REPRESENTING NONCITIZENS IN THE CONTEXT OF LEGAL INSTABILITY AND ADVERSE DETENTION PRECEDENT

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INTRODUCTION

Over the past fifteen years, the initiatives of the Katzmann Study Group on Immigrant Representation have worked to transform the landscape of immigrant representation, expanding access to qualified counsel first in New York and, over time, throughout the country. The study group's work began with the late Judge Robert A. Katzmann's inspirational mission to bring people together to understand the underlying problems in immigrant representation and to devise approaches to address those problems. As we look for initiatives to yield better access to quality counsel in the years ahead, we must once again seek to understand the nature of the challenges to adequate immigrant representation.

This Essay addresses three structural aspects of immigration law that have shifted in recent years and present important challenges for delivering adequate representation. Although the Katzmann study group's many

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initiatives have shored up access to counsel in immigration courts and for immigration applications, the ground has been shifting under our feet. This Essay discusses three (of many)[1] phenomena that make it harder than ever to lawyer on behalf of noncitizens. The first is the rise of red-state lawsuits that lead to enormous unpredictability about the agency rules under which lawyers can expect to operate. The second is the individuation and constitutionalization of detention law, which is particularly challenging due to the increased transfer of detainees to remote locations. The third is the changing dynamic around choice of law for immigration courts and a disconnect between circuit court and U.S. Supreme Court decisions. This dynamic has created uncertainty about what circuit court rules apply and instability about what substantive rules will apply both in immigration court and on appeal. Each of these phenomena mean that lawyering for noncitizens facing removal is more complex than ever. Although there are opportunities embedded in some of these changes, there are also enormous hurdles that make the task of lawyering extremely complex.

This Essay explores the nature of these challenges and suggests ways for legal organizations to prepare themselves for the new landscape. The issues discussed in this Essay affect (1) the kinds of claims lawyers need to be prepared to make, (2) the kinds of courts in which they must appear to pursue those claims, and (3) the importance of legal developments in other parts of the country to those practicing in a given jurisdiction. Lawyers representing those facing removal need to be nimble, well-resourced, and able to think creatively about where the law might be as a case winds its way through the system. These changes are not just reasons for robust continuing legal education, but also aspects of the practice that require different ways of lawyering and different types of capacity in organizations serving noncitizens. As we seek to build a quality bar, we must pay attention to those challenges to provide effective representation.

Part I discusses the rise in red-state litigation that causes instability in the implementation of agency policy. Part II turns to detention law and how legal developments have had the effect of constitutionalizing this area of law and requiring individual habeas litigation. Part III explores the unsettled nature of case law precedent given disputes about choice of law principles and the disconnect between how circuit courts approach immigration issues and the methodology of the Supreme Court. This Essay concludes with some

1. This Essay does not address the very serious problems raised by the increased transfer of detainees to locations far from their homes. Judge Katzmann noted the then-past practice of transferring detainees to far-off locations. Robert A. Katzmann, *Study Group on Immigrant Representation: The First Decade*, 87 FORDHAM L. REV. 485, 495 (2018). Unfortunately, the U.S. Department of Homeland Security is once again transferring detainees to far-off detention centers, where they face enormous obstacles in obtaining representation. *See Southeast Immigrant Freedom Initiative (SIFI)*, S. POVERTY L. CTR. https://www.splcenter.org/our-issues/immigrant-justice/sifi [https://perma.cc/G26W-226A] (last visited Nov. 3, 2023) (reporting that only one in six detainees in the Southeast in the United States has access to counsel in removal proceedings).

thoughts about how to approach the challenges that these phenomena pose for immigrant representation.

I. THE RISE OF RED-STATE LITIGATION AND INSTABILITY IN AGENCY POLICY

During the last several years, red states have increasingly brought actions challenging agency regulations and practices. Those cases have led to nationwide temporary restraining orders and preliminary injunctions that create uncertainty and that may suddenly change the rules under which lawyers operate. Although any legal regime is subject to some level of uncertainty, the shifts in the immigration area are extreme and pose a major challenge to planning for legal needs and day-to-day representation.

A striking example is the litigation about the Biden administration's system of priorities for handling immigration cases. There is an extremely long history of prosecutorial discretion in immigration law.[2] Indeed, shortly after Congress enacted the restrictive 1996 immigration law, a bipartisan group of members of Congress wrote to then–Attorney General Janet Reno urging her to use greater discretion in implementing the law.[3] That request led to formal priorities in President William J. Clinton's administration,[4] which were followed by a new set of priorities in President George W. Bush's administration,[5] President Barack Obama's administration,[6] and President Donald J. Trump's administration.[7] None of those priority systems were challenged in court.

2. *See* Shoba Sivaprasad Wadhia, *Beyond Deportation: Understanding Immigration Prosecutorial Discretion and United States v. Texas*, 36 IMMIGR. & NAT'Y L. REV. 94 (2015).

3. *See* Letter from Rep. Henry J. Hyde, Rep. Barney Frank, Rep. Lamar Smith, Rep. Sheila Jackson Lee, Rep. Bill McCollum, Rep. Martin Frost, Rep. Bill Barrett, Rep. Howard L. Berman, Rep. Brian P. Bilbray, Rep. Corrine Brown, Rep. Charles T. Canady, Rep. Barbara Cubin, Rep. Nathan Deal, Rep. Lincoln Diaz-Balart, Rep. David Dreier, Rep. Bob Filner, Rep. Eddie Bernice Johnson, Rep. Sam Johnson, Rep. Patrick J. Kennedy, Rep. Matthew G. Martinez, Rep. James P. McGovern, Rep. Martin T. Meehan, Rep. F. James Sensenbrenner, Jr., Rep. Christopher Shays, Rep. Henry A. Waxman, Rep. Kay Granger, Rep. Gene Green & Rep. Ciro D. Rodriguez, to Janet Reno, Att'y Gen., U.S. Dep't of Just. & Doris M. Meissner, Comm'r, Immigr. & Naturalization Servs. (Nov. 4, 1999), https://www.ice.gov/doclib/foia/prosecutorial-discretion/991104congress-letter.pdf [https://perma.cc/2DRS-FZPR].

4. Memorandum from Doris Meissner, Comm'r, Immigr. & Naturalization Serv., to Regional Dirs., Dist. Dirs., Chief Patrol Agents & Reg'l & Dist. Couns. (Nov. 17, 2020) (on file with author).

5. *See* Memorandum from William J. Howard, Principal Legal Advisor, to All OPLA Chief Couns. (Oct. 24, 2005) (on file with author).

6. *See* Memorandum from John Morton, Assistant Sec'y, Immigr. & Customs Enf't to All ICE Emps. (June 30, 2010) (on file with author); *see also* Memorandum from John Morton, Dir., Immigr. & Customs Enf't, to All Field Office Dirs., All Special Agents in Charge & All Chief Couns. (June 17, 2011) (on file with author).

7. *See* Memorandum from John Kelly, Sec'y, U.S. Dep't of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Prot., Thomas D. Homan, Acting Dir., U.S. Immigr. & Customs Enf't, Lori Scialabba, Acting Dir., U.S. Citizenship & Immigr Servs., Joseph B. Maher, Acting Gen. Couns., Dimple Shah, Acting Assistant Sec'y for Int'l Affs. & Chip Fulghum, Acting Undersecretary for Mgmt. (Feb. 20, 2017) (on file with author).

Just like other administrations, the Biden administration announced its enforcement priorities through a series of memoranda, culminating in a memorandum from Secretary of the Department of Homeland Security Alejandro Mayorkas known as the "Mayorkas Memo."[8] These memoranda informed advocates of the priorities that would be followed by enforcement officers and government attorneys.[9] They spelled out in detail the kinds of information that would be important to develop for prosecutorial discretion.[10] Advocacy organizations prepared training materials on how to seek prosecutorial discretion under the new priorities.[11] Local U.S. Immigration and Customs Enforcement (ICE) offices set up procedures for processing these requests, including special email addresses and requirements for a request to be considered.[12]

Unlike with past priority systems, this effort to train advocates on standards and procedures turned out to be meaningless once Texas and other states stopped the policies in their tracks. At the time of the *Fordham Law Review* Symposium celebrating the legacy of Judge Katzmann in March 2023, the Mayorkas Memo sat on the U.S. Department of Homeland Security website with a warning that the memo had been enjoined and that ICE "w[ould] not apply or rely upon [it] in any manner."[13] The priorities' fate was tied up in litigation in the U.S. Supreme Court and was not decided until June 23, 2023, two and a half years into President Biden's four-year term.[14] Rather than serving the longstanding role of informing advocates of how to pitch their cases to prosecutors and immigration officials, the final version of the Biden administration's priorities will only apply to the last year and a half of the administration.

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8. *See* Memorandum from Alejandro Mayorkas, Sec'y, U.S. Dep't of Homeland Sec., to Tae Johnson, Acting Dir., Immigr. & Customs Enf't (Sept. 30, 2021) (on file with author); *see also* Memorandum from John Trasviña, Principal Legal Advisor, Immigr. & Customs Enf't, to All OPLA Att'ys (May 27, 2021) (on file with author); Memorandum from David Pekoske, Acting Sec'y, U.S. Dep't of Homeland Sec., to Troy Miller, Senior Off. Performing the Duties of the Comm'r, Customs & Border Prot., Tae Johnson, Acting Dir., Immigr. & Customs Enf't & Tracey Renaud, Senior Off. Performing the Duties of the Dir., Citizen & Immigr. Servs. (Jan. 20, 2021) (on file with author).

9. *See generally* Memorandum from Alejandro Mayorkas to Tae Johnson, *supra* note 8.

10. *Id.* at 1.

11. *See, e.g.*, IMMIGR. DEF. PROJECT, IMMIGR. LEGAL RES. CTR. & NAT'L IMMIGR. PROJECT OF THE NAT'L LAWS. GUILD, PRACTICE ADVISORY FOR IMMIGRATION ADVOCATES: THE BIDEN ADMINISTRATION'S INTERIM ENFORCEMENT PRIORITIES (2021), https://www.immigrantdefenseproject.org/wp-content/uploads/2020/10/Advisory-on-BIDEN-Enforcement-Priorities-Criminal-Defenders-LG-Final-Version.pdf [https://perma.cc/DAR8-PWMF].

12. Our clinic has cases in both the New York - Broadway Immigration Court and the Buffalo Immigration Court. We learned that each of these offices had different procedures.

13. Memorandum from Alejandro Mayorkas to Tae Johnson, *supra* note 8, at 1. Note that, at the time of publication, this warning had been taken off of the memorandum in light of the Supreme Court's decision reversing the injunction. *See* United States v. Texas, 143 S. Ct. 1964 (2023).

14. *Texas*, 143 S. Ct. at 51 (denying stay of nationwide injunction by 5-4 vote and granting certiorari before judgment). The U.S. Court of Appeals for the Fifth Circuit had previously denied a stay of the lower court injunction. Texas v. United States, 40 F.4th 205 (5th Cir. 2022), *rev'd*, 599 U.S. 670 (2023).

Another policy that has been stopped in its tracks is the Deferred Action for Childhood Arrivals (DACA) program.[15] The Biden administration supports this program and would like to process both new and renewal applications. But they have been prevented from doing so by a July 2021 district court order that prevents processing of new applications unless otherwise permitted by court order.[16] Although the litigation continues, the administration is allowed to process renewal applications but is no longer allowed to process new applications.[17]

The litigation against DACA is somewhat surprising given the age of the program, which was created in 2012.[18] DACA provides access to work authorization and some level of stability for around 600,000 individuals who came to the United States at a young age.[19] The program began in the wake of a Senate vote in which a majority of Senators, but fewer than the number required for cloture, supported a permanent path to status.[20] Two years after DACA's creation, the Obama administration sought to create a more expansive program for the parents of U.S. citizens and permanent residents, known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA).[21] Unlike DACA, the DAPA program was controversial, and red states sued to stop it.[22] The suits against DAPA did not question the legitimacy of the DACA program. They ultimately succeeded in stopping the new program while DACA remained in place.[23]

It was not until 2018, six years after DACA's creation, that Texas brought suit with other states to shut down the DACA program.[24] This litigation was

15. *See* Texas v. United States, 549 F. Supp. 3d 572, 580–81 (S.D. Tex. 2021), *aff'd in part, vacated in part, and remanded*, 50 F.4th 498 (5th Cir. 2022) (ruling that the DACA program is unlawful but staying order for previous DACA recipients pending further litigation). U.S. Citizenship and Immigration Services keeps a page on its website devoted to the latest developments in this case and how they limit its implementation. *See DACA Litigation Information and Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/daca-litigation-information-and-frequently-asked-questions [https://perma.cc/K75B-LTGK] (last visited Nov. 3, 2023).

16. Batalla Vidal v. Mayorkas, 618 F. Supp. 3d 119, 121 (E.D.N.Y. 2022).

17. *Texas*, 549 F. Supp. 3d at 580–81.

18. *See* Deferred Action for Childhood Arrivals, 87 Fed. Reg. 53152, 53153 (Aug. 30, 2022) (to be codified at 8 C.F.R. pts. 106, 236, 274a) (noting that former Attorney General Janet Napolitano began DACA through a policy memorandum issued on June 15, 2012).

19. The latest data on DACA recipients shows that 580,310 individuals had DACA protection out of 1.1 million eligible individuals in December 2022. *Deferred Action for Childhood Arrivals (DACA) Data Tools*, MIGRATION POL'Y INST., https://www.migrationpolicy.org/programs/data-hub/deferred-action-childhood-arrivals-daca-profiles [https://perma.cc/K33M-KX4N] (last visited Nov. 3, 2023).

20. *See* DREAM Act of 2007, S. 2205, 110th Cong. (2007).

21. *See* Texas v. United States, 809 F.3d 134, 146 (5th Cir. 2015), *aff'd by an equally divided court*, 579 U.S. 547 (2016).

22. *See generally id.*

23. *See id.* at 188.

24. Complaint for Declaratory & Injunctive Relief, Texas v. United States, 549 F. Supp. 3d 572 (S.D. Tex. 2021), *aff'd in part, vacated in part, and remanded*, 50 F.4th 498, 506 (5th Cir. 2022) (No. 18-CV-00068).

on hold for several years while the courts considered whether the Trump administration had illegally sought to end DACA in 2017. Once the U.S. Supreme Court rejected the termination of DACA,[25] the Texas lawsuit became active. In July 2021, a district court judge in Texas—the same one who appears to have been hand-picked for the lawsuits around DAPA[26]—issued a nationwide injunction to stop the DACA program.[27] That decision was appealed, and the case was later remanded for further proceedings.[28] There is good reason to believe that the courts will eventually strike DACA down,[29] meaning that hundreds of thousands of DACA recipients are in a highly vulnerable position despite having relied on DACA for eleven years. Meanwhile, the lawsuits have stalled adjudication of new DACA applications, leaving a target group of the DACA program completely without status or stability.

Similar nationwide injunctions have stymied a host of other administrative policies.[30] Indeed, state lawsuits challenging immigration policies are now so prevalent that one immigration organization has set up a "Litigation Tracker" website to follow the latest developments in these cases.[31] As this tracker shows, several Republican-led states have become involved in seeking nationwide injunctions against administration immigration policies.[32] Although this effort and some of its associated tactics—such as filing in a court with a predetermined judge—are now mirrored with other

25. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1916 (2020).

26. *See Texas*, 549 F. Supp. 3d at 576; Texas v. United States, 86 F. Supp. 3d 591, 604 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 579 U.S. 547 (2016). Judge Andrew S. Hanen was the judge in both cases. He served in the Brownsville District of the Southern District of Texas when the cases were brought. Unlike other district courts, the Southern District of Texas is divided into many divisions, sometimes with only one or two judges in the district. *See Divisional Office Histories*, U.S. DIST. & BANKR. CT. S. DIST. TEX., https://www.txs.uscourts.gov/page/divisional-office-histories [https://perma.cc/D877-YS3S] (last visited Nov. 3, 2023). As a result, the choice of where to file suit can essentially be a choice of which judge will preside over a case. *See* Alex Botoman, *Divisional Judge-Shopping*, 49 COL. HUM. RTS. REV. 297, 302–03 (2018).

27. *See Texas*, 549 F. Supp. 3d at 572; *see also infra* note 29.

28. *See Texas*, 549 F. Supp. 3d at 572.

29. After further proceedings, Judge Hanen issued summary judgment for Texas and other plaintiff states. Texas v. United States, No. 18-CV-00068, 2023 WL 5951196, at *2 (S.D. Tex. Sept. 13, 2023). The Fifth Circuit, which has been hostile to the DACA program in past rulings, will hear any appeal. *See, e.g.*, Texas v. United States, 50 F.4th 498 (5th Cir. 2022).

30. *See, e.g.*, Florida v. Mayorkas, No. 23-CV-9962, 2023 WL 3398099, at *7 (N.D. Fla. May 11, 2023) (ordering a temporary restraining order against parole policy); Texas v. Biden, No. 21-CV-067, 2022 WL 17718634, at *1, *4 (N.D. Tex. Dec. 15, 2022) (staying rescission of Trump era "remain in Mexico" policy for asylum seekers), *appeal dismissed without prejudice*, No. 23-CV-10143, 2023 WL 5198783 (5th Cir. May 25, 2023).

31. *Litigation Tracker*, JUST. ACTION CTR., https://litigationtracker.justiceactioncenter.org [https://perma.cc/336G-BTSQ] (last visited Nov. 3, 2023). Similarly, the Office of Immigration Litigation recently attended a federal immigration litigation conference, where they handed out a chart of asylum regulations that states which version of each regulation is in effect. *See* OIL's Current Effective Regulations Handout (May 3, 2023) (on file with author). Instead of looking to the most recent version of the Code of Federal Regulations, lawyers in some cases must look to the 2018 or 2020 version of the regulations. *Id.*

32. *See Litigation Tracker*, *supra* note 31.

issues, including recent mifepristone litigation,[33] the multitude of immigration cases is staggering.

Altogether, the litigation against national immigration policies has made immigration law and policy increasingly unpredictable and changeable. The litigation around priorities, for example, has completely disrupted past assumptions that prosecutorial discretion policies will follow those articulated by a given administration.[34] The litigation around DACA, meanwhile, means that once-stable forms of status are now highly unstable and that the government has been stopped from adjudicating new applications of qualified persons. Lawyers working in this environment must be very nimble and able to adjust to ever-changing rules and opportunities. They must be ready to seize an opportunity when it exists—for example, during the months when the prosecutorial direction memos were in force—because today's policy could disappear tomorrow. They must think defensively on behalf of their clients who may have a seemingly stable status today that could disappear tomorrow. Organizations must be prepared to support these attorneys with predictive trainings that note dangers and opportunities where they may exist.

II. THE CONSTITUTIONALIZATION OF DETENTION LAW

Recent legal developments have also shifted the law around detention in ways that have dramatic implications for immigrant representation. These changes are especially important at a time when ICE has increased the number of detainees that it transfers to remote locations.[35] Under immigration law, some detention is discretionary and other detention is framed in mandatory language.[36] In a series of decisions, the Supreme Court shut down lower court approaches that created administrative mechanisms to obtain release for those facing mandatory detention or prolonged detention following a removal order.[37] The new legal regime has constitutionalized much of detention law by requiring individual as-applied constitutional challenges in lieu of broadly applicable rules that provide access to administrative bond hearings based on statutory interpretation. Lawyers seeking to free a client from these types of detention must go to federal court to present as-applied constitutional arguments and, for the most part, do so on a case-by-case basis, rather than by pursuing precedent or rules that could

33. *See* Danco Lab'ys v. All. for Hippocratic Med., 143 S. Ct. 1075, 1075 (2023) (granting stay of lower court injunction of FDA approval by a 5-4 majority).

34. *See Litigation Tracker*, *supra* note 31 (choose "Prosecutorial Discretion" from "Filter by topic").

35. *See, e.g.*, Chris McKenna, *ICE Moved 65 Detained Immigrants from Orange County Jail to Mississippi and Buffalo*, TIMES HERALD-REC. (Aug. 3, 2022, 5:04 AM), https://www.recordonline.com/story/news/local/2022/08/03/ice-moves-detained-immigrants-orange-county-correctional-facility-to-mississippi-buffalo/65389710007/ [https://perma.cc/T8AS-53ST].

36. *Compare* 8 U.S.C. § 1226(a) (an "alien may be arrested and detained"), *with id.* § 1226(c) ("the Attorney General shall take into custody any alien . . . .").

37. *See infra* notes 68–74 and accompanying text.

be applied to other affected persons. Under the new legal regime, it is more important than ever for noncitizens in detention to have lawyers who can litigate the more complex issues required to obtain release. Given the incredible importance of freedom from detention to winning a removal case, these developments demand greater capacity for habeas advocacy.

To understand the shift in detention law, it is useful to look back to the Katzmann study group's early days, particularly to its findings on the impact of detention on case outcomes, how the New York Immigrant Family Unity Project (NYIFUP) was designed to address the particular problems of those in detention, and how NYIFUP lawyers worked to free their clients from detention and, thereby, also increased their chances of prevailing in their cases.

As Judge Katzmann observed in his article commemorating ten years of the study group, a noncitizen's ability to be free from detention is almost as important as having a lawyer.[38] The New York Immigrant Representation Study compared outcomes for noncitizens based on whether they had a lawyer and whether they were detained.[39] By far, the worst results were for those who were detained and without a lawyer.[40] These statistics track common sense. The detention system, though denominated civil, places people in onerous conditions.[41] The system makes it very difficult to communicate with lawyers and loved ones, to maintain paperwork, and to demonstrate the equities that can be important to a successful immigration case.[42] Those outside of detention can pursue their rights, maintain their jobs, support their families, and nourish the connections to their families and communities that are critical to a successful outcome.[43]

The study further found that lawyers had the greatest impact on outcomes for clients who were detained.[44] Even though those clients had a lesser chance of prevailing than nondetained individuals, lawyers made their biggest impact when they represented detained clients.[45]

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38. *See* Katzmann, *supra* note 1, at 495.

39. *See id.*

40. *See id.*

41. *See, e.g.*, Tom Dreisbach, *Government's Own Experts Found 'Barbaric' and 'Negligent' Conditions in ICE Detention*, NAT'L PUB. RADIO (Aug. 16, 2023, 5:01 AM), https://www.npr.org/2023/08/16/1190767610/ice-detention-immigration-government-inspectors-barbaric-negligent-conditions [https://perma.cc/KNG2-C9BE].

42. Many forms of immigration relief are a matter of discretion and depend on a judge's assessment of the equities. *See, e.g.*, Matter of C-V-T-, 22 I. & N. Dec. 7, 11 (B.I.A. 1998) (noting that discretion for cancellation of removal depends on a balance of equitable factors such as employment, property and business ties, evidence of value and service to the community, and rehabilitation). This Essay cites to cases of the Board of Immigration Appeals (BIA) according to the style of the BIA, which uses "Matter of" for precedential cases and "*In re*" for non-precedential cases.

43. *See id.*

44. *See* Katzmann, *supra* note 1, at 495.

45. *See* PETER L. MARKOWITZ, JOJO ANNOBIL, STACY CAPLOW, PETER V.Z. COBB, NANCY MORAWETZ, OREN ROOT, CLAUDIA SLOVINSKY, ZHIFEN CHENG & LINSDAY C. NASH, ACCESSING JUSTICE: THE AVAILABILITY AND ADEQUACY OF COUNSEL IN IMMIGRATION PROCEEDINGS 19 (2011), https://justicecorps.org/app/uploads/2020/06/New-York-Immigrant-Representation-Study-I-NYIRS-Steering-Committee-1.pdf [https://perma.cc/M6LG-QLU6]

Together, these findings shaped the design of the NYIFUP.[46] That project, along with subsequent state funding, has provided representation for the most vulnerable noncitizens by providing lawyers to New Yorkers in detention.[47]

From the start, NYIFUP lawyers—and other lawyers around the country—realized that if they could help their clients get out of detention, they would not only restore to their clients a measure of liberty and the ability to care for themselves and their families, but also would enhance their clients' chances of succeeding at their immigration hearings. Advocates pursued several legal theories based both on how to best read the mandatory detention statute and on principles of constitutional avoidance.[48]

In 2013, when the NYIFUP started as a pilot program in New York City,[49] there were many viable theories for seeking a client's release from detention through habeas litigation. Two theories looked to the wording of the statute mandating detention for groups of noncitizens. That statute provides that mandatory detention applies "when" the noncitizen "is released" irrespective of various possible ongoing forms of criminal supervision.[50] Advocates argued that this statute did not apply to clients whose convictions—and release from criminal custody—were in the past. These clients, they argued, were subject to detention under the permissive language of a different part of the statute, but detention was not mandatory.[51] This argument had substantial success in individual petitions for habeas corpus, although lower courts were divided on the specific statutory interpretation question.[52] In some of these cases, lawyers also argued that the permissive reading of the statute best comported with substantive due process; this is because the logic of requiring detention had less force when an individual had had time in the

(showing that for detained individuals, having a lawyer led to six times the success rate—18 percent as compared to 3 percent—whereas for nondetained individuals, representation led to four times the success rate—7 percent as compared to 18 percent).

46. *See The New York Immigrant Family Unity Project: Universal Representation for Detained Immigrants Facing Deportation in New York State*, VERA, https://www.vera.org/ending-mass-incarceration/reducing-incarceration/detention-of-immigrants/new-york-immigrant-family-unity-project [https://perma.cc/EW8A-5LFZ] (last visited Nov. 3, 2023); *see also* Katzmann, *supra* note 1, at 495.

47. *See* Katzmann, *supra* note 1, at 497.

48. *See infra* notes 49–57.

49. *See* Katzmann, *supra* note 1, at 497.

50. 8 U.S.C. § 1226(c) ("The Attorney General shall take into custody any alien who [listing grounds of inadmissibility and deportability] . . . when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.")

51. *See, e.g.*, Lora v. Shanahan, 15 F. Supp. 3d 478 (S.D.N.Y. 2014), *aff'd on other grounds*, 804 F.3d 601 (2d Cir. 2015), *vacated and remanded*, 138 S. Ct. 1260 (2018).

52. *Compare*, *Lora*, 15 F. Supp. 3d at 493, *and* Sutherland v. Shanahan, 108 F. Supp. 3d 172, 185 (S.D.N.Y. 2015), *vacated and remanded sub nom.* Cruzeta-Bueno v. Aviles, No. 15-2127, 15-2505, 15-2690, 15-2700, 15-2796, 15-3283, 2020 WL 13412862 (2d Cir. Feb. 14, 2020), *with* Straker v. Jones, 986 F. Supp. 2d 345, 352 (S.D.N.Y. 2013), *and* Debel v. Dubois, No. 13 CIV. 6028, 2014 WL 1689042, at *4 (S.D.N.Y. Apr. 24, 2014).

community to build a record relevant to risk of flight and dangerousness—the key issues in a bond hearing.[53]

A related argument noted that the statute, by mandating detention on "release," should not apply to persons who were not held in custody in the first place or who were not sentenced to any prison term.[54] This argument, too, was rooted in the statutory language while also drawing from substantive due process principles about the legitimacy of detention for those who had never been subjected to imprisonment.[55] This approach provided a means to get a bond hearing for detained noncitizens, although it, too, had a mixed reception in the courts.[56]

A third argument posited that the statute contemplated a brief period of detention and did not embrace lengthy periods of detention prior to an administrative or court decision. These cases built on the logic of the U.S. Supreme Court's 2003 decision in *Demore v. Kim*.[57] In *Demore*, the Court rejected a facial challenge to the constitutionality of mandatory detention, relying in part on the assumption that detention would be "brief."[58] Because *Demore* was a facial challenge, it left room for as-applied challenges to periods of detention that were not brief or otherwise constitutionally permissible. This litigation built on Justice Anthony M. Kennedy's concurrence in *Demore*, which noted that due process principles might require an individualized determination of flight risk and dangerousness.[59] The cases involved two arguments: (1) that the circumstances of a specific case showed that detention, as applied to that individual, is unconstitutional;[60] and (2) that, to avoid constitutional issues arising from lengthy detention, the mandatory detention statute should be read as applying to the first six months of detention.[61]

The NYIFUP pilot project was deeply involved in this litigation. Until 2015, these cases typically took the form of individual habeas petitions, which presented the legal arguments set forth above as well as other

53. *See generally* Matter of Guerra, 24 I. & N. Dec. 37 (B.I.A. 2006) (setting the agency standard for a release on bond).

54. *See, e.g.*, *Straker*, 986 F. Supp. 2d at 363 (mandatory detention did not apply to a person who was never sentenced to nor served any term of imprisonment).

55. *See generally* Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 191–205 (2015) (arguing for the application of the principle of constitutional avoidance, the rule of lenity, and a presumption in favor of physical liberty in interpreting detention statutes).

56. *Compare Sutherland*, 108 F. Supp. 3d at 186 (holding that release means a post-conviction release from custody), *and Lora*, 15 F. Supp. 3d at 493 (same), *with* Sylvain v. Att'y Gen., 714 F.3d 150, 161 (3d Cir. 2013) (holding that conditional discharge after conviction is a release).

57. 538 U.S. 510 (2003).

58. *Id.* at 513.

59. *See id.* at 532 (Kennedy, J., concurring); Tijani v. Willis, 430 F.3d 1241, 1242 (9th Cir. 2005).

60. *See, e.g.*, Chavez-Alvarez v. Warden York Cnty. Prison, 783 F.3d 469, 478 (3d Cir. 2015) (applying individualized approach).

61. *See, e.g.*, Rodriguez v. Robbins, 804 F.3d 1060, 1078 (9th Cir. 2015), *rev'd sub nom.* Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (applying a six-month rule to the entire class).

arguments. The process for obtaining a client's release became much simpler in 2015 when the U.S. Court of Appeals for the Second Circuit decided *Lora v. Shanahan*,[62] a case involving one of the clients of the Brooklyn Defender Services from the first years of NYIFUP. The petitioner, Alexander Lora, did not prevail on all of the theories listed above, but he succeeded in obtaining a rule that any noncitizen subject to mandatory detention could have an administrative hearing after six months.[63] In the wake of *Lora*, there was a period of about two and a half years[64] in which there was a simple process—known as a "*Lora* hearing"—for obtaining release.[65] As detention neared the six-month mark, a lawyer or a detained person could submit an administrative request to the immigration court for a bond hearing.[66] In other jurisdictions around the country, similar rules applied for longer periods of time due to circuit precedent or class-wide injunctive orders.[67]

The process for obtaining release is now far more difficult. In 2018, the Supreme Court decided *Jennings v. Rodriguez*,[68] which rejected a six-month period as a benchmark for when noncitizens should be able to obtain release. The following year, the Court decided *Nielsen v. Preap*,[69] which rejected a construction of the statute that treated the "when released" clause as setting a statutory time limit for imposing mandatory detention. Following those two decisions, there are no administrative processes for release, and habeas litigation increasingly depends on individually tailored as-applied constitutional arguments.[70]

Noncitizens in post-order detention face a similar situation. In 2001, the Supreme Court held in *Zadvydas v. Davis*[71] that the post-order detention statute should be read to limit post-order detention to effectuate its purpose of deporting persons under removal orders.[72] Justice Stephen G. Breyer,

62. 804 F.3d 601 (2d Cir. 2015), *cert. granted, judgment vacated*, 138 S. Ct. 1260 (2018).

63. *See id.* at 616.

64. This period ran from October 2015, when the circuit issued its decision, until February 2018, when the Supreme Court overturned the U.S. Court of Appeals for the Ninth Circuit's decision in *Rodriguez*. Jennings v. Rodriguez, 138 S. Ct. 830, 830 (2018).

65. In the period from October 28, 2015 to July 31, 2016, the first nine months after *Lora*, 15 F. Supp. 3d at 478, there were 158 *Lora* hearings in which ninety-nine people obtained bond. *See* VERA INST. OF JUST., ANALYSIS OF *LORA* BOND HEARING DATA: NEW YORK IMMIGRANT FAMILY UNITY PROJECT (NYIFUP) (2016), https://www.law.nyu.edu/sites/default/files/upload_documents/Vera%20Institute_Lora%20Bond%20Analysis_Oct%20%202016.pdf [https://perma.cc/2VMM-LJJ3].

66. *See* Sajous v. Decker, No. 18-CV-2447, 2018 WL 2357266, at *2–3 (S.D.N.Y. May 23, 2018) (describing that the government routinely acquiesced to *Lora* hearings).

67. *See, e.g.*, *Rodriguez*, 804 F.3d at 1060 (circuit-wide injunction in the Ninth Circuit).

68. 138 S. Ct. 830, 834 (2018).

69. 139 S. Ct. 954, 971 (2019).

70. *See, e.g.*, *Sajous*, 2018 WL 2357266, at *10–11 (applying a multi-factor test to the party's right to an individualized bond hearing); Hernandez v. Decker, No. 18-CV-5026, 2018 WL 3579108, at *8–10 (S.D.N.Y. July 25, 2018) (applying an individualized approach and finding detention to be unreasonably prolonged); Keisy G.M. v. Decker, No. 21 Civ. 4440, 2021 WL 5567670, at *8–9 (S.D.N.Y. Nov. 29, 2021) (not finding detention unreasonably prolonged); *see also* Davis v. Garland, No. 22-CV-443, 2023 WL 1793575, at *2 (W.D.N.Y. Feb. 7, 2023) (ordering hearing on alternatives to detention after three years of detention).

71. 533 U.S. 678 (2001).

72. *Id.* at 682.

writing for the Court, emphasized that the post-order statute only grants permissive authority for detention of classes of noncitizens beyond a ninety-day removal period.[73] The Court concluded that detention was presumptively reasonable for the first six months after a removal order.[74]

Following *Zadvydas*, lower courts developed standards for determining whether post-order detention was unreasonable.[75] Through both class actions and precedential rulings in the circuit courts, the six-month mark became a standard for requesting an administrative bond hearing. For NYIFUP's clients, who were often held in New Jersey, the controlling precedent was *Guerrero-Sanchez v. Warden York County Prison*.[76] As a result, after six months of detention, a detainee or lawyer could seek a bond hearing before an immigration judge to determine whether ongoing detention was justified.[77] These hearings, known as "*Guerrero-Sanchez* hearings," were administrative and did not require federal court action.[78]

As with *Lora* hearings, *Guerrero-Sanchez* hearings no longer exist. In 2022, the Supreme Court struck down statutory arguments for bond hearings after six months of post-order detention.[79] Once again, the Supreme Court's actions have stopped administrative hearing processes for evaluating purported justifications for ongoing detention. In lieu of such streamlined proceedings, noncitizens and their lawyers are left to pursue individualized habeas actions.[80]

Sadly, these developments have renewed the need for a bar that can litigate the need for bond hearings with constitutional arguments that are tailored to individual clients' facts and circumstances. Not every detention case will present these questions, but when they do, lawyers will need to be prepared

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73. The ninety-day removal period is set out in 8 U.S.C. § 1231(a)(1). Further detention is authorized under 8 U.S.C. § 1231(a)(6) for persons who were ordered to be removed as inadmissible or on criminal grounds and who have "been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal." For those persons, the statute says that the government "may" detain or release the persons subject to supervision. 8 U.S.C. § 1231(a)(6).

74. *Zadvydas*, 533 U.S. at 701.

75. *See, e.g.*, Guerrero-Sanchez v. Warden York Cnty. Prison, 905 F.3d 208 (3d Cir. 2018) (individual precedent-setting case); Aleman Gonzalez v. Barr, 955 F.3d 762 (9th Cir. 2020), *rev'd*, 142 S. Ct. 2057 (2022).

76. 905 F.3d 208 (3d Cir. 2018).

77. ACLU, PRACTICE ADVISORY: *GUERRERO-SANCHEZ V. WARDEN, YORK COUNTY PRISON* 1 (2018), https://www.aclu-nj.org/sites/default/files/2018_10_18_guerrero_sanchez_advisory_final.pdf [https://perma.cc/G225-XW8T].

78. *See id.*

79. Johnson v. Arteaga-Martinez, 142 S. Ct. 1827 (2022) (reversing the rule in *Guerrero-Sanchez*). The Court also applied its ruling to noncitizens in withholding-only proceedings. *See generally* Johnson v. Guzman Chavez, 141 S. Ct. 2271 (2021) (classifying withholding-only proceedings as under the post-order detention scheme).

80. *See, e.g.*, Cabrera Galdamez v. Mayorkas, No. 22-CV-9847, 2023 WL 1777310 (S.D.N.Y. Feb. 6, 2023) (finding that further detention is unreasonable based on individualized facts); Grant v. Warden of Clinton Cnty. Corr. Facility, No. 22-CV-0331, 2022 WL 3045842 (M.D. Pa. Aug. 2, 2022) (rejecting pro se challenge to eleven months of post-order detention); Davis v. Garland, No. 22-CV-443, 2023 WL 1793575, at *2 (W.D.N.Y. Feb. 7, 2023) (ordering hearing on alternatives to detention after three years of detention).

to pursue these claims on a case-by-case basis. No longer can we expect class actions or robust statutory interpretation decisions based on constitutional avoidance principles. These cases are complex, involving questions of where and when to sue,[81] what record to prepare in advance of a habeas petition, and ways to make an individualized case that detention is unlawful as applied to the individual. They can also take a long time, with each day meaning a greater unjustified deprivation of liberty for those detained.

When administrative remedies are no longer available, lawyers must be prepared to pursue their clients' claims in courts where they can be heard. The developments in detention law require law offices to build in-house expertise in habeas litigation together with external resources to achieve those ends. This expertise must include understanding the complex venue rules (and the debate around those rules) that hamper some individual actions, as well as building the kind of record that courts require for a successful case. It also requires building infrastructure to sustain a case through the unfortunately lengthy time that it can take to prevail. Only through such infrastructure can advocacy organizations curtail detention's power to pressure noncitizens to give up their claims and accept permanent separation from their families and loved ones.

III. CHOICE OF LAW AND SHIFTING DYNAMICS IN CIRCUIT AND SUPREME COURT LAW

The ground has also shifted as to basic issues about what law will apply to a case. The legal rules governing an immigration case are based on the law of the circuit to which that case could be appealed.[82] This rule operated fairly simply in the early days of the NYIFUP program. Clients' cases proceeded primarily in two New York immigration courts,[83] and those seeking to appeal filed petitions for review in the Second Circuit. When Judge Katzmann reflected on the study group's work in 2010, New York's immigration authorities no longer had a general practice of sending New Yorkers to far-off detention centers.[84] That change also limited the relevance of the law of

81. *See* Jessica Rofé, Peripheral Detention, Transfer, and Access to the Courts (2023) (on file with author).

82. *See* Matter of Singh, 25 I. & N. Dec. 670, 672 (B.I.A. 2012).

83. The NYIFUP program was structured to take in cases from the New York - Varick Immigration Court, which handled cases of detained noncitizens arrested by the New York District of Immigration and Customs Enforcement. *See Evaluation of New York Immigrant Family Unity Project*, VERA INST. JUST, https://www.vera.org/publications/new-york-immigrant-family-unity-project-evaluation [https://perma.cc/7WDN-YCK5] (last visited Nov. 3, 2023). When a person was released from custody, the court typically transferred the case to the non-detained docket at 26 Federal Plaza, also in New York City. *See Find an Immigration Court (and Access Internet-based Hearings)*, U.S. DEP'T JUST., https://www.justice.gov/eoir/find-immigration-court-and-access-internet-based-hearings [https://perma.cc/KLG4-97JL] (last visited Nov. 3, 2023).

84. Katzmann, *supra* note 1, at 495 (noting change in detention policy of transferring New Yorkers to far-off detention centers).

other circuits. Instead, the law of the Second Circuit was the primary law that mattered in representing a client.

This seemingly simple system is now far more complex. A combination of changes in technology, case law, and detention practices has created uncertainty about which circuit's law will apply to a case. Under one circuit's law, the case is ruled by the law of the circuit where proceedings commence absent formal transfer.[85] By another circuit's law, proceedings depend on where the immigration judge is sitting at the end of the case, even if that judge only participated at the last minute via video.[86] Still, other courts look at the jurisdiction where the hearing took place, even if the judge appeared by video from another location.[87] Since New York residents placed in detention are increasingly sent to detention centers where cases are venued in other states,[88] the law applied to their cases might be the law of the place where they are detained, the place where the judges who are hearing their cases are sitting, or some other court. Moreover, the immigration judge in the case may apply one circuit's law while the court hearing the petition for review applies a different circuit's law.

Although these effects are most pronounced for individuals in removal proceedings, they are also important for affirmative immigration applications. For example, an individual applying for naturalization cannot meet the good moral character requirements if the person has an aggravated felony conviction from after 1990.[89] If the proper categorization of the conviction is different in different circuits, that individual faces a risk of being denied naturalization (perhaps improperly), being placed into proceedings, and potentially being detained and transported to a jurisdiction

85. Sarr v. Garland, 50 F.4th 326, 332 (2d Cir. 2022). The agency has adopted this rule. *See* Matter of Garcia, 28 I. & N. Dec. 693 (B.I.A. 2023).

86. *See* Herrera-Alcala v. Garland, 39 F.4th 233, 240 (4th Cir. 2022) (applying the law of the location of an immigration judge who appeared by videoconference for the final hearing).

87. Luziga v. Att'y Gen., 937 F.3d 244, 250 (3d Cir. 2019) (addressing issue despite lack of briefing).

88. In the New York region, many detained persons were held in New Jersey facilities with their cases handled in New York courts. *See Hudson County Jail to Take in 300 New Detainees After NY Facility Shuts Down*, JERSEY J. (Jan. 18, 2010), https://www.nj.com/hudson/2010/01/hudson_county_jail_to_take_in.html [https://perma.cc/F5GV-B3Z9] (noting that the Hudson County facility was in close proximity to Manhattan where the detainees' cases would be heard in court). Hudson County jail held roughly 700 detainees when it closed the facility. Peter D'Auria, *Hudson County Will No Longer House ICE Detainees by November 1.*, JERSEY J. (Sept. 10, 2021), https://www.nj.com/hudson/2021/09/hudson-county-spokesman-exit-from-ice-contract-is-very-close-to-imminent.html [https://perma.cc/SP6Z-RRSM]. New Jersey has now mostly closed those facilities, although there is ongoing litigation to return detention to New Jersey. *See* CoreCivic, Inc. v. Murphy, No. 23-967, 2023 WL 5556025 (D.N.J. Aug. 29, 2023) (holding New Jersey law banning detention facilities to be unconstitutional). The closure of facilities likely means that fewer New Yorkers will be detained, but those who are will be sent further away. *See* IMMIGR. LEGAL RES. CTR., CERES POL'Y RSCH. & DET. WATCH NETWORK, IF YOU BUILD IT ICE WILL FILL IT: THE LINK BETWEEN DETENTION CAPACITY AND ICE ARRESTS (2022), https://www.ilrc.org/sites/default/files/resources/if_they_build_it_ice_will_fill_it_report_2022.pdf [https://perma.cc/E8W3-C4LJ].

89. *See* 8 U.S.C. § 1101(f)(8).

where the conviction not only makes them deportable but also barred from relief.

Because the applicable law could be the law of any place a judge might be sitting remotely, there is a possibility of any circuit's law being applied to a client's case. That possibility demands that lawyers understand legal developments across the country and be prepared to argue in any case about what law should apply.

Moreover, even when the law of any given circuit is clear, shifting dynamics in the development of case law mean that practitioners need to be savvy about legal developments across the country and in the Supreme Court. This last point has been true for some time but is especially clear today when the Supreme Court has diverged from the methodological approaches of the circuit courts. These Supreme Court developments require thinking about where the law might go in ways that are not reflected in any circuit's case law.

The Supreme Court continues to play a major role in delineating the law that applies in immigration cases. More than twenty-seven years after major changes to immigration law in 1996,[90] the effort to clarify the law's meaning continues to occupy the courts.[91] These questions create splits in the circuits that often precipitate Supreme Court intervention. Once the issues reach the Court, they can disrupt settled practice in any one circuit. They also can disrupt methodologies that cut across circuit law. The Supreme Court increasingly approaches immigration questions in ways that are methodologically distinct from the circuit courts, thereby increasing the likelihood of shifting precedent within any one circuit. New legal developments can create possibilities for clients whose cases look weak under existing circuit law, or they can pose dangers for clients whose cases seem straightforward under existing circuit law.

One basic methodological dispute is whether the courts should defer to agency interpretations under *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*[92] *Chevron* arguments have had traction in many

90. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of the U.S.C.).

91. In the past Term, the Court heard two cases about provisions in the 1996 law that relate to individual petitions for review. *See* Santos-Zacarias v. Garland, 143 S. Ct 1103, 1120 (2023) (holding that the 1996 provision on judicial review does not require motion to reconsider decision of the Board of Immigration Appeals); Pugin v. Garland, 143 S. Ct. 1833, 1843 (2023) (adopting broad reading of obstruction of justice aggravated felony definition). Each of these decisions leaves many unanswered questions. In addition, the Court has already accepted petitions for certiorari for two additional cases on this topic for the next Term. *See* Wilkinson v. Att'y Gen., No. 21-3166, 2022 WL 4298337 (3d Cir. Sept. 19, 2022) (analyzing the reviewability of eligibility requirements for a type of cancellation of removal for persons who are not lawful permanent residents), *cert. granted sub nom.* Wilkinson v. Garland, 143 S. Ct. 2687 (2023); Campos-Chaves v. Garland, 54 F.4th 314 (5th Cir. 2022) (discussing the remedy for an in absentia order following a defective notice to appear), *cert. granted*, 143 S. Ct. 2687 (2023). These grants are not surprising. The Court has played an active role in immigration cases over the years. *See generally* Nancy Morawetz, *The Perils of Supreme Court Intervention in Previously Technical Immigration Cases*, 64 ARIZ. L. REV. 767 (2022).

92. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

circuit courts;[93] they have had far less traction in the Supreme Court, where the Court has not issued a step-two deference ruling since 2014.[94] This issue is particularly salient now that the Supreme Court has granted certiorari on whether *Chevron* should be overruled.[95] There are many immigration issues for which the circuits courts' decisions defer to agency decision-makers. These precedents are unstable because, when issues reach the Supreme Court, it may not apply *Chevron* principles.

As an example, the Second Circuit held many years ago that it would defer to the Board of Immigration Appeals (BIA) as to which convictions should be categorized as sexual abuse of a minor—a category that bars most forms of relief from deportation regardless of the sentence imposed.[96] The BIA had issued a very broad reading of that statute,[97] which it later applied to misdemeanor convictions.[98] The Second Circuit and other circuit courts deferred to this interpretation.[99] But the Supreme Court then unaminously held in *Esquivel-Quintana v. Sessions*[100] that the BIA's methodology and broad interpretation of the aggravated felony category were incorrect.[101] The Court never once applied principles of deference. Instead, it presented a methodology for reading statutes that made the law at issue not a match for the federal aggravated felony category.

Despite the Court's approach in *Esquivel-Quintana*, the stalemate between the circuits and the Supreme Court on deference did not end. In two decisions,[102] the Second Circuit has continued to defer to broad

93. *See infra* notes 98–106 and accompanying text (Second Circuit); *see also infra* note 115 and accompanying text (Fourth Circuit).

94. Isaiah McKinney, *The Chevron Ball Ended at Midnight but the Circuits Are Still Two-Stepping by Themselves*, YALE J. REGUL.: NOTICE & COMMENT (Dec. 18, 2022), https://www.yalejreg.com/nc/chevron-ended/ [https://perma.cc/7U2J-2732] (noting that the Supreme Court has not deferred under *Chevron* in six years).

95. Loper Bright Enters. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022), *cert. granted in part*, 143 S. Ct. 2429 (2023). Whatever the outcome of that case, there is good reason to believe that the Court will further curtail the scope of the doctrine.

96. *See generally* Mugalli v. Ashcroft, 258 F.3d 52 (2d Cir. 2001) (deferring on scope of sexual abuse of a minor category in the aggravated felony definition). The aggravated felony definition is found at 8 U.S.C. § 1101(a)(43). A person whose conviction fits this category is barred from most forms of relief, including cancellation of removal, 8 U.S.C. § 1229b(a)(3), (b)(1)(C), and asylum, 8 U.S.C. § 1158(b)(2)(B)(i).

97. Matter of Rodriguez-Rodriguez, 22 I. & N. Dec. 991 (B.I.A. 1999) (treating scope of term as delegated to the agency and adopting definition from a child victims' rights statute rather than a federal criminal statute, as not "definitive" but a "guide").

98. *See* Matter of Small, 23 I. & N. Dec. 448 (B.I.A. 2002) (classifying a misdemeanor offence as an aggravated felony under *Rodriguez-Rodriguez*); *In re* Gomez, 2004 WL 2952319 (B.I.A. Dec. 6, 2004) (classifying a misdemeanor sexual abuse conviction with a probationary sentence as an aggravated felony).

99. *See* Mugalli, 258 F.3d at 56–57 (deferring to *Rodriguez-Rodriguez*); Restrepo v. Att'y Gen., 617 F.3d 787, 796–97 (3d Cir. 2010) (following *Mugalli*).

100. 581 U.S. 385 (2017).

101. *See id.* at 391–95 (rejecting classification of all statutory rape convictions as aggravated felonies without citing to the BIA decision in *Rodriguez-Rodriguez* or the victim statute cited by the BIA).

102. Rodriguez v. Barr, 975 F.3d 188 (2d Cir. 2020); Debique v. Garland, 58 F.4th 676 (2d Cir. 2023).

interpretations of the sexual abuse of a minor term without any regard for the methodology that the Supreme Court used in *Esquivel-Quintana*.[103] Instead, the Second Circuit has read the Supreme Court's decision as not squarely overturning its precedent.[104] Meanwhile, at least one other circuit has rejected the deferential approach of the Second Circuit,[105] meaning that the law remains highly unsettled and subject to whatever next decision comes down from the Supreme Court.

At one level, lawyers cannot be expected to predict the future. But on another, their clients deserve to understand that the law being applied today is subject to change in ways that might preserve their chance at continuing their lives with their families in the United States. When there are systematic reasons for thinking that circuit law is unstable, that is valuable information for clients. In any case in which circuit law turns on deference, there is a chance that the rule will change in a court that is not interested in engaging in deference.

Other systemic (and unresolved) methodological questions could have important implications for individual cases. Last Term, Justices Gorsuch and Jackson both supported application of the rule of lenity in a civil fines case that otherwise split on conventional ideological grounds.[106] That portion of the Court's opinion was not necessary to the result and was not endorsed by the other members of the Court.[107] But it is a reminder that there is strong support for respecting lenity principles in the civil context, which could have dramatic implications for immigration cases.

The Supreme Court's decisions also have deep relevance outside of the specific issues decided by the Court. For example, the Court's recent decisions in *Pereida v. Wilkinson*[108] and *Barton v. Barr*[109] created roadblocks to cancellation of removal.[110] Because these cases make it more difficult to

103. 581 U.S. at 391–99 (noting that the offense must be "aggravated"; that it must be read in context with the other offenses in that subsection, i.e., murder and rape; and that it is informed by both the federal criminal statute with the same title enacted the same year and a review of state statutes with respect to the offense at issue). The Court found no reason to consult the rule of lenity or *Chevron* principles due to the clarity of its result. *Id.* at 397–98. The Second Circuit decision ignores this methodology, choosing instead to follow its past decision in *Mugalli*, which defers to the BIA's broad definition. *Rodriguez*, 975 F.3d at 189–190; *Debique*, 58 F.4th at 681.

104. *Rodriguez*, 975 F.3d at 192 (continuing to use a "flexible" definition of sexual abuse of a minor); *Debique*, 58 F.4th at 681 (applying the Second Circuit's deferential approach because it was not squarely overturned by *Esquivel-Quintana*).

105. *See* Larios-Reyes v. Lynch, 843 F.3d 146 (4th Cir. 2016).

106. Bittner v. United States, 143 S. Ct. 713, 724–25 (2023).

107. *Id.*

108. 141 S. Ct. 754 (2021).

109. 140 S. Ct. 1442 (2020).

110. *Barton* expanded application of the "stop time rule" to limit relief to lawful permanent residents based on past conduct that did not make them deportable. *See id.* at 1452. *Pereida* set out a rule that can make it impossible for a noncitizen to qualify for relief from removal due to inadequate court records about the basis of the underlying conviction. *See* 141 S. Ct. at 767 (recognizing that the adoption of the rule could mean that there is no evidence available to prove eligibility for relief).

obtain discretionary relief, they place a premium on developing and pursuing arguments that a client is not deportable in the first place.

Immigration issues will continue to play a significant role on the Supreme Court's docket. They involve federal law questions for which there are and will continue to be important splits in the circuits.[111] A prominent set of cases that are very important for day-to-day practice are circuit splits on the categorical approach to determining what convictions fit the deportability grounds or aggravated felony categories. Last Term, for example, the Court considered the scope of the obstruction of justice prong of the aggravated felony definition.[112] The agency had changed its interpretation, but the circuit court had nonetheless deferred to the latest agency interpretation.[113] When it came to oral argument before the Supreme Court, however, the words "Chevron" and "deference" were not mentioned by any Justice or party.[114] Indeed, when it issued its opinion, the Court made no mention of deference, despite the prominent role deference had played in lower courts.[115]

IV. LAWYERING IN THE FACE OF UNCERTAINTY AND DOCTRINAL SETBACKS

The phenomena described in this Essay require lawyers to be nimble, aware of the changeability of doctrine and policies, and resourced to represent clients in increasingly complex representation. The challenges of uncertain law and policies can be daunting, but they also can be opportunities for creative and hopeful advocacy to protect the rights of clients. As we look to the future, the cause of adequate representation of noncitizens—the core mission of the Katzmann Study Group on Immigrant Representation—requires that we be mindful of these complexities and think about how best to support organizations and advocates as they work to meet these challenges.

First, it is important to seize opportunities when they exist because laws and policies could change. This lesson is clear with the fate of the Biden administration's prosecutorial discretion memos, which enjoyed a brief

111. Morawetz, *supra* note 91, at 796–98 (discussing the structural forces driving the Supreme Court's immigration docket).

112. Pugin v. Garland, 19 F.4th 437 (4th Cir. 2021), *cert. granted in part*, 143 S. Ct. 645 (2023), *and aff'd*, 143 S. Ct. 1833 (2023). Notably, the lower court held that *Chevron* deference should be applied to the obstruction of justice prong of the aggravated felony definition. *Pugin*, 19 F.4th at 441. It therefore deferred to the BIA's ruling in *Matter of Valenzuela Gallardo*, 27 I. & N. Dec. 449 (B.I.A. 2018).

113. *Pugin*, 19 F.4th at 441. *Compare Matter of Valenzuela Gallardo*, 27 I. & N. Dec. at 449 (adopting a broad definition of the obstruction of justice aggravated felony category), *with* Matter of Espinoza-Gonzalez, 22 I. & N. Dec. 889 (B.I.A. 1999) (adopting a narrower view of obstruction based on elements of federal criminal code provisions).

114. Transcript of Oral Argument, Pugin v. Garland, 143 S. Ct. 1833 (2023) (Nos. 22-23, 22-331), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/22-23_8759.pdf [https://perma.cc/5GTD-SQ8X].

115. *See* Pugin v. Garland, 19 F.4th 437, 439 (4th Cir. 2021) (relying on *Chevron* deference), *aff'd*, 143 S. Ct. 1833 (2023) (affirming the result of the U.S. Court of Appeals for the Fourth Circuit but not mentioning *Chevron* or deference).

period of operational force before they were put on hold for a year and a half.[116] Those who waited to file a request faced injunctions against the memos and the clear priorities that they set out. That did not end the chance to seek discretion, but it made such discretion harder to get for clients who would have clearly fit into the previously outlined priorities.

The same need to seize the moment exists with changing case law. When a circuit's case law is favorable, there is a premium on having a case resolved while that precedent is in place.

Second, it is important to develop the expertise to counsel clients that law and policies could change, meaning that there may be hope for developments that could aid or hurt a client's case down the road. This phenomenon is familiar if one looks at the longer history of immigrant representation. There were times, for example, where circuit law treated any two drug possession convictions as an aggravated felony before that precedent was rejected by the Supreme Court.[117] Much as the current Court is hostile to the rights of many immigrants, the possibility of a change in law that benefits a client remains.

Third, it is important to devote resources to finding permanent solutions for clients who hold temporary forms of status. The history of the DACA litigation is a reminder that temporary statuses are insecure and no status short of citizenship is truly secure (and even then, there may be risks associated with past admissions of criminal activity).[118] Returning to past clients and continuing to evaluate ways to obtain a stable route to citizenship remain extremely important.

Fourth, training, resources, and innovative strategies are needed to free noncitizens from a punitive detention system that seriously impedes their ability to pursue their rights and enforces day-to-day cruelty. This work is harder given developments in Supreme Court doctrine, but it is more important than ever.

Finally, true change can only come with a change in both national and local immigration policies. Lawyers for immigrants must understand what advocacy is happening and how to support those seeking positive change for their client communities.

116. *See supra* note 8 and accompanying text.

117. *See generally* Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010).

118. *See* Farhane v. United States, No. 20-1666, 2023 WL 5156847 (2d Cir. Aug. 11, 2023) (upholding denaturalization based on conduct that preceded citizenship).