THE PERILS OF SUPREME COURT INTERVENTION IN PREVIOUSLY TECHNICAL IMMIGRATION CASES

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The post-Kennedy Court has altered its approach to immigration law issues that the Court previously treated as technical. Surveying cases from 2001 through 2018 of technical issues related to the deportability and relief eligibility of noncitizens with past criminal convictions, this Article shows that the Court often ruled unanimously either for or against the noncitizen and that relatively few cases were decided on conventional ideological grounds. Since Justice Kennedy's retirement, however, the two first highly technical cases concerning eligibility for relief from deportation for noncitizens with convictions were decided on conventional ideological grounds. Furthermore, the Court's opinions show a disdain for past precedent and methodological approaches that have protected noncitizens from harsh readings of these laws. Recent cases have also gone beyond the position adopted by the government, either in its briefs or in published agency precedent. The result is a situation in which plenary review in the Supreme Court threatens the rights of noncitizens and, at times, the policy positions of the Biden Administration.

This Article argues that the perils of plenary review in the Court coupled with an executive branch that professes to be more sympathetic to noncitizens create obligations for counsel, potential amici, and government counsel. Counsel should consider the downside risks of plenary review as well as opportunities to advocate for alternative solutions that would help individual clients or resolve a circuit split favorably outside of Court intervention. Amici organizations should recognize that the downside risks of plenary review can be far greater than the narrow issues presented in a specific case. They should consider how any case is an opportunity for the Court to reach beyond the issues squarely presented in a case and compromise interests of noncitizens. Government counsel should recognize the risk that any case before the Court can lead to rulings that extend beyond those advocated by the government. They should further vet positions adopted in the lower courts in defense of agency decisions and reconsider litigation positions that are not warranted.

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INTRODUCTION

It is now clear that the Supreme Court has swung to the right in a way that threatens longstanding precedent in many areas of law.[1] In addition, the Court has adopted new tools for exerting its power through the "shadow docket" even when it does not ultimately consider a case on the merits.[2] In immigration, both these trends are evident in high-profile cases, such as the Supreme Court's rushed intervention to require the Biden Administration to reinstate the Trump Administration's policy of keeping asylum seekers in Mexico under the Orwellian title: "Migration Protection Protocols."[3]

This Article posits that even before the confirmation of the latest Trump appointee to the Supreme Court, the trend towards anti-immigrant decisions had moved from areas that have been politically charged to areas of immigration law that used to be considered technical. As the technical has become political, the steady stream of once-technical cases threatens to solidify anti-immigrant policies that will be very hard to undo. Understanding the dangers of Supreme Court intervention is therefore essential both for immigration advocates and for an Administration that defends a multitude of technical decisions about how to read immigration laws. Today, when any issue reaches the Supreme Court, the odds of a result that undermines both immigrant rights and the power of the Executive to administer laws with any element of compassion is high.

This Article does not suggest that cases can be neatly categorized as political or technical. Indeed, all Supreme Court cases about immigration law involve questions of how to best interpret constitutional and statutory provisions,

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1. The rightward turn was evident even before Justice Barrett joined the Court. *See, e.g.*, Whole Women's Health v. Jackson, 141 S. Ct. 2494 (2021) (denying motion to preserve status quo ante prior to Texas law banning most abortions); Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2351 (2021) (Kagan, J., dissenting) (charging that the Court has rewritten the Voting Rights Act to match policy preferences); Lee Kovarsky, *The Trump Executions*, 100 TEX. L. REV. 621, 660 (2022) (showing how the Supreme Court facilitated former President Trump's rush to executions); Aziz Huq, *The Roberts Court is Dying. Here's What Comes Next*, POLITICO (Sept. 15, 2021, 4:30 AM) https://www.politico.com/news/magazine/2021/09/15/the-roberts-court-is-dying-heres-what-comes-next-511784 [https://perma.cc/AQ6Q-U3R2] (commenting on how even when the Chief Justice has broken with his conservative colleagues, he has done so on process, not substance).

2. *See, e.g.*, Steven Vladeck, *The Supreme Court Doesn't Just Abuse Its Shadow Docket. It Does So Inconsistently*, WASH. POST (Sept. 3, 2021, 10:43 AM) https://www.washingtonpost.com/outlook/2021/09/03/shadow-docket-elena-kagan-abortion/ [https://perma.cc/8EHE-GBFD] (commenting on inconsistent use of shadow docket to advance conservative policy positions); Ala. Ass'n of Realtors v. Dep't of Health and Hum. Servs., 141 S. Ct. 2485, 2490 (2021) (lifting stay on eviction moratorium during the COVID-19 pandemic).

3. Biden v. Texas, 142 S. Ct. 926, 926–27 (2021) (denying stay of injunction requiring reinstatement of the Migration Protection Protocols). *See generally* Anil Kalhan, *Immigration Enforcement, Strategic Entrenchment, and The Dead Hand of the Trump Presidency*, 2021 UNIV. OF ILL. L. REV. ONLINE, 46, 66, 66 n.78 (2021) (describing how the Trump Administration tied the hands of the Biden Administration on significant immigration matters).

and in that sense, the lawyers present technical arguments about the best readings of those provisions, as well as how to apply past caselaw and methods of interpretation. Instead, this Article posits that groups of cases can move from being treated by the Court as technical to being treated as political or ideological. When that happens, it appears that the subject matter of the case leads the Justices to put a thumb on the scale of technical arguments, and the results in the cases fall along a conventional right–left axis.

To illustrate this point, this Article takes a close look at recent decisions at the intersection of immigration law and criminal law. Noncitizens with criminal convictions have been a target for decades in Congress.[4] In both large immigration bills and criminal law bills, Congress has treated the "criminal alien"[5] as a punching bag. In its statutes, debates, and reports, Congress has used language designed to politicize and deceive, such as terming convictions "aggravated felonies" when they are neither aggravated nor always felonies.[6] These overreaches by Congress were followed by executive interpretations (in both Democratic and Republican administrations) that stretched the laws to be more draconian than they were written.[7] Often, however, the Supreme Court pushed back in opinions that were lopsided or even unanimous, applying the technical requirements of the statute and limiting some of the most extreme interpretations of these laws.

Now, however, the previously technical has become political. After Justice Kennedy's departure from the Court in 2018, the first two cases addressing deportability and bars to relief for noncitizens with criminal convictions were decided by a Court divided on conventional ideological grounds.[8] No longer do we have, for example, a Justice Scalia, who ruled for noncitizens with criminal convictions in 6 out of 11 cases described in this Article between 2001 and his death in 2016.[9] No longer do we have cases in which Justice Sotomayor and Justice Thomas are in agreement in a divided immigration case.[10] We are in a very different time, and any case runs a serious risk of being decided in the shadow of the same anti-immigrant tropes about the "criminal alien" that fueled some of the worst

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4. *See generally* ALINA DAS, NO JUSTICE IN THE SHADOWS: HOW AMERICA CRIMINALIZES IMMIGRANTS (2020).

5. This term is generally used to refer to any noncitizen who has had contact with the criminal justice system, whether through an arrest or conviction. It labels people regardless of the fairness or validity of the underlying interaction with the criminal legal system or the length of time that has passed since that interaction.

6. DAS, *supra* note 4, at 19–20.

7. Consider, for example, the agency positions that led to the trio of Supreme Court cases on the proper application of the "drug trafficking" aggravated felony ground. *See* discussion *infra* Part I.B.1.

8. *See infra* Part II.

9. The cases discussed in this Article are set out in the Appendix to this Article. Those in which Justice Scalia ruled for the immigrant were Leocal v. Ashcroft, 543 U.S. 1 (2004); Lopez v. Gonzales, 549 U.S. 47 (2006); Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010); Judulang v. Holder, 565 U.S. 42 (2011); Moncrieffe v. Holder, 569 U.S. 184 (2013); and Mellouli v. Lynch, 575 U.S. 798 (2015). Although three of these cases were unanimous, Justice Scalia broke with Justices Thomas and Alito in *Moncrieffe* and *Mellouli* and with Justice Thomas in *Lopez*.

10. *See, e.g.*, Luna Torres v. Lynch, 578 U.S. 452 (2016).

excesses in Congress and without regard to precedent and principles that have shaped prior rulings. Today, the Court may take any case as an opportunity to read the immigration laws in ways that were never articulated by any formal agency decision but are instead developed by lawyers defending an agency result in a particular case. Indeed, the Court will go beyond arguments advanced by government counsel and thereby close off defenses to deportation and impose greater harshness on noncitizens. Both litigators and those in the Executive seeking to preserve a modicum of humanity in the immigration laws ignore these trends at their peril.

Part I of this Article describes how the Court treated cases concerning noncitizens with criminal convictions who face deportability or possible bars to a discretionary hearing during the period before Justice Kennedy's departure from the Court. Part II explores the Court's two post-Kennedy decisions in this area and argues that they mark a decided shift from the past. Part III offers some observations on steps that litigators, amici, and the Executive could take to curtail the opportunities for the current Supreme Court to impose further damage on immigration law.

I. THE 1996 LAWS AND SUPREME COURT TREATMENT OF CASES ON DEPORTABILITY AND ACCESS TO RELIEF FOR NONCITIZENS WITH CRIMINAL CONVICTIONS: 2001–2018

The post-Kennedy Court has dramatically shifted the Court's treatment of cases involving deportability and access to relief hearings for noncitizens with criminal convictions. This Part begins with a description of the kinds of legal issues that have reached the Court since the passage of the landmark 1996 immigration laws and how they were treated by the Court prior to Justice Kennedy's departure.

This Article focuses on the time before and after Justice Kennedy's departure not because Justice Kennedy was a swing Justice in the cases described in this Article, but because the period prior to his departure was notable for the number of cases involving noncitizens with convictions that were decided by a unanimous or lopsided Court. The claim here is instead descriptive—that the period prior to Justice Kennedy's retirement was characterized by a different type of approach to cases involving noncitizens with criminal convictions. That approach has changed, perhaps because of the new membership of the Court, perhaps because of new dynamics in how the Court's members resolve differences.[11] There are undoubtedly many theories about why and how the Court has changed. What matters for lawyers considering taking an immigration case to the Court or for government lawyers considering how to manage possible Supreme Court review is the phenomenon of

11. Others might refer to the change as the Trump Court or might characterize the Court by the changes in membership—the additions of Justices Gorsuch, Kavanaugh, and Barrett, and the loss of Justices Kennedy, Scalia, and Ginsburg. As discussed below, however, the changes in the Court's approach to immigration cases involving noncitizens with criminal convictions extend even to members of the Court who are not newly added to the Court. *See infra* notes 95–97 and accompanying text (noting Chief Justice Roberts's votes in recent cases).

how the Court's approaches have changed, and the implications of such a change for their approach to plenary Supreme Court consideration of immigration cases.

A. The 1996 Laws: How They Changed Immigration Law and Set the Stage for Court Resolution of Legal Questions

The 1996 Congress made sweeping changes to immigration law, including revamping the rules governing long-time residents who faced deportation.[12] Congress expanded grounds of deportability and altered the eligibility rules for a wide array of forms of relief from deportation. Each one of these new provisions created legal questions about the scope of the changes. Despite the passage of 26 years, many legal questions are not settled, and the Supreme Court continues to play a central role in deciding what makes someone deportable and what makes that person eligible for relief from deportation.

Prior to 1996, two forms of relief protected long-time noncitizens from being deported without a chance at a hearing in which they could present individualized facts about their situation. The first of these, relief under section 212(c) of the Immigration and Nationality Act ("INA"),[13] was available to lawful permanent residents. In 1996, the eligibility criteria required that the person have seven years of lawful residence and not have been convicted of an "aggravated felony" for which the person had served five years in prison.[14] At the time, the immigration law had a list of convictions that were considered "aggravated felonies." The limitation on relief based on having served five years for a conviction of an aggravated felony limited the scope of the provision, although it no doubt applied in a disparate way based on racial justice disparities that determined the length of sentences and how much time was served.[15]

The second form of relief, for noncitizens who were not lawful permanent residents, was "suspension of deportation." The eligibility requirements for this

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12. *See generally* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000); Jason Cade, *The Plea Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751 (2013).

13. Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182.

14. The text of the law stated: "Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years." 8 U.S.C. § 1182(c) (repealed 1996).

15. *See generally* THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (2018) (documenting extensive racial disparities throughout every stage of the criminal legal system); THE SENTENCING PROJECT, REDUCING RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM (2016) (same).

form of relief depended on the reason why the individual was deportable. For those deportable on criminal grounds, eligibility for relief required continuous residence of ten years following commission of the act that was the ground of deportation.[16] The individual would then have to show that deportation would cause exceptional and extremely unusual hardship to the individual facing deportation or to a spouse, parent, or child who was a U.S. citizen or a lawful permanent resident.

These two forms of relief from deportation had a long history, dating back to 1940 when the Attorney General concluded that discretionary relief was permitted under the Seventh Proviso of section 3 of the Immigration Act of 1917. The Attorney General concluded that the 1917 Act should be read to allow discretionary relief for a noncitizen who could be barred from readmission to the country due to a past crime involving moral turpitude.[17] In 1952, the INA further cemented these forms of relief by setting out formal eligibility criteria.[18] Although they were revised over time, these two forms of relief provided a crucial safety valve in cases where the government sought to deport a noncitizen with a long history of presence in the United States. As developed in caselaw, they allowed for consideration of such equities as length of residence in the United States, family ties, military service, employment history, and rehabilitation since any criminal offense.[19]

The 1996 Congress expanded the grounds of deportability, including adding and expanding a long list of convictions deemed "aggravated felonies." Some categories were defined by a generic type of offense, while others were defined through a cross-reference to a federal crime.[20] Some were cabined by the

16. For those deportable on various criminal grounds, the law provided the following requirements for the person seeking relief: "has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence . . . ." 8 U.S.C § 1254(a)(2) (repealed 1996).

17. Matter of L-, 1 I. & N. Dec. 1, 1 (B.I.A. 1940) (authorizing *nunc pro tunc* waiver to readmit noncitizen who previously traveled). Relief under the Seventh Proviso was later replaced by relief under § 212(c) of the INA. Although initially this relief required some prior departure from the United States that permitted a *nunc pro tunc* waiver, eventually the Board of Immigration Appeals ("BIA") made this relief available generally to those charged with deportability who met the eligibility requirements. Matter of Silva, 16 I & N. Dec. 26 (B.I.A. 1976). For a critique of how these forms of relief were applied in practice, and racial disparities in the granting of relief, see MAE NGAI, IMPOSSIBLE SUBJECTS 113 (2014).

18. Immigration and Nationality Act § 244, 8 U.S.C. § 1254a.

19. *See, e.g.*, Matter of Y- C- C-, 6 I. & N. Dec. 670, 670 (B.I.A. 1955) (granting suspension for long-time noncitizen who provided service to the merchant marine during war years); Matter of B-, 5 I. & N. Dec. 72, 85 (B.I.A. 1953) (granting suspension and concluding that bar based on subversive associations did not apply where they were "acts of a young girl in love").

20. *Compare* 8 U.S.C. § 1101(a)(43)(S) (offense relating to perjury) *with* 8 U.S.C. § 1101(a)(43)(B) (cross-referencing federal controlled substance laws).

length of the prison term,[21] some were cabined by a dollar loss amount,[22] and some were not cabined by anything other than the type of crime.[23] These new deportability grounds raised numerous questions about the breadth of the immigration categories and which state law crimes fell under the federal categories.

Congress also altered the requirements for obtaining a relief hearing. For lawful permanent residents, two simultaneous changes in the 1996 law greatly reduced access to a § 212(c) hearing. A new form of relief called "cancellation of removal" for lawful permanent residents ("LPR cancellation") eliminated any sentence requirement for disqualifying "aggravated felonies."[24] This greatly reduced access to a relief hearing. This change went beyond that proposed in either house of Congress, each of which had proposed that a lawful permanent resident be barred from such an equity hearing if he or she had been convicted of an "aggravated felony" for which the sentence imposed was five years.[25] As a result, the newly expanded "aggravated felony" definition, without any qualifier, served to both impose deportability and bar relief from removal.[26]

For noncitizens who lacked permanent resident status, Congress also greatly altered access to relief. Under the new law, cancellation of removal for non-lawful permanent residents ("non-LPR cancellation") is unavailable to a person with a conviction for any offense that is an inadmissibility ground (namely an offense that could be used to prevent a new visa or, in general, entry into the country) or for an offense that is a ground of deportability (namely an offense that renders a person subject to expulsion).[27] In addition, the old law allowed a noncitizen facing deportation to show that deportation would cause the noncitizen exceptional and extremely unusual hardship. Under the 1996 law, the only relevant hardship is to a parent, spouse, or child who is a lawful permanent resident or a U.S. citizen.[28]

Congress also added additional bars to relief based on the time of any offense. For both the continuous residence requirements of LPR and non-LPR cancellation, Congress created a "stop time" rule that stops the clock on continuous residence based on service of a charging document or commission of certain criminal offenses.[29] In a sense, the stop time rule operates in the opposite way of the

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21. *E.g.*, 8 U.S.C. § 1101(a)(43)(F) (crime of violence for which the term of imprisonment is at least one year); *id.* § 1101(a)(43)(G) (theft offense for which the term of imprisonment is at least one year).

22. *E.g.*, 8 U.S.C. § 1101(a)(43(M)(i) (fraud involving loss exceeding $10,000).

23. *E.g.*, 8 U.S.C. § 1101(a)(43)(A) (listing murder, rape, and sexual abuse of a minor without any qualifications).

24. 8 U.S.C. § 1229b(a)(3).

25. Morawetz, *supra* note 12, at 1955 n.106 (discussing legislative history and how restriction was added in a conference report).

26. The effect of both of these changes was amplified by new definitional provisions that defined the terms "conviction" and "sentence." Under the INA, a suspended sentence is treated as a sentence, and some dispositions that would not be considered convictions under state law are deemed to be convictions under federal immigration law. *See* 8 U.S.C. § 1101(a)(48).

27. 8 U.S.C. § 1229b(b)(1)(C).

28. 8 U.S.C. § 1229b(B)(1)(D).

29. 8 U.S.C. § 1229b(d).

pre-1996 law for suspension, which looked at the time of good moral character since the offense. As voted on in the House and Senate, the "stop time" rule only stopped accrual of time at the time the charging document was served. The conference report added the additional bar based on the timing of criminal offenses.[30]

Together, new grounds of deportability and new eligibility requirements for an individualized relief hearing, now called "cancellation of removal," raised a dizzying array of legal questions. These included how to match criminal convictions under the laws of the fifty states to the dozens of categories of aggravated felonies, how the laws applied to those who were convicted before the laws were enacted, and how to read new rules about computing the length of continuous residence.

B. Litigation in the Supreme Court over Deportability and Access to Relief from Deportation Between 2001 and 2018

Leading up to Justice Kennedy's retirement in 2018, cases involving deportability, relief from removal, and the intersection of immigration and criminal law were largely treated as technical as opposed to ideological cases.[31] During the period from 2001 to 2018, the Court decided 14 cases on the substantive rights of noncitizens with criminal convictions in cases involving either criteria for deportability or criminal bars to an individualized relief hearing. These cases involved the scope of the aggravated felony definition (which triggers deportability and bars individualized relief hearings), the methodology for comparing state convictions to federal categories, and other issues related to eligibility for relief. The cases broke both for and against the immigrant, and many cases were decided by lopsided majorities. The cases also read as technical examinations of the relevant law.

1. Cases about the Scope of the Aggravated Felony Definition and Grounds for Deportation

A large number of Supreme Court cases in the 2001–2018 period concerned the definition of an "aggravated felony." This category serves as a bar to any equity hearing for lawful permanent residents as well as other noncitizens. For lawful permanent residents, an aggravated felony conviction bars consideration of the equities of the case, regardless of the strength of those equities, such as service in the United States military, decades of rehabilitation, or having all of one's family in the United States.[32] For nonpermanent residents, it serves as a bar to even considering whether removal would cause, for example, "extraordinary and

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30. *See* Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 151–52 (1998) (discussing legislative history of stop time provision).

31. *See supra* Introduction (discussing the terms technical and ideological). Note that this specific time period is chosen based on the group of cases discussed in this Article. Other cases divided along ideological grounds earlier. *See, e.g.*, Demore v. Kim, 538 U.S. 510 (2003) (splitting 5–4 on the merits of challenge to mandatory detention); Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (splitting 5–3 on the merits of a challenge to mandatory detention).

32. 8 U.S.C. § 1229b(a)(3). *See also* Matter of C-V-T-, 22 I. & N. Dec. 7, 11 (B.I.A. 1998) (describing factors that can be considered at a cancellation hearing).

extremely unusual hardship" to a U.S. citizen spouse or child.[33] As a result, the contours of the aggravated felony definition have enormous importance in determining the fate of non-U.S. citizens. The Court's decisions were split in terms of whether they upheld the government. But they were also characterized by lopsided—or even unanimous—majorities for the positions taken by the Court.

a. Controlled Substance Cases

Between 2006 and 2013, the Court decided three cases on the proper scope of the aggravated felony definition for drug trafficking crimes. In each of these cases, the Court ruled for the immigrant by a lopsided majority.

In 2006, the Court considered *Lopez v. Gonzales*.[34] The government argued that any state felony drug conviction should be treated as a drug trafficking aggravated felony, even if the state law did not require any trafficking element for a conviction. The Court ruled 8–1 against the government. In an opinion joined by Chief Justice Roberts and Justices Scalia and Alito, Justice Souter wrote that the government's position did not fit "with any commonsense conception of 'illegal trafficking.'"[35] Furthermore, it meant that a crime that could not be punished as a felony under federal law was being treated as an aggravated felony simply because the state chose to label it that way. The Court paid particular attention to the implications of the government's argument for marijuana offenses. It noted that the federal statute treats marijuana possession as a misdemeanor and that the grounds of deportability for a controlled substance offense exclude small amounts of marijuana.[36]

Four years later in *Carachuri-Rosendo v. Holder*,[37] the Court revisited which controlled substance offenses would be categorized as aggravated felonies. In *Carachuri-Rosendo*, the government took the position that any two drug possession convictions, no matter how classified by the state, should together be treated as a drug trafficking aggravated felony. The government's position rested on the fact that a federal prosecutor could charge a second possession offense as a recidivist offense and, in that hypothetical scenario, the individual could be convicted of a felony under federal law.[38] The Court's ruling was unanimous against the government, although Justices Scalia and Thomas concurred on separate grounds. The Court noted that under federal law the classification of a second marijuana offense depends on whether a prosecutor had chosen to charge an individual as a recidivist. It rejected the idea that a hypothetical state prosecution could visit the harsh consequences of the aggravated felony label.[39]

Three years later, the Court returned to the controlled substance aggravated felony category in *Moncrieffe v. Holder*.[40] The issue in *Moncrieffe* was how to

33. 8 U.S.C. § 1229b(b)(1)(C) (barring those with convictions under any ground of deportability, including convictions labeled as aggravated felonies).

34. *See generally* 549 U.S. 47 (2006).

35. *Id.* at 53.

36. *Id.* at 59.

37. *See generally* 560 U.S. 563 (2010).

38. *Id.* at 575–76.

39. *Id.* at 576.

40. *See generally* 569 U.S. 184 (2013).

categorize a state marijuana conviction under a law that was expansive enough to include small transfers of marijuana for no remuneration. The issue arose because under federal law, the transfer of a small amount of marijuana is punished as a misdemeanor.[41] This time the Court ruled 7–2 against the government with Chief Justice Roberts and Justice Scalia joining the majority and Justices Thomas and Alito dissenting. The Court concluded that an offense that would be punished as a misdemeanor under federal law could not be treated as a drug trafficking aggravated felony.

b. Other Aggravated Felony Categories

The Court heard seven cases about the aggravated felony category that did not involve controlled substances. The immigrant won three of these cases and the government prevailed in four. Once again, most of the margins were lopsided. Three cases were unanimous: one was 8–1, and two were 6–3. The single 5–4 case involved constitutional questions about the void for vagueness doctrine.

In *Leocal v. Ashcroft*, a 2004 case, Chief Justice Rehnquist wrote for a unanimous Court that the crime of violence aggravated felony category did not reach convictions for driving under the influence based on criminal negligence.[42]

In *Gonzales v. Duenas-Alvarez*, a 2006 case, the Court ruled 8–1 for the government on whether a California theft conviction was an aggravated felony.[43] The Court found that the immigrant's argument for treating the California statute as reaching offenses outside the scope of the federal category depended on "legal imagination."[44] The Court concluded that a noncitizen seeking to show that a state crime should be interpreted as falling outside a federal category must show a realistic probability that the state statute is actually broader than the federal statute.

In 2009 and 2012, the Court considered two cases involving the fraud aggravated felony category. In *Nijhawan v. Holder*, the Court ruled 9–0 for the government that the categorical approach—a methodology for determining whether a state conviction matches the federal conviction-based category—did not apply to the amount threshold for an aggravated felony fraud offense.[45] In *Kawashima v. Holder*, the Court proceeded to rule 6–3 for the government that the tax evasion aggravated felony category reaches a broad swath of tax offenses. Justices Ginsburg, Breyer, and Kagan dissented.[46]

In 2016, in *Luna Torres v. Lynch*, the Court considered whether state crimes that did not involve any interstate commerce element fell within the federal aggravated felony for arson committed across state lines.[47] The Court ruled 6–3 for the government that the state crimes were aggravated felonies and that the absence

41. *Id.* at 199 (discussing how the government's argument would treat a federal misdemeanor as a felony).
42. 543 U.S. 1, 4 (2004).
43. 549 U.S. 183, 185 (2007).
44. *Id.* at 193.
45. 557 U.S. 29, 32 (2009).
46. 565 U.S. 478, 480 (2012).
47. 578 U.S. 452, 454 (2016).

of an interstate commerce element, as argued in that case, did not matter.[48] Justices Sotomayor, Thomas, and Breyer dissented.

In 2017, in *Esquivel-Quintana v. Sessions*, the Court took on the aggravated felony category directed to convictions for sexual abuse of a minor.[49] The eight-member Court unanimously rejected the government's position that the law extended to convictions in states where the age of consent is 18.

The only closely divided decision was the Court's 2018 5–4 ruling in *Sessions v. Dimaya*.[50] *Dimaya* was a void for vagueness challenge to one aspect of the crime of violence aggravated felony. Justice Kagan wrote for the Court in an opinion joined in part by Justice Gorsuch. Chief Justice Roberts dissented, along with Justices Alito, Thomas, and Kennedy. A separate dissent by Justice Thomas would have further limited the types of arguments that could be presented by noncitizens.

c. Other Deportability Grounds

In the years since 1996, the Court heard one case about grounds of deportability other than the aggravated felony ground. In *Mellouli v. Lynch*, the Court considered deportability based on a state drug conviction from a state that punishes a broader set of substances than the federal law.[51] The Court ruled 7–2 in favor of Mellouli's argument that the Kansas statute was not a match with the federal controlled substance statute. Justice Ginsburg's opinion was joined by Chief Justice Roberts and Justice Scalia. The dissenters were Justices Thomas and Alito.

2. Issues Related to Relief for Noncitizens with Criminal Convictions

In the years between 2001 and 2018, the Court decided three other cases that related to deportability and access to relief for noncitizens with criminal convictions. One of these cases was decided 9–0 for the noncitizen. One case was decided 6–3 for the noncitizen. Only one was a 5–4 split.

In 2001, the Court ruled 5–4 in *I.N.S. v. St. Cyr* that changes in access to relief in the 1996 law should not be applied retroactively.[52] This case broke on ideological grounds with four dissenters: Justices Scalia, Thomas, O'Connor, and Chief Justice Rehnquist. Notably, however, the dissenters did not reach the merits of the claims. Instead, they would have found that the Court lacked jurisdiction over these substantive questions.[53]

In 2011, the Court resolved the complicated fallout of its decision in *St. Cyr* about access to pre-1996 relief under § 212(c) of the INA. In *Judulang v. Holder*, a unanimous Court ruled that access to pre-1996 relief was broadly available for lawful permanent residents with pre-1996 convictions, rejecting artificial

48. The Court limited its holding to situations where the interstate commerce element is purely jurisdictional. *See id.* at 473.

49. 137 S. Ct. 1562 (2017).

50. 138 S. Ct. 1204 (2018).

51. 575 U.S. 798, 804 (2015).

52. 533 U.S. 289, 326 (2001).

53. *Id.* at 326–27.

distinctions drawn by the circuit courts and the agency on the scope of access to prior relief.[54]

In 2012, the Court also considered the proper interpretation of a new provision defining when a noncitizen who travels should be subject to the rules for new applicants for admission. In *Vartelas v. Holder*, the Court concluded 6–3 that the new rules should not apply to a person who had a conviction that predated the 1996 laws. Chief Justice Roberts joined the majority.[55] Justices Scalia, Thomas, and Alito dissented.

C. Reflections on the 2001–2018 Period of Litigation

A detailed look at cases decided between 2001 and 2018 shows that they were treated largely as part of the Court's technical statutory docket and not as highly controversial decisions.[56] These cases generally recognized the two-step process for determining whether deportation is mandatory and discussed rules of construction that favor statutory constructions that protect immigrants from deportation. They also upheld the categorical approach methodology for determining when a noncitizen has been convicted of an offense. Even when ruling against the noncitizen, these cases did not rely on any presumed generalized congressional intent to rid the United States of all noncitizens with criminal convictions, but instead as cases involving technical issues of statutory construction about whether a particular level of harshness was dictated by the language of specific provisions.

1. Treating Deportability and Eligibility for Relief as Technical and Noncontroversial Cases

For the most part, the Court treated cases involving deportability on criminal grounds and restrictions on relief as technical cases that were noncontroversial. Of the 14 cases, only *INS v. St. Cyr* and *Dimaya v. Sessions* were decided on a 5–4 basis. Moreover, the dissenters in *St. Cyr* did not reach the merits because they concluded that the Court lacked jurisdiction. The case therefore does not show a split on the substantive rules on who should be subject to deportation or eligible for relief. This rate of 5–4 decisions, 14%, is similar to an average rate of 5–4 decisions over the entire period of approximately 16%.[57]

The remaining cases show a high level of unanimous or very lopsided opinions. The Court decided six cases, or 43%, unanimously. Another case was 8–1 and two more were 7–2. If you put this group of nine cases together, they made up

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54. 565 U.S. 42, 45 (2011).

55. 566 U.S. 257, 261 (2012).

56. Kevin Johnson has made a similar observation about the years 2009–13, looking at the full range of immigration cases. *See* Kevin R. Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 OKL. L. REV. 57, 62–63 (2015).

57. This rate of 5–4 decisions is based on the annual statistical overview published by SCOTUSBlog. SCOTUSBlog has altered its methodology a bit from year to year, which is why the statistic is offered as an approximation. *Stat Pack Archive*, SCOTUSBLOG, https://www.scotusblog.com/reference/stat-pack/ [https://perma.cc/Z75Z-2DBX] (last visited July 23, 2022).

64% of the cases on substantive rules on deportability and relief for persons with criminal convictions decided over the 17 years.

The last group of three cases was decided by 6–3 or 5–3 margins, but the decisions did not always break on conventional ideological lines. In *Kawashima*, for example, Justice Sotomayor joined Justice Thomas's majority opinion finding that a tax offense was an aggravated felony. In *Luna Torres*, Justice Kagan drafted the opinion that ruled against the noncitizen and was joined by Justice Ginsburg. The dissent, which would have ruled for the noncitizen, included Justices Thomas, Sotomayor, and Breyer. Only *Vartelas* could be described as a split where the "swing" Justices decided the case. In that case, Justice Kennedy and Chief Justice Roberts joined Justice Ginsburg's opinion finding that new rules on treating returning lawful permanent residents as subject to inadmissibility grounds (and therefore subject to a broader set of grounds for removal) did not apply to those with pre-1996 convictions.

Students of the Court will know that these mixed coalitions are not unusual and that the public focus on an ideologically divided Court historically describes a minority of the Court's cases. The important point for purposes of this Article is that this general characterization of the Court carried over to its substantive cases on which long-time noncitizen residents with criminal convictions would face deportation or a bar to an individualized hearing.

2. Recognizing the Two-Step System for Deportation

The Court's decisions between 2001 and 2018 also demonstrated a clear understanding of the two-step process for deportation in which a broader set of deportability grounds creates the possibility of deportation and a narrower set of bars to relief determines who has access to an individualized hearing. Access to relief was front and center in the *St. Cyr* case where the noncitizen sought to access pre-1996 relief. It was also central to the *Judulang* case where the Court concluded that the agency's implementation of the *St. Cyr* ruling was arbitrary and capricious.

Turning to the post-1996 scheme, the Court repeatedly showed its understanding of this framework in cases under the 1996 law where classification of a conviction as an "aggravated felony" would mean mandatory rather than discretionary deportation. In *Carachuri-Rosendo*, for example, the seven-member majority opinion explicitly noted that "whether a noncitizen has committed an 'aggravated felony' is relevant, *inter alia*, to the type of relief he may obtain from a removal order, but not to whether he is in fact removable."[58] Thus, it said, Mr. Carachuri could "avoid the harsh consequence of mandatory removal. But he will not avoid the fact that his conviction makes him, in the first instance, removable. Any relief he may obtain depends upon the discretion of the Attorney General."[59] The Court made the same point in *Moncrieffe v. Holder*, noting that "if a noncitizen has been convicted of one of a narrower set of crimes classified as 'aggravated felonies,' then he is not only deportable, but also ineligible for these discretionary forms of relief." [60]

58. Carachuri-Rosendo v. Holder, 560 U.S. 563, 581 (2010).
59. *Id.*
60. 569 U.S. 184, 187 (2013) (citations omitted).

The Court addressed access to an individualized relief hearing in two other cases. In *Lopez*, it noted that access to discretionary relief meant that Mr. Lopez's removal did not moot out the case.[61] In *Luna Torres*, it observed that the aggravated felony classification of Mr. Luna Torres's conviction served to prevent him from seeking cancellation of removal.[62]

Although not part of the 14 cases discussed in this Article because they were not strictly speaking about who is subject to deportation on criminal grounds and who faces a criminal bar to relief, two other cases in this time period are notable in showing the Court's clear understanding of the role of mandatory deportation rules and the stakes at issue for noncitizens. In *Padilla v. Kentucky*, issued in 2010, the Court ruled 7–2 that criminal defense counsel had breached their duties to a criminal defendant about the immigration consequences of a plea.[63] *Padilla* had a more familiar ideological split, with Justices Thomas and Scalia dissenting and arguing that there are no Sixth Amendment rights related to advice on immigration issues. Nonetheless, Chief Justice Roberts and Justice Alito concurred, agreeing that the noncitizen's rights were violated with misadvice, but seeking a more limited rule.[64] Seven years later in *Lee v. United States*, the Court ruled 6–2 that a lawful permanent resident who was misinformed about the immigration consequences of his plea did not have to show individualized prejudice.[65] This time, Chief Justice Roberts wrote the opinion for the Court. He explained that Lee's attorney had wrongly assured him that his plea would not have deportation consequences when it would in fact lead to mandatory deportation. Given the stakes for Lee, he reasoned, it was wrong to presume that Lee would not have taken his chance at going to trial had he been properly informed.[66] Justices Thomas and Alito dissented. These two cases highlighted critical features of how the deportation system works and the role of deportability and access to relief from removal. In both cases, the ineffectiveness issue arose because the underlying conviction was categorized by immigration law as a drug trafficking aggravated felony that barred discretionary relief.

3. Deciding Cases Based on the Categorical Approach

The Court's decisions between 2001 and 2018 also adopted strong endorsements of the categorical approach. As explained in these cases, the categorical approach looks at what is required for a conviction regardless of the facts alleged in the particular case. The Court considered eight cases considering whether a particular conviction should be categorized as a deportable offense or an aggravated felony.[67] Although there is plenty of room for disagreement about the

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61. Lopez v. Gonzales, 549 U.S. 47, 52 n.7 (2006) (noting that finding on aggravated felony category determined access to relief through cancellation).

62. Luna Torres v. Lynch, 578 U.S. 452, 454 (2016).

63. 559 U.S. 356, 360 (2010).

64. *Id.* at 375 (Alito, J., concurring).

65. 137 S. Ct. 1958, 1964 (2017).

66. *Id.* at 1967–69.

67. During this time, the Court also decided important categorical cases in the context of the Armed Career Criminal Act. *See* Mathis v. United States, 579 U.S. 500 (2016); Descamps v. United States, 570 U.S. 254 (2013).

specific outcomes of these cases, these cases either explicitly endorsed or applied the categorical approach.

The Court applied categorical reasoning expressly in *Lopez*, *Carachuri*, *Moncrieffe*, *Mellouli*, *Nijhawan*, *Kawashima*, *Duenas-Alvarez*, and *Luna Torres*. In each of these cases, the Court held that immigration consequences of convictions that are based on what a person was "convicted of" must look to the nature of the crime as defined by statute and not the individual facts of the noncitizen's case. In two cases, the Court observed that there was a long history in immigration law of categorizing convictions based on what a prosecutor must prove under the relevant statute. That means that each criminal statute is categorized, for immigration purposes, by the least acts required for a conviction under the relevant law.[68] The seven-member majority opinion in *Mellouli* observed that, "[a]s early as 1913, courts examining the federal immigration statute concluded that Congress, by tying immigration penalties to convictions, intended to 'limi[t] the immigration adjudicator's assessment of a past criminal conviction to a legal analysis of the statutory offense,' and to disallow '[examination] of the facts underlying the crime.'"[69] The Court tinkered with application of the categorical approach in *Nijhawan*, *Kawashima*, and *Duenas-Alvarez*, but each of those cases reaffirmed the centrality of categorical analysis in immigration law.

4. Recognizing Rules of Construction Favoring Noncitizens

Over the 18 years prior to Justice Kennedy's retirement, the Court also repeatedly acknowledged the rules of construction favoring readings of statutory ambiguities to favor noncitizens facing deportation. In *St. Cyr*, the Court relied expressly on this rule of construction.[70] Other cases acknowledged the rule, while leaving its implications to another day, in light of the Court's conclusion that the statute was clear. The Court announced this rule of construction in 1948[71] and reaffirmed it several times prior to *St. Cyr*.[72]

Although the rule was not dispositive in later cases, it was cited as good law and noted as an issue the Court did not need to address. For example, in his unanimous opinion in *Esquivel-Quintana*, Justice Thomas noted that the parties had argued about the relationship between a rule of lenity for noncitizens and *Chevron* deference.[73] He did not question the validity of the two general rules of construction, simply noting that because the Court found the statute was clear, and that the offense was not an aggravated felony, there was no need to consult those rules. Similarly, ruling against the noncitizen and writing for six members of the Court in *Kawashima*, Justice Thomas commented that it was "true that we have in the past,

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68. Moncrieffe v. Holder, 569 U.S. 184, 191 (citing Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1688–1702, 1749–52 (2011)); Mellouli v. Lynch, 575 U.S. 798, 805 (2015) (same).

69. *Mellouli*, 575 U.S. at 805.

70. I.N.S. v. St. Cyr, 533 U.S. 289, 320 (2001).

71. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

72. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 449; I.N.S. v. Errico, 385 U.S. 214, 225 (1966); Costello v. I.N.S., 376 U.S. 120, 128 (1964).

73. Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1572 (2017).

construed ambiguities in deportation statutes in the alien's favor." But he concluded that the statute before the Court was sufficiently clear that the rule did not apply.[74]

II. THE POST-KENNEDY COURT: IDEOLOGICALLY DIVIDED OPINIONS LIMITING ACCESS TO RELIEF FROM REMOVAL

After Justice Kennedy retired in June 2018 and the post-Kennedy Court began to take form, ideological divisions hardened on critical questions regarding access to relief from deportation. The Court decided two relevant cases that are directly relevant to noncitizens with criminal convictions: *Barton v. Barr*[75] and *Pereida v. Wilkinson*.[76] In both cases, the Court ruled for the government in opinions divided along ideological lines. Chief Justice Roberts, who had ruled for the noncitizen in numerous cases prior to 2019, voted for the government in both cases. These cases go to the basic rules as designed in 1996 about who gets a chance to make a case on the equities to stay in the United States. By ruling as it did, the new Court greatly shut down the critical safety valve of relief from deportation through individualized hearings that examine the equities of each individual case.[77]

A. Barton v. Barr

In the first post-Kennedy case about access to relief, *Barton v. Barr*, the Court ruled that criminal conduct that is a basis for denying admission to the United States can serve to stop the accrual of residence and thereby deny access to a relief

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74. Kawashima v. Holder, 565 U.S. 478, 489 (2012).

75. 140 S. Ct. 1442 (2020).

76. 141 S. Ct. 754 (2021).

77. During the Terms when the Court decided *Barton* and *Pereida*, it also ruled for the noncitizen in two cases that had the practical effect of expanding access to relief. These cases, however, did not directly address substantive criteria for relief for noncitizens with convictions as *Barton* and *Pereida* did. In *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021), the Court ruled 6–3 that a charging document that does not meet the requirements of the statute cannot be used to stop the accrual of residence for relief from removal. The decision was 5–4 with Justices Gorsuch and Barrett joining Justices Breyer, Sotomayor, and Kagan. Unlike *Barton* and *Pereida*, *Niz-Chavez* involves a transitory issue related to the government's compliance with the statute, and not a question of statutory eligibility for relief based on past acts and records that cannot be changed. It also did not involve criminal grounds. In *Guerrero-Lasprilla*, the Court ruled 7–2 that equitable tolling questions involve mixed questions of fact and law and are therefore subject to judicial review. *Guerrero-Lasprilla* concerned the courts' jurisdiction over equitable tolling decisions. Because those equitable tolling decisions matter for noncitizens who have been barred from relief and seek the benefit of later judicial decisions, it has the effect of expanding access to relief. It was not, however, a decision about how to read the statute's constraints on relief based on criminal convictions and therefore is not a direct ruling on the scope of access to discretionary relief. For that reason, those decisions, while suggesting that noncitizens can be successful in the current Court, have less relevance to the underlying criteria for deportability and access to discretionary relief and the ideological turn in cases about the treatment of the "criminal alien." There is good reason, however, to fear that the turn evident in the cases involving criminal convictions will spill over to other areas where the current Court has not yet exhibited similar harshness. Indeed, that was evident in the last term, when the Court decided *Patel v. Garland*, 142 S. Ct. 1614 (2022). *Patel* refused to apply the rule favoring judicial review in concluding that Congress had closed off fact review in cases involving certain discretionary relief.

hearing for a lawful permanent resident.[78]. Despite being a technical issue that did not involve broader jurisprudential questions (such as void for vagueness doctrine or approaches to retroactive laws), the ruling was 5–4, with Chief Justice Roberts joining Justices Kavanaugh, Gorsuch, Alito, and Thomas to rule against the noncitizen.

Barton concerned the stop time rule[79] for counting residence in the United States. The stakes were enormous for the system of relief from removal. If the residence clock stops before seven years in the case of a lawful permanent resident or ten years in the case of a noncitizen without permanent residence, the immigration court cannot have an equity hearing no matter how sympathetic the noncitizen's case.[80] That means no relief hearing for United States military veterans, no relief hearing where a citizen child is severely disabled, and no relief hearing when the criminal offense is many years old.

Barton presented an issue on which the agency had not taken a position in a published opinion. The ultimate ruling of the Court, therefore, has sweeping implications that were not vetted through any formal agency process. At issue was opaque language added by the conference report to the stop time rule. As originally proposed, the stop time rule only operated based on service of a charging document in the immigration case. The apparent theory was that a person should not benefit from time that results from delays in proceedings. The language of the final bill, however, was poorly drafted and not explained in the accompanying conference report. It stated: "Any period of continuous residence...in the United States shall be deemed to end...when an alien has committed an offense referred to in Section 212(a)(2) that renders the alien inadmissible to the United States under Section 212(a)(2) or removable from the United States under Section 237(a)(2) or 237(a)(4)...."[81]

The question in *Barton* was how to apply this language when a permanent resident, such as Barton, was already admitted to the country and was not subject to removal based on inadmissibility. Under immigration law, persons who have been admitted to the country can face removal if they are subject to deportability.[82] Those seeking to enter or obtain a new visa are required to meet admissibility grounds. Barton was a lawful permanent resident who was not seeking admission. He argued that the clock could not stop in his case on the basis of an offense that was an inadmissibility ground and not a deportability ground.

In Barton's case, the government's trial attorney had argued before the Immigration Judge ("IJ") that Barton could not seek cancellation due to an arrest during his first seven years in the United States. The IJ ruled that it did not matter that the identified offense had not been part of the charges on which Barton was

78. 140 S. Ct. at 1449 (2020).

79. 8 U.S.C. § 1229b(d)(1).

80. *See id.* § 1229b(a)(2) (seven years of continuous residence required for cancellation of removal for lawful permanent residents); § 1229b(b)(1)(A) (ten years of continuous residence required for cancellation of removal for nonlawful permanent residents).

81. *Id.* § 1229b(d)(1).

82. *See id.* § 1227(a)(2).

found removable. On this point, he relied on a precedent decision of the BIA in *Matter of Jurado-Delgado*.[83] The IJ did not address what would later be the critical question before the Supreme Court, namely, whether it mattered that the 1996 offense would not have made Barton deportable.[84] A single member of the BIA affirmed, also presuming that *Matter of Jurado-Delgado* resolved the question, even though that case did not concern how to treat cases where an individual was not seeking admission and was not rendered "deportable."

Once the case got to the Court of Appeals, the Office of Immigration Litigation ("OIL"), a part of the Justice Department, took on the job of defending the unpublished decision of the BIA. It proceeded to defend the ruling and won a victory in the Eleventh Circuit that any ground of inadmissibility is sufficient to stop the clock for a lawful permanent resident, even if the offense did not make the person deportable. The government argued that being "inadmissible" is a status that can apply to a person lawfully admitted for permanent residence and does not depend on whether the person could be removed from the country on that basis.[85] The argument also turned on technical questions of the rule against "surplusage" in reading a statute. Barton argued that if all that was necessary was "an offense referred to in section 212," then there would be no need to add in that the offense made the person "inadmissible or deportable." The Eleventh Circuit agreed with the OIL attorney's position that being "inadmissible" is a status that does not require that the noncitizen be subject to removal on that basis. It went on to conclude that there was no surplusage problem because being "rendered" inadmissible requires more than committing an offense referred to in § 212.[86] It did not address the larger question of why the statute would bother to refer to persons made removable under § 237(a)(2) (the provision setting forth grounds of deportability) if this were the correct reading. That provision was pure surplusage under the position taken by the Eleventh Circuit.

With the benefit of pro bono Supreme Court counsel, Barton sought certiorari. He presented a split between the Ninth Circuit and the Eleventh, Fifth, and Second Circuits (although the petition admitted that the Second Circuit view was dicta).[87] Not one of these cases involved a precedent decision of the BIA. The petition also referred to an unpublished decision of the Third Circuit. In opposing certiorari, the Solicitor General ("SG") argued that intervention by the Court "would be premature."[88] It proceeded to note that "[the BIA] has yet to issue a precedential opinion addressing the issue, and further percolation in the courts of appeals would be beneficial, particularly given that the court of appeals' decision in this case was

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83. 24 I. & N. Dec. 29 (B.I.A. 2006).

84. *See* Opinion of the Immigration Judge, *In re Barton*, reproduced in Petition for Writ of Certiorari at 35a, Barton v. Barr, 140 S. Ct. 1442 (2020) (No. 18-725) (treating Matter of Jurado-Delgado as resolving application of the stop time rule).

85. Brief for Respondent at 17, Barr v. U.S. Att'y Gen., 904 F.3d 1294 (11th Cir. 2018) (No. 17-13055).

86. *Barr*, 904 F.3d at 1301.

87. Petition for Writ of Certiorari, *supra* note 84 at 18–19, 18 n.2.

88. Brief in Opposition at 11, *Barton*, 140 S. Ct. 1442 (No. 18-725).

the first to conclude that the plain language of the statute forecloses petitioner's interpretation."[89] The Court nonetheless took the case.

Once the case was taken, the SG's office proceeded to deliver a full-throated defense of a position that had never been adopted by any formal agency procedure. It argued that the proper way to read the statute was that any offense that is sufficient to make a noncitizen inadmissible is enough to stop the clock for residence. As to congressional purpose, the SG cited only a general purpose to prevent noncitizens from accruing time after having "'abuse[d] the hospitality of this country'" citing an opinion of the BIA.[90] The SG also argued that the petitioner's position would create discrepancies between those who travel following a criminal conviction and those who do not travel (a reading that was not in fact necessary since the question was the person's status at the time of the offense).[91] Finally, the SG resurrected arguments that cancellation is a matter of "grace" and that it makes sense for eligibility to be read narrowly.[92] None of these policy ideas of what makes "sense" was ever endorsed by the BIA. Nowhere did the SG acknowledge that there was no indication in the legislative history that the criminal offense add-on to the clock stop rule was meant to do anything else than affect those who were subject to removal but not yet put in proceedings.

Justice Kavanaugh, in an opinion for the Court, joined by Chief Justice Roberts and Justices Thomas, Alito, and Gorsuch, leaned heavily on the supposed purpose of the clock stop rule. He presumed a rationale that Congress never articulated. He said that "the cancellation-of-removal statute functions like a traditional recidivist sentencing statute."[93] It was therefore "entirely ordinary to look beyond the offense of conviction at criminal sentencing, and it is likewise entirely ordinary to look beyond the offense of removal at the cancellation-of-removal stage of an immigration case." This casual analogy was nowhere mentioned in the oral argument by any justice or any party.[94] It was invoked three times in the opinion, with no opportunity for Barton's counsel to explain why the analogy was inapt.

In more language that sounds more in policy than analysis of the immigration statute, Justice Kavanaugh stated that it was "not surprising" that Congress would look to grounds of inadmissibility since those grounds decide who should be admitted in the first place. He then blithely stated: "If a crime is serious enough to deny admission to a noncitizen, the crime can also be serious enough to preclude cancellation of removal, at least if committed during the initial seven years of residence." This statement presumed that Congress meant to apply inadmissibility rules to lawful permanent residents. It further presumed that the rules on who may be admitted only exclude those with serious crimes, when in fact even a marijuana offense, a crime that has been committed by the vast majority of Americans, is

89. *Id.* at 6.

90. Brief of Respondent at 9–10, *Barton*, 140 S. Ct. 1442 (No. 18-075). The brief cited *In re Perez*, 22 I. & N. Dec. 689, 700 (B.I.A. 1999) (en banc), a case that concerned retroactivity issues about the scope of the clock-stop rule and not its proper interpretation.

91. *Id.* at 19–20.

92. *Id.* at 21.

93. *Barton*, 140 S. Ct. at 1449.

94. *See* Transcript of Oral Argument, *Barton*, 140 S. Ct. 1442 (No. 18-725).

enough to bar admission no matter how long ago it occurred.[95] Presuming that such an offense, no matter how long ago, would be enough to bar cancellation ignores the entire structure of immigration law which, in general, applies far stricter standards for admission than for deciding who with roots in the country will be deported.[96]

In the end, Justice Kavanaugh relied heavily on his policy arguments to justify the result. He conceded that his reading created surplusage, but suggested that as long as any reading led to surplusage of some degree he could ignore that canon, which was at the heart of Barton's argument.[97] He acknowledged the harshness of deportation, but concluded that "Congress also made a choice to categorically preclude cancellation of removal for noncitizens who have substantial criminal records" with no reference to the scope of the ruling he adopted and what kind of minor criminal records it would encompass. The opinion ends with a reference to *Jurado-Delgado*, a decision that concerns a very different question from that on which the Court ruled—namely whether the bar to relief can apply without respect to the ground of removability charged by the agency and found by the IJ—and which both the court below and the SG had previously acknowledged had not squarely considered the legal issues in *Barton*.[98]

Unlike most cases that had led to sharp splits prior to 2018, *Barton* did not concern any overarching jurisprudential issues, such as void for vagueness doctrine, or retroactivity principles. It was instead a technical case about how to read a provision of the immigration law that had been on the books for over two decades, on which the agency had not issued a published position, and which was fairly newly being litigated in the circuit courts. It is hard to see this decision as anything but the manifestation of a new ideological turn on the Court and a willingness to read a purpose of harshness into restrictions on relief.

B. Pereida v. Wilkinson

In its second case curtailing access to relief, *Pereida v. Wilkinson*, the Court considered how to apply bars to relief hearings when the record of conviction related to a possible bar to relief is ambiguous. Mr. Pereida was a long-time resident of the United States who sought cancellation of removal for non-lawful permanent residents based on "exceptional and extremely unusual hardship" that his

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95. *See* Nancy Morawetz, *Rethinking Drug Inadmissibility*, 50 WM. & MARY L. REV. 163, 194–96 (2008) (discussing national data on one time use of marijuana by age cohort).

96. For example, inadmissibility can be based on an "admission of facts" and not solely on a conviction. *See* 8 U.S.C. § 1182(a)(2)(a)(i)–(ii). Grounds of inadmissibility include any violation of a controlled substance law, 8 U.S.C. § 1182(a)(2)(A)(i), while the deportability provision has an exception for small amounts of marijuana. 8 U.S.C. § 1227(a)(2)(B). There are, however, a few ways in which inadmissibility is not as broad, such as firearm offenses, which are grounds of deportability but not inadmissibility.

97. 140 S. Ct. at 1453.

98. *See* Brief in Opposition, *supra* note 88, at 12 (noting that the Court had not issued a precedential opinion on the issue in *Barton*); Barton v. U.S. Att'y Gen., 904 F.3d 1294, 1302 n.5 (11th Cir. 2018) (noting that *Jurado-Delgado* concerned a different question from *Barton*).

deportation would cause to his U.S. citizen children.[99] This relief is unavailable to noncitizens ever convicted of an offense that makes the person either inadmissible or deportable.[100] In Mr. Pereida's case, the record of conviction was unclear. Further, he was convicted under what is known as a "divisible" statute, which sets out multiple crimes, some of which meet the requirements for a disqualifying conviction and some of which do not.[101] The question was whether he was eligible for a cancellation of removal hearing when the criminal records were unclear about whether he was convicted of a disqualifying crime.[102]

A key issue in *Pereida* was how to incorporate the categorical approach in the context of applications for relief where the noncitizen bears the burden of proof. The categorical approach is a methodology for classifying convictions that has been central to immigration cases for over a century.[103] The question in each case is what the minimum requirements are for a conviction under the relevant criminal law, and whether any such conviction fits the federal ground of inadmissibility, deportability, or bar to relief. The methodology is central to how the Court has decided each of the aggravated felony cases since 1996, as well as the *Mellouli* case, which concerned deportability for state-controlled substance convictions.

In *Pereida*, the noncitizen had been convicted under a divisible statute, which means that the relevant criminal statute encompassed more than one crime and could be divided into different crimes. As presented in the litigation, some of those crimes could be categorized as "crimes involving moral turpitude" (which would disqualify a non-LPR from pursuing cancellation of removal) and some could not. Mr. Pereida's conviction record was unclear about whether his conviction was for one of those disqualifying crimes. At issue in the case was whether he was eligible for cancellation or was barred due to a conviction for a crime involving moral turpitude.

As with the *Barton* case, the issues litigated in *Pereida* went well beyond those that had been decided by the Attorney General in any opinion or regulation. In a precedential decision, *Matter of Almanza*,[104] the BIA had considered a case in which the noncitizen refused a request from the IJ to produce documents about his conviction that might have shown whether his conviction was for a subsection of a criminal statute that was a bar to relief. Mr. Almanza's counsel took the position that it was the government's obligation to produce the records, and that in the face of an unclear record, his client should be presumed not to have been convicted under the part of the divisible statute that would bar relief. In its decision, the BIA framed the

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99. Petition for Writ of Certiorari at 1, Pereida v. Barr, 141 S. Ct. 754 (2021) (No. 19-438) (quoting requirements for cancellation for nonpermanent residents at 8 U.S.C. § 1229b(b)(1)(D)).

100. *See* 8 U.S.C. § 1229b(b).

101. *See generally* Mathis v. United States, 579 U.S. 500 (2016) (setting out the requirements for a statute to be divisible).

102. Pereida v. Wilkinson, 141 S. Ct. 754, 759 (2021), *aff'g* 916 F.3d 1128 (8th Cir. 2019).

103. *See* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1702 (2011).

104. 24 I. & N. Dec. 771, 773 (B.I.A. 2009).

question as whether Mr. Almanza had satisfied his burden to show that he was eligible for relief.

The BIA held that Mr. Almanza bore the burden of establishing eligibility for relief and that he also bore the burden of producing corroborating evidence requested by the IJ.[105] The BIA emphasized that the IJ had been clear about requesting the records and that Mr. Almanza had provided no reason for failing to do so. It concluded that a respondent "can[not] satisfy his burden of proof by producing the inconclusive portions of a record of conviction, and by failing to comply with an appropriate request from the Immigration Judge to produce the more conclusive portions of that record." Thus, while *Matter of Almanza* placed a burden on the noncitizen to provide a judge with reasons for any inconclusive record, it did not hold that an inconclusive record, on its own, acts as a bar to relief.

In Mr. Pereida's case, as in other cases involving these issues that were litigated in the circuit courts, those courts that ruled for the government went beyond *Almanza* to find that an inconclusive record, on its own, can serve to block access to relief. The IJ in Mr. Pereida's case relied on records presented by the government that Mr. Pereida had been convicted under a part of the state statute that was a crime involving moral turpitude. On appeal, the BIA concluded that the records in the case were insufficient to determine the subsection under which Mr. Pereida was convicted.[106] But it went on to hold that Mr. Pereida was barred from relief without considering whether any records existed that could clarify the subsection for his conviction. This reasoning went well beyond the BIA's precedential holding in *Matter of Almanza* because it barred Mr. Pereida from seeking relief even if he had no ability whatsoever to produce documents that could shed light on whether he was convicted of a disqualifying offense.

Before the court of appeals, government litigators leaned into the argument that the burden of proof was decisive in the face of an inconclusive record. Some courts accepted this position. In the Eighth Circuit opinion in Mr. Pereida's case, the court explained that none of the available documents in Mr. Pereida's case could resolve the subsection under which he was convicted. Assuming that the record was complete, the court noted: "[T]he fact that Pereida is not to blame for the ambiguity surrounding his criminal conviction does not relieve him of the obligation to prove eligibility for discretionary relief under this circuit's precedent."[107]

The SG supported a grant of certiorari based on the split in the circuits. But the SG's brief in response did not fully embrace the logic of the Eighth Circuit. The SG argued that in assigning the burden to the noncitizen, "Congress ensured that aliens do not benefit from withholding available evidence that would shed light on which offense an alien was previously convicted of." This statement was consistent with the agency's rationale in *Matter of Almanza* (although the SG did not cite to

105. *Id.* at 774–75.

106. Petition for Writ of Certiorari, *supra* note 99, at 9–10 (citing Petitioners Appendix at 17a, Pereida v. Barr, 916 F.3d 1128 (8th Cir. 2019) (No. 17-3377)).

107. Pereida v. Barr, 916 F.3d 1128, 1133 (8th Cir. 2019).

that case).[108] The SG agreed that the Court should take the case to address a split in the circuits, and the Court took the case.

Before the Supreme Court, the SG argued that the question of what crime the noncitizen was convicted of was a factual question, and not a legal question under the categorical approach. The SG argued that the burden of proof was on the noncitizen, and also that the burden of production was on the noncitizen to provide evidence, noting that another rule would create an incentive to withhold evidence. In making this second point, the SG cited to *Matter of Almanza*. Turning to the facts of the case, the SG emphasized its view that Mr. Pereida had the opportunity to refute the evidence submitted by the government but had chosen not to do so.[109]

The Court ruled against Mr. Pereida in an opinion written by Justice Gorsuch and joined by the Chief Justice and Justices Alito, Thomas, and Kavanaugh. The Court's opinion makes no reference to the leading BIA precedent in *Matter of Almanza* and does not consider the possibility that a noncitizen's burden is simply to produce available records when requested by the IJ or explain their unavailability. It treats the question of the nature of the underlying conviction as a fact question not subject to the categorical approach. The Court wrote that the burden on that fact question required the noncitizen to present evidence that showed that the subsection of the conviction was one that did not bar relief. The Court also proceeded to question the idea that the burden on noncitizens was unfair. Justice Gorsuch, writing for the Court, suggested that Mr. Pereida, whose criminal proceedings were pending during his removal case, might be responsible for the absence of appropriate records. But in a discussion that reached beyond the issues in the case, Justice Gorsuch suggested it does not matter whether the task faced by the noncitizen was impossible. It is the task mandated by Congress in setting forth that the applicant for relief bears the burden of proof.

The Court's opinion in *Pereida* also commented on what evidence can be used to determine the subsection of a statute under which a noncitizen was convicted. On this matter there was no dispute in the briefs. Both the government and Pereida's counsel agreed that the only proper documents for determining the nature of a conviction were those recognized under *Shepard v. United States*,[110] which sets out a limited set of formal criminal court documents that are appropriate for determining what subsection of a divisible statute was the basis for a conviction. As presented in the briefs, the question for the Court was whether the statute could be read as precluding relief when there were no available *Shepard* documents indicating the subsection under which the individual had been convicted. As amici had shown the Court, these formal court documents showing the subsection of a conviction are frequently never created or are destroyed after a period of time.[111] In his opinion, Justice Gorsuch questioned the relevance of the *Shepard* documents. He also suggested that documents that the statute deems admissible into evidence to prove the existence of a conviction (as opposed to the proper categorization of the

108. Brief in Opposition at 12, Pereida v. Barr, 141 S. Ct. 754 (2021) (No. 19-438).

109. Brief for the Respondent at 31, *Pereida*, 141 S. Ct. 754 (No. 19-438).

110. 544 U.S. 13, 26 (2005).

111. Brief for Nat'l. Ass'n of Crim. Def. Laws. & Nat'l. Ass'n of Fed. Defs. as Amici Curiae Supporting Petitioner at 6, *Pereida*, 141 S. Ct. 754 (No. 19-438).

conviction) could be used by a noncitizen to meet the burden identified by the Court.[112] Neither party had relied on that other statute and there was no briefing about its relevance to categorizing convictions.

Since the decision in *Pereida*, members of the BIA have seized on the statute identified by Justice Gorsuch, 8 U.S.C. § 1229a(c)(3)(B), and suggested that it provides a whole new way to dismantle the categorical approach in immigration cases. In an amicus invitation, the BIA invited briefing about the relevance of this subsection to deportability issues (which were not at issue in *Pereida*) and for eligibility for persecution-based relief (which also was not at issue in *Pereida*).[113] Thus, the relatively narrow question presented in Mr. Pereida's case, has now mushroomed into a wholesale questioning of the use of categorical analysis in immigration cases.

C. Unpacking the Hostility to Relief for Noncitizens with Criminal Convictions in Barton v. Barr *and* Pereida v. Wilkinson

The Court's decisions in *Barton* and *Pereida* reflect a new hostility to systems of relief from removal, at least with respect to noncitizens with past criminal convictions. They reflect a lack of appreciation of the historical role of relief from removal in tempering the harshness of broad grounds of deportability and the lines that Congress drew in 1996 on access to that relief. While there can be no question that the 1996 laws are harsher than prior laws, there is little reason to think that Congress intended to visit the particular harshness reflected in these post-Kennedy Court opinions.

1. Rhetorical Excess

The *Barton* and *Pereida* opinions both employ rhetorical tools to deny the role of relief in tempering the harshness of laws governing deportation. Consider the first line of the Court's opinion in *Pereida*. Justice Gorsuch writes: "Everyone agrees that Clemente Avelino Pereida entered this country unlawfully, and that the government has secured a lawful order directing his removal. The only remaining question is whether Mr. Pereida can prove his eligibility for discretionary relief."[114]

In fact, anyone with a basic understanding of immigration law knows that a "lawful order directing [a noncitizen's] removal" from an immigration court only happens after the court decides: (1) that the individual is removable; and (2) that the person is either not eligible for relief or should not receive relief.[115] The question in Mr. Pereida's case was whether he was eligible for relief. Furthermore, the question the Court was deciding had nothing to do with whether Mr. Pereida entered lawfully or not. Instead, it was a general question about how to apply bars to relief when the record of conviction is unclear. Thus, the question is fully applicable to long-time lawful permanent residents who are deportable and are seeking a hearing on their equities before being deported. The Court's discussion of Mr. Pereida's status at

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112. *Pereida*, 141 S. Ct. at 767 (discussing 8 U.S.C. § 1229a(c)(3)(B)).

113. BIA, AMICUS INVITATION NO. 21-30-09 (Nov. 19, 2021), https://www.justice.gov/eoir/page/file/1445471/download [https://perma.cc/2UGG-89UV] (last visited Jan. 29, 2022).

114. 141 S. Ct. at 758.

115. *See supra* Subsection I.C.2.

entry might have had some rhetorical value in preparing the reader to sympathize with the result. But it had nothing to do with the issue before the Court.

It is hard to imagine this error—treating a "lawful order of removal" as possible without consideration of eligibility for relief from removal—in the two decades before the *Pereida* decision. The central issue in the vast majority of cases over the past two decades was whether a person who was deportable was or was not barred from relief. Consider *St. Cyr*, where the Court held that access to relief was important enough to apply anti-retroactivity principles.[116] Or consider the three Supreme Court cases concerning which controlled substance offenses are properly categorized as an aggravated felony.[117] In every one of those cases, it was clear that the individual was deportable for the offense, but no lawful order of removal was possible without first considering eligibility for relief. And in all three cases, the Court overwhelmingly ruled that the noncitizen should have a shot at a relief hearing. Or consider the two key criminal cases, *Padilla* and *Lee*, on the obligation of criminal defense counsel to advise a noncitizen of the risks of removal and the likelihood that a person would risk trial rather than give up on a chance to remain with family in the United States.[118] Both cases involved drug convictions where the key error of counsel was pleading guilty to a drug offense that would be categorized as an aggravated felony and thus as a bar to relief through cancellation of removal.

Similarly, consider how Justice Kavanaugh discusses the issues in *Barton*. He characterizes Congress as having developed "strict" limits on who can apply for cancellation of removal,[119] when the question in the case is exactly how strict the rules should be. He offers no source for this claimed congressional intent to be as strict as possible. The opinion goes on to muddle the issues, saying that the question in the case is whether cancellation eligibility is limited by the charged offense of removal,[120] when the essential issue in the case is whether an offense that could not be charged as a ground of removal can serve to stop access to relief for a person who is a long-time resident and not seeking admission into the country.

2. Use of Facts

In both *Pereida* and *Barton*, the Court's opinions rely heavily on unfavorable facts about the individual—facts that would be fair game at any relief hearing—but then go on to say that they are properly reading the statute for all sets of facts. In this sense the opinions read more like an attorney's brief than as opinions that are based on broader principles.

In *Pereida*, Justice Gorsuch's opinion for the Court makes much of the fact that Mr. Pereida's conviction took place during his immigration proceedings, so that he had an opportunity to obtain the criminal records that would resolve any question about whether he was convicted under one part of the statute or another. The Court suggested that Mr. Pereida was manipulating the record and insinuated that he had

116. I.N.S. v. St. Cyr, 533 U.S. 289, 321–24 (2001) (describing importance of decisions affecting availability of relief from deportation).

117. *See supra* Subsection I.B.1.

118. *See supra* Subsection I.C.2.

119. Barton v. Barr, 140 S. Ct. 1442, 1445, 1448 (2020).

120. *Id.* at 1447.

access to materials he had simply chosen not to provide to the immigration court. But the Court then proceeded to say, albeit in dicta, that this fact didn't matter for its ruling and that it was just too bad that some people would be barred from relief through no fault of their own. But if that was a fair way to read the statute, why did the Court spend time suggesting that the courts were being manipulated instead of supporting its conclusion that such manipulation was irrelevant? The only answer is that these facts could be used to discredit the noncitizen in the particular case and thereby gloss over the harshness of the rule the Court adopted.

Similarly, in *Barton*, the Court dwelled on Mr. Barton's record, noting in its conclusion that "the laws enacted by Congress do not allow cancellation of removal when a noncitizen has amassed a criminal record of this kind."[121] Indeed, in Mr. Barton's case, the stop time question arose with an aggravated assault conviction within the first seven years, followed by several additional convictions. But the Court's interpretation of the statute had little to do with a "criminal record of this kind." Instead, its holding means that a single offense, including very minor drug offenses, and including some that never led to a conviction, would serve to bar relief potentially after decades of a clean record. And, as in *Pereida*, the Court hid behind the presumed intent of Congress, when there was in fact no such intent evident from Congress. Once again, the relevant statutory language had been inserted at the last minute with no explanation of its scope.

3. Ignoring Precedent

The *Pereida* decision also displays an astounding lack of appreciation of the Court's precedents. Justice Gorsuch states without any caveats that the categorical approach arose in the context of criminal cases and "migrated" to the immigration context.[122] He simply fails to acknowledge two Supreme Court decisions, *Mellouli* and *Moncrieffe*, that recognized the categorical approach as central to immigration cases for more than a century. Notably, *Moncrieffe* devotes a paragraph to this proposition, including a citation to a 1914 case that includes an early explanation of why this methodology is appropriate in immigration cases.[123] By sourcing the categorical approach to more recent criminal cases, Justice Gorsuch cast doubt on how rigorously it should be applied in immigration cases. He did so by emphasizing constitutional protections for criminal defendants while sidestepping the basic question in both contexts of what it means for a person to be "convicted" of an offense.[124] Had he acknowledged the Court's past precedents, he could not have proceeded to speculate about myriad ways in which the categorical approach could be modified for application in the immigration realm.

4. Inconsistent and Argumentative Use of Agency Precedent

In *Barton*, the Court pretended that it was relying on positions of the agency, but, as the SG admitted in the opposition to the petition, there was no agency

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121. *Id.* at 1454.

122. Pereida v. Wilkinson, 141 S. Ct 754, 762 (2021).

123. Moncrieffe v. Holder, 569 U.S. 184, 191 (2013) (citing United States *ex rel.* Mylius v. Uhl, 210 F. 860, 862 (C.A.2 1914)).

124. *See* Mathis v. United States, 136 S. Ct 2234, 2252–53 (citing textual and fairness reasons for the categorical approach).

precedent on the central question of whether an offense that could not serve as a ground of deportability could serve as a bar to relief. Throughout the opinion, Justice Kavanaugh cited published agency decisions on other issues to weave together the semblance that the opinion was based on agency precedent.[125]

Meanwhile, in *Pereida*, where there was on-point agency precedent, Justice Gorsuch simply did not cite to it. Had he done so, he might have had to explore whether the appropriate burden in the case was a factual burden of persuasion and not a burden of production based on the availability of evidence. Had Justice Gorsuch explored the issue as involving a burden of production, the Court's holding would have been narrower and more in line with the agency's precedents.

5. Reaching Issues or Rationales That Were Not Presented

Both *Pereida* and *Barton* reach out to address issues or adopt rationales that were not argued by either party. In *Pereida*, Justice Gorsuch looked to a provision of the statute on how to establish the fact of a conviction as a way to decide whether the conviction matches relevant grounds of deportation.[126] Neither party suggested this, it was not briefed, and the Court had no benefit of an adversary process to evaluate whether there was any basis for this idea. In *Pereida*, the Court's musings are dicta. But there is good reason to worry that they will be picked up going forward to change the rules under which both criminal defense and immigration counsel have operated.

Similarly, in *Barton*, the Court's opinion is the first place where the stop time rule was characterized as a recidivist provision.[127] Had that been presented, there would have been very good arguments for why it was an inapt analogy. Recidivism suggests a past conviction, not just a possible admission to past behavior. Furthermore, recidivism tends to affect the severity of a sentence, rather than acting as a bar to any consideration by the sentencing court. Had the government argued that the stop time rule was intended to be a recidivism provision, the parties could have shown that there was nothing in the statute or the legislative history suggesting that was the case or, if it was, that the recidivism grounds Congress chose to apply to a lawful permanent resident were the deportability grounds and not the very expansive bars to admission. But since the idea began in the Court, it was never tested.

The Court's reach for rationales for harsh interpretations that mandate deportation also disregards the Supreme Court's long-established rule of reading immigration statutes in a way that favors the noncitizen.[128] That rule, which functions like the rule of lenity in criminal cases, should have resolved any ambiguities in either case in favor of preserving the safety valve of a relief hearing

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125. *Barton*, 140 S. Ct at 1446 (citing *In re* Jurado-Delgado, 24 I. & N. Dec. 29 (B.I.A. 2006)), 1447 (same), 1450 (same), 1450 (citing *In re* Perez, 22 I. & N. Dec. 689 (B.I.A. 1999)).

126. *See Pereida*, 141 S. Ct. at 767 (discussing 8 U.S.C. § 1229a(c)(3)(B)).

127. *See supra* note 94 and accompanying text (noting that the term recidivist did not appear at argument).

128. *See supra* Subsection I.C.4.

for the noncitizen. Instead, both opinions embrace readings that they acknowledge will place insurmountable burdens before those seeking relief.

6. Inconsistent Use of Statutory Interpretation Rules

Both *Pereida* and *Barton* purport to be readings of the immigration statute as it was enacted by Congress. But the opinions do not in fact adhere to consistent principles of statutory interpretation.

In *Barton*, the petitioner's central argument was that the government's reading of the statute created a major problem of surplusage. Recall that the issue in *Barton* was whether the residency clock stopped with a person being convicted of an offense that triggered removability or whether it was sufficient for the person to fall into an abstract category of persons whose offense triggered the inadmissibility grounds for determining who can obtain a visa. If in fact, being "inadmissible" was sufficient to stop the clock for a permanent resident already in the country who was not seeking a new visa, the entire section citing to grounds of deportability was redundant. Justice Kavanaugh casually dismissed this problem by noting that the parties agreed that there would be some surplusage under either reading of the provision.[129] But the existence of some surplusage is hardly a reason to ignore the rule and choose the reading with the most surplusage!

The role of result orientation in lieu of relying on statutory tools is perhaps most apparent when Justice Kavanaugh proceeds to read the statute according to a policy interpretation that he invents for the case—that Congress wanted to base eligibility for a hearing on whether the person was a "recidivist"[130] and selected the broadest possible reading of what it means to be a recidivist. There was absolutely nothing in the statute that endorsed this reading.

Meanwhile in *Pereida*, Justice Gorsuch bases his decision on the idea that the term "burden" is a unitary concept that excludes concepts such as a burden of production. Had he considered the precedential opinion of the BIA, he might have had to consider alternative meanings for this term, such as a burden to produce available records.

Of course, any decision can be criticized, as these opinions were by the dissenters. But one senses that the new, more solid majority is not even listening to its colleagues on the Court. Instead, it is rewriting the rules as it would prefer them to be, not as Congress has mandated, and not with any attention to the essential role of access to relief hearings for long-term residents seeking to remain in the United States.

Altogether, the *Barton* and *Pereida* decisions signal a serious turn in how the Court is approaching deportability and eligibility for relief for noncitizens with criminal convictions. These cases suggest that the Court is more willing to find justifications for the harshest consequences of deportation. Moreover, the more partisan flavor of the cases suggests that they signal a turn in perception that will be hard to undo.

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129. *Barton*, 140 S. Ct. at 1453 (noting that either party's interpretation would create some redundancy).

130. *Id.* at 1446, 1453–54.

III. RESPONDING TO THE COURT'S TURN

The changes in the Court's approach to technical immigration issues require litigants, potential amici, and the government to rethink past approaches to immigration cases. With any case providing an opportunity for the Court to retract access to relief hearings and mandate more deportations, a noncitizen's downside risk from Supreme Court review is far greater than before. While it might appear that the noncitizen has nothing to lose by seeking review, alternative approaches might be more likely to achieve a beneficial result and responsible counsel should scrutinize any possibility for pursuing relief outside the Court. Meanwhile, possible amici organizations should factor in both the chances that plenary review will achieve the desired result as well as the risk that any case will invite the Court to impose legal frameworks that extend beyond the issues in the case and thereby speed deportations and restrict access to relief. Potential amici at the cert stage should consider whether the chance of rectifying one line of bad precedent in a circuit may have unintended bad consequences for other issues of concern to the amici organizations. With respect to the government, its interest should not be to maximize deportations, but instead to apply the statutes in a way that most serves whatever policy views the government might have. Allowing cases to go before a Court that will strike out on its own to limit access to relief from deportation does not serve the interests of an administration that understands relief hearings as a crucial bulwark against unjust deportations (however that administration might define them).

A. Structural Forces Driving the Supreme Court's Immigration Docket

To understand the measures parties should take in light of the Court's turn against noncitizens, it is important to grasp the underlying litigation dynamics that drive the Court's immigration docket. These dynamics are unusual and explain why there have been and will continue to be a substantial number of circuit splits that present themselves for the Court's review.

Immigration cases typically begin with decisions by IJs that either side can appeal to the BIA. This is a system of mass adjudication, with judges deciding nearly 300,000[131] cases per year and the BIA deciding around 30,000 cases per year.[132] Many of these cases are decided by a single member of the BIA and only a small fraction is published as precedent. When the BIA issues a decision, it stands as the position of the Attorney General, unless the Attorney General certifies the case to issue a new decision.[133] Court review happens when the noncitizen challenges the decision of the BIA or the Attorney General in court. Unlike other systems of mass adjudication, such as social security benefits cases, where appeals go first to the district court,[134] petitions for review in immigration cases go directly to the courts of appeals. There are literally thousands of these cases filed in the courts of appeals

131. U.S. DEP'T OF JUST. EXEC. OFF. FOR IMMIGR. REV., STATISTICS YEARBOOK FISCAL YEAR 2018, at 9, https://www.justice.gov/eoir/file/1198896/download [https://perma.cc/YR2B-BAXZ] (291,370 cases completed at the immigration court level in FY 2018).

132. *Id.* at 35.

133. 8 U.S.C. § 1003.1(h).

134. *See* 42 U.S.C. § 405(g).

every year, and thousands of dispositions.[135] It is hardly surprising that a system that has thousands of cases decided by twelve different courts of appeals will lead to conflicts in the circuits on the proper application of federal law.

Once the circuits divide on an issue, there is also a ready pro bono bar prepared to take cases to the Supreme Court. As I have described in prior writings, this bar seeks opportunities for handling merits cases before the Court and for oral argument.[136] Immigration cases, like criminal cases, do not involve conflicts with paying clients and are therefore particularly likely to survive conflicts checks at large firms with appellate practices.

The fact that the Court is less sympathetic to noncitizens cannot be expected to stop the flow of petitions for writ of certiorari. Lawyers taking on individuals who have lost below will see Supreme Court review as a chance at a good outcome, even if the chances are not as high as they once were. Lower odds, even if lawyers see them as lower, are not going to alter the dynamics that generate offers of free assistance to pursue a case at the Supreme Court if there is a possibility for the Court to grant certiorari.[137]

Meanwhile, the potential for conflicts among the circuit courts has not lessened with time. April 2022 marks 25 years since the effective date of the 1996 law, but the Court is still facing cases about what that statute means and how it is properly applied in various contexts. The aggravated felony definition has 20 discrete subsections,[138] many of which are divided into sub-subsections. Even when the Court has reviewed one of those subsections, the Court's opinion will often leave questions about the scope of the definition for another day. For example, in *Esquivel-Quintana*, the Court rejected a reading of the definition that reached sexual relationships between older teenagers, but did not set out a rule that explained how the provisions would apply, for example, to other sexual contact, cases involving age disparities, or state statutes with different affirmative defenses from federal law.[139] Similarly in *Luna Torres*, the Court concluded that an interstate commerce element is not required for a state conviction of arson to be an aggravated felony,

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135. In the 12 months ending on June 30, 2021, the courts of appeals decided 6,765 administrative cases, 3,928 of which were decided on the merits. *Statistical Tables for the Federal Judiciary, Table B-1*, U.S. CTS. (June 30, 2021), https://www.uscourts.gov/statistics/table/b-1/statistical-tables-federal-judiciary/2021/06/30 [https://perma.cc/4MKA-EW6F]. About 85% of administrative appeals to the courts of appeals involve immigration cases. *See Federal Judicial Caseload Statistics 2013*, U.S. CTS. http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2013 [https://perma.cc/Y3A5-FLBK].

136. *See* Nancy Morawetz, *Counterbalancing Distorted Incentives in Supreme Court Pro Bono Practice: Recommendations for the New Supreme Court Pro Bono Bar and Public Interest Practice Communities*, 86 N.Y.U. L. REV. 131, 138–45 (2011).

137. *See, e.g.*, Jeffrey L. Fisher, *A Clinic's Place in the Supreme Court Bar*, 65 STAN. L. REV. 137, 191, 193 (2013) (arguing that the Supreme Court bar should not turn away a potentially meritorious case because the case may have negative consequences).

138. 8 U.S.C. § 1101(a)(43).

139. Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1572 (describing interpretation of 8 U.S.C. § 1101(a)(43)(A)'s subsection on "sexual abuse of a minor" as applying when a statutory rape offense relies solely on the age of the victim).

but did not address arguments that had not been pressed below that the interstate commerce element in the federal statute served a purpose other than jurisdiction, for example, targeting more serious offenses.[140] At the same time, there are significant methodological questions that cross categories, such as whether to afford deference to the aggravated felony rulings of the BIA since the issue arises as well in the criminal context, or whether the "realistic probability" standard for categorical analysis announced in *Duenas-Alvarez* extends to situations where disparities between state and federal categories are apparent from the face of the statute. These issues promise many opportunities (or dangers depending on one's perspective) for further Supreme Court intervention on immigration matters.

B. Rethinking the Obligations of Individual Counsel

In my prior article, *Counterbalancing Distorted Incentives in Supreme Court Pro Bono Practice: Recommendations for the New Supreme Court Pro Bono Bar and Public Interest Practice Communities*,[141] I suggested several ways that counsel could mitigate the distorted incentives of Supreme Court pro bono and Supreme Court clinic practice.[142] These recommendations remain relevant today. The new turn on the Court, however, combined with the new Administration, suggests some concrete ways in which pro bono counsel could alter their approach to achieve better results for their clients.

In *Counterbalancing*, I proposed that counsel: (1) engage in a full case analysis, including examination of alternative routes for serving the client's interest; (2) coordinate with other counsel to learn of cases raising similar issues to determine the best vehicle for review; (3) counsel their clients to explore the relative merits of different approaches; and (4) work with experts in the substance and practice of the relevant area of law.[143] All of these approaches remain relevant today. The negative turn in the Court towards noncitizens together with the election of an Administration that purports to be more receptive to positions favoring immigrants, however, creates new ways to think about these options.

With respect to alternative routes for resolution, the current Administration has issued guidance on prosecutorial discretion that invites lawyers to identify ways

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140. Luna Torres v. Lynch, 578 U.S. 452, 473 (noting that Luna Torres "nowhere contests that § 844(i)'s commerce element—featuring the terms 'in interstate or foreign commerce' and 'affecting interstate or foreign commerce'—is of the standard, jurisdictional kind.").

141. *See* Morawetz, *supra* note 136, at 190–91.

142. Jeffrey Fisher has criticized my arguments about distorted incentives, claiming that the interests of the Supreme Court clinics line up with those of potential clients. Fisher, *supra* note 137, at 177 (arguing that Supreme Court clinics have different incentives from law firm practices.) More generally, naming the incentives does not mean that all lawyers or all firms fail to act in responsible ways to counteract those incentives; indeed this article applauds lawyers who work to ensure that the client's interests remain paramount.

143. Notably, none of these suggestions create any tension with the client's interests, and Professor Fisher's critique of my article embraces all of these approaches while strongly defending his clinic from having deviated from any of them. *See* Fisher, *supra* note 137, at 179–87.

that issues can be resolved amicably.[144] The latest guidance from Secretary Mayorkas emphasizes that every enforcement decision reflects a choice about the government's priorities. Although the Secretary has not issued guidance that specifically addressed cases that are in court, the renewed emphasis on prosecutorial discretion means that there might be opportunities for a client that go beyond the "cert-worthy" issue in the case. Consider for example a joint motion to reopen removal proceedings before the BIA.[145] These motions can be filed at any time and might be based, for example, on legal developments since the original order. Although a noncitizen pursuing such a motion must establish either compliance with strict time limits, or a basis for equitable tolling, these limits do not apply when the parties jointly move the BIA to reopen a case. These opportunities are all the more important to seize at a time when a favorable outcome at the Supreme Court is less likely.

In addition, the executive branch can provide relief to an individual in ways that address the more systemic issues presented in a case. The Attorney General has the power to certify an issue and reconsider issues decided by the BIA or prior Attorneys General.[146] There may therefore be opportunities for more global resolutions of an issue presented in a case through further litigation at the agency instead of litigation at the Supreme Court. This power of the Attorney General can of course be used either in ways to expand or contract the rights of noncitizens. For example, in the past, the Attorney General has issued new decisions in the midst of Supreme Court litigation that bolster the position of the agency.[147] But the certification power can also be used to revisit positions with which the Administration might disagree.

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144. *See* Memorandum from Alejandro Mayorkas, Sec'y, Dep't of Homeland Sec., to Tae Johnson Acting Dir., U.S. Immigr. and Customs Enf't (Sept. 30, 2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf [https://perma.cc/X43A-DD4M]. At this time of publication, there is ongoing litigation about these priorities, but prosecutorial discretion remains a remedy that ICE will consider. *See Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor*, U.S. IMMIGR. AND CUSTOMS ENF'T., https://www.ice.gov/about-ice/opla/prosecutorial-discretion [https://perma.cc/L5VK-3GC7].

145. The parties pursued this approach in Hernandez-Serrano v. Garland, 30 F.4th 535 (6th Cir. 2022), where a divided panel had created a split about the IJ and BIA's authority to "administratively close" proceedings. Although the case raised a clear circuit split, the parties jointly moved the BIA to reopen the case. That approach succeeded in mooting out the case before the court and providing relief to the individual client.

146. 8 U.S.C. § 1003.1(h). *See* ADAM B. COX & CRISTINA M. RODRIGUEZ, THE PRESIDENT AND IMMIGRATION LAW 186–87 (2020) (describing the use of this power during the Trump Administration).

147. *See, e.g.*, In re Soriano, 21 I. & N. Dec. 516, 534 n.4 (B.I.A. 1996, Att'y Gen. 1997) (Attorney General vacatur of BIA decision and certification of the case shortly before supplemental merits briefs were due in the Supreme Court in I.N.S. v. Elramly, 516 U.S. 1170 (1996), and leading to the Court's remand of the case without plenary argument, 518 U.S. 1051 (1996)). *See also* Matter of N.A.M, 24 I. & N. Dec. 336 (B.I.A. 2007) (issued during the pendency of Ali v Achim, 552 U.S. 1085 (2007) dismissing case based on agreement of the parties)); Voluntary Departure: Effect of a Motion to Reopen or Reconsider or a Petition for Review, 72 Fed. Reg. 67674-01 (Nov. 30, 2007) (proposed during the pendency of Dada v. Mukasey, 554 U.S. 1 (2008)).

One case this past Term illustrates the power of certification. In *Birhanu v. Garland*,[148] the petitioner sought review of the agency's refusal to consider a noncitizen's mental health at the time of a past criminal conviction in deciding whether the conviction is a "particularly serious crime" that bars relief based on fear-based claims.[149] The BIA had previously issued a precedential decision, *Matter of G-G-S-*,[150] categorically rejecting any consideration of the individual's mental health at the time of a past conviction. Plenary review in Birhanu's case would have challenged *Matter of G-G-S-*. It also could have involved a host of additional issues, including whether the Court should defer to the agency interpretation; and what role international standards for a "particularly serious crime," which include a present-day inquiry into dangerousness, should play in evaluating a noncitizen's eligibility for relief.

With Birhanu's petition pending before the Court, the Attorney General decided to certify a related case that presented the same issue of the correctness of the decision in *Matter of G-G-S-*.[151] Meanwhile, the parties postponed the time for the SG to reply in *Birhanu*. There was of course a risk that the Attorney General would reaffirm *G-G-S-* and bolster the reasoning of the decision. But there was also an opportunity for briefing before the agency that could lead to a decision that offered a better standard for Birhanu and that would avoid the danger of an adverse Supreme Court opinion. Ultimately, the Attorney General issued a decision overruling *Matter of G-G-S-*.[152] This resolved Birhanu's case. At the request of the government,[153] the Supreme Court granted certiorari, and vacated and remanded Birhanu's case for further consideration.[154]

What was possible through certification in *Birhanu* takes work and requires that the Supreme Court advocate work with others to create the possibilities for a solution outside the Supreme Court. That requires counsel that remains true to their obligations to their client to pursue any route to victory and not just the one that is presented through Supreme Court litigation.

C. Rethinking Role of Amici Organizations

Organizations that appear as amici before the Court have an important role in mitigating the potential harm from plenary Supreme Court review. Savvy Supreme Court counsel know well that an amicus brief at the certiorari stage can increase the chances that the Court will take a case.[155] It is therefore hardly surprising that immigrant rights organizations face requests to support petitions as amici. Unlike the lawyers representing an individual, these organizations have an

148. Brief for Respondent at 8, Birhanu v. Garland, No. 21-539, 2022 WL 2295108 (U.S. June 27, 2022).

149. 8 U.S.C. § 1231(b)(3)(B)(ii).

150. 26 I. & N. Dec. 339, 347 (B.I.A. 2014).

151. Matter of B-Z-R-, 28 I. & N. Dec. 424 (Att'y Gen. 2021).

152. Matter of B-Z-R-, 28 I. & N. Dec. 563 (Att'y Gen. 2022).

153. *See generally* Brief for Respondent, *supra* note 148.

154. Birhanu v. Garland, 2022 WL 2295108 (U.S. June 27, 2022).

155. See Allison Orr Larsen and Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1936–40 (2016) (discussing the impact of certiorari stage amicus briefs on the Court's willingness to grant certiorari).

opportunity to look beyond the individual's case and consider the broader risks of Supreme Court review.

Some amicus groups have a regional focus and might see a case as an opportunity to achieve a better rule for their circuit that follows the rule currently in effect in another circuit. Similar to lawyers representing individuals, they might see little risk in the Court resolving a conflict because all of their clients otherwise are subject to the unfavorable rule. These groups ought to factor in as well the possibility that the Court will reach beyond the specific issue and adopt methodological approaches that disadvantage their clients. This risk is evident in hindsight in the experience of the *Pereida* litigation. The opinion in *Pereida*, as discussed above, not only rejected Pereida's claim for relief, but also provided an opportunity for the Court to comment on an issue that was not before the Court, namely a provision about the admissibility of documents and its possible relationship to the categorical approach. This commentary has already led the BIA to invite briefing on questions that have dramatic implications for the application of the categorical approach not just in the context of eligibility for relief, but also in determining deportability.[156] The experience with *Pereida* shows that when the Court undertakes review of any issue, it can do damage well beyond the issues presented in the case.

D. Rethinking the Approach of Government Counsel

The new dynamics on the Supreme Court present new challenges for the government as well, particularly if government counsel is interested in furthering a vision of immigration policy that is not simply about maximizing deportations and hurdles to relief hearings. Despite well-grounded criticism of the Biden Administration for its positions on immigration policy, this Administration has made outward facing claims to seek a more humane system of immigration law. These positions present obligations for the lawyers who represent the government. They require scrutiny of the legal positions that have been asserted in each case and whether they match the Administration's view of proper application of the laws. They require consideration of the potential consequences of Supreme Court review leading to an outcome that reaches beyond the four corners of the case. They also require receptivity to possible solutions that implement the agency's stated objectives on prosecutorial discretion.

By the time cases reach the Supreme Court, they have been shaped by arguments of government counsel before the agency and the court of appeals. The government's legal positions in immigration cases are first developed by government trial attorneys at Immigration and Customs Enforcement before IJs and the BIA. Once a case goes before the courts, the government's position is advanced by the OIL. Unlike, for example, a government appeal of a district court decision, the positions taken by the OIL in the courts of appeals are not routinely vetted by the Office of the Solicitor General.[157] Thus, the issues as presented in circuit splits

156. Amicus Invitation, *supra* note 113.

157. The core responsibilities of the Office of the Solicitor General include deciding when to pursue a case on appeal or writ of certiorari. 28 C.F.R. § 0.20. Because immigration cases begin in the courts as petitions by the noncitizen, this vetting does not take place in immigration cases at the court of appeals level. *See* 8 U.S.C. § 1252(b)(2).

are not likely to have benefitted from a considered review of whether they implement a vision of the law that the government wishes to defend.

Once cases are past the courts of appeals, the SG's office has many opportunities to mitigate the potential consequences of review by a Court that is hostile to the rights of immigrants. First, it can choose to not seek certiorari in cases it lost below. During the Trump Administration, the SG's office was unusually aggressive in taking immigration cases to the Supreme Court.[158] That has not been the case with the Biden Administration, although it has continued to press cases where the original petitions were filed by the prior SG.[159] Second, where cases are pressed by lawyers representing individual noncitizens, it could review each case to decide whether some alternative resolution is appropriate and if not, how the office can mitigate the risk that a decision will reach beyond the issues presented in that individual case.

Just as individual lawyers have an obligation to consider alternative forms of prosecutorial discretion available to their clients, the government has an obligation to assure that it is not seeking removal in a case where that does not further the Administration's announced views on prosecutorial discretion. The role of government counsel is especially important here because the market dynamics of pro bono lawyering at the Supreme Court could limit the degree to which the individual lawyer identifies opportunities for resolution. The government may be in as good a place as the individual counsel to identify a resolution that obviates Supreme Court review.

The SG's office and the executive branch can also treat cases headed for Supreme Court review as opportunities to reconsider the government's positions on best interpretations of the governing law. The *Birhanu* case is a good example. At the heart of *Birhanu* were the obligations of the United States towards persons who fear persecution in their country of origin. As a signatory to the Refugee Convention, the United States has pledged to provide protection to genuine refugees subject to discrete exceptions. One of those exceptions, as enacted into the immigration laws, is if the individual "having been convicted by final judgment of a particularly serious crime, is a danger to the community of the United States."[160] The text of this provision (like the international law from which it comes) is plainly focused on whether the individual "is" a danger. Unfortunately, however, the caselaw has treated the conviction itself as sufficient to presume danger.[161] But that leaves the question of what it is about the past conviction that allows the government to presume danger such that a genuine refugee will be denied protection. That is where

158. This phenomenon was most pronounced with cases involving broad issues, such as class actions, and the Muslim ban on visas. But the SG also sought certiorari in some individual immigration cases. *See, e.g.*, Garland v. Ming Dai, 141 S. Ct. 1669 (2021).

159. This is particularly striking in cases involving the right to a bond hearing for noncitizens being held under the discretionary detention regime of 8 U.S.C. § 1241(a)(6). *See* Johnson v. Areteaga-Martinez, 142 S. Ct. 1827, 1830 (2022); Garland v. Aleman Gonzalez, 142 S. Ct. 2057, 2064 (2022).

160. 8 U.S.C. § 1231(b)(3)(ii).

161. Matter of N.A.M., 24 I. & N. Dec. 336, 342 (B.I.A. 2007) ("[O]nce an alien is found to have committed a particularly serious crime, we no longer engage in a separate determination to address whether the alien is a danger to the community.").

Matter of G-G-S- comes in. *Matter of G-G-S-* concluded that an IJ should not consider the possible mental impairment of the refugee at the time of the conviction in deciding whether it should bar the possibility of persecution-based relief.

By certifying the issue of *Matter of G-G-S-*, Attorney General Garland took a second look at the agency's position before deciding whether to defend it in the Supreme Court. That process allowed him to issue a decision that is truer to the text of the statute and the Refugee Convention, instead of sending the SG's office to defend a past position of the agency. The Court has now remanded the case in light of the new opinion of the Attorney General, thereby avoiding plenary review and the possibility of the Court adopting some as-of-now unknown limitation on relief that the government never sought but which this Court might choose to adopt.

The SG's office could also engage in more extensive vetting of legal positions before cementing its views in briefs before the Court. Extensions of time in responding to petitions could serve not just to manage a busy docket but also to invite broader input into what would be an appropriate position for the government on the issues. One can presume that there is already consultation with the OIL, but because that office's primary role is to defend removal orders, it might not best reflect the broader interests of the government. Indeed, due to the lawmaking role of Supreme Court adjudication, it would be appropriate to create a participatory process with immigration experts from the outside. Such a process could identify legal positions that undermine the executive branch's interest in achieving a more just execution of the laws and preserving the agencies' discretion.

The government would be best served by a more considered evaluation of its legal positions long before cases reach the Supreme Court stage. The litigation positions adopted by the OIL set the stage for positions argued by the SG. Yet, as the *Barton* case illustrates, these positions are adopted and argued to defend deportations even in the absence of any binding agency precedent. They are choices that are currently made in the context of defending removal, not in the context of evaluating what the governing laws mean. An administration that purports to care about a more humane system of immigration laws can begin by assuring that there is greater consideration of whether it is appropriate to read the law in the harshest way possible.

Finally, the government has the ability, under *Brand X*,[162] to adopt new interpretations of a statute even where the courts have affirmed a past interpretation or the courts have addressed an issue in advance of an authoritative agency interpretation. This was certainly the case in *Barton*, where the SG conceded that there was no agency precedent on point and the Supreme Court's decision is not fairly read as offering the only plausible reading of the statutory phrase at issue. It is also the case with the dicta in *Pereida* that explores issues about documents to establish the nature of a conviction when that statute was not at issue and the Court's comments do not account for the origins of the relevant statute. These are matters

162. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

where the agency has a second chance to assure that the statute is read to uphold access to relief hearings where they are not barred by Congress.

The question is not whether the government has the power, but whether it will use its power in a way that serves the broader objectives of the underlying statutes or will instead confine itself to defending removal orders that its prosecutors have secured below. With the ongoing threat to basic fairness posed by the current Court and its hostility to noncitizens, it is time for the government to step up to this role and reconsider its aggressiveness in seeking broad applications of deportation laws.

CONCLUSION

The post-Kennedy Court has altered the dynamics for immigration litigation such that previously technical cases are now decided on more conventional ideological grounds and show a basic hostility to noncitizens, especially those with criminal convictions who are the subject of this Article's study. This change in the Court has important implications for all of the actors who appear before the Court. Individual lawyers, amicus organizations, and government counsel have renewed reason to look for alternatives to resolution of these cases without Supreme Court review.

APPENDIX

Table of Cases 2001–2021 Involving Deportability or Bars to Relief on Criminal Grounds

Case and citation	Issues	Majority Opinion Justices (author in bold)	Dissenting Opinion Justices (author in bold)	Other Opinions (authors in bold)	Result in favor of noncitizen?	Notes
INS v. St Cyr, 533 U.S. 289 (2001)	(1) Jurisdiction over retroactive impact of repeal of § 212(c) and (2) retroactive reach of repeal of § 212(c).	**Stevens**, Souter, Kennedy, Breyer, Ginsburg	**Scalia**, Rehnquist, Thomas, O'Connor (in part)	**O'Connor** (dissenting)	Yes	Dissent is on jurisdiction and would not reach merits.
Leocal v. Ashcroft, 543 U.S. 1 (2004)	Whether driving under the influence with a criminal negligence standard is an aggravated felony "crime of violence" under INA § 101(a)(43)(F).	**Rehnquist**, for a unanimous Court	None		Yes	
Lopez v. Gonzales, 549 U.S. 47 (2006)	Whether any state felony drug offense is an aggravated felony under INA § 101(a)(43)(B).	**Souter**, Roberts, Stevens, Scalia, Kennedy, Ginsburg, Breyer, Alito	**Thomas**		Yes	
Gonzalez v. Duenas-Alvarez, 549 U.S. 183 (2007)	Whether California aiding and abetting theft offense is an aggravated felony under INA § 101(a)(43)(G).	**Breyer**, Roberts, Scalia, Kennedy, Souter, Thomas, Ginsburg, Alito, Stevens (in part)	**Stevens** (concurring and dissenting)		No	
Nijhawan v. Holder, 557 U.S. 29 (2009)	Whether categorical approach applies to dollar threshold for fraud aggravated felony under INA § 101(a)(43)(M)(i).	**Breyer**, for a unanimous Court	None		No	

Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010)	Whether second drug possession offense is a drug trafficking aggravated felony under INA § 101(a)(43)(B).	**Stevens**, Roberts, Kennedy, Ginsburg, Breyer, Alito, Sotomayor	None	**Scalia** (concurring in judgment); **Thomas** (concurring in judgment)	Yes	
Judulang v. Holder, 565 U.S. 42 (2011)	Whether to uphold BIA's comparable grounds methodology on access to § 212(c).	**Kagan**, for a unanimous Court	None		Yes	
Kawashima v. Holder, 565 U.S. 478 (2012)	Whether tax offenses under 26 U.S.C. §§ 7206(1), (2) are crimes of deceit under INA § 101(a)(43)(M)(i).	**Thomas**, Roberts, Scalia, Kennedy, Alito, Sotomayor	**Ginsburg**, Breyer, Kagan		No	
Vartelas v. Holder, 566 U. S. 257 (2012)	Whether 1996 law provision on admissibility of noncitizens who travel, INA § 101(a)(13), applies to individual whose criminal offense pre-dates 1996 law.	**Ginsburg**, Roberts, Kennedy, Breyer, Sotomayor, Kagan	**Scalia**, Thomas, Alito		Yes	
Moncrieffe v. Holder, 569 U.S. 184 (2013)	Whether state drug offense that includes distribution of a small amount of marijuana for no remuneration constitutes an aggravated felony under INA § 101(a)(43)(B).	**Sotomayor**, Roberts, Scalia, Kennedy, Ginsburg, Breyer, Kagan	**Thomas**, Alito		Yes	
Mellouli v. Lynch, 575 U.S. 798 (2015)	Whether a state drug offense is related to a federal controlled substance offense under INA § 237 (a)(2)(B) if the state schedule is broader than the federal schedule.	**Ginsburg**, Roberts, Scalia, Kennedy, Breyer, Sotomayor, Kagan	**Thomas**, Alito		Yes	

Luna Torres v. Lynch, 578 U.S. 452 (2016)	Whether state arson offense without interstate commerce element is an aggravated felony within the meaning of INA § 101(a)(43).	**Kagan**, Roberts, Kennedy, Ginsburg, Alito	**Sotomayor**, Thomas, Breyer		No	
Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017)	Whether California sex offense defining minor as under 18 constitutes a sexual abuse of a minor aggravated felony under INA § 101(a)(43)(A).	**Thomas**, for a unanimous Court	None		Yes	Justice Gorsuch did not participate.
Sessions v. Dimaya, 138 S. Ct. 1204 (2018)	Whether residual clause of aggravated felony crime of violence is void for vagueness.	**Kagan**, Ginsburg, Breyer, Sotomayor, Gorsuch (judgment of the Court and opinion of the Court as to parts II and IV-A))	**Roberts**, Kennedy, Thomas, Alito; **Thomas**, (Kennedy, Alito joining in part)	**Gorsuch** concurring in the judgment	Yes	
Barton v. *Barr*, 140 S. Ct. 1442 (2020)	Whether the stop time rule in a case involving a permanent resident who is not facing admission is triggered by admissibility grounds or deportability grounds.	**Kavanaugh**, Roberts, Thomas, Alito, Gorsuch	**Sotomayor**, Ginsburg, Breyer, Kagan		No	
Pereida v. Wilkinson, 141 S. Ct 754 (2021)	Whether noncitizen faces bar to relief when the underlying criminal statute is divisible and the record is inconclusive as to whether the offense fell under a divisible part that is an aggravated felony.	**Gorsuch**, Roberts, Thomas, Alito, Kavanaugh	**Breyer**, Sotomayor, Kagan		No	Justice Barrett did not participate.

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