factual findings at issue as nondiscretionary. Rejecting both arguments, Justice Barrett’s opinion adopted the view that § 242’s bar on review of “any judgment” meant a bar on review on all authoritative decisions relating to the granting or denial of discretionary relief. *Id.* at 1626.

In dissent, Justice Gorsuch’s opinion (joined by Justices Breyer, Kagan, and Sotomayor) would have read § 242 as inapplicable to the initial, statutory ineligibility determination, and only applicable to the secondary, discretionary decision whether to grant or deny relief. *Id.* at 1627. As a result of the majority’s decision, Justice Gorsuch noted that federal courts may not review or correct IJ or BIA decisions that an individual is ineligible for relief, even when those decisions might rest on mistaken factual determinations. *Id.* at 1637. More broadly, potentially erroneous determinations that lead to statutory ineligibility for several avenues of relief might be shielded from any meaningful federal court oversight.

The Seventh and Fourth Circuits have since extended the majority’s reasoning in *Patel v. Garland* to hold that judicial review is unavailable for discretionary denials of adjustment of status by USCIS. *Shaiban v. Jaddou*, 97 F.4th 263 (4th Cir. 2024); *Britkovyy v. Mayorkas*, 60 F.4th 1024 (7th Cir. 2023).

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

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

page 893, after the carryover sentence from page 892 and before the sentence that starts “We return . . . ,” add new paragraph:

In *Wilkinson v. Garland*, the Supreme Court considered the following question:

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

In March 2024, in a 6-3 decision, the Supreme Court held that an immigration judge’s negative determination of “exceptional and extremely unusual hardship” as required for cancellation of removal is reviewable by a federal court under INA § 242(a)(2)(D) [8 U.S.C. § 1252(a)(2)(D)] as a mixed question of law and fact. 601 U.S. 209 (2024). Justice Sotomayor’s majority opinion noted, “[t]oday’s decision announces nothing more remarkable than the fact that this Court meant what it said in *Guerrero-Lasprilla*: Mixed questions of law and fact, even when they are primarily factual, fall within the statutory definition of ‘questions of law’...and are therefore reviewable.” *Id.* at 225. The Court maintained that its ruling was

consistent with its 2022 decision in *Patel v. Garland* [discussed in the Update to page 887 above], which prohibited judicial review of certain determinations by the IJ. *Id.*; *see also id.* at 226-27 (Jackson, J. concurring in judgment) (clarifying that courts cannot review the facts underlying a hardship determination). Finally, the Court clarified that although the hardship determination was not discretionary, an IJ's decision at the second step of cancellation adjudication involves "unreviewable discretion." *Id.* at 218 and 225-26. Justice Alito, joined by Chief Justice Roberts and Justice Thomas, dissented. *Id.* at 228-33.

page 913, after note 5, add note 6:

6. In May 2023, the Biden administration launched the Family Expedited Removal Management (FERM) program, enabling ICE to place families into expedited removal proceedings to occur within 30 days. *See* U.S. Immigr. & Customs Enft., *ICE Announces New Process for Placing Family Units in Expedited Removal*, May 10, 2023. Because FERM removal timelines are so rushed, families' access to counsel, as well as meaningful opportunities to apply for relief, are drastically diminished. *See* National Immigrant Justice Center, *Too Fast for Fairness: "Expedited Removal" and The Family Expedited Removal Management Program*, Jan. 11, 2024. Families placed into FERM experience such low representation rates not only because of the financial burden of private representation, but because they still seek access to housing, food, and employment within the first weeks of their arrival. National Immigrant Justice Center, *ICE's Family Expedited Removal Management (FERM) Program Puts Families At Risk*, Aug. 31, 2023.

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

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

The effects of the Court's ruling were evident soon after in *Al Otro Lado, Inc. v. Mayorkas*, 619 F. Supp. 3d 1029 (S.D. Cal. 2022) (assessing legality of DHS's "Turnback Policy," including a "metering" and "waitlist" system for asylum-seekers arriving at ports of entry). The district court, prior to *Aleman Gonzales*, had ruled that the DHS "turnback policy" for asylum seekers at ports of entry violated immigration law and the APA. Subsequently, in considering the appropriate remedy, the district stated that had it heard the case prior to

Aleman Gonzales, it “would not [have] hesitate[d]” to issue “broad, programmatic injunctive relief.” In the wake of *Aleman Gonzales*, however, the district court could only provide injunctive relief to the individual plaintiffs. In the remedies ruling, District Judge Bashant offered a scathing appraisal of the effect of *Aleman Gonzales*:

With acknowledgment that its decision will further contribute to the human suffering of asylum seekers enduring squalid and dangerous conditions in Mexican border communities as they await entry to POEs, this Court finds the shadow of *Aleman Gonzalez* inescapable in this case. Even the most narrow, meaningful equitable relief would have the effect of interfering with the “operation” of § 1225 [INA § 235], as that term is construed by the *Aleman Gonzalez* Court, and, thus, would clash with § 1252(f)(1)’s [INA § 242(f)(1)’s] remedy bar. *Aleman Gonzalez* not only renders uneconomical vindication of Plaintiff class members’ statutorily- and constitutionally-protected right to apply for asylum, those inefficiencies inevitably will lead to innumerable instances in which Plaintiff class members will be unable to vindicate their rights at all. Thus, while the majority and dissent in *Aleman Gonzalez* hash out their textual disagreements concerning § 1252(f)(1)’s [INA § 242(f)(1)’s] scope in terms of remedies, make no mistake, *Aleman Gonzalez* leaves largely unrestrained immigration enforcement agencies to rapaciously scale back rights. *Al Otro Lado*, 619 F. Supp.3d at 1033-34.

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

CHAPTER NINE

ENFORCEMENT AND BEYOND

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

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

page 931, after the carryover paragraph, add this paragraph:

The 2022 DHS Statistical Yearbook, published in November 2023, reported these more recent statistics for removals and returns:

year	removals (removal orders)	administrative returns (withdrawal of applications for admission)	enforcement returns (all other returns)	expulsions (on public health grounds under Title 42 order)
2018	327,608	72,756	87,202	x
2019	347,090	89,719	81,401	x
2020	237,364	113,857	53,595	206,770
2021	85,783	128,339	49,664	1,071,074
2022	108,733	180,266	81,121	1,103,966

See 2022 Yearbook of Immigration Statistics 103, table 39.

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

5. *Egbert v. Boule*, 596 U.S. 482, 142 S. Ct. 1793, 213 L.Ed.2d 54 (2022), arose from a physical confrontation between a U.S. citizen plaintiff and a U.S. Border Patrol agent who allegedly injured the plaintiff and retaliated against him for filing a complaint with the agent’s supervisors at the Border Patrol. The U.S. Supreme Court held that the plaintiff had no cause of action for money damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The Court, with Justice Thomas writing for the majority, applied *Hernandez v. Mesa*, 140 S. Ct. 735 (2020), to disallow a *Bivens* claim. Though the defendant agent was not “straddling” the border and the plaintiff was a U.S. citizen, national security was “at issue,” and the defendant was furthering the Border Patrol’s statutory mandate to prevent unlawful entry or exit. Justice Sotomayor dissented, joined by Justices Breyer and Kagan.

6. On January 20, 2021, President Biden terminated the state of emergency on the U.S. southern border that President Trump had declared on February 19, 2019, in Presidential Proclamation 9844. Biden’s Proclamation stated: “It shall be the policy of my

Administration that no more American taxpayer dollars be diverted to construct a border wall” and ordered a pause in construction except for projects already funded by specific congressional appropriates. *See Proclamation 10142, Termination of Emergency With Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction*, 86 Fed. Reg. 7225 (2021). In late 2021, the Biden administration announced that it would stop most border wall construction and instead use border wall funding to close “small” gaps in the wall and pay for environmental and cleanup projects in areas of wall construction during the Trump administration. Camilo Montoya-Galvez, *U.S. to Use Border Wall Funds to Close Gaps and Clean Up Trump-Era Construction Sites*, CBS News, Dec. 20, 2021.

More recently, some observers have noted that the administration has continued construction of barriers on the border, even if they might be called “closing small gaps” or “environmental and cleanup projects.” *See Philip Bump, Has Biden Actually Not Built “One Meter” of Border Wall?*, Wash. Post, Jan. 11, 2023. After the Biden administration announced in October 2023 that it would waive a variety of environmental, historic preservation, and other statutory requirements to continue work on a portion of the wall, Homeland Secretary Mayorkas issued a statement reiterating its policy that “a border wall is not the answer” and that the administration’s border wall construction was funded by appropriations during the prior administration and required to be spent for that purpose. *See Administration Reiterates Opposition to Border Wall*, 100 Interp. Rel. 40-10 (Oct. 16, 2023). In May 2024, a federal district court in Texas issued a permanent injunction requiring the Biden administration to spend appropriated funds for new wall construction, not for repairs of sections of existing border wall or to remediate environmental damage. *See General Land Office of Texas v. Biden*, 2024 WL 2754118 (S.D. Tex. May 29, 2024).

The next selection addresses border enforcement in the Biden administration after the end of the border restrictions imposed under the authority in Title 42.

MUZAFFAR CHISHTI, KATHLEEN BUSH-JOSEPH & JULIAN MONTALVO
TITLE 42 POSTMORTEM:
U.S. PANDEMIC-ERA EXPULSIONS POLICY DID NOT SHUT DOWN THE BORDER

Migration Policy Institute. April 25, 2024.

* * *

One year after the use of Title 42 was ended and amid ongoing record encounters at the U.S.-Mexico border, some politicians are expressing nostalgia for the public-health authority. Former President Donald Trump, now the presumptive Republican presidential nominee, and his allies are arguing for the return of the policy, practically describing it as a magic wand that will restore order to the border. Even some congressional Democrats have pointed to the discontinuation of Title 42 as one reason for the current border morass.

Though COVID-19 is no longer a public-health emergency, indications from the Trump camp suggest that a second administration would re-invoke Title 42. Stephen Miller, a Trump senior advisor, told *The New York Times* a new order could be based on “severe strains of the flu, tuberculosis, scabies, other respiratory illnesses like RSV and so on, or just a general issue of mass migration being a public-health threat and conveying a variety of communicable diseases.”

Did Title 42 in fact lead to a better managed border?

The evidence indicates it was not the success its admirers contend in limiting irregular migration, and it may represent failed deterrence. During its use, the numbers of encounters surged and cases of migrants attempting unauthorized re-entry soared, as did the number of “gotaways”—the term used by U.S. Customs and Border Protection (CBP) for migrants who were not intercepted while crossing the border illegally. Because Title 42 short-circuited the careful series of consequences that CBP had put in place over earlier years, including criminal prosecution for illegal entry or re-entry, it created major churn at the border: Facing no formal consequences for their unauthorized entry, expelled migrants kept trying to cross until they succeeded.

There were exceptions to the Title 42 policy, such as when a federal judge exempted unaccompanied children from its application, which meant that some families split up before reaching the border to allow children to cross without adults. And by preventing migrants from even filing an asylum claim, Title 42 shifted the Overton window [that is, the group of policies that are widely accepted throughout society as legitimate policy options] so that the right to seek asylum—a pillar of U.S. and international law—was no longer guaranteed in all cases. This precedent, set in motion by the Trump administration, likely informed President Joe Biden’s recent support for a now-abandoned bipartisan Senate bill that would have resumed expulsions once an average of 5,000 encounters occurred in a day.

Reimposition of Title 42 likely would do little to tackle the nature and scale of irregular migration to the U.S.-Mexico border today, given the fact that the size and increasing diversification of nationalities reaching the border have outpaced the U.S. government’s ability to process, detain, and remove vast numbers of border arrivals.

This article provides an overview of the scale, impact, and effectiveness of Title 42, ahead of the one-year anniversary of the order’s lifting in May 2023. While Title 42 was just one of many landmark and wide-ranging immigration restrictions imposed by the Trump administration, the public-health authority was both larger in scale and represented a more emblematic shift away from the United States’ historical openness to people seeking refuge. Continued into the Biden administration, which ultimately carried out more expulsions than the Trump administration, Title 42’s usage reframed the scope of border enforcement.

High-Profile but Questionable Results

While use of the World War II-era authority had been floated early in the Trump administration to limit the admission of border arrivals, Cabinet secretaries resisted

invoking Title 42 due to lack of a public-health justification. The outbreak of COVID-19 changed that, though some officials still questioned the scientific basis for the restrictions. In March 2020, the federal Centers for Disease Control and Prevention (CDC) issued an order under Title 42 of the U.S. Code allowing for the quick expulsion of migrants because of “a serious danger of the introduction of COVID-19.”

Under Title 42, migrants arriving at the border without authorization were subject to immediate expulsion, with limited humanitarian exceptions. Arrivals at the southwest border slowed in the early days of Title 42’s use, likely due to it acting as an early deterrent as well as general pandemic-related travel restrictions worldwide. However migrant encounters began increasing in May 2020, less than two months after the order’s imposition, and have remained high ever since * * *. If Title 42 was intended to deter unauthorized migration, it clearly did not succeed, even from early on.

The scale of expulsions—which occurred overwhelmingly at the U.S.-Mexico border but also at the northern border—dwarfed other Trump administration measures such as the Migrant Protection Protocols (MPP, also known as Remain in Mexico), which required some asylum seekers to wait in Mexico while their case was processed in U.S. immigration court. Border officials expelled migrants more than 2,960,000 times under Title 42, compared to approximately 81,000 asylum seekers processed throughout MPP, in operation from 2019 to 2022.

It took CBP officials on average 15 minutes to process an encountered migrant under Title 42. Authorities usually did not screen migrants for protection claims, other than in exceptional cases. If they did not meet an exception, migrants were then expelled to Mexico at the closest port of entry, or their country of origin if possible. By contrast, it takes CBP agents anywhere from 30 minutes to a few hours to formally process an apprehension under Title 8, the traditional statutory authority used prior to the pandemic and since the lifting of Title 42.

Expulsions without Meaningful Enforcement

During the Title 42 era, expelled migrants often repeatedly tried to cross again. Unauthorized migrants formally processed under the standard Title 8 authority face a five-year bar on re-entry, with risk of prison time if they are apprehended again. But without these consequences under Title 42, migrants were effectively incentivized to repeat their attempts until they eventually succeeded in entering the United States. * * * The recidivism rates were even higher for particular nationalities: for Mexicans and northern Central Americans, the rate surged from 20 percent in FY 2019 to 49 percent in May 2022. Border officials were processing some migrants multiple times.

Beyond a hike in recidivism, the number of migrants crossing without being intercepted also soared. “Gotaways,” the term used by CBP for such migrants, increased dramatically during the Title 42 era and quickly declined after it ended. The month before the end of Title 42, in April 2023, there were nearly 73,500 gotaways, according to federal

data obtained by the Cato Institute; two months later, the number had more than halved, to 32,800.

Increasingly Limited Use of Title 42

The use of Title 42 at the border was not uniform, and it diminished over time; just 41 percent of overall encounters while the order was in effect led to expulsions. This is largely because there were exceptions to the use of Title 42, including for unaccompanied children, and CBP officials used discretion to allow some migrants to enter the United States because of individual humanitarian concerns or other reasons.

The likelihood of expulsion depended on a migrant's nationality and family profile. The policy was principally used to expel Mexicans and Central Americans, whom Mexico agreed to accept. Single adults from Mexico, El Salvador, Guatemala, and Honduras were expelled 89 percent of the time they were encountered, versus 8 percent of single adults from other countries. Logistical and diplomatic barriers prevent the United States from removing unauthorized migrants of certain nationalities—including China, Cuba, and Venezuela—which have posed a problem as more migrants from these and other nontraditional origin countries have been encountered crossing the border.

Unaccompanied children were excluded from expulsions starting in November 2020 due to a court order in *P.J.E.S. v. Wolf*. In 2021, Mexico began refusing to accept the return of families with children. As a result, CBP began processing children and families under Title 8, the standard immigration authority, releasing many into the United States to await deportation proceedings in immigration court. At ports of entry, CBP's Office of Field Operations processed about 20,000 migrants per month under humanitarian exceptions to Title 42. CBP typically relied on nonprofit organizations along the U.S.-Mexico border to identify vulnerable migrants such as those with severe medical needs.

While migrants were not screened for asylum under Title 42, they could seek U.S. protection under the Convention Against Torture. Individuals invoking this protection had to affirmatively state a "reasonably believable" fear of torture if they were expelled. It is not clear how many migrants were screened or entered the United States on those grounds.

Declining Usage

When Title 42 began in March 2020, 7,200 migrants were processed under it, representing nearly 14 percent of the 52,000 encounters nationally that month. CBP averaged more than 75,900 expulsions per month over the course of the life of Title 42. Usage peaked in May 2021, when 57 percent of all encounters led to expulsions (113,800 out of a total of 198,500). The final full month that Title 42 was in place, April 2023, expulsions accounted for 32 percent of all encounters: 87,200 out of 276,000.

Unintended Consequences

Title 42 also led to a form of family separation that was different from the widely criticized practice of detaining parents and children separately, as had occurred earlier in the Trump administration, but which yielded a similar result. After the November 2020 court

ruling that authorities could no longer apply Title 42 to unaccompanied children, some parents separated themselves from their children, sending them unaccompanied across the border. In FY 2021, after the court order went into effect, the Border Patrol processed more than 12,200 unaccompanied minors who had previously been expelled under Title 42, according to data obtained by CBS News. In FY 2022, 153,000 unaccompanied children arrived at a U.S. border, the most in history.

A Stark Departure from Decades of Law on Asylum

Title 42's blocking of access to asylum was a departure from decades of law and policy, as immigrant advocacy groups highlighted in lawsuits challenging the expulsions. In September 2021, a federal district court's ruling in *Huisha Huisha v. Mayorkas*—later upheld by the U.S. Court of Appeals for the DC Circuit—prevented CBP from expelling families back to countries where they faced persecution or torture, citing the grave harm they could experience in their home countries and in Mexico due to factors such as cartel violence.

Against this backdrop, candidate Biden promised to end Title 42, among other Trump measures. However, upon taking office in January 2021, the Biden administration kept Title 42 in place, leading immigrant-rights advocates to allege that the Department of Homeland Security (DHS) was using the public-health policy as a border deterrent. In April 2022, the administration announced that it would end the use of Title 42, but legal challenges by some Republican-led states delayed those plans for more than a year. Following appeals that reached the Supreme Court, the administration on May 11, 2023 ended the public-health emergency that authorized Title 42, thus terminating the expulsions policy.

Post-Title 42: Still High Arrivals, but More Orderly

Leading up to the end of Title 42, many observers expected a surge of arrivals to the southwest border. In anticipation, Biden in January 2023 announced a post-Title 42 plan that involved a mix of disincentives and incentives to channel people away from irregular crossings and towards lawful entries. One year later, the new strategy has had mixed success.

To disincentivize illegal crossings, the Biden administration restricted access to asylum for migrants crossing without authorization and increased enforcement at the southwest border. DHS removed or returned 660,000 migrants between May 12, 2023 and April 3, 2024—the most since FY 2011, when there were more than 715,000 removals and returns. However, arrivals continue to outpace the government's capacity; CBP recorded more than 2 million encounters at the southwest border from May 2023 to February 2024.

On the other hand, nearly 1 million arrivals have come through legal pathways, many of which are new. * * *

* * *

All the same, irregular migration to the U.S.-Mexico border has continued at a high level, causing ripple effects beyond the border, including unforeseen strains on major destination cities, especially New York, Chicago, and Denver, spurring calls from both Republicans and some Democrats to reimpose Title 42.

The combination of high numbers, vast diversification of nationalities, and family compositions of arrivals mean that even if the expulsions policy were reinstated, border arrivals would likely continue to overwhelm officials' processing capacity. CBP is on track to record more than 1 million encounters of migrants arriving as "family units" (CBP's term) in FY 2024—a group that both the Biden and Trump administrations were unable to expel either because of a court order or Mexico's refusal to accept them.

While Title 42 offers a campaign-style slogan to shut down the border, the reality is that it never met that promise. And whatever outcomes it had come at the very sizeable cost of reneging on decades of U.S. commitments to guaranteeing humanitarian protection. The Biden administration is working closely with Mexico and other countries in the region on measures that seem to be stabilizing flows. Additionally, the administration is reportedly considering executive actions that could permit quick invocation of emergency authorities to halt asylum seeking between ports of entry should numbers rise in coming months.

Such efforts notwithstanding, current and future border control challenges are the result of global forces compelling heightened and different kinds of migration to the United States, combined with years of congressional inaction that have left the U.S. immigration enforcement and asylum systems with insufficient resources and outdated tools. Those challenges are here to stay, with or without Title 42.

Biden Administration June 2024 Order on "Securing the Border"

In May 2024, the Biden administration issued an interim final rule on "Security the Border" that went further in restricting movement across the southern border of the United States and thereby restricting access to the U.S. asylum system. The administration invoked INA § 212(f) as authority as the basis for a Proclamation that permits DHS to suspend consideration of asylum claims. The Proclamation also changed the standard for evaluating asylum claims when the number of encounters at the southern border return to a consecutive seven-day average of fewer than 1,500 encounters. *See Securing the Border*, Proclamation 10773, 89 Fed. Reg. 48487 (June 3, 2024); *see also* U.S. Dep't of Homeland Sec. & U.S. Dep't of Justice, *Securing the Border*, 89 Fed. Reg. 48710 (June 7, 2024) (interim final rule implementing Proclamation). Immigrant advocacy groups have challenged the Proclamation and the accompanying interim final rule as violations of the INA and the APA. *See Las Americas Immigrant Advocacy Center v. U.S. Dep't of Homeland Sec.*, Complaint, No. 1:24-CV-01702 (D.D.C. June 12, 2024); *see also* Hamed Aleaziz, *A.C.L.U. Sues to Stop Biden's Asylum Ban on the U.S.-Mexico Border*, N.Y. Times, June 12, 2024. A fuller overview is in this Update to pages 742-43.

* * *

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

On January 26, 2021, Acting Attorney General Monty Wilkinson issued a Department of Justice memorandum formally rescinding the zero-tolerance policy. *See* U.S. Dep't of

Justice, Office of the Att’y Gen., *Memorandum for all Federal Prosecutors, Rescinding the Zero-Tolerance Policy for Offenses Under 8 U.S.C. § 1325(a)*, Jan. 26, 2021. On the Trump administration’s zero tolerance policy, see William A. Kandel, *The Trump Administration’s “Zero Tolerance” Immigration Enforcement Policy*, Cong. Res. Serv. (2021).

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

On the increase during the Biden administration through April 2024 in the number of criminal prosecutions for immigration violations, see *Immigration Prosecutions Increase With New Push for Border Enforcement*, TRAC Immigration (June 25, 2024) (showing that prosecution levels are up by 65 percent from three years before).

page 950, at the end of note 4, add new note 5:

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

In August 2021, the federal district court in *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996 (D. Nev. 2021), held that INA § 276 is unconstitutional because it violates the equal protection component of the Fifth Amendment. Analyzing both the statute’s original enactment in 1929 and its reenactment in 1952 as part of the Immigration and Nationality Act, the court found that “racial animus—as evidenced through the historical background, legislative history, sequence of events leading up to passage—was, at minimum, a motivating

factor in the passage of Section [276] that disparately impacts Mexican and Latinx individuals.” The court concluded that the statute, though facially neutral, has a racially disparate impact. Applying *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977), this showing of disparate impact shifted the burden to the government to show that § 276 would have been enacted without a racially discriminatory purpose. After finding that the government failed to carry this burden, the court granted the defendant’s motion to dismiss his indictment for unlawful reentry under § 276.

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

For discussion of judicial treatment of case precedents reflecting racist premises or attitudes, see Ahilan T. Arulanantham, *Reversing Racist Precedent*, 112 Geo. L.J. 439 (2024).

page 952, after the carryover paragraph, add:

Biden Administration Enforcement Priorities

Immediately upon taking office, President Biden revoked President Trump’s executive order on interior enforcement and directed the Department of Homeland Security to revise its civil immigration enforcement priorities. *See* Exec. Order 13993, *Revision of Civil Immigration Enforcement Policies and Priorities*, 86 Fed. Reg. 7051 (2021) (revoking Executive Order 13768 of Jan. 25, 2017). Concurrently, Biden’s Acting Secretary of DHS issued new interim enforcement priorities. *See* Memorandum from Acting Sec’y of Homeland Sec. David Pekoske, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Jan. 20, 2021). These interim priorities signaled a rejection

of the Trump administration's approach and a return to the priorities of the Obama administration. As part of the new directive, DHS had planned to implement a "100-day Pause on Removals." That moratorium on removals was challenged by a group of states and enjoined by a federal district court. *Texas v. United States*, 524 F. Supp.3d 598 (S.D. Tex. 2021) (finding state had standing to challenge federal policy and issuing nationwide injunction). A subsequent ruling by the same district judge enjoined the enforcement priorities in the interim memo. 555 F. Supp.3d 351 (S.D. Tex. 2021).

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

It is estimated that there are more than 11 million undocumented or otherwise removable noncitizens in the United States. We do not have the resources to apprehend and seek the removal of every one of these noncitizens. Therefore, we need to exercise our discretion and determine whom to prioritize for immigration enforcement action.

In exercising our discretion, we are guided by the fact that the majority of undocumented noncitizens who could be subject to removal have been contributing members of our communities for years. They include individuals who work on the frontlines in the battle against COVID, lead our congregations of faith, teach our children, do back-breaking farm work to help deliver food to our table, and contribute in many other meaningful ways. Numerous times over the years, and presently, bipartisan groups of leaders have recognized these noncitizens' contributions to state and local communities and have tried to pass legislation that would provide a path to citizenship or other lawful status for the approximately 11 million undocumented noncitizens.

The fact an individual is a removable noncitizen therefore should not alone be the basis of an enforcement action against them. We will use our discretion and focus our enforcement resources in a more targeted way. Justice and our country's well-being require it.

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

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

^a This memorandum is reprinted in the 2024 edition of the statutory supplement.—eds.

A. Threat to National Security

A noncitizen who engaged in or is suspected of terrorism or espionage, or terrorism-related or espionage-related activities, or who otherwise poses a danger to national security, is a priority for apprehension and removal.

B. Threat to Public Safety

A noncitizen who poses a current threat to public safety, typically because of serious criminal conduct, is a priority for apprehension and removal.

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

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

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

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

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

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

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

The decision how to exercise prosecutorial discretion can be complicated and requires investigative work. Our personnel should not rely on the fact of conviction or the result of a database search alone. Rather, our personnel should, to the fullest extent possible, obtain and review the entire criminal and administrative record and other investigative information to learn of the totality of the facts and circumstances of the conduct at issue. The gravity of an apprehension and removal on a noncitizen's life, and potentially the life of family members and the community, warrants the dedication of investigative and evaluative effort.

C. Threat to Border Security

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

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

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

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

* * *

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

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

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

* * *

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

It is an unfortunate reality that unscrupulous employers exploit their employees' immigration status and vulnerability to removal by, for example, suppressing wages, maintaining unsafe working conditions, and quashing workplace rights and activities. Similarly, unscrupulous landlords exploit their tenants' immigration status and vulnerability to removal by, for example, charging inflated rental costs and failing to comply with housing ordinances and other relevant housing standards.

We must ensure our immigration enforcement authority is not used as an instrument of these and other unscrupulous practices. A noncitizen's exercise of workplace or tenant rights, or service as a witness in a labor or housing dispute, should be considered a mitigating factor in the exercise of prosecutorial discretion.

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

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

The Biden administration then sought certiorari review as well as a stay of the Fifth Circuit's decision from the Supreme Court (both as a whole and as to its nationwide scope). In *Texas v. United States*, the U.S. Supreme Court declined to stay the Texas district court order or limit its geographic scope, but the Court granted certiorari. *See* 143 S. Ct. 51 (2022). The Court directed the parties to brief three questions: (1) whether state plaintiffs had standing to challenge enforcement guidelines; (2) whether the guidelines violate INA

§§ 236(c) or 241(a), or the Administrative Procedure Act; and (3) whether INA § 242(f)(1) prevents a federal court from stopping the enforcement of enforcement guidelines. The third question concerned the applicability of *Garland v. Aleman Gonzales*, 142 S. Ct. 2057 (2022), which had raised serious doubts about the use of classwide injunctive relief to remedy violations of immigration statutes. It was unclear if the same reasoning would limit the use of injunctive relief against the federal government's immigration enforcement policies. *Aleman Gonzales* is described more fully in the Update to page 992 in Chapter Eight.

On June 23, 2023, an 8-1 majority of the Supreme Court ruled on the first question, albeit in two separate opinions, one of which garnered five votes, while the other garnered three. The Court held that the states lacked standing to challenge the enforcement priorities and therefore that federal courts lacked jurisdiction to review the claims, though for different reasons. According to the majority opinion for the Court by Justice Kavanaugh, joined by Chief Justice Roberts and Justices Sotomayor, Kagan, and Jackson: “[t]he states have not cited any precedent, history, or tradition of courts ordering the Executive Branch to change its arrest or prosecution policies so that the Executive Branch makes more arrests or initiates more prosecutions.”). *United States v. Texas*, 599 U.S. 670, 677, 143 S. Ct. 1964, 1970 (2023).

The majority cited *Reno v. AADC* [covered more fully on pp. 647-59 in Chapter Five of the casebook, and pp. 702-04 in Chapter Six] and *Arizona v. United States* [covered more fully on pp. 1050-65 in Chapter Nine] for the proposition that “enforcement discretion over arrests and prosecutions extends to the immigration context.” 599 U.S. at 679, 143 S. Ct. at 1971. The majority was careful, however, to note that because plaintiffs lacked standing, the Court’s ruling expressed no opinion on whether the President and the executive branch were complying with removal statutes. The majority also stressed that its rationale did not necessarily extend to policies that do more than govern the exercise of enforcement discretion, such as those that also provide benefits such as the DACA program. Justices Gorsuch, Thomas, and Barrett concurred in the judgment, but would have ruled that the district court lacked authority to enjoin the prosecutorial discretion guidelines under 8 U.S.C. 1252(f)(1), as construed in *Aleman-Gonzalez*.

Notes on Biden Administration Enforcement Priorities

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

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

The memorandum included a nonexhaustive list of examples of protected areas, including: a school, such as a pre-school, primary or secondary school, vocational or trade

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

The fundamental question is whether our enforcement action would restrain people from accessing the protected area to receive essential services or engage in essential activities. Our obligation to refrain, to the fullest extent possible, from conducting a law enforcement action in or near a protected area thus applies at all times and is not limited by hours or days of operation.

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

2. In April 2021, DHS rescinded ICE’s authority to impose civil financial penalties on noncitizens who fail to leave the United States. The Trump administration began in 2018 to exercise ICE’s authority to impose such penalties. *See DHS Ends Fines as Penalties for Unlawful Presence*, 98 Interp. Rel. 18-8 (May 3, 2021).

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

4. The Biden administration terminated the office for victims of crimes by foreign nationals — the Victim of Immigration Crime Engagement Office (VOICE) that the Trump administration established in 2017. In June 2021, the Biden administration replaced it with a “streamlined and all-encompassing” telephone service. *See ICE Phone Line Replaces Crime Victims Office*, 98 Interp. Rel. 24 (June 21, 2021).

page 955, at the end of subsection (iii) and before section c, add:

(iv) Application to state governments as employers

On May 18, 2023, the Regents of the University of California, citing the university's commitment to "ensuring that all students, regardless of immigration status, can pursue and attain a world-class UC education," voted unanimously to appoint "a Regents working group that, by the end of November of this year, will consider relevant issues and develop an implementation plan and a legal strategy" to hire students for university employment regardless of immigration status and federal employment authorization. *See* Teresa Watanabe, *UC Regents Take Groundbreaking Step Toward Hiring Immigrant Students Without Legal Status*, L.A. Times, May 18, 2023. The legal foundation for the Regents' decision was the analysis, endorsed by leading constitutional law and immigration law scholars, that federal employer sanctions do not apply to state governments because the relevant statute nowhere says expressly that it applies to state governments. U.S. Supreme Court decisions have held that especially in areas of traditional state prerogatives (such as employment), a federal statute does not apply to state governments unless its text expressly covers states. IRCA includes no such language. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985); *see also Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 543 (2002).

On January 25, 2024, the Regents voted 10 to 6 to postpone any implementation plan for one year. California State Assemblymember David Alvarez (D-Chula Vista) responded by introducing AB 2586, which would call on public higher education in the state of California – campuses of the University of California, the State University, and California Community College campuses – to hire students in on-campus employment without regard to federal employment authorization. In May 2024, the California State Assembly approved the legislation by a 59 to 4 vote. As of late July 2024, the Senate Judiciary Committee and the Senate Education Committee approved it by lopsided majorities, and the bill is pending in the Senate Appropriations Committee.

page 963, at the end of note 5, add new notes 6 and 7:

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

Our worksite enforcement efforts can have a significant impact on the well-being of individuals and the fairness of the labor market. Our accomplishments in this area make clear that we can maximize the impact of our efforts by focusing on unscrupulous employers who exploit the vulnerability of undocumented workers. These employers engage in illegal acts ranging from the payment of substandard wages to imposing unsafe working conditions and facilitating human trafficking and child exploitation. Their culpability compels the intense focus of our enforcement resources.

In addition, unscrupulous employers harm each worker competing for a job. By exploiting undocumented workers and paying them substandard wages, the unscrupulous employers create an unfair labor market. They also unfairly drive down their costs and disadvantage their business competitors who abide by the law.

We can most effectively protect the American labor market, the conditions of the American worksite, and the dignity of the individual by focusing our worksite enforcement efforts on unscrupulous employers. This is how we will proceed.

U.S. Dep't of Homeland Sec., *Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual* (Memorandum from A. Mayorkas to ICE, CBP, CIS Directors) (Oct. 12, 2021).

7. In January 2023, the Department of Homeland Security (DHS) announced that noncitizen workers who are victims of, or witnesses to, the violation of labor rights, can access a streamlined and expedited process to request deferred action – in practical terms, temporary protection from deportation and eligibility for a work permit. See U.S. Dep't of Homeland Sec., *DHS Announces Process Enhancements for Supporting Labor Enforcement Investigations*, Jan. 13, 2023.

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

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

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

According to ICE's website, there are currently two types of § 287(g) agreements, "Jail Enforcement Model" ("JEM") and "Warrant Service Officer" ("WSO"). JEM agreements allow ICE to train employees of law enforcement agencies (LEAs) to "identify and process removable noncitizens" who have criminal or pending criminal charges who are arrested by state or local LEAs. WSO agreements facilitate ICE officers to "train, certify, and authorize state and local law enforcement" officials to "serve and execute administrative warrants on" noncitizens who are in their agency's jail. Notably, it appears that the number of § 287(g) agreements increased since 2020. As explained on page 1020, in July 2020, there were 75 § 287(g) with 21 states. Four years later, ICE has a total of 135 § 287(g) agreements, of which 60 are JEM agreements in 16 states and 75 are WSO agreements in 11 states. See ICE, Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, available at <https://www.ice.gov/identify-and-arrest/287g>. For a nationwide map of 287(g) agreements, see Immigrant Legal Resource Center, National Map of 287(g) Agreements, <https://www.ilrc.org/national-map-287g-agreements>, (July 2024). See also Abigail F. Kolker, *The 287(g) Program: State and Local Immigration Enforcement*, Cong. Res. Serv. (2021).

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

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

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

Texas Governor Greg Abbott has adopted policies that involve state law enforcement personnel, without federal authorization, in the enforcement of federal immigration laws. A prominent part of one initiative, Operation Lone Star, authorizes state and local law enforcement agencies to partner with private landowners to arrest migrants for trespassing under state law. Two counties on the border have implemented the program. For an overview of state enforcement efforts, see the excerpt from Muzaffar Chishti & Kathleen Bush-Joseph, *Activism on Immigration by U.S. States is Back, with New Tactics and Different Targets* (Migration Pol’y Inst. June 28, 2023) in this Update to page 1114 of this Chapter.

As part of Operation Lone Star, in October 2023, the Texas National Guard laid concertina wire on the New Mexico-Texas border to prevent unauthorized migrants who have allegedly been crossing the southern border from Mexico into New Mexico and then walking over to El Paso, Texas. See Uriel J. Garcia, *Texas strings concertina wire along New Mexico border to deter migrants*, Tex. Trib., Oct. 17, 2023. Wire has also been erected in other parts of the Texas border, including near the riverfront of Eagle Pass, Texas and Maverick County. U.S. Border Patrol officers and other federal officers responded by cutting some of the wire along the riverfront, which prompted the state to file a suit seeking preliminary and permanent injunction against the federal government to enjoin officers from cutting concertina wire. See *State of Texas v. U.S. Dep’t of Homeland Sec.*, No. DR-23-CV-00055-AM, 2023 WL 8285223, at *3 (W.D. Tex. Nov. 29, 2023). The state raised several claims, including “common law conversion, common law trespass to chattels, and several violations under the Administrative Procedure Act (“APA”). *Id.* at *1. The district court denied the state’s motion for preliminary injunction. *Id.* at *17.

The U.S. Court of Appeals for the Fifth Circuit, however, reversed and granted the state’s request for an injunction, thereby enjoining the federal government “from damaging, destroying, or otherwise interfering with Texas’s [concertina]-wire fence in the vicinity of Eagle Pass, Texas” except to address medical emergencies. *State v. United States Dep’t of Homeland Sec.*, 88 F.4th 1127, 1130 (5th Cir. 2023). The federal government appealed to the U.S. Supreme Court, which vacated the injunction and consequently allowed the federal government to remove the wire. See *Dep’t of Homeland Sec. v. Texas*, 144 S. Ct. 715, 217 L. Ed. 2d 387 (2024).

In addition to the foregoing initiatives, Texas engaged in other efforts to curb unauthorized immigration. In November 2023, the Texas legislature passed Senate Bill 4 (SB 4), which added new sections to the Texas Penal Code that penalize entry or re-entry of noncitizens into the state. In particular, Section 2 of SB 4 makes it a crime for a noncitizen to enter or attempt to enter the state “directly from a foreign nation at any location other than a lawful port of entry.” SB 4, § 2, 88th Legis., 4th Spec. Sess. (Tex. 2023) (codified at Tex. Penal Code § 51.02(a)). SB 4 also criminalizes a noncitizen who seeks to enter or attempt to enter the state after the noncitizen has been “denied admission to” or removed from the United States. SB 4, § 2 (codified at Tex. Penal Code § 51.03(a)).

Moreover, SB 4 added a new section to the Texas Code of Criminal Procedure, which empowers judges to order noncitizens “to return to the foreign nation from which the person entered or attempted to enter.” SB 4, § 1 (codified at Tex. Code of Crim. Proc. Art. 5B.002). In cases involving convictions of noncitizens for violating SB 4, Section 1 provides that the order must include, among other things, “the manner of transportation of the noncitizen to a port of entry” and the law enforcement agency tasked with “monitoring the order.” *Id.*

Several plaintiffs sued the state of Texas. The ensuing litigation went through notable (and somewhat confusing) procedural twists and turns. At the outset, on February 29, 2024, the federal district court for the Western District of Texas issued a preliminary injunction. *United States v. Texas*, 2024 WL 861526, at *43 (W.D. Tex. Feb. 29, 2024). The court concluded that S.B.4 is unconstitutional on four grounds:

First, the Supremacy Clause and Supreme Court precedent affirm that states may not exercise immigration enforcement power except as authorized by the federal government. Second, SB 4 conflicts with key provisions of federal immigration law, to the detriment of the United States’ foreign relations and treaty obligations. Third, surges in immigration do not constitute an “invasion” within the meaning of the Constitution, nor is Texas engaging in war by enforcing SB 4. Finally, to allow Texas to permanently supersede federal directives on the basis of an invasion would amount to nullification of federal law and authority—a notion that is antithetical to the Constitution and has been unequivocally rejected by federal courts since the Civil War.

United States v. Texas, 2024 WL 861526, at *1 (W.D. Tex. Feb. 29, 2024), vacated, 144 S. Ct. 797 (2024).

Next, the state appealed to the U.S. Court of Appeals for the Fifth Circuit, which granted an administrative stay pending appeal. The U.S. Supreme Court subsequently stayed the Fifth Circuit’s order, 144 S. Ct. 797 (2024). However, approximately two weeks later, on March 19, 2024, the Court reversed itself and vacated its *own* stay. 144 S. Ct. 797 (2024). Further, that same day, the Fifth Circuit lifted its stay and, after hearing oral arguments, concluded that “Texas’s motion for stay pending appeal should be denied.” *United States v. Texas*, 97 F.4th 268, 274 (5th Cir. 2024). In other words, the state is prohibited from enforcing SB 4 as per the district court’s preliminary injunction.

Despite the legal setbacks, Texas’s SB 4 spurred other states to pass laws or proposed legislation that mirrored Texas’s efforts to restrict unauthorized entry to the United States. See David Chen, *Inspired by Texas, Republicans in Other States Eye Immigration Bills*, N.Y. Times, March 20, 2024, <https://www.nytimes.com/2024/03/20/us/texas-immigration-republican-states.html> (discussing legislation proposed in seven states, including Iowa, Kansas, Louisiana, and Oklahoma, that criminalizes the unauthorized entry or re-entry of immigrants). Two of these bills passed in April and are worth noting. On April 10, 2024, Iowa enacted Senate File 2340, which, like Texas’s SB 4, makes it an offense for a noncitizen to enter or attempt to enter the state if the person has been excluded or removed from the

United States or left the United States “while an order of exclusion, deportation, or removal is outstanding.” Iowa Code § 718C.2(1). Also akin to SB 4, Senate File 2340 authorizes a state judge to order a noncitizen to return to the “foreign nation from which the person entered or attempted to enter.” § 718C.5(1). *See id.* A lawsuit was filed immediately and on June 17, 2024, a federal district court issued an injunction, holding that Senate File 2340 is likely preempted. *United States v. Iowa*, 2024 WL 3035430, at *15 (S.D. Iowa June 17, 2024).

Oklahoma also passed, in April 2024, legislation, HB 4156, which similarly criminalizes the act of unauthorized entry or re-entry into Oklahoma or what the law describes as “impermissible occupation” of the state. HB 4156 § 2(A)-(B). Specifically, HB 4156 penalizes the act of “willfully and without permission enter[ing] and remain[ing] in the State of Oklahoma without having first obtained legal authorization to enter the United States.” H.B. 4156 § 2(A)-(B). It also makes it a felony for a noncitizen who has been “denied admission, excluded, deported, or removed” or has departed the United States “while an order of exclusion, deportation, or removal is outstanding” to enter or attempt to enter the state. *Id.* at § 2D. Several plaintiffs sued and in June 2024, the district court enjoined the law, finding that the law is preempted. *See United States v. Oklahoma*, 2024 WL 3449197, at *14 (W.D. Okla. June 28, 2024).

In sum, as this Update goes to press in late July 2024, Texas’s SB 4, Iowa’s Senate File 2340, and Oklahoma’s HB 4156, are unenforceable because of preliminary injunctions issued against their implementation.

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

In April 2021, the Department of Justice stopped requiring cooperation with U.S. Immigration and Customs Enforcement as a condition of funding under the Byrne Grant program for local law enforcement agencies. *See Sarah N. Lynch, U.S. Justice Department Ends Trump-era Limits on Grants to “Sanctuary Cities,” Reuters*, Apr. 28, 2021. Consistent with this position, earlier the same month the Department of Justice dropped its challenge to a federal court decision that had blocked federal government’s efforts to condition federal grants to two cities in Rhode Island on cooperation with federal immigration enforcement. *See Cities Win Immigration Policing Dispute With US Government*, Assoc. Press, Apr. 20, 2021. In *City & County of San Francisco v. Garland*, 42 F.4th 1078 (9th Cir. 2022), the Ninth Circuit affirmed earlier injunctions against immigration-related conditions on Byrne grants.

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

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

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

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

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

Other states and localities, some in collaboration with non-profit organizations, have recently established or pushed for legal representation programs for noncitizens in immigration proceedings. In Oregon, for example, a non-profit organization established the Equity Corps of Oregon, a statewide representation program that trains and connects pro-bono lawyers with immigrants needing legal representation. See <https://innovationlawlab.org/programs/equity-corps-of-oregon/>. As another example, Colorado H.R. 21-199, signed into law in 2021, established an immigrant legal defense fund to expand the availability of free legal services and representation to low-income individuals in immigration proceedings, with a priority on noncitizens in immigration detention and on noncitizens who are not detained and are in Colorado but outside the Denver Metro area. *See also San Diego County Will Provide Immigrants With Lawyers*, Assoc. Press, May 4, 2021. More recently, in New York, advocates have pushed for the passage of Senate Bill S 999A/Assembly A 170, “Access to Representation Act (ARA),” which aims to provide the right to counsel in removal proceedings. *See* S. Res. S999, 2023-24 Sess. (N.Y. 2023), <https://www.nysenate.gov/legislation/bills/2019/S7261>; Nicholas Turner & Erica Bryant, *New York Could Become the First State to Provide the Right to Legal Representation*, VERA INST. OF JUST. (Nov. 30, 2022), <https://www.vera.org/news/new-york-could-become-the-first-state-to-provide-the-right-to-legal-representation-in-immigration-court>. Proponents of the bill contend that its passage would address the significant needs of immigrants in removal proceedings and could yield the state billions of dollars. *See* Brad Lander, New York City Comptroller, *Economic Benefits of Immigration Legal Services*, March 18, 2024, <https://comptroller.nyc.gov/reports/economic-benefits-of-immigration-legal-services/> (explaining that legal representation of immigrants enables thousands of immigrants to remain in their communities and could result in a net benefit of \$8.4 billion). The Vera Institute of Justice website offers a map depicting other publicly funded local and state deportation defense programs (the “SAFE Network”) across the United States. *See* <https://www.vera.org/ending-mass-incarceration/reducing-incarceration/detention-of-immigrants/advancing-universal-representation-initiative>.

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

For an overview of driver’s license eligibility by state, see National Immigration Law Center, *State Laws Providing Access to Driver’s Licenses or Cards, Regardless of Immigration Status* (July 2023). Minnesota is the most recent state to allow individuals to apply for a driver’s license regardless of immigration status. *See* Trisha Ahmed, *Regardless of immigration status, people in Minnesota can begin applying for driver’s licenses*, AP News, Sept. 7, 2023, <https://apnews.com/article/drivers-license-for-all-minnesota-immigrants->

undocumented-f9170d8674fc07c38af8ee080b031756. It should be noted, however, that the standard Minnesota driver's license is distinct from the REAL ID-compliant driver's license that becomes effective in May 2025. See <https://dps.mn.gov/divisions/dvs/real-id/Pages/license-id-options.aspx>.

For overviews of students with DACA or who are undocumented at colleges and universities, and of state laws and policies on tuition, see Presidents' Alliance on Higher Education and Immigration, *Higher Ed Portal: Portal to the States*, <https://www.higheredimmigrationportal.org/states/>.

page 1114, at the end of note 3, add the following excerpt:

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

Migration Policy Institute. June 28, 2023.

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

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

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

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

* * *

Sweeping New Restrictions in Florida

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

- Making it a felony to transport into Florida migrants who entered the country without authorization and were not inspected by federal authorities.

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

This law comes as Florida receives a disproportionate share of migrants entering through the U.S.-Mexico border or via new parole programs. Many newly arriving Cubans, Haitians, Nicaraguans, Venezuelans, and other South Americans have flocked to Florida, where a wide range of Caribbean and Latin American diaspora communities are established. Florida was the top state for asylum filings in immigration court in fiscal year (FY) 2022 and the first two months of FY 2023.

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

* * *

Texas Amps Up its Crackdown on Unauthorized Immigration

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

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

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

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

* * *

States Extending Protections to Immigrants

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

The move towards expanding rights is not simply a Democratic one. Utah, a Republican-controlled state, this year committed to offering in-state college tuition to immigrants who hold or have applied for asylum, humanitarian parole, refugee status, a special immigrant visa (SIV), or TPS. This builds on a 2002 law offering in-state tuition to

students graduating from a Utah high school and meeting other conditions, regardless of status. Voters in Arizona last year approved a similar proposition offering in-state tuition at public colleges and universities to high school graduates regardless of status, reflecting a major shift in the state's immigration politics. As of this writing, at least 23 states and the District of Columbia offer in-state tuition to students regardless of immigration status.

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

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

A Creative Turn to Multiple Strategies

States have diversified their strategies to advance their immigration aims, using not just legislation but a host of tactics to advance policy, particularly for immigration enforcement. Texas was an early leader in suing the federal government over immigration, leading a group of 26 states against the Obama administration over an expansion of DACA and a new program offering deferred action to parents of U.S. citizens and legal immigrants (Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA) in 2014. Democrat-led states were very active in challenging the Trump administration, filing 17 multistate lawsuits focused on immigration issues. Since 2020, Texas has led lawsuits to maintain the Migrant Protection Protocols (MPP, otherwise known as Remain in Mexico) and undermine the Biden administration's attempt to narrow immigration enforcement priorities (a case the Supreme Court tossed out last week) and erect parole programs for Cubans, Haitians, Nicaraguans, and Venezuelans, among other efforts. Florida has joined many of these lawsuits. It also sued to block federal authorities from releasing migrants from government custody with parole or NTAs.

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

dispatched ahead of the May end of the pandemic-era Title 42 expulsions policy and 2,500 National Guard members in place since last summer.

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

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

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

Additionally, approximately 3,000 migrants were sent from Arizona to Washington, DC in 2022, although Ducey's efforts appeared less designed to garner media attention, and the trips were coordinated with local Washington service providers. Ducey's Democratic successor, Katie Hobbs, has continued the practice. With minimal political theater, borderland service providers and the city of El Paso have also funded migrants' cross-country trips to their selected destination. Colorado briefly bused migrants to Chicago and New York, and New York City itself has bought bus and plane tickets for asylum seekers and other migrants to travel elsewhere in the state, other states, and, in a few cases, internationally.

* * *