

SHOPPING ON THIN ICE: VENUE LIMITS ON ICE DETENTION TRANSFERS TO PREVENT FORUM SHOPPING

Abstract: U.S. Immigration and Customs Enforcement (ICE), the federal agency that manages the world’s largest civil immigration detention system, transfers hundreds of detained noncitizens to different detention centers every day at its sole discretion and for any reason, typically without advising the noncitizen’s counsel or family. This unchecked transfer power, in tandem with ICE’s power to begin deportation proceedings wherever and whenever it chooses, creates a ripe environment for forum shopping. This Note explores how the current system allows ICE to engage in forum shopping—by transferring noncitizens to regions of the country where their claims have a lower probability of success—to the great detriment of their cases and often their lives. This Note argues that the U.S. Congress should enact venue-protective legislation to safeguard noncitizens’ due process rights and prevent ICE from gaining an unfair advantage in deportation cases.

INTRODUCTION

Jeffrey lived in New York with his family and had been a lawful permanent resident for twenty-two years when U.S. Immigration and Customs Enforcement (ICE) apprehended him for having two drug possession convictions on his record, which in some circuits is deemed the most serious immigration law violation—an “aggravated felony.”¹ Fortunately, New York is in the jurisdiction of the U.S. Court of Appeals for the Second Circuit, in which a second drug possession misdemeanor conviction is not considered an “aggravated felony for immigration law purposes.”² In the Second Circuit, Jeffrey qualified for cancellation of removal, a form of immigration relief that could prevent his deportation, especially in light of his strong family ties.³

¹ ALISON PARKER, HUM. RTS. WATCH, *LOCKED UP FAR AWAY* 74 (2009), https://www.hrw.org/sites/default/files/reports/us1209webwcover_0.pdf [<https://perma.cc/7HCQ-6QUT>]; see 8 U.S.C. § 1101(a)(43) (defining aggravated felony); AM. IMMIGR. COUNCIL, *AGGRAVATED FELONIES* 1 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/aggravated_felonies_an_overview_0.pdf [<https://perma.cc/ZCS4-CTZY>] (explaining that aggravated felonies carry the most severe immigration consequences). Importantly, aggravated felonies in immigration law are not necessarily serious offenses and often include minor and nonviolent crimes, such as tax fraud and missing a court appearance. AM. IMMIGR. COUNCIL, *AGGRAVATED FELONIES*, *supra*.

² PARKER, *LOCKED UP FAR AWAY*, *supra* note 1, at 74 n.2; *Alsol v. Mukasey*, 548 F.3d 207, 210, 219 (2d Cir. 2008) (finding that a second misdemeanor conviction for possession is not an aggravated felony and is thus not a deportable offense).

³ PARKER, *LOCKED UP FAR AWAY*, *supra* note 1, at 74. Cancellation of removal would have allowed an immigration judge to pardon Jeffrey’s deportation, thus allowing him to continue living in the United States as a lawful permanent resident. See AM. IMMIGR. COUNCIL, *THE REMOVAL SYSTEM*

Jeffrey spent three months in detention awaiting his deportation hearing, only to learn that he would be transferred to a detention facility in Pearsall, Texas and thus be subject to the laws of a new jurisdiction: the U.S. Court of Appeals for the Fifth Circuit.⁴ In the Fifth Circuit, a second drug possession conviction constitutes an aggravated felony, which renders a noncitizen ineligible for cancellation of removal.⁵ An immigration judge in Texas ordered Jef-

OF THE UNITED STATES 4 (2022), https://www.americanimmigrationcouncil.org/sites/default/files/research/removal_system_of_the_united_states_an_overview.pdf [<https://perma.cc/Q3EB-9FAV>] (explaining cancellation of removal).

⁴ PARKER, LOCKED UP FAR AWAY, *supra* note 1, at 74. The United States is geographically divided into twelve federal circuit courts of appeals: the District of Columbia Circuit covers Washington, D.C.; the First Circuit covers Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico; the Second Circuit covers Connecticut, New York, and Vermont; the Third Circuit covers Delaware, New Jersey, Pennsylvania, and the Virgin Islands; the Fourth Circuit covers Maryland, North Carolina, South Carolina, Virginia, and West Virginia; the Fifth Circuit covers Louisiana, Mississippi, and Texas; the Sixth Circuit covers Kentucky, Michigan, Ohio, and Tennessee; the Seventh Circuit covers Illinois, Indiana, and Wisconsin; the Eighth Circuit covers Arkansas, Iowa, Missouri, Minnesota, Nebraska, North Dakota, and South Dakota; the Ninth Circuit covers Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington; the Tenth Circuit covers Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming; and the Eleventh Circuit covers Alabama, Florida, and Georgia. *Geographic Boundaries of U.S. Courts of Appeals and U.S. District Courts*, U.S. COURTS, https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf [<https://perma.cc/NNR8-T7ZK>]. A thirteenth federal circuit court of appeals, the Federal Circuit, has nationwide jurisdiction over some areas of law, such as patents and trademarks, but is irrelevant in the immigration context. *Court Jurisdiction*, U.S. COURT OF APPEALS FOR THE FED. CIR. (Jan. 9, 2024), <https://cafc.uscourts.gov/home/the-court/about-the-court/court-jurisdiction/> [<https://perma.cc/4E4T-Q2YZ>].

⁵ *United States v. Cepeda-Rios*, 530 F.3d 333, 335 (5th Cir. 2008); *see* 8 U.S.C. § 1229b(a)(3) (prohibiting the Attorney General of the United States from cancelling the removal of a permanent resident who has an aggravated felony conviction); AM. IMMIGR. COUNCIL, AGGRAVATED FELONIES, *supra* note 1, at 2–3 (describing ineligibility for cancellation of removal based on an aggravated felony conviction). This Note uses the term “noncitizen” to refer to individuals who are not U.S. citizens, including lawful permanent residents, individuals with temporary status, and undocumented immigrants. Federal immigration laws refer to this subset of individuals as “aliens,” othering language that carries derogatory, pejorative, and dehumanizing connotations—for this reason, this Note will use the term “alien” only when quoting case law or statutory language. *See, e.g.,* *Flores v. U.S. Citizenship & Immigr. Servs.*, 718 F.3d 548, 551–52 n.1 (6th Cir. 2013) (“We recognize that using the term ‘alien’ to refer to other human beings is offensive and demeaning. We do not condone the use of the term and urge Congress to eliminate it from the U.S. Code.”), *abrogated by* *Sanchez v. Mayorkas*, 593 U.S. 409 (2021); *see also* D. Carolina Núñez, *War of the Words: Aliens, Immigrants, Citizens, and the Language of Exclusion*, 2013 BYU L. REV. 1517, 1519 (analyzing the usage of the term “alien” and arguing that “aliens” are at the bottom of the linguistic hierarchy, as compared to “immigrants” and “citizens”); Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 FORDHAM L. REV. 1545, 1570–71 (2011) (noting that “alien” conveys “dehumanizing associations,” such as “strangeness, hostility, and otherness,” and other nonhuman associations like “animals” to be “caught and released”); Kevin R. Johnson, *“Aliens” and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIA. INTER-AM. L. REV. 263, 264 (1996) (explaining that “aliens” are “outsiders to the national community”); Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1428 (1995) (“It is no coincidence that we still refer to noncitizens as ‘aliens,’

frey's deportation, the Board of Immigration Appeals (BIA) denied his appeal, and Jeffrey was eventually deported to Jamaica—a country where he did not know anyone.⁶

Jeffrey was much more likely to receive a favorable case outcome before ICE transferred him to a different judicial circuit where his probability of success was virtually nonexistent.⁷ The current immigration detention transfer regime allows ICE to decide not only where it holds detained noncitizens, but also which circuit's law applies to their removal proceedings.⁸ There are no clear statutory or regulatory constraints on such actions, and there is no oversight of ICE's transfer practices.⁹ Scholars and researchers have long noted the dire consequences of these practices—particularly ICE transfers to remote detention facilities, which are often in the rural South and far from counsel, support networks, and evidence that would support noncitizens' cases.¹⁰

a term that calls attention to their 'otherness,' and even associates them with nonhuman invaders from outer space.”).

⁶ PARKER, LOCKED UP FAR AWAY, *supra* note 1, at 74. After being deported, Jeffrey expressed “sadness and depression” because he missed his family in the United States and lacked connections and support in Jamaica. *Id.* (quoting telephone interview with Jeffrey J. on October 10, 2008).

⁷ See *infra* notes 167–194 and accompanying text (detailing the divergent results of deportation hearings conducted in different jurisdictions).

⁸ See *infra* notes 96–110 and accompanying text (explaining Immigration and Customs Enforcement's (ICE) venue-transfer powers under the current regime); 8 U.S.C. § 1231(g)(1) (authorizing the Attorney General to decide where to detain noncitizens while awaiting removal proceedings or removal). Courts have interpreted this authority to include the power to transfer detainees. See *Gandarillas-Zambrana v. Bd. of Immigr. Appeals*, 44 F.3d 1251, 1256 (4th Cir. 1995) (finding that ICE's predecessor had the inherent authority to transfer detainees because of its power to decide where to detain them); *Rios-Berrios v. Immigr. & Naturalization Serv.*, 776 F.2d 859, 863 (9th Cir. 1985) (similar).

⁹ See *infra* notes 96–110 and accompanying text (describing the current regime's lack of oversight).

¹⁰ See, e.g., LAURA RIVERA & DAN WERNER, S. POVERTY L. CTR., NO END IN SIGHT 5 (2018), https://www.splcenter.org/sites/default/files/leg_ipp_no_end_in_sight_2018_final_web.pdf [<https://perma.cc/PRQ8-GXTG>] (“[A]ll too often, detained immigrants, particularly in the Deep South, give up on their cases because their conditions of confinement are too crushing to bear.”); EUNICE HYUNHYE CHO & PAROMITA SHAH, S. POVERTY L. CTR., NAT'L IMMIGR. PROJECT, NAT'L LAWS. GUILD, & ADELANTE ALA. WORKER CTR., SHADOW PRISONS 6, 10, 19 (2016), https://www.splcenter.org/sites/default/files/ipp_shadow_prisons_immigrant_detention_report.pdf [<https://perma.cc/R8DB-MSPK>] (emphasizing that few detainees at remote detention centers in the South manage to obtain legal representation, receive visits from family, or receive mail, including letters that could serve as evidence in their proceedings); Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 36–37, 43 (2015) (finding that noncitizens have access to fewer attorneys in remote locations, including small cities on the Southwest border and East Coast, than in other jurisdictions); Peter L. Markowitz & Lindsay C. Nash, *Constitutional Venue*, 66 FLA. L. REV. 1153, 1200 (2014) (noting that immigrant detainee transfers create distance from support networks and make it more difficult to gather evidence); Peter Markowitz et al., *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 363–64 (2011) (noting that ICE transferred approximately 64% of noncitizens detained in New York City to distant locations—primarily including Texas, Louisiana, and Pennsylvania—where fewer detainees secured legal representation compared to those in New York City); ALISON PARKER, HUM. RTS. WATCH, A COSTLY MOVE 1–3 (2011), <https://www.hrw.org/sites/default/files/reports/us0611web>

Considerably less scholarship, however, examines constraints on venue and forum selection by immigration authorities in removal proceedings.¹¹ This Note seeks to add to this important discussion.¹² By cataloguing the government's broad discretion in transferring detainees, this Note explains how such practices unfairly advantage the government by allowing it to forum shop for its preferred outcome: the deportation of noncitizens.¹³ Further, it argues that Congress should intervene to safeguard the due process rights of noncitizens facing deportation.¹⁴

This Note proceeds in four Parts. Part I provides the historical legal context of the federal government's plenary power over immigration matters, offers an overview of the immigration detention system in the United States, and describes the detainee transfer process.¹⁵ Part II discusses jurisdiction and venue in civil proceedings generally and in removal proceedings specifically, explains why the law generally disfavors forum shopping, and notes how ICE detainee transfers may lead to forum shopping.¹⁶ Part III provides concrete examples of detainee transfers that change controlling law for removal proceedings.¹⁷ Part IV of this Note argues that Congress should impose a venue-protective statutory regime that accounts for predictive choice-of-law analyses in removal proceedings to limit unfair forum shopping by immigration enforcement agencies and proposes such a legislative model.¹⁸

I. THE CURRENT IMMIGRATION DETENTION LEGAL FRAMEWORK AND ICE TRANSFER PRACTICES

U.S. immigration law is a particularly complicated field of law that many consider to be second only to the federal tax code in legal complexity.¹⁹ Unlike

wcover_0.pdf [https://perma.cc/5TPL-HV24] (discussing the adverse consequences of long-distance transfers on the attorney-client relationship and the ability to access crucial evidence).

¹¹ See Markowitz & Nash, *supra* note 10, at 1205 (advocating a constitutional theory of venue to protect transferred detainees); Adrienne Pon, Note, *Identifying Limits to Immigration Detention Transfers and Venue*, 71 STAN. L. REV. 747, 783–84 (2019) (arguing that civil personal jurisdiction doctrine could prevent immigration agencies from transferring detainees to an unfair forum).

¹² See *infra* notes 195–229 and accompanying text (proposing a venue-protective legislative framework in removal proceedings).

¹³ See *infra* notes 155–194 and accompanying text (detailing how ICE can leverage its unchecked transfer power to engage in forum shopping by selecting a judicial circuit with a higher likelihood of deporting a noncitizen and transferring a detainee to that jurisdiction).

¹⁴ See *infra* notes 195–229 and accompanying text (proposing a new statutory framework that protects venue for removal proceedings to limit ICE forum shopping for circuits most likely to deport noncitizens via its transfer power).

¹⁵ See *infra* notes 19–119 and accompanying text.

¹⁶ See *infra* notes 120–154 and accompanying text.

¹⁷ See *infra* notes 155–194 and accompanying text.

¹⁸ See *infra* notes 195–229 and accompanying text.

¹⁹ See *United States v. Aguirre-Tello*, 324 F.3d 1181, 1187 (10th Cir. 2003) (noting that the complexity of immigration law is such that it can be perplexing even to lawyers, let alone to those without

most tax cases, however, the outcome in an immigration case can mean the difference between life and death.²⁰ Moreover, “death penalty cases heard in traffic court settings”—as one immigration judge has described the deportation cases before her—aptly describes the dearth of resources available to immigration courts as they grapple with an overwhelming caseload.²¹

From a policy standpoint, the U.S. immigration system is broken—this much is clear according to many conservatives, liberals, and others across the political spectrum.²² At one end of the spectrum, some believe that “criminals”

a legal background), *opinion vacated on reh'g en banc*, 353 F.3d 1199 (10th Cir. 2004); *Castro-O'Ryan v. Immigr. & Naturalization Serv.*, 847 F.2d 1307, 1312 (9th Cir. 1987) (comparing the difficulty of immigration law to that of the Internal Revenue Code (quoting E. HULL, WITHOUT JUSTICE FOR ALL 108 (1985))); IMMIGR. POL'Y CTR., COMPREHENSIVE IMMIGRATION REFORM 1 (2009), <https://www.americanimmigrationcouncil.org/sites/default/files/research/CIR%20Primer%20-%20FINAL.pdf> [<https://perma.cc/8GBS-M3CZ>] (“The Immigration and Nationality Act of 1952 . . . rivals the tax code in the level of detail, confusion, and absurd consequences produced by years of layering on provisions without systematically reviewing their results.”); Alex Nowrasteh, *Bad Laws Lead to Bad Executive Orders*, CATO INST. (Nov. 21, 2014), <https://www.cato.org/commentary/bad-laws-lead-bad-executive-orders> [<https://perma.cc/784A-XXPM>] (“Like the income tax code, our immigration laws contain numerous provisions for the president to exercise arbitrary power, inflict cruel punishments for minor offenses and limit legal immigration with quota numbers seemingly picked by a random number generator.”).

²⁰ See, e.g., ELIZABETH G. KENNEDY & ALISON PARKER, DEPORTED TO DANGER, HUM. RTS. WATCH 35 (2020), https://www.hrw.org/sites/default/files/report_pdf/elsalvador0220_web_0.pdf [<https://perma.cc/74QG-B6FV>] (identifying 138 cases of people who were killed between 2013 and 2019 after being deported to El Salvador); Sarah Stillman, *When Deportation Is a Death Sentence*, NEW YORKER (Jan. 8, 2018), <https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence> [<https://perma.cc/KJ4M-7TQB>] (recounting stories of deported noncitizens who were killed in their home countries, including the case of a woman named Laura, who begged not to be deported because she feared her ex-partner would kill her, was deported regardless, was found in an incinerated vehicle within a week after her deportation, and whose ex-partner confessed to her murder); MacKenzie Elmer, *Brother of Slain Deported Man: 'We Fought to Keep Him Here,'* DES MOINES REG., <https://www.desmoinesregister.com/story/news/2015/04/10/constantino-morales-roque-deported-mexico-killed/25615303/> [<https://perma.cc/CK2P-3HTB>] (Apr. 10, 2015) (reporting the story of a former Mexican police officer who, after having received death threats from a drug cartel if he ever returned to Mexico, was denied asylum, deported, and killed by drug cartel members within a year after his deportation).

²¹ See Dana Leigh Marks, *Immigration Judge: Death Penalty Cases in a Traffic Court Setting*, CNN (June 26, 2014), <https://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/index.html> [<https://perma.cc/X3DD-5EVG>] (emphasizing that immigration judges must not only handle increasingly complex law, but must also do so with fewer resources than federal judges). As of January 2024, there are seventy-two immigration courts in the United States. See *Find An Immigration Court and Access Internet-Based Hearings*, U.S. DEP'T OF JUST., <https://www.justice.gov/eoir/find-immigration-court-and-access-internet-based-hearings> [<https://perma.cc/KC8J-WDYA>] (Jan. 4, 2024) (listing every immigration court by state); see, e.g., Austin Kocher, *Immigration Court Map Is Now Updated for 2022*, AUSTIN KOCHER BLOG (Aug. 16, 2022), <https://austinkocher.substack.com/p/immigration-court-map-is-now-updated> [<https://perma.cc/RK35-S8VV>] (showing a U.S. map of immigration courts in relation to the federal circuits in which they are located).

²² See David J. Bier, *Why the Legal Immigration System Is Broken: A Short List of Problems*, CATO INST. (July 10, 2018), <https://www.cato.org/blog/why-legal-immigration-system-broken-short-list-problems> [<https://perma.cc/SC52-JYL8>] (enumerating problems within the current immigration system that necessitate reform); *Why Immigration Detention Is Necessary*, CTR. FOR IMMIGR. STUD.

or “invaders” are taking over the country due to weak border management and immigration enforcement.²³ Some argue that entering noncitizens threaten Americans’ safety and that seeking asylum is a loophole to legal immigration, and so they advocate for the prolonged detention of noncitizens until their deportation.²⁴ On the opposite end of the spectrum, others assert that detaining such a high number of noncitizens is “inhumane, unnecessary, and wasteful,” and that restrictive legal immigration pathways provide asylum seekers and other migrants with effectively no pathway at all.²⁵

(Jan. 24, 2019), <https://cis.org/Fact-Sheet/Why-Immigration-Detention-Necessary> [<https://perma.cc/7QE7-L4RS>] (“Immigration and border security controls are at a crisis point . . .”). But see CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON 13* (2019) (arguing that the immigration system is not broken, but rather intentionally designed to “punish, stigmatize, and marginalize” noncitizens).

²³ See Matt O’Brien, *Yes, Illegal Immigration Is an Invasion*, WASH. TIMES (Dec. 11, 2022), <https://www.washingtontimes.com/news/2022/dec/11/yes-illegal-immigration-is-invasion/> [<https://perma.cc/X8CQ-PQ7X>] (arguing that noncitizens entering via the Southern border constitutes an “invasion” against which border states may independently act under Article I, Section 10 of the U.S. Constitution); Joel Rose, *A Majority of Americans See an ‘Invasion’ at the Southern Border, NPR Poll Finds*, NPR (Aug. 18, 2022), <https://www.npr.org/2022/08/18/1117953720/a-majority-of-americans-see-an-invasion-at-the-southern-border-npr-poll-finds> [<https://perma.cc/6DAN-GJ3D>] (noting that 53% of Americans across the political spectrum believe it is somewhat or completely true that an invasion is occurring at the Southern border); Simon Romero, Manny Fernandez & Michael Corkery, *Walmart Store Connected Cultures, Until a Killer ‘Came Here For Us,’* N.Y. TIMES (Aug. 4, 2019), <https://www.nytimes.com/2019/08/04/us/el-paso-shooting-mexico-border.html> [<https://perma.cc/7GEW-F8AE>] (reporting that the perpetrator of the deadliest U.S. shooting against Latinos uploaded a manifesto in which he explained the reason behind the attack to be a “Hispanic invasion of Texas”).

²⁴ See *Why Immigration Detention Is Necessary*, *supra* note 22 (arguing that officials should detain noncitizens until their deportation because asylum claims are a loophole to lawful immigration, allowing noncitizens to vanish before future court appearances); Press Release, Departments of Justice and Homeland Security Release Quarterly Alien Incarceration Report Highlighting the Negative Effects of Illegal Immigration and the Need for Border Security, U.S. DEP’T OF JUST. (June 7, 2018), <https://www.justice.gov/opa/pr/departments-justice-and-homeland-security-release-quarterly-alien-incarceration-report> [<https://perma.cc/VT9M-E6UL>] (“It is outrageous that tens of thousands of Americans are dying every year because of the drugs and violence brought over our borders illegally . . .” (quoting former Attorney General Jeff Sessions)); *President’s Immigration Reform Plan Places Interests of Illegal Aliens Ahead of Americans, Says FAIR*, FED’N FOR AM. IMMIGR. REFORM (Jan. 29, 2013), <https://www.fairus.org/press-releases/presidents-immigration-reform-plan-places-interests-illegal-aliens-ahead-americans> [<https://perma.cc/73JG-CM5A>] (discussing concerns about the effects of immigration reform on American communities, including concerns about job competition). But see Michael T. Light, Jingying He & Jason P. Robey, *Comparing Crime Rates Between Undocumented Immigrants, Legal Immigrants, and Native-Born U.S. Citizens in Texas*, 117 PROC. NAT’L ACAD. SCI. 32340, 32345 (2020), <https://www.pnas.org/doi/epdf/10.1073/pnas.2014704117> [<https://perma.cc/ES29-HYTA>] (finding that undocumented immigrants pose a lower criminal risk than native U.S. citizens).

²⁵ *Detaining People Seeking Protection: Inhumane, Unnecessary, and Wasteful*, HUM. RTS. FIRST (July 14, 2021), <https://humanrightsfirst.org/library/detaining-people-seeking-protection-inhumane-unnecessary-and-wasteful/> [<https://perma.cc/DDE3-4CQ3>] (contending that detaining asylum seekers is unnecessary because the overwhelming majority attend all immigration hearings and that detention, in addition to causing considerable physical harm and psychological distress, also aggravates the trauma that led them to flee their home countries); see “*Why Don’t They Just Get in Line? Barriers to Legal Immigration: Hearing Before the Subcomm. on Immigr. & Citizenship of the H. Comm. on the*

This Part of the Note provides an overview of the important factors at play when considering immigration detention transfer and venue reform.²⁶ Section A lays out the plenary power doctrine as it relates to immigration law.²⁷ Section B discusses the three federal agencies involved in the immigration process.²⁸ Finally, Section C explains the immigration detention system, including who is subject to detention, how the ICE transfer process works, and the Alternatives to Detention program.²⁹

A. The Federal Government's Plenary Power Over Immigration Law

The Constitution does not expressly grant Congress the power to regulate immigration.³⁰ Scholars have thus argued that Congress derives its federal immigration power from several clauses in the Constitution.³¹ One such clause is

Judiciary, 117th Cong. 24–25 (2021) (statement of David J. Bier, Research Fellow, Cato Institute) (explaining that noncitizens effectively cannot “get in line” for lawful permanent residency without being sponsored by the U.S. government, a family member, or an employer); AM. IMMIGR. COUNCIL, WHY DON'T IMMIGRANTS APPLY FOR CITIZENSHIP? THERE IS NO LINE FOR MANY UNDOCUMENTED IMMIGRANTS 1 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/why_dont_immigrants_apply_for_citizenship_0.pdf [<https://perma.cc/6VM8-TGV2>] (noting that the U.S. immigration system limits legal immigration pathways to three categories—employment-based, family-based, and humanitarian assistance—and that these pathways are severely limited, making most undocumented immigrants ineligible for them); David J. Bier, *150-Year Wait for Indian Immigrants with Advanced Degrees*, CATO INST. (June 8, 2018), <https://www.cato.org/blog/150-year-wait-indian-immigrants-advanced-degrees> [<https://perma.cc/YT2A-BW8Y>] (noting that Indian immigrants with advanced degrees are projected to have a 151-year wait for a green card); Mike Flynn, Shikha Dalmia & Terry Colon, *What Part of Legal Immigration Don't You Understand?*, REASON (Oct. 2008), <https://reason.org/wp-content/uploads/files/a87d1550853898a9b306ef458f116079.pdf> [<https://perma.cc/RH46-HVGR>] (depicting a flowchart that illustrates difficulties in obtaining lawful immigration status). See generally U.S. Asylum and Border Policies Resulting in Human Rights Violations: Human Rights First's Submission for the Office of the High Commissioner for Human Rights (OHCHR) Special Rapporteur on the Human Rights of Migrants Pursuant to Human Rights Council Resolution 43/6, HUM. RTS. FIRST (Mar. 1, 2022), <https://humanrightsfirst.org/library/u-s-asylum-and-border-policies-resulting-in-human-rights-violations/> [<https://perma.cc/V3GZ-JJTX>] (listing U.S. border policies that have violated human rights and international treaties, including the Title 42 “Remain in Mexico” policy that forcibly returned thousands of asylum seekers to Mexico while they awaited their hearing, resulting in the kidnapping, torture, and rape of many, as well as the murder of at least two asylum seekers).

²⁶ See *infra* notes 30–119 and accompanying text.

²⁷ See *infra* notes 30–44 and accompanying text.

²⁸ See *infra* notes 45–59 and accompanying text.

²⁹ See *infra* notes 60–119 and accompanying text.

³⁰ See Nikolas Bowie & Norah Rast, *The Imaginary Immigration Clause*, 120 MICH. L. REV. 1419, 1421–22 (2022) (explaining that the Constitution does not contain an explicit delegation of authority over immigration); Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 611 (2013) (same).

³¹ T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP 28–30 (9th ed. 2021) (listing the Naturalization Clause, the Commerce Clause, the Migration and Importation Clause, the War Power Clause, and unenumerated powers as potential sources for Congress's power to regulate immigration).

the Naturalization Clause, which grants Congress the power “[t]o establish an uniform Rule of Naturalization.”³² Pursuant to this power, Congress passed the Naturalization Act of 1790, the nation’s first immigration law, which established several requirements and limited naturalization to “free white person[s].”³³

Since then, Congress enacted several immigration laws that exclude people based on race and national origin, and the U.S. Supreme Court has consistently upheld these actions based on the plenary power doctrine—a doctrine limiting judicial review of immigration matters on the ground that the political branches of the federal government (that is, the executive and legislative branches) hold absolute authority over immigration law.³⁴ In an early plenary power case following the enactment of the Chinese Exclusion Act of 1882, for instance, the Supreme Court declared that Congress had broad authority to exclude noncitizens based on race if it considered their presence in the country to be dangerous.³⁵ The Court reasoned that national sovereignty inherently includes control over immigration, as an independent country should have the ability to decide who is allowed to enter and remain within its borders.³⁶

³² U.S. CONST. art. I, § 8, cl. 4; ALENIKOFF ET AL., *supra* note 31, at 28 (noting the Naturalization Clause as an enumerated power that may imply the power to control immigration).

³³ See Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103–04 (repealed 1795) (establishing naturalization requirements, including that a noncitizen be a “free white person” to be eligible). The Immigration and Nationality Act of 1952 (INA) now prohibits racial discrimination in naturalization. See Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 311, 66 Stat. 163, 239 (1952) (codified as amended at 8 U.S.C. § 1422). Section 311 of the Act states, “[t]he right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race” *Id.*

³⁴ See *Nishimura Ekiu v. United States*, 142 U.S. 651, 659–60 (1892) (finding that the judiciary lacks the authority to decide who may remain in the country, as the Constitution vests this authority in the political branches of the federal government); *Carlson v. Landon*, 342 U.S. 524, 537 (1952) (finding the power to expel noncitizens to be a plenary power of the political branches of the federal government and that the Constitution does not guarantee judicial review of such action); see, e.g., Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1982–85 (2013) (explaining that immigration law remains outside typical federal constitutional jurisprudence because it lacks several procedural due process protections due to the plenary power doctrine). But see Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1392–94 (1999) (arguing against diminishing federal exclusivity in immigration matters).

³⁵ See *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 606, 609 (1889) (upholding the constitutionality of a law that excluded Chinese laborers from entering the United States, including those who had previously resided lawfully in the country and had received permission to return); see also Chinese Exclusion Act of 1882, ch. 126, § 14, 22 Stat. 58 (1882) (repealed 1943) (forbidding state and federal courts from conferring U.S. citizenship upon Chinese individuals).

³⁶ See *Chae Chan Ping*, 130 U.S. at 603 (“That the government of the United States . . . can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation.”); see also *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (“The Court without exception has sustained Congress’s ‘plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.’” (quoting *Boutilier v. Immigr. & Naturalization Serv.*, 387 U.S.

Over time, scholars and activists have advocated for the reexamination of the plenary power cases from the nineteenth century on the ground that they were based on racial animus and decided by the same Court that decided anti-canonical cases such as *Plessy v. Ferguson*, which upheld racial segregation.³⁷ The Supreme Court, however, has ruled time and time again that the judiciary does not have authority over immigration so long as the actions of the executive and legislature comport with the Constitution, upholding the political branches' plenary power over immigration as recently as 2018.³⁸ In practice, the judicial

118, 123 (1967)); *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893) (coming to a similar conclusion as in *Nishimura Ekiu*); *Nishimura Ekiu*, 142 U.S. at 659 ("It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.").

³⁷ See *Plessy v. Ferguson*, 163 U.S. 537, 543 (1896) (holding that state laws mandating racial segregation did not violate the Fourteenth Amendment's Equal Protection Clause), *overruled by Brown v. Bd. of Ed.*, 347 U.S. 483 (1954); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 5–6 (1998) (discussing that the plenary power doctrine arose when the Supreme Court was deciding controversial cases that upheld the constitutionality of racial segregation and women's exclusion from the public sphere); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550, 554–56 (1990) (noting that the plenary power doctrine was based on racist sentiment against Asian Americans when it arose and that cases invoking it since then have simply reiterated the initial racist reasoning); see also Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 862 (1987) ("[The] *Chinese Exclusion [Case]* is a 'relic from a different era' . . . when the Bill of Rights had not yet become our national hallmark and the principal justification and preoccupation of judicial review. It was an era before United States commitment to international human rights." (quoting *Reid v. Covert*, 354 U.S. 1, 12 (1957))). Criticism of perpetuating racism in the name of plenary power is abundant. See generally Kevin R. Johnson, *Systemic Racism in the U.S. Immigration Laws*, 97 IND. L.J. 1455, 1459 (2022) (noting that, although the plenary power doctrine came into existence when racism and violence were prevalent against Chinese immigrants, the present-day Supreme Court continues to uphold discriminatory immigration laws that result from it); Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13, 13 (2003) (explaining that the racist Chinese exclusion cases establishing the plenary power doctrine remain influential and relevant today); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 14, 129 (2002) (explaining that the plenary power doctrine is rooted in racism against Chinese laborers); Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1127–29 (1995) (same).

³⁸ See, e.g., *Trump v. Hawaii*, 585 U.S. 667, 699–702, 704–06 (2018) (upholding President Donald Trump's executive order imposing restrictions on immigrants from seven Muslim-majority countries despite evidence that the ban's underlying motivation was religious discrimination). Generally, federal courts rule only on whether the federal government ran afoul of the Constitution, and, in doing so, they give broad leeway to the federal government. See *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 591–92 (4th Cir. 2017), *as amended* (May 31, 2017), *as amended* (June 15, 2017) (finding that President Trump's national security reasons in signing the Muslim ban executive order were made in bad faith based on anti-Islamic statements he made during his presidential campaign and an advisor's statement indicating that President Trump directed him to find a legal way to ban Muslims), *vacated and remanded sub nom. Trump v. Int'l Refugee Assistance*, 583 U.S. 912 (2017); Brief of Former National Security Officials as Amici Curiae Supporting Respondents at 15, *Trump v. Hawaii*,

branch is relatively uninvolved in the federal immigration power, as Congress enacts immigration statutes and executive branch agencies interpret them.³⁹

Furthermore, drawing on the political branches' plenary power, immigration law deviates from typical constitutional protections.⁴⁰ Noncitizens charged with a criminal offense generally retain their due process rights under the Fifth and Fourteenth Amendments, but, because removal proceedings are deemed civil rather than criminal, noncitizens in detention or deportation proceedings do not have the right to bail or court-appointed counsel.⁴¹ If provided the opportunity to present their cases, noncitizens must frequently do so without legal representation, without understanding English (much less a highly technical and complex legal field), and without several of the procedural due process protections guaranteed to criminal defendants, such as the protection against ex post facto laws.⁴² Moreover, many noncitizens do not have the right to present their cases before an immigration judge at all, and instead have their cases adjudicated by an ICE

585 U.S. 667 (2018) (No. 17-965) (arguing that the Muslim ban executive order failed to promote national security and advance foreign policy objectives); *see also* Ilya Somin, *Immigration Law Defies the American Constitution*, THE ATLANTIC (Oct. 3, 2019), <https://www.theatlantic.com/ideas/archive/2019/10/us-immigration-laws-unconstitutional-double-standards/599140/> [<https://perma.cc/QVN7-KGJ9>] (explaining that constitutional violations in immigration law are held to a different standard than other constitutional violations because of the plenary power doctrine). At the same time, the Court has qualified the plenary power in certain respects. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 695, 697, 699 (2001) (declining to extend the plenary power doctrine to the indefinite detention of deportable noncitizens because of constitutional constraints); *Chae Chan Ping*, 130 U.S. at 604 (providing that the Constitution and public policy limit Congress's plenary power).

³⁹ *See* ALEINIKOFF ET AL., *supra* note 31, at 72 (explaining that statutes enacted by Congress and regulations promulgated by administrative agencies govern immigration). The executive agencies that interpret immigration statutes include the U.S. Department of Homeland Security (DHS) and the U.S. Department of Justice (DOJ). *See About the Office*, U.S. DEP'T OF JUST., <https://www.justice.gov/eoir/about-office> [<https://perma.cc/F35U-6SXH>] (Apr. 25, 2023) (explaining that the DOJ's Executive Office of Immigration Review (EOIR) interprets federal immigration laws).

⁴⁰ *See Mathews v. Diaz*, 426 U.S. 67, 80 (1976) (stating that Congress's plenary power allows it to "make[] rules regarding aliens that would be unacceptable if applied to citizens"); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 282 (explaining that constitutional rights protected in other legal areas have not been similarly protected in immigration law).

⁴¹ *See Plyler v. Doe*, 457 U.S. 202, 210 (1982) (noting that the due process protections of the Fifth and Fourteenth Amendments apply to noncitizens, including those unlawfully present in the country); Daniel Kanstroom & M. Brinton Lykes, *Migration, Detention, and Deportation: Dilemmas and Responses* (listing rights unavailable to individuals facing deportation, including the right to a jury trial in removal proceedings, the right to counsel, and the right to bail), in THE NEW DEPORTATIONS DELIRIUM 1, 11 (Daniel Kanstroom & M. Brinton Lykes eds., 2015).

⁴² *See Ex Post Facto Law*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "ex post facto law" as "a statute that criminalizes an action and simultaneously provides for punishment of those who took the action before it had legally become a crime" and explaining that the Constitution prohibits such retrospective laws for criminal defendants); Kanstroom & Lykes, *supra* note 41, at 11 (listing protections that are available to criminal defendants but unavailable to noncitizens in removal proceedings); DANIEL KANSTROOM, DEPORTATION NATION 135, 176 (2007) (explaining that a noncitizen may be deported for conduct that was not considered a crime or deportable offense when they committed it).

officer, often within one day.⁴³ Some argue that the constitutionality of such limited due process rights for certain noncitizens stems from the entry fiction doctrine in immigration law—a doctrine that deems some noncitizens to have never entered the country despite being physically present within the United States, thereby allowing the government to summarily deport them.⁴⁴

B. Immigration Enforcement in the United States

Prior to 2003, the Immigration and Naturalization Service (INS), an agency within the Department of Justice (DOJ), handled all immigration benefits and enforcement in the United States, including detention and deportation.⁴⁵ After the September 11, 2001 terrorist attacks, Congress dissolved the INS and enacted the Homeland Security Act of 2002, which created the Department of Homeland Security (DHS) and transferred all immigration functions and enforcement to DHS.⁴⁶ DHS is comprised of several agencies, including the three primary entities responsible for immigration adjudication and enforcement—U.S. Citizenship and Immigration Services (USCIS), Customs and Border Protection (CBP), and ICE.⁴⁷ USCIS processes immigration benefits, and ICE and CBP enforce immigration laws and border security.⁴⁸ This Note engages with detention and

⁴³ AM. IMMIGR. COUNCIL, A PRIMER ON EXPEDITED REMOVAL 1 (2019), <https://www.americanimmigrationcouncil.org/research/primer-expedited-removal> [<https://perma.cc/BT4X-X4A5>]. Noncitizens without the right to a hearing include those in “expedited removal” and “reinstatement of removal”—two summary deportation procedures enacted in 1996. See AM. IMMIGR. COUNCIL, REMOVAL WITHOUT RECOURSE 1 (2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/removal_without_recourse.pdf [<https://perma.cc/4NEQ-7SGR>]; see also 8 U.S.C. § 1225(b) (vesting the power of expedited removal in individual immigration officers).

⁴⁴ See Eunice Lee, *The End of Entry Fiction*, 99 N.C. L. REV. 565, 572–73 (2021) (explaining entry fiction). The Supreme Court, invoking Congress’s plenary power over immigration, has upheld limited due process rights for noncitizens who have not been legally admitted. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”).

⁴⁵ ALEINIKOFF ET AL., *supra* note 31, at 71–72 (reviewing the administrative agencies with federal immigration authority).

⁴⁶ See 6 U.S.C. § 101; *Homeland Security Act of 2002*, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/homeland-security-act-2002> [<https://perma.cc/2SAU-NLJ9>] (Nov. 30, 2023) (noting that the Homeland Security Act of 2002 created DHS). The establishment of DHS constituted the most extensive federal government reorganization in fifty years, as the duties of twenty-two agencies were transferred to DHS. Andrew Glass, *This Day in Politics: Homeland Security Department Begins Operations*, Jan. 24, 2003, POLITICO (Jan. 24, 2019), <https://www.politico.com/story/2019/01/24/homeland-security-department-begins-2003-1116070> [<https://perma.cc/36RS-LYWD>].

⁴⁷ *Operational and Support Components*, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/operational-and-support-components> [<https://perma.cc/KZA4-X4EV>] (Oct. 23, 2023) (listing all agencies within DHS, including the Coast Guard, Secret Service, and Transportation Security Administration).

⁴⁸ *What We Do*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/about-us/mission-and-core-values/what-we-do> [<https://perma.cc/59VS-LJFU>] (Feb. 27, 2020). Immigration benefits include immigrant visa petitions, employment authorization applications, petitions for adjustment of status to permanent resident status, naturalization applications, and affirmative asylum adjudications. *About CBP*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/about> [<https://perma.cc/LUS3->

transfer practices by the Enforcement and Removal Operations division of ICE.⁴⁹ Although CBP also detains noncitizens, CBP detention is only temporary while noncitizens await transfer to ICE custody.⁵⁰

The Executive Office of Immigration Review (EOIR), a sub-agency within the DOJ, is responsible for operating the immigration court system.⁵¹ The U.S. Attorney General appoints immigration judges, who work for the EOIR and preside over removal proceedings.⁵² Removal proceedings are administrative proceedings in which a noncitizen who has been ordered removed by DHS can either (1) contest their removability or (2) concede removability and request relief from removal.⁵³ The federal government—which is always represented by a

6W6W] (Oct. 16, 2023); *Providing Immigration Benefits & Information*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/providing-immigration-benefits-information> [<https://perma.cc/P64U-7HLB>] (Oct. 14, 2022); *What We Do*, *supra*; *Who We Are*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/about-ice> [<https://perma.cc/4C36-33VT>].

⁴⁹ This Note does not explore ICE's Homeland Security Investigations (HSI) division, which is the primary investigative component of DHS and is dedicated to probing transnational crime, including human trafficking, drug trafficking, and terrorism. See *Homeland Security Investigations*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/about-ice/homeland-security-investigations> [<https://perma.cc/JQV8-6KAD>] (Apr. 14, 2023) (detailing HSI's responsibilities); see also Kari Hong, *10 Reasons Why Congress Should Defund ICE's Deportation Force*, 43 HARBINGER 40, 40–41 (2019) (explaining that the “Abolish ICE” movement refers to abolishing ICE's deportation force—the Enforcement and Removal Operations division—rather than HSI); Jason Buch, *ICE Criminal Investigators Ask to Be Distanced from Detentions, Deportations in Letter to Kirstjen Nielsen*, TEX. OBSERVER (June 27, 2018), <https://www.texasobserver.org/ice-hsi-letter-kirstjen-nielsen-criminal-civil-deportation-zero-tolerance/> [<https://perma.cc/J26F-DTLE>] (reporting that HSI requested Kirstjen Nielsen, Homeland Security Secretary, to separate it into an agency independent of ICE because ICE's contentious detention and deportation practices have hindered HSI's investigative efforts).

⁵⁰ MARY E. KRAMER, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY 15 (8th ed. 2019) (explaining that Customs and Border Protection (CBP) arrests people at land borders, airports, and seaports and transfers anyone who contests removal or requests relief to ICE); U.S. CUSTOMS & BORDER PROT., SHORT-TERM DETENTION STANDARDS AND OVERSIGHT 4 (2015), https://www.cbp.gov/sites/default/files/assets/documents/2022-Jan/Short-Term%20Detention%20Standards%20and%20Oversight_1.pdf [<https://perma.cc/QC5Z-Q84S>]. ICE and CBP differ in at least one major way: ICE primarily enforces immigration laws within the interior of the country, whereas CBP enforces immigration laws at ports of entry, between them, and at the border. *Immigration Enforcement Actions Annual Flow Report*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/immigration-statistics/enforcement-actions> [<https://perma.cc/72NM-TLQF>] (Nov. 20, 2023). Although beyond the scope of this Note, it is worth noting that the “border,” wherein constitutional protections do not fully apply, is defined by federal regulations as a one-hundred-mile zone from any external boundary of the United States. 8 C.F.R. § 287.1(a) (2022); *The Constitution in the 100-Mile Border Zone*, ACLU (Aug. 21, 2014), <https://www.aclu.org/other/constitution-100-mile-border-zone> [<https://perma.cc/695R-PL92>] (illustrating that the one-hundred-mile border zone includes substantial portions of Texas and New York, as well as the entire state of Florida and almost the entire state of Massachusetts).

⁵¹ KEVIN R. JOHNSON ET AL., UNDERSTANDING IMMIGRATION LAW 248 (2d ed. 2015).

⁵² See 8 U.S.C. § 1229a(a) (providing that immigration judges preside over removal proceedings); 8 C.F.R. § 1001.1(l) (2024) (defining “immigration judge” and stating that attorneys appointed by the Attorney General serve in this role).

⁵³ See AM. IMMIGR. COUNCIL, THE REMOVAL SYSTEM OF THE UNITED STATES, *supra* note 3, at 2–4 (explaining that an immigration judge must first determine whether a noncitizen is removable and, if so, must determine whether to grant relief from removal).

DHS staff attorney—prosecutes the case, and noncitizen respondents often proceed without representation, as they do not have the right to court-appointed counsel.⁵⁴

If the court grants relief from removal, the noncitizen is allowed to remain in the country, either temporarily or indefinitely.⁵⁵ If the court denies relief, the noncitizen has thirty days to appeal to the BIA, an administrative body within the EOIR.⁵⁶ The BIA consists of twenty-three Appellate Immigration Judges and adjudicates appeals by “paper review” rather than oral argument.⁵⁷ Upon a BIA denial, a noncitizen has thirty days to appeal to the federal court of appeals with jurisdiction over the judicial circuit where the immigration proceedings concluded.⁵⁸ Nevertheless, federal courts of appeals only have jurisdiction to review

⁵⁴ *Id.* at 2 (stating that a DHS attorney must prosecute removal proceedings); see 8 U.S.C. § 1362 (providing that a noncitizen in removal proceedings has the right to choose their own legal representation and that the government is not responsible for covering any associated expenses); 8 C.F.R. § 1003.16 (same).

⁵⁵ See JOHNSON ET AL., *supra* note 51, at 407, 414 (explaining lasting forms of relief, such as cancellation of removal and asylum, and limited forms of relief, such as Deferred Action for Childhood Arrivals (DACA) and prosecutorial discretion); see AM. IMMIGR. COUNCIL, HOW THE UNITED STATES IMMIGRATION SYSTEM WORKS 5–8 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/how_the_united_states_immigration_system_works_0.pdf [<https://perma.cc/S392-UGFU>] (explaining that asylum leads to lawful permanent resident status whereas DACA does not).

⁵⁶ See 8 C.F.R. § 1003.1(a)(1) (establishing the Board of Immigration Appeals (BIA) in the EOIR); *id.* § 1003.1(d)(1) (providing that the BIA is responsible for appellate review of immigration adjudications); *id.* § 1003.38(b) (providing that a noncitizen must file an appeal with the BIA within thirty days of an immigration judge’s decision); *Board of Immigration Appeals*, U.S. DEP’T OF JUST., <https://www.justice.gov/eoir/board-of-immigration-appeals> [<https://perma.cc/N9GM-SJC4>] (Sept. 7, 2023) (explaining that the BIA serves as the highest administrative body in immigration law). A noncitizen must exhaust this final administrative step before appealing to a federal court. 8 U.S.C. § 1252(d)(1); JOHNSON ET AL., *supra* note 51, at 432; see *Minasyan v. Mukasey*, 553 F.3d 1224, 1229 (9th Cir. 2009) (stating that, thirty days after the decision, an immigration judge’s order of removal becomes final).

⁵⁷ *Board of Immigration Appeals*, *supra* note 56. “Paper review” refers to the fact that the BIA generally does not conduct physical courtroom proceedings, instead having one judge or a three-judge panel review the appeal submitted and decide the case based on those documents. JOHNSON ET AL., *supra* note 51, at 432 (stating that most BIA appeals are decided by one Board member unless one of several possible conditions is met); ELIZABETH KEYES, AM. BAR. ASS’N, TIPS FOR APPEALING TO THE BOARD OF IMMIGRATION APPEALS (BIA) 4 (Andrea Siemens & Irena Lieberman eds., 2006), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/tips_for_appealing_to_bia.pdf [<https://perma.cc/FW72-J4TP>]; *Asylum Manual*: 27. *Board of Immigration Appeals*, IMMIGR. EQUAL., <https://immigrationequality.org/asylum/asylum-manual/board-of-immigration-appeals/> [<https://perma.cc/QX29-SXEH>] (explaining that paper review is the primary method by which the BIA reviews appeals and that it rarely grants requests for oral argument).

⁵⁸ 8 U.S.C. § 1252(b)(2); see *Esenwah v. Ashcroft*, 378 F.3d 763, 765 (8th Cir. 2004) (stating that federal courts of appeals have jurisdiction over removal orders pursuant to 8 U.S.C. § 1252(b)(2)); AM. IMMIGR. COUNCIL, PRACTICE ADVISORY: HOW TO FILE A PETITION FOR REVIEW 1 (2015), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/how_to_file_a_petition_for_review_2015_update.pdf [<https://perma.cc/9JD9-4QV3>] (providing that the appropriate circuit court must receive a petition for review within thirty days after a BIA or ICE decision). Federal district courts previously had jurisdiction to consider final orders of removal when a noncitizen peti-

asylum cases, questions of law, and constitutional issues, limiting almost all discretionary decisions in removal proceedings to immigration judges, or on appeal, to the BIA.⁵⁹

C. The U.S. Immigration Detention System

The rise of industrialization and advancements in international travel led to a surge in immigration to the United States at the turn of the nineteenth century.⁶⁰ Ellis Island, a beacon of hope for many arriving immigrants across generations, became the site of the world's first immigration detention center in 1892.⁶¹ Initially, the U.S. government temporarily detained noncitizens at Ellis Island to assess for contagious diseases and other disqualifying criteria that made them deportable, such as poverty or homosexuality.⁶² From the 1930s

tioned for habeas corpus, but Congress divested them of this jurisdiction when it enacted the REAL ID Act of 2005. *See* Nasrallah v. Barr, 140 S. Ct. 1683, 1690 (2020) (“The REAL ID Act clarified that final orders of removal may not be reviewed in district courts, even via habeas corpus, and may be reviewed only in the courts of appeals.”); MIGRATION POL’Y INST., MAJOR US IMMIGRATION LAWS, 1790–PRESENT 6 (2013), <https://www.migrationpolicy.org/sites/default/files/publications/CIR-1790Timeline.pdf> [<https://perma.cc/R4HS-YJYY>] (explaining that the REAL ID Act of 2005 foreclosed judicial review of removal orders through habeas corpus petitions at district courts and required review at the court of appeals level); LEGAL ACTION CTR., AM. IMMIGR. COUNCIL, JUDICIAL REVIEW PROVISIONS OF THE REAL ID ACT 2 (2005), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/realid6705.pdf [<https://perma.cc/VZ57-5LST>] (stating that the REAL ID Act eliminated habeas corpus review of final removal orders). Since then, district courts may consider habeas petitions only as they relate to a noncitizen’s detention and lack jurisdiction to review final orders of deportation. *See* Moreno-Bravo v. Gonzales, 463 F.3d 253, 254–55 (2d Cir. 2006) (explaining that the REAL ID Act of 2005 changed the legal framework for habeas petitions that challenged final orders of removal). Only federal courts of appeals have such jurisdiction under 8 U.S.C. § 1252. *Gittens v. Menifee*, 428 F.3d 382, 384–85 (2d Cir. 2005).

⁵⁹ 8 U.S.C. § 1252(a)(2)(B), (b)(4). Note, however, that review of discretionary decisions for asylum cases are held to a heightened “abuse of discretion” standard of review. *Id.* § 1252(b)(4)(D); *see* Zuh v. Mukasey, 547 F.3d 504, 506–07 (4th Cir. 2008) (explaining that courts of appeals apply the abuse of discretion standard when reviewing an immigration judge’s denial of asylum). Besides reviewing for abuse of discretion, courts of appeals only review immigration judge or BIA decisions on questions of law and constitutional claims, rather than on discretionary or factual issues. 8 U.S.C. § 1252(a)(2)(D); *see* Jean-Pierre v. U.S. Att’y Gen., 500 F.3d 1315, 1322 (11th Cir. 2007) (emphasizing that when “presented with a mixed question of law and fact, the court should analyze it to the extent there are legal elements, but should not review any factual elements” (quoting H.R. REP. NO. 109-72, at 175 (2005) (Conf. Rep.))).

⁶⁰ *See* Adam McKeown, *Global Migration, 1846–1940*, 15 J. WORLD HIST. 155, 164–67 (2004) (explaining that industrialization and newly developed transportation technology led to increased migration to the United States).

⁶¹ *See A Short History of Immigration Detention*, FREEDOM FOR IMMIGRANTS, <https://www.freedomforimmigrants.org/detention-timeline> [<https://perma.cc/R44A-WKZM>] (2018) (noting that the first detention facility for immigrants opened in Ellis Island in 1892); *see also* Ellis Island, STATES OF INCARCERATION, <https://statesofincarceration.org/story/ellis-island> [<https://perma.cc/Q2RG-RMQU>] (clarifying that, despite its reputation as a “Golden Door” for immigrants entering the United States, Ellis Island served as a detention center).

⁶² *Ellis Island*, *supra* note 61.

until its closing in November 1954, however, Ellis Island was primarily a mass detention and mass deportation center, holding noncitizens suspected of being communists or U.S. enemies during World War II.⁶³

By 1986, the federal government opened its first long-term detention center exclusively for noncitizens.⁶⁴ At the time, there were 3,025 detained noncitizens throughout the country.⁶⁵ ICE now operates the largest immigration detention system in the world.⁶⁶ At the end of Fiscal Year 2019, ICE maintained an average daily population of 50,165 detained noncitizens.⁶⁷ Individuals in ICE custody are held in one of the following types of detention facilities: (1) five detention centers owned by ICE and managed by contracted officers; (2) eight Contract Detention Facilities; (3) twelve facilities under Intergovernmental Service Agreements (IGSA) dedicated specifically to detained noncitizens in ICE custody; or (4) two hundred shared-use or non-dedicated IGSA—local

⁶³ *Id.*; *Immigration and Deportation at Ellis Island*, PBS, <https://www.pbs.org/wgbh/american-experience/features/goldman-immigration-and-deportation-ellis-island/> [<https://perma.cc/U9JK-VXRQ>]. See generally KANSTROOM, *supra* note 42, at 161–66 (detailing the history of deportation in the United States during the 1930s).

⁶⁴ See Frances Frank Marcus, *Prison for Aliens Opens in Louisiana*, N.Y. TIMES (Apr. 9, 1986), <https://www.nytimes.com/1986/04/09/us/prison-for-aliens-opens-in-louisiana.html> [<https://perma.cc/X75Z-FNKB>] (distinguishing between border processing facilities and the new immigration prison in Louisiana and emphasizing that the new prison was designed for long-term detention). The federal detention facility cost \$17.5 million in 1986 and was built to hold 1,300 noncitizens—1,000 noncitizens without a criminal record and 300 noncitizens with criminal records. *Id.*; see *Value of \$17,500,000 from 1986 to 2024*, CPI INFLATION CALCULATOR, <https://www.in2013dollars.com/us/inflation/1986?amount=17500000> [<https://perma.cc/KPA9-8YV3>] (showing the equivalent of \$17.5 million in 1986 is approximately \$50.57 million in 2024).

⁶⁵ Marcus, *supra* note 64. Detained noncitizens were under the custody of the Immigration and Naturalization Service (INS) but were detained in county jails and private prisons rather than in federal immigration detention centers. *Id.*

⁶⁶ *United States: Overview*, GLOB. DET. PROJECT, <https://www.globaldetentionproject.org/countries/americas/united-states> [<https://web.archive.org/web/20240224034748/https://www.globaldetentionproject.org/countries/americas/united-states>]; DORA SCHRIRO, U.S. IMMIGR. & CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2 (2009), <https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf> [<https://perma.cc/33GA-ZL2H>].

⁶⁷ U.S. IMMIGR. & CUSTOMS ENF'T, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 5 (2020), <https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf> [<https://perma.cc/EK85-AZR3>]. This Note relies on Fiscal Year 2019 data as a more accurate reflection of typical detainee population sizes, as the COVID-19 pandemic resulted in temporary changes to the detention system that have obscured the data from 2020 to 2022. See U.S. IMMIGR. & CUSTOMS ENF'T, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT FISCAL YEAR 2020 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 3 (2021), <https://www.ice.gov/doclib/news/library/reports/annual-report/eroReportFY2020.pdf> [<https://perma.cc/2L3B-QDK6>] (explaining that ICE reduced its detainee population during the COVID-19 pandemic to facilitate social distancing). During Fiscal Year 2019, for instance, ICE held an average daily population of 45,000 noncitizens in detention, which decreased to approximately 20,000 at the conclusion of Fiscal Year 2020. *Id.*

and state jails that contract with ICE, receive a per-diem payment per detained noncitizen, and house ICE detainees with criminal inmates.⁶⁸

Despite being confined in jails or nearly indistinguishable “detention facilities,” noncitizens are not in detention because of any crime; rather, their detention is said to be a preventive measure to facilitate and ensure removal from the country.⁶⁹ By the end of Fiscal Year 2022, detained noncitizens spent an average of 795 days—or over two years—in ICE detention, and the growing immigration case backlog directly correlates with longer detention periods.⁷⁰

This Section discusses the current detention system in the United States.⁷¹ First, Subsection 1 explains which noncitizens are subject to detention.⁷² Subsection 2 describes the immigration detention transfer process.⁷³ Subsection 3 then discusses the Alternatives to Detention program.⁷⁴

1. Who Is Subject to Detention?

Immigration law specifies three categories of noncitizens who may or must be detained:⁷⁵ (1) “arriving aliens;”⁷⁶ (2) noncitizens apprehended within

⁶⁸ U.S. IMMIGR. & CUSTOMS ENF'T, FISCAL YEAR 2019, *supra* note 67, at 6; SCHRIRO, *supra* note 66, at 10 (explaining that shared-use facilities under Intergovernmental Service Agreements (IGSAs) are local jails that house criminal inmates and immigration detainees); see Lauren-Brooke Eisen & Ram Subramanian, *A Market for Holding Humans: The Correctional and Detention Bed Trade*, BRENNAN CTR. FOR JUST. (Aug. 8, 2022), <https://www.brennancenter.org/our-work/research-reports/market-holding-humans-correctional-and-detention-bed-trade> [<https://perma.cc/5AZ4-K6S3>] (offering an example of the detention bed market in local jails—in Louisiana, ICE pays \$74 per day per bed).

⁶⁹ See *Immigr. & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (explaining that removal proceedings are not intended to punish individuals for unlawfully entering the country, but rather serve to determine whether they may stay); David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1006–07 (2002) (explaining that immigration detention is a preventive measure to ensure removal, rather than a punitive measure, because immigration officials do not have the authority to detain individuals for punishment); see also Michael Flynn, *Immigration Detention and Proportionality* 7 (Glob. Det. Project, Working Paper No. 4, 2011), https://www.globaldetentionproject.org/wp-content/uploads/2016/06/GDP_detention_and_proportionality_working_paper.pdf [<https://perma.cc/CX6Y-X73L>] (defining “immigration-related detention” as “the deprivation of liberty of non-citizens because of their status”).

⁷⁰ *Immigration Court Backlog*, TRAC IMMIGR., <https://trac.syr.edu/phptools/immigration/backlog/> [<https://perma.cc/46XP-6L4L>] (Nov. 2023). By the end of Fiscal Year 2022, there were a total of 1,936,445 pending immigration cases nationwide. *Id.* As of December 2021, asylum seekers waited an average of 1,751 days, or almost five years, from the time DHS served them with a Notice to Appear initiating deportation proceedings until their individual merits hearing in immigration court. *A Mounting Asylum Backlog and Growing Wait Times*, TRAC IMMIGR. (Dec. 22, 2021), <https://trac.syr.edu/immigration/reports/672/> [<https://perma.cc/V3NT-EPGK>].

⁷¹ See *infra* notes 75–119 and accompanying text.

⁷² See *infra* notes 75–95 and accompanying text.

⁷³ See *infra* notes 96–110 and accompanying text.

⁷⁴ See *infra* notes 111–119 and accompanying text.

⁷⁵ ALEINIKOFF ET AL., *supra* note 31, at 348.

⁷⁶ See 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (subjecting “arriving aliens” to mandatory detention pending a positive credible fear determination or, if no credible fear is found, removal proceedings).

the United States;⁷⁷ and (3) noncitizens subject to a final deportation order.⁷⁸ Additionally, federal statutes require the detention of noncitizens who have committed certain criminal or other offenses.⁷⁹

a. Detention Before a Final Removal Order: “Arriving Aliens” and Noncitizens Within the United States

The Code of Federal Regulations defines an “arriving alien” as “an applicant for admission coming or attempting to come into the United States at a port-of-entry.”⁸⁰ In 1996, Congress enacted a statute allowing for the summary deportation of “arriving aliens” who are inadmissible due to fraud or misrepresentation or because they lack valid documentation, such as a valid passport or visa (in other words, because the noncitizen is undocumented).⁸¹ Known as expedited removal, this process allows the government to detain and deport such noncitizens without a hearing, unless they can either prove continuous physical presence in the United States for the preceding two years or establish a “credible fear” of persecution upon deportation.⁸² If ICE does not grant re-

⁷⁷ See *id.* § 1226(a)(1)–(2) (authorizing the Attorney General to arrest and detain a noncitizen while removal proceedings are pending); *id.* § 1226(c)(1) (requiring detention without bond for noncitizens who have committed certain crimes and were apprehended within the United States).

⁷⁸ See *id.* § 1231(a)(2) (authorizing mandatory detention during the ninety-day removal period for noncitizens subject to a final deportation order); *id.* § 1231(a)(1) (providing that the removal period is ninety days).

⁷⁹ *Id.* § 1226(c)(1).

⁸⁰ 8 C.F.R. § 1.2 (2024).

⁸¹ See 8 U.S.C. § 1182(a)(6)(C) (providing that noncitizens who make a misrepresentation to gain admission to the United States or other immigration benefit are inadmissible); *id.* § 1182(a)(7) (providing that noncitizens lacking valid documentation are inadmissible); AM. IMMIGR. COUNCIL, A PRIMER ON EXPEDITED REMOVAL, *supra* note 43, at 1–2 (explaining that Congress created the expedited removal process by enacting the Illegal Immigration and Immigrant Responsibility Act of 1996).

⁸² 8 U.S.C. § 1225(b)(1)(A)(ii) (governing asylum and credible fear of persecution claims for noncitizens suspected to be “arriving aliens”); 8 C.F.R. § 235.3(b)(4) (providing that a noncitizen who expresses fear of persecution in being returned to their home country may not be deported until an asylum officer conducts a credible fear interview). Since 2004, immigration authorities have used their power under the expedited removal statute to deport people arriving at the Canadian or Mexican border, as well as those who crossed the border without inspection if apprehended within one hundred miles of either border and within two weeks of their arrival. AM. IMMIGR. COUNCIL, A PRIMER ON EXPEDITED REMOVAL, *supra* note 43, at 1. In 2017, the Trump Administration broadened the authority of immigration officials under the statute by extending the application of expedited removal. *Id.* The expansion included not only undocumented individuals found within one hundred miles of the border or noncitizens who committed fraud or misrepresentation, but also any noncitizen located anywhere in the United States who could not prove they were continuously present in the country for the preceding two years. *Id.* Essentially, if a noncitizen already within the United States could not prove they had been present in the country for the preceding two years, they would be detained and deported without a hearing before an immigration judge unless they could establish a “credible fear” of returning to their home country. *Id.* at 1–2 (stating that when an immigration official encounters a noncitizen they believe to be subject to expedited removal, the noncitizen bears the burden of proof to demonstrate that expedited removal should not apply to them and providing that expedited removal may not be applied to asylum seekers with a credible fear of return).

lease or bond, arriving noncitizens detained for expedited removal are ineligible for a bond redetermination hearing by an immigration judge.⁸³

Immigration officials may, in their discretion, detain noncitizens apprehended within the United States (who are thus not considered “arriving aliens”) or release them on bond or on their own recognizance.⁸⁴ If they choose not to release the noncitizen, an immigration judge may consider the noncitizen for bond at a bond redetermination hearing, where the judge determines whether the noncitizen is a danger to the community or a flight risk.⁸⁵ Bond hearings are discretionary, and, although a noncitizen may appeal a denial to the BIA, the appeal is unlikely to succeed unless the noncitizen can show that the immigration judge abused their discretion—a high standard.⁸⁶

b. Detention After a Final Removal Order

To plan and execute a noncitizen’s deportation, ICE has the authority to detain noncitizens for ninety days after serving them with a final removal order.⁸⁷ ICE may continue to hold a noncitizen past the removal period in certain circumstances, such as when the noncitizen refuses or fails to apply for travel or other documents required for departure or when the noncitizen is deemed inadmissible or deportable based on a criminal or terrorism-related ground.⁸⁸ Although ICE is not required to release the noncitizen if it does not effectuate the individual’s deportation during the removal period, the Supreme Court has held that ICE detention may not exceed six months after a final removal order unless deportation is in the “foreseeable future” or special circumstances arise.⁸⁹

⁸³ See 8 C.F.R. § 1003.19(h)(2)(i)(B) (listing “arriving aliens” among the categories of noncitizens for whom immigration judges may not review DHS custody decisions).

⁸⁴ See 8 U.S.C. § 1226(a) (governing the arrest, detention, and release of noncitizens who are not “arriving aliens” and explaining that the Attorney General may continue to detain the noncitizen or release them on bond or conditional parole); 8 C.F.R. § 236.1(c)(8) (providing that immigration officials may, in their discretion, release a noncitizen they deem to be neither dangerous nor a flight risk).

⁸⁵ 8 C.F.R. § 236.1(c)(8).

⁸⁶ See 8 U.S.C. § 1231(a)(6) (allowing the Attorney General to detain inadmissible noncitizens beyond a ninety-day removal period if they are deemed to pose a danger or flight risk).

⁸⁷ *Id.* § 1231(a)(1); see also AM. IMMIGR. COUNCIL, THE REMOVAL SYSTEM OF THE UNITED STATES, *supra* note 3, at 7 (defining “removal period” as the ninety-day period following the issuance of a final removal order, during which ICE may detain an individual to plan their deportation).

⁸⁸ See 8 U.S.C. § 1231(a)(1)(C) (providing that the ninety-day removal period may be extended if the noncitizen fails or refuses to apply for documents necessary for travel to execute removal); *id.* § 1231(a)(2) (requiring the Attorney General to detain an inadmissible noncitizen for the removal period).

⁸⁹ See *Zadvydas v. Davis*, 533 U.S. 678, 690, 701 (2001) (holding that the indefinite detention of a noncitizen whose deportation is not in the “foreseeable future” is unconstitutional absent special justification by the government). The Court provided a six-month presumptive limit to detention, such that, after six months, if the noncitizen provides evidence that deportation is not likely to be in the reasonably foreseeable future, the government must rebut that showing or release the noncitizen from detention. *Id.* at 701.

c. Mandatory Detention

The Immigration and Nationality Act (INA) requires the detention of noncitizens who have committed a triggering criminal or security-related offense.⁹⁰ Triggering criminal activity encompasses a broad range of offenses, including those for which a noncitizen did not serve any jail time.⁹¹ Noncitizens who fall within this mandatory category are not entitled to a bond hearing⁹² and may include noncitizens with lawful status, such as lawful permanent residents or “green card holders.”⁹³ There is a common misconception that many detained noncitizens have engaged in criminal conduct.⁹⁴ In Fiscal Year

⁹⁰ See 8 U.S.C. § 1226(c)(1) (requiring detention of noncitizens who are inadmissible or deportable for having committed specific criminal offenses). Relevant criminal activity includes committing “crimes involving moral turpitude, an aggravated felony, a controlled substance offense [or] a firearm offense,” as well as security-related grounds, such as terrorism. ALENIKOFF ET AL., *supra* note 31, at 349. Mandatory detention is controversial in the immigration law field, as ICE may detain noncitizens for old, minor charges for which they have already served time. See, e.g., Tina Vasquez, *Activists Fear ICE Will Target Another Reproductive Justice Advocate for Deportation (Updated)*, REWIRE NEWS GRP. (Mar. 14, 2018), <https://rewirenewsgroup.com/2018/03/14/activists-fear-ice-will-target-another-reproductive-justice-advocate-deportation/> [<https://perma.cc/C88K-7NJB>] (describing that a longtime lawful permanent resident with a ten-year-old dismissed charge on her record was detained by ICE, which may have used the old charge to detain her—a “common tactic”).

⁹¹ 8 U.S.C. § 1227(a)(2) (listing several triggering criminal offenses, such as crimes involving moral turpitude, multiple criminal convictions, an aggravated felony conviction, controlled substance abuse or conviction, domestic violence, and failing to register or falsifying documents). A noncitizen, for instance, is deportable for committing a crime involving moral turpitude within five years of admission to the country if the potential sentence for the crime is at least one year, regardless of the actual sentence imposed or actual time served. See *id.*; *id.* § 1101(a)(48)(B) (defining “term of imprisonment” or “sentence” to include “the period of incarceration or confinement ordered by a court,” regardless of time suspended or served) (emphasis added).

⁹² *Id.* § 1226(c)(2) (leaving the release of criminal noncitizens to the Attorney General’s discretion); see also *Mandatory Detention*, DET. WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/mandatory-detention> [<https://perma.cc/5N8P-J33Y>] (explaining mandatory detention laws and lack of entitlement to bond hearings). Any noncitizen subject to expedited removal as an “arriving alien” is also subject to mandatory detention. See 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (requiring detention of arriving noncitizens unless they express a credible fear of persecution if deported).

⁹³ *Id.* § 1226(c)(1) (referencing offenses that render a noncitizen deportable or inadmissible and mandating such noncitizen’s detention as a “criminal alien”). Lawful permanent residents are subject to grounds of deportability because they have already been admitted, unless they leave the country for longer than 180 days, which makes them subject to grounds of inadmissibility instead. *Id.* § 1101(a)(13)(C).

⁹⁴ See *Bad Hombres?*, S. POVERTY L. CTR. (Oct. 2, 2018), <https://www.splcenter.org/20181002/bad-hombres> [<https://perma.cc/W9XT-KHAX>] (describing the “bad hombres” characterization as a “Trump fallacy” and discussing ICE’s misleading claims that most of its arrests in Fiscal Year 2017 were of “convicted criminals or [noncitizens] with criminal charges,” despite over one-third, or 34%, of deported noncitizens having no criminal convictions and another 15% having committed only immigration violations); see also Z. Byron Wolf, *Trump Basically Called Mexicans Rapists Again*, CNN, <https://www.cnn.com/2018/04/06/politics/trump-mexico-rapists> [<https://perma.cc/K4N8-HXAV>] (Apr. 6, 2018) (quoting former President Trump’s remarks when he announced his presidential campaign in 2015: “The US has become a dumping ground for everybody else’s problems When Mexico sends its people, they’re not sending their best. They’re not sending you. They’re sending people that have lots of problems They’re bringing drugs. They’re bringing crime. They’re rapists. And some, I assume, are good people.”).

2021, however, 98.1% of new deportation proceedings were based on civil immigration violations, such as entering without inspection, whereas 1.9% were based on criminal grounds.⁹⁵

2. Detained Noncitizens: The Transfer Process

The political branches' plenary power over immigration grants Congress the authority to enact immigration statutes and allows executive agencies, such as DHS and the DOJ, to promulgate regulations interpreting those statutes.⁹⁶ One such statute—8 U.S.C. § 1231(g)(1)—authorizes the Attorney General, and by extension DHS, to arrange for places where officials may detain noncitizens

⁹⁵ *New Proceedings Filed in Immigration Court*, TRAC IMMIGR. (Jan. 2024), <https://trac.syr.edu/phptools/immigration/ntanew/> [<https://perma.cc/K7RL-2MHX>]. Two laws enacted in the 1920s, 8 U.S.C. §§ 1325 and 1326, criminalized unauthorized entry and reentry into the United States, thus subjecting migrants to criminal prosecutions for crossing the border and justifying their detention on criminal grounds. NAT'L IMMIGR. PROJECT, NAT'L LAWS. GUILD, EXPLAINER: EQUAL PROTECTION CHALLENGES TO PROSECUTIONS UNDER 1325 & 1326: THE GROUNDBREAKING DECISION IN *UNITED STATES V. CARILLO-LOPEZ* 3 (2021), https://nipnlg.org/sites/default/files/2023-03/2021_21Dec-1325-6-Handout%20%281%29.pdf [<https://perma.cc/ZQ5Y-FA65>]. These two laws have been challenged several times, and at least one district court has ruled that Congress passed 8 U.S.C. § 1326 with “racist and discriminatory intent,” violating the Equal Protection Clause of the Constitution. *Id.* at 5; *see also* NAT'L IMMIGRANT JUST. CTR. & NAT'L IMMIGR. PROJECT, NAT'L LAWS. GUILD, NOVEMBER 2022: IMMIGRATION PROSECUTIONS BY THE NUMBERS 1 (2022), https://nipnlg.org/sites/default/files/2023-02/2022_Nov-1325-6-numbers.pdf [<https://perma.cc/B9PU-E6B5>] (“[DHS] refers around 99 percent of all immigration-related prosecutions, subjecting people not only to civil immigration detention and deportation proceedings but also to criminal sanctions.”); *cf.* Victor C. Romero, *Decriminalizing Border Crossings*, 38 FORDHAM URB. L.J. 273, 299–301 (2010) (arguing for the decriminalization of border crossings under 8 U.S.C §§ 1325 and 1326). Moreover, social science research has found that native-born U.S. citizens are more likely to commit crimes than the undocumented population. *See* Michael T. Light et al., *supra* note 24, at 32345 (finding that undocumented immigrants pose a lower criminal risk than native U.S. citizens).

⁹⁶ *See* ALEINIKOFF ET AL., *supra* note 31, at 72 (explaining that DHS and other administrative agencies “fill the many gaps” left by the immigration statutes Congress enacted); MAEVE P. CAREY, CONG. RSCH. SERV., IF10003, AN OVERVIEW OF FEDERAL REGULATIONS AND THE RULEMAKING PROCESS 1 (2021) (explaining that Congress delegates to federal agencies the power to create and enforce regulations that implement statutes and that these rules have the force of law). When a statute is ambiguous, courts must “defer to the [BIA]’s reasonable interpretation, rather than substitute its own reading.” *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 57 (2014); *see* *Immigr. & Naturalization Serv. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (“[J]udicial deference to the Executive Branch is especially appropriate in the immigration context.”); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984) (holding that a statute’s plain meaning controls, but, if it is ambiguous, a court must defer to the agency’s reasonable interpretation rather than provide its own meaning to the statute). *But see* Michael Kagan, *Chevron’s Liberty Exception*, 104 IOWA L. REV. 491, 495, 532 (2019) (arguing that *Chevron* deference is “inappropriate when courts review the legality of a government intrusion on physical liberty” in detention and deportation contexts); Rebecca Sharpless, *Zone of Nondeference: Chevron and Deportation for a Crime*, 9 DREXEL L. REV. 323, 341 (2017) (arguing that *Chevron* deference should not extend to agency interpretations of statutes mandating deportation on criminal grounds because the rationale for *Chevron* deference—“agency expertise, political accountability, and delegation”—does not apply in the context of deportation for a crime).

while they await deportation.⁹⁷ DHS and some courts have interpreted this statute to mean that DHS holds the power to transfer detainees at its discretion.⁹⁸ Other courts have held that the statute does not grant DHS the power to transfer detainees to other facilities because it does not explicitly say so—especially in the context of a statute that explicitly references the Attorney General’s authority in other parts.⁹⁹ The Supreme Court has yet to consider the issue.¹⁰⁰

The transfer of noncitizens from one detention center to another faces minimal oversight; indeed, there is currently no independent oversight body that reviews immigrant detention or assures adequate detention conditions in general.¹⁰¹ Moreover, the infringement of transferred immigrant detainees’ rights is older than ICE itself.¹⁰² In 1995, in *Orantes-Hernandez v. Thornburgh*, the U.S. Court of Appeals for the Ninth Circuit upheld a class-wide permanent injunction preventing ICE’s predecessor from transferring represented Salvadorans to detention centers across the United States when the

⁹⁷ See 8 U.S.C. § 1231(g)(1) (“The Attorney General shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal.”); see also ALEINIKOFF ET AL., *supra* note 31, at 72 (explaining that, although the INA explicitly designates authority to the Attorney General, Congress transferred most of the authority to the Secretary of Homeland Security).

⁹⁸ See, e.g., *Van Dinh v. Reno*, 197 F.3d 427, 433 (10th Cir. 1999) (explaining that the Attorney General’s power to transfer immigrant detainees arises from 8 U.S.C. § 1231(g)(1)); *Gandarillas-Zambrana v. Bd. of Immigr. Appeals*, 44 F.3d 1251, 1256 (4th Cir. 1995) (“The INS necessarily has the authority to determine the location of detention of an alien in deportation proceedings . . . and therefore, to transfer aliens from one detention center to another.”); *Rios-Berrios v. Immigr. & Naturalization Serv.*, 776 F.2d 859, 863 (9th Cir. 1985) (stating that the Court was not opining on whether the detainee should have been transferred to a different state, as that is a decision for the Attorney General); *Sasso v. Milhollan*, 735 F. Supp. 1045, 1048 (S.D. Fla. 1990) (“Congress . . . has squarely placed the responsibility of determining where aliens are to be detained within the sound discretion of the Attorney General.”).

⁹⁹ See, e.g., *Reyna ex rel. J.F.G. v. Hott*, 921 F.3d 204, 209–10 (4th Cir. 2019) (finding that judicial review of DHS transfer decisions was permitted because the authority to transfer was not specified in the statute); *Aguilar v. U.S. Immigr. & Customs Enf’t Div. of Dep’t of Homeland Sec.*, 510 F.3d 1, 20–21 (1st Cir. 2007) (same); *Zhao v. Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005) (same).

¹⁰⁰ See *Reyna*, 921 F.3d at 209 (basing its reasoning on the Supreme Court’s interpretation of specified authority for a different statute, as the Supreme Court has been silent on the issue with respect to 8 U.S.C. § 1231(g)).

¹⁰¹ AM. IMMIGR. COUNCIL, OVERSIGHT OF IMMIGRATION DETENTION 2 (2022), https://www.americanimmigrationcouncil.org/sites/default/files/research/oversight_of_immigration_detention_an_overview.pdf [<https://perma.cc/L53X-XJEN>] (“Some of the offices with oversight over immigration detention are independent of ICE, while others are located within the agency. There is no oversight body for immigration detention that is independent of DHS as a whole.”). Congress maintains some oversight over DHS, but its oversight authority is distributed among more than ninety committees and subcommittees. THOMAS WARRICK & MARK MASSA, ATL. COUNCIL, FUTURE OF DHS PROJECT: KEY FINDINGS AND RECOMMENDATIONS: CONGRESSIONAL OVERSIGHT 1 (2020), <https://www.atlanticcouncil.org/wp-content/uploads/2020/12/Future-of-DHS-Issue-Brief-2021.pdf> [<https://perma.cc/AU8S-7CCH>].

¹⁰² See *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 566–68 (9th Cir. 1990) (upholding a permanent injunction that provides special rights to detained Salvadorans based on evidence that ICE’s predecessor transferred Salvadorans to remote detention centers without notifying retained counsel).

court found, among other violations, that immigration authorities were refusing Salvadoran detainees the right to call their attorneys from the transferee detention center.¹⁰³ Moreover, between 1999 and 2008, ICE and its predecessor transferred almost 1.4 million detainees to detention facilities throughout the country, many to Southern states that fall under jurisdiction of the generally immigrant-unfriendly U.S. Court of Appeals for the Fifth Circuit.¹⁰⁴

Meanwhile, ICE asserts that detainee transfers serve several legitimate purposes.¹⁰⁵ One of the most common reasons for transfers is the overcrowding of contracted prisons and facilities, which requires ICE to play “a nationwide game of immigration prison hopscotch” to find available bed space.¹⁰⁶ ICE maintains that any limits on its transfer power would prevent it from using detention beds across the United States in the most cost-effective ways.¹⁰⁷ The lack of oversight, accountability, and venue-protective mechanisms, however, provide ample opportunity for ICE to transfer individuals in bad faith, such as for retaliatory purposes or to forum shop for jurisdictions that historically deport more noncitizens.¹⁰⁸ Accounts of ICE’s retaliatory transfers have existed

¹⁰³ *Id.* at 554–55, 565. Other violations included lying to Salvadoran detainees about their eligibility for asylum and coercing them to self-deport. *Id.* at 554–55.

¹⁰⁴ PARKER, LOCKED UP FAR AWAY, *supra* note 1, at 6, 29 (stating that the jurisdiction most likely to receive transferred detainees is the Fifth Circuit because a high number of detainees are transferred to Texas and Louisiana); *see, e.g.*, David Leopold, *The Anti-Immigrant Judicial Pipeline Is Gushing and There’s Only One Way to Stop It*, MEDIUM (Aug. 25, 2021), <https://medium.com/@DavidLeopold/the-anti-immigrant-judicial-pipeline-is-gushing-and-theres-only-one-way-to-stop-it-b03b9159fbb8> [<https://perma.cc/KM7Q-XAXT>] (characterizing the Fifth Circuit as part of an “anti-immigrant judicial pipeline”).

¹⁰⁵ *See* U.S. IMMIGR. & CUSTOMS ENF’T, POL’Y NO. 11022.1, DETAINEE TRANSFERS 3 (2012), <https://www.ice.gov/doclib/detention-reform/pdf/hd-detainee-transfers.pdf> [<https://perma.cc/5FEW-GUJF>] (listing reasons for which ICE may transfer detainees). ICE lists the following reasons for transferring detainees: (1) to provide a detainee with adequate medical attention or mental health assistance; (2) to carry out a detainee’s approved transfer request; (3) to ensure the safety of detainees, detention facility staff, and ICE personnel; (4) at the agency’s discretion and for its convenience if a noncitizen is detained at a location different from the case’s venue; (5) on a case-by-case basis, to transfer a detainee to a more adequate facility depending on a detainee’s particular situation; (6) discontinuing use or closing down a facility due to non-compliance with ICE detention standards, non-use, or urgent circumstances; and (7) to reduce facility population due to overcrowding or in anticipation thereof. *Id.*

¹⁰⁶ César Cuauhtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 BERKELEY LA RAZA L.J. 17, 59–60 (2011); *see* PARKER, LOCKED UP FAR AWAY, *supra* note 1, at 19 (“ICE claims an almost unfettered power to transfer detainees at will, resulting in a disorderly system of detainee musical chairs that often violates non-citizens’ rights.”).

¹⁰⁷ PARKER, A COSTLY MOVE, *supra* note 10, at 6.

¹⁰⁸ *See, e.g.*, ACLU OF N.J., BEHIND BARS: THE FAILURE OF THE DEPARTMENT OF HOMELAND SECURITY TO ENSURE ADEQUATE TREATMENT OF IMMIGRATION DETAINEES IN NEW JERSEY 12 (2007), https://www.aclu-nj.org/sites/default/files/field_documents/051507detentionreport_2.pdf [<https://perma.cc/Q35K-Z73H>] (“Many detainees believe that ICE uses transfers as a way of punishing detainees who stand up for their rights.”); ICE Jail Transfers Are Violent, BLACK ALL. FOR JUST IMMIGR. (July 29, 2022), <https://baji.org/ice-jail-transfers-are-violent/> [<https://perma.cc/Y2L2-8BLB>] (“Transfers

since the inception of DHS and ICE in 2003, and there is no evidence that the agency requires officers to justify or explain their need to transfer a detainee.¹⁰⁹

Additionally, although ICE's detainee transfer policy requires the agency to notify a represented detainee's counsel of the transfer, numerous attorneys have reported never receiving such a notification, making it difficult for them to locate their clients in any one of approximately two hundred detention facilities throughout the country.¹¹⁰

3. Alternatives to Detention

In addition to an average daily population of 22,578 detained noncitizens in ICE custody, ICE also monitors and surveils an additional 214,000 people

have long been used by ICE as a form of retaliation against detained organizers . . . "); Tina Vásquez, *'This Is Retaliation': ICE Transfers Cameroonian Women Asylum-Seekers After Protest*, PRISM (Mar. 2, 2020), <https://prismreports.org/2020/03/02/this-is-retaliation-ice-transfers-cameroonian-women-asylumseekers-after-protest/> [<https://perma.cc/6Y3E-NSH8>] (reporting that forty female Cameroonian asylum seekers protested conditions at their detention facility and were then abruptly transferred to a facility more than two hundred miles away).

¹⁰⁹ See *supra* note 108 and accompanying text (noting that lack of oversight on ICE transfers increases the probability that immigration officials will transfer detainees in bad faith, such as for forum shopping or retaliatory purposes). Ernest Francois, a forty-nine-year-old man from Haiti, was initially detained by ICE at a correctional facility in Newark, New Jersey in 2017. *TRAFFICKED & TORTURED, FREEDOM FOR IMMIGRANTS 1* (2023), https://static1.squarespace.com/static/5a33042eb078691c386e7bce/t/63ed9236ee82156a4608eba2/1676513859587/FInal+Report_FFI_T%26T_021523.pdf [<https://perma.cc/F4X6-5PCZ>]. In 2020, Ernest began speaking to the media about medical negligence in the facility after having waited for necessary surgery and x-rays to no avail. *Id.*; see Matt Katz, *ICE Detainees in Newark Allege Poor Medical Care and Mistreatment*, *GOTHAMIST* (Jan. 28, 2020), <https://gothamist.com/news/ice-detainees-newark-allege-poor-medical-care-and-mistreatment> [<https://perma.cc/M35X-GDFB>] (documenting Ernest's story in the media). After five months and significant media coverage, ICE transferred Ernest to a county jail in New Jersey. *TRAFFICKED & TORTURED, supra*, at 1. Eight months later, after Ernest began engaging in protests at the jail, ICE subsequently transferred him to an immigration detention facility in Miami, Florida. *Id.* Upon his arrival, Ernest began protesting confinement conditions with other detainees and, two months later, was transferred to a remote facility in Moore Haven, Florida, where he experienced the worst conditions of all the facilities he had lived in since 2017. *Id.* Ernest would again be transferred from Moore Haven to Miami and back again to a county jail in New Jersey. *Id.* at 3. Ernest realized that every time he was transferred, he was placed in solitary confinement at the receiving facility and was forced to go several days without necessary medications. *Id.* He understood these transfers to be retaliation for his involvement in hunger strikes and formal complaints about confinement conditions. *Id.*

¹¹⁰ See PARKER, *LOCKED UP FAR AWAY, supra* note 1, at 43–44 (noting that, despite detention standards requiring ICE to notify counsel of their clients' transfers, ICE either made no such notification or did so days or weeks after transferring the noncitizen); U.S. IMMIGR. & CUSTOMS ENF'T, POL'Y NO. 11022.1, *supra* note 105, at 4 (requiring attorney notification); 85 *Immigrant and Human Rights Groups Call for Investigation & Demand Private Prison Ban Extend to ICE Detention*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (Feb. 9, 2022), <https://civilrights.org/2022/02/09/85-immigrant-and-human-rights-groups-call-for-investigation-demand-private-prison-ban-extend-to-ice-detention/> [<https://perma.cc/8GY5-AU8P>] (explaining that ICE uses a system of approximately two hundred detention centers and jails).

with its Alternatives to Detention (ATD) program.¹¹¹ The purpose of the ATD program is to allow individuals who would otherwise be detained to live within the community while also ensuring their attendance at future court hearings.¹¹² The program utilizes GPS tracking via ankle monitors or a mobile application, face-to-face meetings and phone calls with ICE officers or case managers, and unannounced home visits.¹¹³ ATD supporters praise its relative freedom for noncitizens who would otherwise find themselves in prolonged detention and subject to potential human rights abuses and transfers that might change the noncitizen's probability of deportation.¹¹⁴ Indeed, ATDs successfully led to higher appearance rates in court, contributing to an ATD enrollee appearance rate of 99.27% in immigration court in 2017.¹¹⁵

Some ATD opponents argue that the ATD program, although less expensive than physical detention, allows noncitizens to abscond from immigration court and incentivizes migrants to seek asylum in the United States, knowing they would not be detained while their cases are pending and would instead be able to wear ankle monitors or similar monitoring in the community.¹¹⁶ Other ATD opponents take a pro-immigrant stance and argue that subjecting a large noncitizen population to electronic monitoring takes a toll on immigrant com-

¹¹¹ DET. WATCH NETWORK, THE CASE AGAINST "ALTERNATIVES TO DETENTION" 14 (2022), https://www.detentionwatchnetwork.org/sites/default/files/DWN_The%20Case%20Against%20ATDs_12.1.22.pdf [<https://perma.cc/ET8T-PZV7>] (providing Alternatives to Detention (ATD) and detention statistics for Fiscal Year 2022). Note that the average daily population in detention centers nationwide was lower during the COVID-19 pandemic to facilitate social distancing. U.S. IMMIGR. & CUSTOMS ENF'T, FISCAL YEAR 2020, *supra* note 67, at 3. In Fiscal Year 2019, before the pandemic, ICE held an average daily population of 50,165. U.S. IMMIGR. & CUSTOMS ENF'T, FISCAL YEAR 2019, *supra* note 67, at 5.

¹¹² ALENIKOFF ET AL., *supra* note 31, at 352.

¹¹³ See AUDREY SINGER, CONG. RSCH. SERV., R45804, IMMIGRATION: ALTERNATIVES TO DETENTION (ATD) PROGRAMS 7–8 (2019) (listing different types of ATD technology).

¹¹⁴ See, e.g., *Alternatives to Detention*, INT'L DET. COAL., <https://idcoalition.org/alternatives-to-detention/> [<https://perma.cc/MUD6-SWL7>] (listing ATD benefits, including respect for human rights, effectiveness in migration management, and affordability).

¹¹⁵ AM. IMMIGR. LAWS. ASS'N ET AL., AILA DOC. NO. 17071103, THE REAL ALTERNATIVES TO DETENTION 2 (2019), <https://justiceforimmigrants.org/what-we-are-working-on/immigrant-detention/real-alternatives-detention/> [<https://perma.cc/6UT6-LS8Q>]. An ATD study found that 81% of noncitizens released from ICE detention between 2001 and 2016 attended all subsequent immigration court hearings. Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785, 847 (2018). The same study found that 95% of released noncitizens with a pending asylum application also appeared at all subsequent immigration court hearings. *Id.*

¹¹⁶ See AM. IMMIGR. COUNCIL, THE REMOVAL SYSTEM OF THE UNITED STATES, *supra* note 3, at 7 (comparing ATD program costs of up to \$17 per noncitizen per day to detaining a noncitizen in a facility or jail, which costs between \$126 to \$182 per noncitizen per day); ALENIKOFF ET AL., *supra* note 31, at 352 (discussing that some ATD opponents believe ATDs encourage noncitizens to abscond).

munities.¹¹⁷ A subset of ATD opponents within this larger group advocate for community-driven alternatives to detention, such as case management handled exclusively by nonprofit organizations without electronic monitoring technologies.¹¹⁸ Finally, critics also posit that the population of noncitizens in ICE detention is not offset by monitoring some via ATD programs, but rather that ATD programs expand the reach of ICE detention.¹¹⁹

II. DETENTION AND REMOVAL: JURISDICTION AND VENUE

Despite the high stakes involved for noncitizens, removal proceedings are deemed to be civil proceedings, meaning the due process protections available to criminal defendants are thus unavailable to noncitizens facing detention and deportation.¹²⁰ Unlike typical civil proceedings, removal proceedings also lack the jurisdiction and venue protections available to civil litigants.¹²¹ Section A of this Part discusses jurisdiction and venue in civil proceedings generally.¹²² Section B addresses jurisdiction and venue in removal proceedings.¹²³

A. Jurisdiction and Venue in Civil Proceedings

Jurisdiction and venue are two interrelated, but distinct, concepts in civil procedure—the former refers to a court’s power to adjudicate a case, and the

¹¹⁷ See, e.g., ALY PANJWANI & HANNAH LUCAL, AFRICAN BUREAU FOR IMMIGR. & SOC. AFFS., BOS. IMMIGR. JUST. & ACCOUNTABILITY NETWORK, CMTY. JUST. EXCH., DET. WATCH NETWORK, ENVISION FREEDOM FUND, FREEDOM FOR IMMIGRANTS, GLAHR, JUST FUTURES L., LA RESISTENCIA, LONG BEACH IMMIGRANT RTS. COAL., MIJENTE, ORGANIZED CMTYS. AGAINST DEPORTATIONS & YOUTH JUST. COAL., TRACKED AND TRAPPED 4 (Julie Mao ed., 2022), <https://search.issuelab.org/resource/tracked-and-trapped-experiences-from-ice-digital-prisons.html> [<https://perma.cc/87MD-7VHV>] (arguing that electronic monitoring of noncitizens broadens the reach of ICE detention by placing noncitizens under surveillance analogous to digital prisons, rather than offering a true alternative to detention); DET. WATCH NETWORK, *supra* note 111, at 11 (“There can be no alternative to a system that should not exist in the first place. Nothing needs to replace detention . . .”).

¹¹⁸ Trinh Q. Truong, *Immigrants and Asylum-Seekers Deserve Humane Alternatives to Detention*, CTR. FOR AM. PROGRESS (July 13, 2022), <https://www.americanprogress.org/article/immigrants-and-asylum-seekers-deserve-humane-alternatives-to-detention/> [<https://perma.cc/65HB-6TJS>].

¹¹⁹ DET. WATCH NETWORK, *supra* note 111, at 5.

¹²⁰ Erica Bryant, *Immigrants Facing Deportation Do Not Have the Right to a Publicly Funded Attorney. Here’s How to Change That.*, VERA INST. OF JUST. (Feb. 9, 2021), <https://www.vera.org/news/immigrants-facing-deportation-do-not-have-the-right-to-a-publicly-funded-attorney-heres-how-to-change-that> [<https://perma.cc/EM2Y-Z8XD>].

¹²¹ Pon, *supra* note 11, at 779, 783–84; see Markowitz & Nash, *supra* note 10, at 1201, 1204 (explaining that supporters of the national contacts approach find that the approach does not violate due process due to statutory transfer and venue safeguards). For example, 28 U.S.C. § 1391 governs venue for federal question cases and requires venue to be either connected to the claim or where the defendant resides. Markowitz & Nash, *supra* note 10, at 1183.

¹²² See *infra* notes 124–131 and accompanying text.

¹²³ See *infra* notes 132–154 and accompanying text.

latter is the location where a court may exercise its authority.¹²⁴ To adjudicate a case, a court must have both subject matter and personal jurisdiction, and venue must be proper.¹²⁵ Subject matter jurisdiction is a court's power to hear a certain kind of case, whereas personal jurisdiction refers to a court's power to enter a judgment against a particular defendant.¹²⁶ In typical civil proceedings, litigants rely on choice-of-law rules and traditional personal jurisdiction safeguards, including states' long-arm statutes and a minimum contacts analysis, to determine if a nonresident defendant's connections with the forum state are sufficient for the state to assert personal jurisdiction over the defendant.¹²⁷

Venue (the location of the court where the case is tried) relates to the doctrine of forum non conveniens, which considers whether the forum is inconvenient to the defendant based on the location of witnesses and evidence, the choice of law applicable to the dispute, and other factors.¹²⁸ If venue is improper or defective in a particular district court, the court may dismiss the case or transfer it to the appropriate venue.¹²⁹ In fact, a court may transfer the case to a different venue even if venue is proper in the initial court if doing so is more convenient for the litigating parties and their witnesses.¹³⁰ Beyond these statutory protections, the Supreme Court has also recognized that ensuring civ-

¹²⁴ See 28 U.S.C. §§ 1331–1332 (defining the subject matter jurisdiction of federal courts); *id.* § 1391 (governing venue); *Leroy v. Great W. United Corp.*, 443 U.S. 173, 183–84 (1979) (explaining that the venue statute is designed to protect defendants against the possibility that the plaintiff will select an inconvenient or arbitrary location to pursue the lawsuit); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 718 (1838) (“Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them.”).

¹²⁵ JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10856, WHERE A SUIT CAN PROCEED: COURT SELECTION AND FORUM SHOPPING 1 (2022). Whether a court has subject matter jurisdiction and personal jurisdiction are two separate inquiries that the court must independently satisfy to adjudicate a case. See *id.* at 1–2 (explaining that a court must satisfy both requirements and that, although personal jurisdiction is waivable, subject matter jurisdiction is not). Federal subject matter jurisdiction requires that the case amount in controversy exceed \$75,000 and that the case either: (1) involve a federal question (i.e., a federal or constitutional claim) or (2) involve litigants from different states or one foreign litigant. See 28 U.S.C. § 1331 (defining federal question jurisdiction); *id.* § 1332 (describing diversity jurisdiction).

¹²⁶ LAMPE, *supra* note 125, at 1. These concepts are applicable to the immigration court context. See *In re Sanchez-Briones*, No. A72 328 292, 2006 WL 2008363, at *1 (B.I.A. June 2, 2006) (“[A]n Immigration Judge denied the motion on the ground that the Immigration Court no longer had personal or subject matter jurisdiction over the respondent because she had complied with the voluntary departure order, thus closing her deportation proceedings.”).

¹²⁷ See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980) (affirming that a court may exercise personal jurisdiction only over defendants who have had minimum contacts with the forum state); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (establishing the minimum contacts test). The rationale of the minimum contacts requirement is to protect defendants from the challenges associated with litigating in a court that is far away or inconvenient. *World-Wide Volkswagen Corp.*, 444 U.S. at 292.

¹²⁸ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (listing weighing factors to consider when determining the convenience of a forum).

¹²⁹ 28 U.S.C. § 1406(a).

¹³⁰ *Id.* § 1404(a).

il proceedings occur in a fair location is an important factor in safeguarding due process interests.¹³¹

B. Jurisdiction and Venue in Removal Proceedings

In deportation cases, the concepts of jurisdiction and venue converge.¹³² Removal proceedings begin, and jurisdiction vests, at the time and place where DHS files the charging document with an immigration court.¹³³ This document, called a Notice to Appear (NTA), contains information regarding DHS's case against a noncitizen, including grounds of removability and the date and time of the noncitizen's court hearing.¹³⁴ Federal regulations promulgated by DHS govern venue, which lies at the immigration court where jurisdiction vests.¹³⁵ Stated differently, DHS establishes jurisdiction and venue for removal proceedings wherever it files an NTA with an immigration court.¹³⁶ In turn, immigration judges are required to follow the law of the judicial circuit where they are located.¹³⁷ Effectively, DHS, and more specifically ICE, has the power to select a forum by using its unfettered transfer discretion in tandem with its broad authority to decide whether, when, and where to file an NTA.¹³⁸

¹³¹ See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985) (“[J]urisdictional rules may not be employed in such a way as to make litigation ‘so gravely difficult and inconvenient’ that a party unfairly is at a ‘severe disadvantage’ in comparison to his opponent.” (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972))); see also *Markowitz & Nash*, *supra* note 10, at 1207 (explaining, by quoting several cases, the Supreme Court’s acknowledgement that fair venue implicates due process interests, particularly with the objective of preventing inconvenience to the parties).

¹³² See 8 C.F.R. § 1003.14(a) (2024) (providing that an immigration court’s jurisdiction vests when DHS files a Notice to Appear (NTA)); *id.* § 1003.20(a) (providing that an immigration court’s venue lies where jurisdiction vested).

¹³³ *Id.* § 1003.14(a); *id.* § 1239.1(a) (stating that an NTA commences removal proceedings); JOHNSON ET AL., *supra* note 51, at 418.

¹³⁴ 8 U.S.C. § 1229(a)(1); ILRC ATTORNEYS, IMMIGRANT LEGAL RES. CTR., THE NOTICE TO APPEAR 1 (2020), https://www.ilrc.org/sites/default/files/resources/nta_practice_advisory.pdf [<https://perma.cc/ENT3-2XYT>]; JOHNSON ET AL., *supra* note 51, at 418.

¹³⁵ 8 C.F.R. § 1003.20(a); see *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 597–98 (9th Cir. 2002) (stating that removal proceedings commence upon filing the NTA with the immigration court). Venue is not determined by the location in which a noncitizen happens to enter the country. *Matter of Rahman*, 20 I. & N. Dec. 480, 483 (B.I.A. 1992) (“[T]he place where an applicant happens to attempt to enter the United States, in and of itself, may have little, if any, significance to the question of where venue should lie in an exclusion proceeding.”).

¹³⁶ See 8 C.F.R. § 1003.14(a) (governing jurisdiction of immigration courts); *id.* § 1003.20(a) (governing venue of immigration courts).

¹³⁷ *Matter of Chairez-Castrejon*, 26 I. & N. Dec. 478, 481–82 (B.I.A. 2015) (holding that immigration judges must apply the law of the circuit in which they sit).

¹³⁸ See U.S. DEP’T OF JUST., IMMIGRATION COURT PRACTICE MANUAL 61 (2023), <https://www.justice.gov/eoir/book/file/1528921/download> [<https://perma.cc/RXL6-EJZS>] (“Individual DHS offices . . . are not required to file a Notice to Appear with any particular immigration court, but EOIR maintains an administrative control court list as a guide for where DHS may file charging documents and which immigration courts generally have jurisdiction over particular DHS offices or detention locations.”); JOHNSON ET AL., *supra* note 51, at 419 (describing immigration officers’ prosecutorial

ICE may issue an NTA to a noncitizen caught entering without inspection at the border, to a noncitizen within the United States, or to a noncitizen after criminal arrest.¹³⁹ Further, the DHS Office of the Inspector General, the agency's watchdog, has confirmed that ICE officers need not file an NTA within any specific time period after serving it to the noncitizen.¹⁴⁰ On the contrary, the Office has expressed that, due to operational or other reasons, ICE may delay filing an NTA, transfer a noncitizen to a detention facility in a different jurisdiction, and then file the NTA at the immigration court with jurisdiction over the receiving facility.¹⁴¹

Removal proceedings do not benefit from the personal jurisdiction minimum contacts analysis that attaches to civil proceedings; instead, a noncitizen need only have minimum contacts with the United States, rather than with any particular state.¹⁴² Although technically applicable, the doctrine of forum non conveniens does not carry much weight, as courts have upheld that venue is not inconvenient even in cases where an immigration court is located hundreds of miles away from evidence, counsel, and the noncitizen's community.¹⁴³ Instead, immigration courts have repeatedly deferred to ICE's assertion that returning a noncitizen to the detention facility from which they were transferred is too costly, and the BIA and courts of appeals have upheld these findings.¹⁴⁴

discretion in choosing when and whether to commence removal proceedings by issuing an NTA). Using its prosecutorial discretion, ICE may decide to cancel the NTA altogether—thus cancelling removal proceedings—after a noncitizen has been served with the charging document. AM. IMMIGR. COUNCIL, NOTICES TO APPEAR: LEGAL CHALLENGES AND STRATEGIES 10 (2019), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/notices_to_appear_practice_advisory.pdf [<https://perma.cc/F6RJ-D76K>]. A related issue beyond the scope of this Note involves DHS's authority to mail NTAs to noncitizens or counsel, which satisfies service of process regardless of where the noncitizen is located. *See* 8 U.S.C. § 1229(a)(1) (allowing service of process of an NTA via mail to the noncitizen or their counsel of record if serving the noncitizen in person is impracticable).

¹³⁹ JOHNSON ET AL., *supra* note 51, at 419.

¹⁴⁰ OFF. OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-10-13, IMMIGRATION AND CUSTOMS ENFORCEMENT POLICIES AND PROCEDURES RELATED TO DETAINEE TRANSFERS 2 (2009), <https://trac.syr.edu/immigration/library/P4225.pdf> [<https://perma.cc/9B3L-7TS6>].

¹⁴¹ *Id.* In practice, ICE has waited weeks or months to issue an NTA to a detainee. Shoba Sivaprasad Wadhia, *Under Arrest: Immigrants' Rights and the Rule of Law*, 38 U. MEM. L. REV. 853, 875 (2008).

¹⁴² *See* Pon, *supra* note 11, at 783 (discussing minimum contacts analysis in immigration court and explaining that noncitizens who reside in the country can easily satisfy minimum contacts with the United States); Markowitz & Nash, *supra* note 10, at 1187–88 (discussing national service of process and personal jurisdiction).

¹⁴³ Markowitz & Nash, *supra* note 10, at 1197–98; *see, e.g.*, Pon, *supra* note 11, at 749 (recounting the case of a noncitizen who was apprehended near his residence in New York City and immediately transferred more than 1,200 miles to Miami).

¹⁴⁴ *See* Robledo-Amaya v. Holder, 354 F. App'x 167, 169–70 (5th Cir. 2009) (upholding denial of a motion to change venue despite subjecting a noncitizen's claim to less favorable circuit law upon transfer and rendering him ineligible for deportation relief); *Ballesteros v. Ashcroft*, 452 F.3d 1153, 1157–58 (10th Cir. 2006) (same), *adhered to in part on reh'g sub nom.* *Ballesteros v. Gonzales*, 482 F.3d 1205 (10th Cir. 2007); *In re Espinal*, No. A38 676 095, 2006 WL 3252544, at *2 (B.I.A. Aug. 17, 2006) (same).

Either party in removal proceedings—ICE or the noncitizen respondent—may file a motion to change venue.¹⁴⁵ As most detainees do not have counsel, they are unlikely to successfully file such a motion.¹⁴⁶ Represented detainees, though more likely to file successful motions through counsel, still find it difficult to obtain a change of venue.¹⁴⁷ Indeed, some immigration judges have articulated their inclination to deny detainees' change of venue motions unless ICE consents.¹⁴⁸

An immigration judge has the authority to grant a change of venue so long as the moving party demonstrates "good cause," which involves considering several factors, including administrative convenience, location of witnesses, and preventing adjudication delays.¹⁴⁹ The BIA and courts, however, have consistently upheld that changing venue to a detainee's city of residence prior to detention or transfer is insufficient to support good cause, even if the noncitizen's counsel is located in that city.¹⁵⁰ For example, the BIA upheld a denial of a motion to change venue when ICE transferred a detainee to Oakdale, Lou-

¹⁴⁵ 8 C.F.R. § 1003.20(b) (2024). The moving party must provide the opposing party with notice and an opportunity to respond. *Id.* DHS violates venue regulations when it transfers venue without notifying the noncitizen. *Jian v. Immigr. & Naturalization Serv.*, 28 F.3d 256, 258–59 (2d Cir. 1994).

¹⁴⁶ See PARKER, LOCKED UP FAR AWAY, *supra* note 1, at 61–62 (noting that many detainees, especially those without counsel, find it difficult to successfully move to change venue).

¹⁴⁷ *Id.* at 63–64.

¹⁴⁸ See *Garcia-Guzman v. Reno*, 65 F. Supp. 2d 1077, 1079 (N.D. Cal. 1999) (noting that an immigration judge advised detainee's counsel that "it was her practice to deny [detainees'] motions for change" unless ICE's predecessor, the INS, agreed). During a hearing, an immigration judge in Seattle told detainee's counsel, "I don't normally grant motions for a change of venue [filed by a detainee] Because he is in detention held by the INS, I cannot tell the INS to transfer to another district." *Id.*

¹⁴⁹ 8 C.F.R. § 1003.20(b); *Matter of Rahman*, 20 I. & N. Dec. 480, 482–83 (B.I.A. 1992); OFF. OF THE CHIEF IMMIGR. JUDGE, EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUSTICE, OPPM 18-01, CHANGE OF VENUE 2 (2018), <https://www.justice.gov/eoir/page/file/1026726/download> [<https://perma.cc/879G-B7JN>] (memorandum from the Chief Immigration Judge stating that immigration judges must ensure that "good cause has been shown" before granting change of venue); see also *Lovell v. Immigr. & Naturalization Serv.*, 52 F.3d 458, 460 (2d Cir. 1995) (finding that an immigration judge's failure to consider noncitizen's change of venue motion was abuse of discretion); *Matter of Rivera*, 19 I. & N. Dec. 688, 690 (B.I.A. 1988) (upholding immigration judge's denial of venue change from Puerto Rico to New York, where noncitizen resided, because the only witnesses to noncitizen's unlawful entry were in Puerto Rico). Immigration judges have "broad and general" authority to change venue. *Matter of Dobere*, 20 I. & N. Dec. 188, 189 (B.I.A. 1990). It is important, however, to distinguish change of venue, which an immigration judge has the authority to grant, from change of place of detention, over which an immigration judge has no authority. *Rahman*, 20 I. & N. at 484 ("The place of detention is a subject over which the immigration judge has no authority . . .").

¹⁵⁰ See *Rahman*, 20 I. & N. at 481–82 (reversing immigration judge's granted motion to change venue, even though the location of the noncitizen's attorney was far from where the noncitizen was detained and thus where his proceedings would be conducted). The Board held that the immigration judge was not required to grant a change of venue request for an attorney located far away. *Id.*; see also *Mayers v. Immigr. & Naturalization Serv.*, 70 F.3d 1268, 1268 (5th Cir. 1995) (unpublished table decision) (upholding immigration judge's denial of venue change where proceedings were in Louisiana and the attorney was in New York, thereby requiring the noncitizen to proceed without counsel).

isiana—more than 1,600 miles away from where he and his family resided in Boston, Massachusetts.¹⁵¹

Upon a denial, the BIA or a court of appeals will not overturn the immigration judge's decision unless it finds an abuse of discretion.¹⁵² Further, some courts of appeals have also upheld venue change denials unless the noncitizen can demonstrate that their case was prejudiced by the transfer.¹⁵³ Together, these factors work against detainees, heightening their burden to show "good cause" for a change of venue.¹⁵⁴

III. ICE FORUM SHOPPING: HOW TRANSFERRING A DETAINED NONCITIZEN MAY LEAD TO A CHANGE IN CONTROLLING LAW

The law generally disfavors forum shopping based on the notion that litigants obtain an unfair advantage by selecting a court that is more likely to decide the case in their favor.¹⁵⁵ Section A of this Part first details the ways in which

¹⁵¹ See *In re Espinal*, 2006 WL 3252544, at *1–2 (B.I.A. Aug. 17, 2006) (finding denial of request to change venue from Oakdale, Louisiana to Boston, Massachusetts was proper despite detainee's transfer to Oakdale changing controlling circuit law and thus making him ineligible for removal relief); *Driving Directions from Plymouth County Correctional Facility in Boston, MA to Oakdale Federal Detention Center in Oakdale, LA*, GOOGLE MAPS, <https://maps.google.com> [<https://perma.cc/8GJ7-UVUK>] (follow "Directions" hyperlink; then search starting point field for "Plymouth County Correctional Facility, 26 Long Pond Road, Plymouth, MA 02360" and search destination field for "Oakdale Federal Detention Center, 2105 E. Whatley Road, Oakdale, LA, 71463"). As a result of the transfer, the controlling law in the Fifth Circuit, where Oakdale is located, made the noncitizen ineligible for deportation relief that was available to him in the First Circuit, where Boston is located. *In re Espinal*, 2006 WL 3252544, at *1.

¹⁵² See, e.g., *Chow v. Immigr. & Naturalization Serv.*, 12 F.3d 34, 39 (5th Cir. 1993) (stating that an immigration judge's decision to deny a change of venue may be overturned only for abuse of discretion); *Baires v. Immigr. & Naturalization Serv.*, 856 F.2d 89, 92 (9th Cir. 1988) (same); *Rivera*, 19 I. & N. at 690 (stating that a change-of-venue denial is within an immigration judge's discretion).

¹⁵³ *Lovell*, 52 F.3d at 460–61; see *Calla-Collado v. Att'y Gen. of U.S.*, 663 F.3d 680, 685 (3d Cir. 2011) (holding that transferring an immigration detainee from New Jersey to Louisiana did not violate the detainee's rights unless they could show the transfer prejudiced their case); *Matter of Santos*, 19 I. & N. Dec. 105, 107 (B.I.A. 1984) (holding that a noncitizen "must demonstrate that he has been prejudiced by a violation of a procedural rule or regulation before his deportation proceeding will be invalidated").

¹⁵⁴ PARKER, LOCKED UP FAR AWAY, *supra* note 1, at 62–63.

¹⁵⁵ See *Hanna v. Plumer*, 380 U.S. 460, 467–68 (1965) (explaining that federal courts apply state law in diversity cases to discourage forum shopping, thus leading to a uniform application of law regardless of forum); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that a federal court sitting in diversity jurisdiction must apply state substantive law). Forum shopping occurs when a party to a lawsuit can select from several forums, each with jurisdiction over the case and with different applicable law, for the party's most favorable outcome. *Ferens v. John Deere Co.*, 494 U.S. 516, 527 (1990). See generally Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677 (1990) (explaining forum shopping). Courts explain that the main concern underlying forum shopping is that a litigant could influence the results of a case by strategically selecting a court or jurisdiction in which to file their lawsuit. *Sheldon v. PHH Corp.*, 135 F.3d 848, 855 (2d Cir. 1998) (quoting *Olmstead v. Anderson*, 400 N.W.2d 292, 303 (Mich. 1987)); see also Richard Maloy, *Forum Shopping? What's Wrong With That?*, 24 QUINNIPIAC L. REV. 25, 26–28 (2005) (comparing courts' different definitions

ICE may take advantage of forum shopping to secure favorable venues for removal proceedings.¹⁵⁶ Next, Section B explains how different venues follow different substantive law that impacts noncitizens' deportation proceedings.¹⁵⁷

A. How Detainee Transfers Lead to Forum Shopping

Courts and commentators have emphasized the importance of uniformity in applying federal law to mitigate forum shopping opportunities.¹⁵⁸ Administrative agencies that handle national programs, including DHS and its enforcement of federal immigration laws, find it difficult to maintain consistent interpretations of the law they enforce across different circuits.¹⁵⁹ In turn, this variation in law provides ample opportunity for similarly situated cases to result in significantly different outcomes.¹⁶⁰

of forum shopping). In the immigration context, and in the scope of this Note, ICE forum shopping constitutes interstate or inter-circuit forum shopping. *See* Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 553 (1989) (stating that attorneys, judges, and scholars typically use the term “forum shopping” to criticize litigants they believe exploit jurisdiction or venue selection to manipulate the result of a case).

¹⁵⁶ *See infra* notes 158–166 and accompanying text.

¹⁵⁷ *See infra* notes 167–194 and accompanying text.

¹⁵⁸ *See* *Kansas v. Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring) (“[The Supreme Court’s] principal responsibility . . . is to ensure the integrity and uniformity of federal law.”); *Taylor v. United States*, 504 U.S. 991, 992 (1992) (White, J., dissenting from denial of certiorari) (“One of the Court’s duties is to do its best to see that the federal law is not being applied differently in the various circuits around the country. The Court is surely not doing its best when it denies certiorari in this case, which presents an issue on which the Courts of Appeals are recurringly at odds. I would grant certiorari.”); *see also* Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1218 (2004) (arguing that the Supreme Court is the primary guardian of uniform interpretation and application of federal law); Arthur D. Hellman, *The Proposed Intercircuit Tribunal: Do We Need It? Will It Work?*, 11 HASTINGS CONST. L.Q. 375, 393–94 (1984) (discussing the problem of nonuniformity in the law caused by unresolved circuit splits). *But see* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1579–81 (2008) (questioning the value of uniformity in interpretations of federal law and arguing that other values may be more important but are often ignored in favor of uniformity). In 1982, Congress created the Federal Circuit Court, the thirteenth court of appeals, as a response to the lack of uniformity in patent law and to discourage litigants from forum shopping. Hannah Mehrle, Note, *Forum Shopping Within the United States Patent and Trademark Office*, 70 CASE W. RES. L. REV. 791, 806 (2020); *see also* Scott E. Atkinson, Alan C. Marco & John L. Turner, *The Economics of a Centralized Judiciary: Uniformity, Forum Shopping, and the Federal Circuit*, 52 J.L. & ECON. 411, 411 (2009) (deeming the creation of the U.S. Court of Appeals for the Federal Circuit the “most significant institutional change to the federal judiciary” since the 1891 creation of the Circuit Courts of Appeal).

¹⁵⁹ *Rosendo-Ramirez v. Immigr. & Naturalization Serv.*, 32 F.3d 1085, 1092 (7th Cir. 1994). *See generally* Samuel Estreicher & Richard Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 692–99, 713–14 (1989) (providing the Social Security Administration as an example of an agency that handles a national program and struggles with maintaining uniformity nationwide).

¹⁶⁰ Estreicher & Revesz, *supra* note 159, at 713–14.

In the immigration field, courts have expressed concerns over forum shopping from both noncitizens and immigration authorities.¹⁶¹ A noncitizen may forum shop, for example, by seeking asylum in a state under the Ninth Circuit's jurisdiction, where circuit law is more favorable and asylum claims have a higher probability of success.¹⁶² Noncitizen forum shopping, however, is rare because most people in removal proceedings are unrepresented and have no substantive knowledge of immigration law.¹⁶³ In contrast, courts have found convincing evidence of ICE forum shopping in several cases.¹⁶⁴

When ICE transfers a detainee, venue lies with the immigration court where the NTA is filed, and that immigration court must follow the law of the judicial circuit in which it is located.¹⁶⁵ As a result, there are at least two circumstances in which ICE can use its NTA filing power in conjunction with its transfer power to forum shop: (1) ICE can wait months or even years between serving an NTA on a noncitizen and filing the NTA with an immigration court, thus allowing it to commence removal proceedings in a faraway place or less favorable circuit; and (2) ICE can file an NTA right away, transfer the detainee to a detention facility that falls under the jurisdiction of a different circuit, and

¹⁶¹ See, e.g., *Singh v. Gonzales*, 495 F.3d 553, 558 (8th Cir. 2007) (finding that a noncitizen's attempt to forum shop supported an immigration judge's adverse credibility determination); *Rosendo-Ramirez*, 32 F.3d at 1092 (finding that ICE's predecessor, INS, had the "upper hand" in forum shopping because it had the authority to detain noncitizens in circuits other than where they were apprehended and thus controlled applicable law and venue).

¹⁶² Miriam Jordan, *Ninth Circuit Appeals Court Grants More Protections for Asylum Seekers*, N.Y. TIMES (Mar. 7, 2019), <https://www.nytimes.com/2019/03/07/us/asylum-seekers-ninth-circuit.html> [<https://perma.cc/88S8-ZREA>].

¹⁶³ See *United States v. Aguirre-Tello*, 324 F.3d 1181, 1187 (10th Cir. 2003) ("[I]mmigration law is technical and complex to the point that it is confusing to lawyers, much less to laymen."), *opinion vacated on reh'g en banc*, 353 F.3d 1199 (10th Cir. 2004); INGRID EAGLY & STEVEN SHAFER, AM. IMMIGR. COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 5 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf [<https://perma.cc/E4VE-9GVK>] (explaining data from 2007 to 2012 that showed approximately 14% of detained noncitizens were represented).

¹⁶⁴ See *de Jesus Paiva v. Aljets*, No. CIV036075(DWF/AJB), 2003 WL 22888865, at *4 (D. Minn. Dec. 1, 2003) ("The Court finds that the practical effect of ICE's decision to transport Petitioners from Minnesota to Pennsylvania was to prevent them from filing their Petition while they were present in this state. To now hold that Petitioners may only file their petition in the state that the ICE determines to send them would be to allow the ICE to forum shop, intentionally or not."); *Farah v. Immigr. & Naturalization Serv.*, No. Civ. 02-4725 DSDRLE, 2002 WL 31828309, at *3 (D. Minn. Dec. 11, 2002) ("Although the Court refuses to find that the INS intentionally tried to manipulate jurisdiction in this case, the practical effect of its sudden decision to transport Farah from Minnesota to Louisiana overnight was to prevent him from filing his Petition while he was present in this state.").

¹⁶⁵ 8 U.S.C. § 1252(b)(2); 8 C.F.R. §§ 1003.14, 1003.20 (2024); see *Ballesteros v. Ashcroft*, 452 F.3d 1153, 1157–58 (10th Cir. 2006) (holding that immigration judges must apply the law of the judicial circuit in which they sit and that noncitizens do not have the right to have removal proceedings initiated in a particular place or to have the law of a different circuit applied to their case), *adhered to in part on reh'g sub nom.* *Ballesteros v. Gonzales*, 482 F.3d 1205 (10th Cir. 2007); see also *Latu v. Ashcroft*, 375 F.3d 1012, 1019 (10th Cir. 2004) (similar); *Menowitz v. Brown*, 991 F.2d 36, 40 (2d Cir. 1993) (similar).

then file for change of venue, which case law demonstrates that immigration judges are likely to grant.¹⁶⁶

B. How Venue Changes Lead to a Change in Controlling Law

ICE's practice of transferring detained noncitizens has faced scrutiny since the agency's inception in 2003.¹⁶⁷ Subject to almost no oversight, the agency can use its virtually unlimited transfer power to forum shop for a circuit in which applicable law is most likely to accomplish a noncitizen's deportation.¹⁶⁸ This Section discusses how statutory developments have impacted substantive law variations related to the detention of criminal noncitizens,¹⁶⁹ as well as the implications of variations in controlling law for noncitizens seeking asylum on grounds of persecution in their home countries.¹⁷⁰

1. Statutory Framework and Variations in Substantive Law for Criminal Noncitizens

The harsh provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility

¹⁶⁶ See *Immigration Court Cases Jump in June 2021; Delays Double This Year*, TRAC IMMIGR. (July 28, 2021), <https://trac.syr.edu/immigration/reports/654/> [<https://perma.cc/H95X-ENG5>] (explaining there are two different dates related to NTAs—the date it was issued to a noncitizen and the date it was filed with EOIR—that can differ by months or years); U.S. IMMIGR. & CUSTOMS ENF'T, DETENTION AND DEPORTATION OFFICER'S FIELD MANUAL 231 (2006), https://www.ice.gov/doclib/foia/dro_policy_memos/09684drofieldpolicymanual.pdf [<https://perma.cc/VP6Q-GHYU>] (providing an example of an NTA being served in Los Angeles and subsequently filed with EOIR in Chicago—thus establishing venue in Chicago—where there was no bed space in Los Angeles and the detainee was transferred to a detention facility in Chicago). The first scenario described, where ICE waits months or years before filing an NTA with an immigration court, allows ICE to effectuate several transfers before filing the NTA, thus providing it with the opportunity to handpick the immigration court in which it would like to file the NTA to commence removal proceedings. See, e.g., *Pereira v. Sessions*, 585 U.S. 198, 205–07 (2018) (providing an example of DHS serving an NTA in May 2006 and filing it with the immigration court more than a year later in August 2007); see also *Immigration Court Cases Jump in June 2021; Delays Double This Year*, *supra* (explaining the two dates associated with NTAs).

¹⁶⁷ For a discussion of these questionable ICE practices and associated commentary, see generally EUNICE HYUNHYE CHO, TARA TIDWELL CULLEN & CLARA LONG, ACLU, JUSTICE-FREE ZONES (2020), https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2020-04/Justice-Free%20Zones_Immigrant_Detention_Report_ACLU-HRW-NIJC_April-2020.pdf [<https://perma.cc/K54E-XV9U>]; PARKER, A COSTLY MOVE, *supra* note 10; PARKER, LOCKED UP FAR AWAY, *supra* note 1.

¹⁶⁸ See AM. IMMIGR. COUNCIL, OVERSIGHT OF IMMIGRATION DETENTION, *supra* note 101, at 2 (explaining that there is no oversight body for immigration detention that is independent from DHS); García Hernández, *supra* note 106, at 19 (offering several examples of ICE's broad transfer authority and the increasing number of transfers in recent decades).

¹⁶⁹ See *infra* notes 171–188 and accompanying text.

¹⁷⁰ See *infra* notes 189–194 and accompanying text.

Act (IIRIRA) have led to a convergence of immigration and criminal law.¹⁷¹ These two statutes thus indirectly established a relatively new subfield within immigration law called “cimmigration” law.¹⁷² Committing any crime, even minor offenses, frequently leads to immigration problems for noncitizens, including lawful permanent residents.¹⁷³ Further complicating the situation, there is no statute of limitations curtailing immigration officials’ authority to deport a noncitizen based on a conviction, even if the conviction occurred decades earlier, and ex post facto laws are acceptable in deportation proceedings because such proceedings are civil, not criminal.¹⁷⁴ In other words, a person may be deported today for committing a newly deportable offense decades ago, when it was not yet a deportable offense.¹⁷⁵

The most serious category of offenses for which a noncitizen may be convicted under the INA is an aggravated felony.¹⁷⁶ Simply meeting the statutory definitions of “conviction” and “aggravated felony,” regardless of facts,

¹⁷¹ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009–546 (codified in scattered sections of 8 and 18 U.S.C.). See generally Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1891 (2000) (detailing the impact of federal legislation on immigration policy).

¹⁷² See Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 379–80 (2006) (explaining the convergence of immigration and criminal law).

¹⁷³ See Daniel Kanstroom, *Criminalizing the Undocumented: Irony Boundaries of the Post-September 11th “Pale of Law,”* 29 N.C. J. INT’L L. & COM. REG. 639, 652 (2004) (“Deportation is now often a virtually automatic consequence of a non-citizen’s criminal conviction for even a minor state misdemeanor.”); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 482 (2007) (“Just as more and more immigration violations are culminating in criminal convictions, so too are more and more criminal convictions culminating in deportation or other adverse immigration consequences.”). Deportation for criminal conduct developed after many of the plenary power cases discussed in Part I were decided. See *supra* notes 30–39 and accompanying text; Kanstroom, *supra* note 171, at 1899–1905 (discussing the early immigration cases that based their reasoning on Congress’s plenary power over immigration matters).

¹⁷⁴ See Andrew Tae-Hyun Kim, *Deportation Deadline*, 95 WASH. U. L. REV. 531, 534 (2017) (explaining that the lack of statutes of limitations in immigration law differs from other areas of law); see, e.g., *Atkinson v. Att’y Gen. of the U.S.*, 479 F.3d 222, 224 (3d Cir. 2007) (describing deportation proceedings initiated in June 1997 based on a December 1991 conviction of conspiracy to distribute a controlled substance—a six-year delay); *Toia v. Fasano*, 334 F.3d 917, 918 (9th Cir. 2003) (outlining removal proceedings initiated in 1997 based on a 1989 conviction—an eight-year delay); *In re Brieva-Perez*, 23 I. & N. Dec. 766, 767 (B.I.A. 2005), *aff’d*, *Brieva-Perez v. Gonzales*, 482 F.3d 356 (5th Cir. 2007) (discussing deportation proceedings initiated in February 2003 based on a 1995 conviction of unauthorized use of a motor vehicle—an eight-year delay).

¹⁷⁵ Stumpf, *supra* note 173, at 393 (explaining that the Ex Post Facto clause of the U.S. Constitution does not apply in deportation proceedings); Kanstroom & Lykes, *supra* note 42, at 6 (noting that a noncitizen may face deportation for past actions that were not deemed deportable offenses at the time they occurred).

¹⁷⁶ 8 U.S.C. § 1101(a)(43) (defining “aggravated felony”); JOHNSON ET AL., *supra* note 51, at 403 (describing the consequences of being convicted of an aggravated felony for immigration purposes).

time served, or suspended sentence, makes certain noncitizens categorically ineligible for deportation relief.¹⁷⁷ Moreover, after being deported due to an aggravated felony conviction, a noncitizen is permanently barred from the United States.¹⁷⁸

Determining if an aggravated felony for immigration purposes need be a felony at all is a point of contention between circuits, with disagreements regarding whether a misdemeanor may qualify as an aggravated felony.¹⁷⁹ Therefore, how crimes are defined becomes especially salient when considering forum shopping if an aggravated felony conviction within one judicial circuit is not considered an aggravated felony in another circuit.¹⁸⁰

Consider the following examples. A state sex crime, which is not a deportable aggravated felony in the Ninth Circuit, is one in the Sixth Circuit.¹⁸¹ A state marijuana crime is not a deportable aggravated felony in the Second and Third Circuits, but it is one in the Fifth Circuit.¹⁸² The Fifth Circuit also classifies a second drug possession misdemeanor as an aggravated felony, whereas the Sixth Circuit does not consider it an aggravated felony unless the first misdemeanor conviction was at issue in the prosecution of the second misdemeanor.¹⁸³

Similar circumstances exist in cases dealing with adjustment of status, a process through which an eligible noncitizen may change their immigration

¹⁷⁷ 8 U.S.C. § 1229b(a)(3); *id.* § 1228(c) (stating that any “alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States”); *id.* § 1227(a)(2)(A)(iii) (providing that “[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable”). Contrary to common knowledge terms, an aggravated felony conviction under the INA need not be a conviction, nor a felony, nor aggravated. Emma Winger, *The Supreme Court Limits the Crimes That Can Lead to Near-Automatic Deportation*, IMMIGR. IMPACT (June 14, 2021), <https://immigrationimpact.com/2021/06/14/supreme-court-aggravated-felony-immigration/> [<https://perma.cc/JJ9Z-9KH2>].

¹⁷⁸ 8 U.S.C. § 1182(a)(9)(A)(i).

¹⁷⁹ *See, e.g.*, *Gattem v. Gonzales*, 412 F.3d 758, 767–68 (7th Cir. 2005) (finding a misdemeanor under Illinois state law to qualify as an aggravated felony for immigration purposes); *United States v. Gonzales-Vela*, 276 F.3d 763, 768 (6th Cir. 2001) (same); *United States v. Marin-Navarette*, 244 F.3d 1284, 1287 (11th Cir. 2001) (same). Under federal law, a “felony” is an offense that is punishable by more than one year of imprisonment. 18 U.S.C. § 3559(a). A “misdemeanor” is an offense that is punishable by one year or less of imprisonment. *Id.*

¹⁸⁰ JOHNSON ET AL., *supra* note 51, at 403. Criminal pleas are important enough in the immigration context that the Supreme Court, in 2010, held that the Sixth Amendment right to counsel requires an attorney to accurately advise a noncitizen defendant about the potential deportation consequences of a guilty plea. *Padilla v. Kentucky*, 559 U.S. 356, 366–67, 389 (2010).

¹⁸¹ *Petition for Writ of Certiorari at 19, Esquivel-Quintana v. Sessions*, 581 U.S. 385 (2017) (No. 16-54).

¹⁸² Brief for Petitioner at 7, *Moncrieffe v. Holder*, 569 U.S. 184 (2013) (No. 11-702).

¹⁸³ *Compare* *United States v. Cepeda-Rios*, 530 F.3d 333, 335 (5th Cir. 2008) (holding that two or more state misdemeanor drug possession convictions qualify as an aggravated felony), *with* *Rashid v. Mukasey*, 531 F.3d 438, 448 (6th Cir. 2008) (holding that a second state misdemeanor drug possession conviction does not qualify as an aggravated felony, where the first misdemeanor conviction was not at issue in the prosecution of the second offense).

status to that of a lawful permanent resident.¹⁸⁴ Noncitizens with certain types of criminal convictions are categorically ineligible for adjustment of status in the Fifth Circuit but may still be eligible in the Ninth and Tenth Circuits.¹⁸⁵

Finally, consider criminal convictions that were vacated due to an error during trial or other reasons that render them void.¹⁸⁶ Circuits are split regarding whether such a vacated conviction is still considered a conviction for immigration purposes: the Fifth Circuit, for example, considers a vacated conviction to be a valid conviction for removal purposes, whereas the Seventh, Ninth, and Tenth Circuits do not.¹⁸⁷ Therefore, a detained noncitizen transferred from any of those circuits to the Fifth Circuit would find themselves deportable for a conviction that would not have rendered them deportable where they were initially detained and likely reside.¹⁸⁸

2. Variations in Substantive Law for Asylum Seekers

Noncitizens who have never been convicted of crimes are also affected by a change in controlling law when they are transferred to a different circuit.¹⁸⁹ Asylum claims require a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opin-

¹⁸⁴ JOHNSON, *supra* note 51, at 412 (explaining adjustment of status in the removal context).

¹⁸⁵ *Acosta v. Gonzales*, 439 F.3d 550, 556 (9th Cir. 2006), *overruled by* *Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2012), *and holding modified by* *Garfias-Rodriguez v. Holder*, 649 F.3d 942 (9th Cir. 2011); *Padilla-Caldera v. Gonzales*, 426 F.3d 1294, 1301 (10th Cir.), *amended and superseded on reh'g*, 453 F.3d 1237 (10th Cir. 2005), *disapproved in later appeal sub nom.* *Padilla-Caldera v. Holder*, 637 F.3d 1140 (10th Cir. 2011), *as corrected* (Mar. 22, 2011); *Mortera-Cruz v. Gonzales*, 409 F.3d 246, 256 (5th Cir. 2005); *PARKER, LOCKED UP FAR AWAY*, *supra* note 1, at 75 (noting that the Fifth Circuit prohibits individuals detained in Texas, Mississippi, and Louisiana from qualifying for adjustment of status if they have particular criminal convictions, whereas these convictions would not be decisive if the same individuals were held in the Ninth or Tenth Circuits).

¹⁸⁶ *See generally Immigration Consequences of an Order Vacating a Conviction: Obtaining an Order the Immigration Authorities Will Respect*, LAW OFFS. NORTON TOOBY, <https://nortontooby.com/node/17750> [<https://perma.cc/S86L-UXHQ>] (explaining that vacatur of legally defective criminal convictions may eliminate adverse immigration consequences caused by the conviction).

¹⁸⁷ *Compare Renteria-Gonzalez v. Immigr. & Naturalization Serv.*, 322 F.3d 804, 814 (5th Cir. 2002) (holding that a vacated conviction remains valid for immigration removal purposes), *with Sandoval v. Immigr. & Naturalization Serv.*, 240 F.3d 577, 582–83 (7th Cir. 2001) (holding that a vacated conviction was not valid for removal purposes); *Nath v. Gonzales*, 467 F.3d 1185, 1188–89 (9th Cir. 2006) (same); *and Cruz-Garza v. Ashcroft*, 396 F.3d 1125, 1129 (10th Cir. 2005) (same).

¹⁸⁸ *See Matter of Chairez-Castrejon*, 26 I. & N. Dec. 478, 481–82 (B.I.A. 2015) (holding that immigration judges must apply the law of the circuit in which they sit).

¹⁸⁹ *See, e.g., Shannon J. Murphy, Interpreting the Immigration and Nationality Act in Federal Circuit Courts: How the Ninth Circuit Became a Vessel Traveling “at Some Distance from the Main Fleet,”* 14 DREXEL L. REV. 261, 275–90 (2022) (providing a sample case study of an asylum seeker whose case would be decided differently depending on whether it was brought in the Second or the Ninth Circuit).

ion.”¹⁹⁰ The definition of “particular social group” differs depending on the circuit hearing the case.¹⁹¹

The Third Circuit, for instance, has held that “Guatemalan women” is too broad to qualify as a particular social group for asylum purposes despite the petitioner fleeing her home country due to gender-based violence.¹⁹² In contrast, the Ninth Circuit remanded a case with strikingly similar facts, holding that “young women in Guatemala” could constitute a cognizable particular social group.¹⁹³ Because ICE may detain asylum seekers anywhere in the country, differing definitions of the legal elements of asylum clearly pose a uniformity problem.¹⁹⁴

IV. A NEW FRAMEWORK TO PREVENT ICE FORUM SHOPPING AND PROTECT FAIR VENUE FOR REMOVAL PROCEEDINGS

The lack of protective provisions regulating fair venue and choice-of-law in removal proceedings deprives thousands of detained noncitizens of liberty, and often life, without due process of law.¹⁹⁵ These continuous due process violations demand congressional action, as the plenary power doctrine forecloses many of the federal courts’ options to effect change in the immigration system.¹⁹⁶ Enacting a venue-protective legislative regime averts serious due

¹⁹⁰ 8 U.S.C. § 1101(a)(42) (defining “refugee”); *Matter of Acosta*, 19 I. & N. Dec. 211, 219 (B.I.A. 1985) (listing the elements of asylum). *See generally* JOHNSON ET AL., *supra* note 51, at 355–61 (explaining the standards for asylum). Asylum seekers who do not neatly fit into the more recognized protected grounds may claim to be a member of a particular social group that shares a “common, immutable characteristic” that one cannot change or should not be required to change. *Acosta*, 19 I. & N. Dec. at 232–33. The social group must “be discrete and have definable boundaries,” called the “particularity” requirement, and be recognized by the broader society, called the “social distinction” requirement. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 239–40 (B.I.A. 2014).

¹⁹¹ *Compare Chavez-Chilel v. Att’y Gen. U.S.*, 20 F.4th 138, 146 (3d Cir. 2021) (finding that “Guatemalan women” is not a particular social group), *with Perdomo v. Holder*, 611 F.3d 662, 663, 669 (9th Cir. 2010) (holding that “young women in Guatemala” may be a particular social group).

¹⁹² *Chavez-Chilel*, 20 F.4th at 146.

¹⁹³ *Perdomo*, 611 F.3d at 669.

¹⁹⁴ *See* ELEANOR ACER & JESSICA CHICCO, HUM. RTS. FIRST, U.S. DETENTION OF ASYLUM SEEKERS 15–16 (2009), <https://www.corteidh.or.cr/tablas/r25623.pdf> [<https://perma.cc/C885-G5BA>] (stating that asylum seekers may be detained at the border or within the United States).

¹⁹⁵ *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“[T]he Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”); *Yamataya v. Fisher*, 189 U.S. 86, 100–01 (1903) (holding that noncitizens in deportation proceedings are entitled to due process).

¹⁹⁶ *See Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“This Court has repeatedly emphasized that ‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.” (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909))); *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (“The Court without exception has sustained Congress’s ‘plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.’” (quoting *Boutilier v. Immigr. & Naturalization Serv.*, 387 U.S. 118, 123 (1967))); *Oceanic Steam Navigation Co.*, 214 U.S. at 343 (1909) (recogniz-

process concerns triggered by ICE's broad discretion to forum shop by transferring detainees and initiating removal proceedings whenever and wherever it chooses.¹⁹⁷ This Part proposes a new framework for determining proper venue in removal proceedings, such that ICE's unchecked discretion does not lead to an unfair advantage in deportation cases.¹⁹⁸

First, Congress should impose a due process presumption in favor of release for all noncitizens subject to immigration detention.¹⁹⁹ In the criminal law context, unless the government can offer a particularized reason for a defendant's detention, defendants enjoy a due process presumption in favor of release in the least restrictive terms that will ensure future court appearances.²⁰⁰ Similarly, Congress should require immigration officials to offer a particularized reason for detaining a noncitizen awaiting adjudication of their removal proceedings.²⁰¹ Although deportation cases are not criminal proceedings, the deprivation of liberty is the same in both contexts.²⁰² In circumstances where ICE is unconvinced that a person will attend future hearings, the ATD program can be a good alternative if it is, indeed, used as an alternative rather

ing Congress's plenary power over admission of noncitizens and noting that it has complete power over immigration).

¹⁹⁷ See 8 C.F.R. § 1003.14(a) (2024) (governing jurisdiction of immigration courts); *id.* § 1003.20(a) (governing venue of immigration courts); U.S. DEP'T OF JUST., IMMIGRATION COURT PRACTICE MANUAL, *supra* note 138, at 61 (explaining that DHS offices are not required to file an NTA with a particular immigration court); Wadhia, *supra* note 141, at 875 (explaining that ICE sometimes waits weeks or months to issue an NTA, thus initiating removal proceedings).

¹⁹⁸ See *infra* notes 199–229 and accompanying text.

¹⁹⁹ See 18 U.S.C. § 3142(a)–(c), (e) (imposing a presumption in favor of release in the criminal context).

²⁰⁰ *Id.*; see *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (explaining that, in the criminal context, official intrusion, including seizures, must be justified by specific and articulable facts). This presumption includes noncitizens in the criminal context but not in the deportation context. *Criminal Defense of Immigrants: Due Process Presumption in Favor of Release*, LAW. OFFS. OF NORTON TOOBY, <https://nortontooby.com/node/15790> [<https://perma.cc/PN9G-Q4RL>].

²⁰¹ See *Cole*, *supra* note 69, at 1009–10 (stating that, in the absence of war, no Supreme Court Justice has supported civil detention without a particularized justification). The Supreme Court has permitted preventive detention in the immigration context only when there are “individualized” showings to detain the noncitizen. *Id.* at 1015; see *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (stating that the Supreme Court has authority, under the federal habeas corpus statute, to determine whether the amount of time a particular noncitizen has been detained to secure deportation is reasonable); *Carlson v. Landon*, 342 U.S. 524, 542 (1952) (“There is no denial of . . . due process . . . where there is reasonable apprehension of hurt from aliens charged with a philosophy of violence against this Government.”). *But see Wong Wing v. United States*, 163 U.S. 228, 235 (1896) (“Proceedings to exclude or expel [noncitizens] would be vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation.”).

²⁰² See Eunice Cho, *More of the Same: Private Prison Corporations and Immigration Detention Under the Biden Administration*, ACLU (Oct. 5, 2021), <https://www.aclu.org/news/immigrants-rights/more-of-the-same-private-prison-corporations-and-immigration-detention-under-the-biden-administration> [<https://perma.cc/3LPB-7PM2>] (reporting that immigrant detainees fill private prison beds).

than as an extension of immigration detention.²⁰³ A presumption in favor of release is especially important for those who immigration law considers “arriving aliens”—noncitizens seeking admission into the United States at a port of entry.²⁰⁴

Second, Congress should enact a venue-protective statute that requires DHS to file NTAs at the immigration court closest to where it apprehends the noncitizen or, if the encounter did not result in apprehension, closest to the noncitizen’s residence.²⁰⁵ Some activists and commentators have suggested requiring ICE to file an NTA within a limited timeframe, such as within forty-eight hours of arresting a noncitizen.²⁰⁶ Instead, Congress should impose a geographical limit because, just as ICE can select a forum by waiting to file an NTA until after it transfers a detainee, placing a temporal limit may cause ICE to rapidly transfer detainees before it must file the NTA.²⁰⁷ For example, in the case of Jeffrey’s story in the Introduction, a temporal limit on NTAs could prompt ICE to detain Jeffrey and, rather than wait three months to transfer him from New York to Texas, transfer him immediately and file his NTA in a Texas immigration court.²⁰⁸ This timeline could be devastating to many noncitizens’ ability to retain counsel, which is already a major problem for detainees who are transferred to remote locations with an insignificant immigration law bar.²⁰⁹

A new geographical limit on NTA filing, along with a presumption in favor of release, would help prevent most issues arising from changes in control-

²⁰³ See SINGER, *supra* note 113, at 7–8 (discussing ATD programs, including GPS tracking, in-person and phone meetings with ICE officers or case managers, and unannounced home visits); Eagly et al., *supra* note 115, at 847 (finding that 95% of noncitizens released between 2001 and 2016 with pending asylum applications attended all immigration court hearings after their release). *But see* PANJWANI & LUCAL, *supra* note 117, at 4, 8, 33 (arguing that ATD programs are an extension of immigration detention and reporting that noncitizens subjected to the programs’ surveillance felt constantly watched, controlled, and as though they were “on a leash”).

²⁰⁴ See 8 C.F.R. § 1.2 (2024) (defining “arriving alien”). “Arriving aliens” are ineligible for bond, so, without a presumption of release, they are essentially subject to a presumption of detention. *See id.* § 1003.19(h)(2)(i)(B) (providing that immigration judges do not have the authority to set bond for “arriving aliens”).

²⁰⁵ See OFF. OF INSPECTOR GEN., *supra* note 140, at 2 (stating that ICE need not file an NTA within any specified timeframe); Wadhia, *supra* note 141, at 875 (noting that ICE has waited weeks or months to issue NTAs).

²⁰⁶ PARKER, A COSTLY MOVE, *supra* note 10, at 6.

²⁰⁷ See OFF. OF INSPECTOR GEN., *supra* note 140, at 2.

²⁰⁸ See PARKER, LOCKED UP FAR AWAY, *supra* note 1, at 74 (describing Jeffrey’s story).

²⁰⁹ See, e.g., Eagly & Shafer, *supra* note 10, at 42, 76 (describing a study of over 1.2 million immigration cases that found no attorneys listing an address in Artesia, New Mexico, a city of 11,500 people where DHS detained noncitizens). Although immigration judges typically grant continuances to allow noncitizens to retain counsel, such continuances are only marginally helpful if the noncitizen is transferred to a location where there is no counsel to retain. *See id.* at 34 (finding that detained noncitizens were less likely to be granted a continuance to find counsel, and, even when granted such a continuance, they were less likely to find counsel); PARKER, LOCKED UP FAR AWAY, *supra* note 1, at 4.

ling law upon a detainee's transfer.²¹⁰ Those who are detained may be transferred for documented, legitimate reasons without undergoing a venue change, and thus a change in applicable circuit law, because their NTA will have already been filed at the immigration court closest to their place of residence or apprehension.²¹¹ In turn, such a requirement would also help instill legitimacy in the system, as noncitizens need not fear that ICE is transferring them to obtain an unfair litigation advantage that leads to their deportation.²¹²

Third, Congress should require immigration judges to either dismiss or transfer removal cases to the proper venue, just as federal courts dealing with general civil proceedings dismiss or transfer a case to the appropriate venue upon a party's objection.²¹³ In the immigration context, however, to account for the scarcity of legal representation in removal proceedings, the law should require immigration courts to act without necessitating a party's objection.²¹⁴

As part of this legislative requirement on immigration judges, Congress should also clearly delineate what constitutes "good cause" for granting a change of venue motion.²¹⁵ Certain circumstances, such as a change of venue to the jurisdiction in which the noncitizen resided before being detained, should be presumed to meet the "good cause" standard unless proven otherwise, especially if the noncitizen retained counsel near their place of residence.²¹⁶ This

²¹⁰ See 18 U.S.C. § 3142 (imposing presumption in favor of release in the criminal context); 8 C.F.R. § 1003.14(a) (2024) (governing jurisdiction of immigration courts); *id.* § 1003.20(a) (governing venue of immigration courts); U.S. DEP'T OF JUST., IMMIGRATION COURT PRACTICE MANUAL, *supra* note 138, at 61 (explaining that DHS offices are not required to file an NTA with a particular immigration court); Wadhia, *supra* note 141, at 875 (noting instances when ICE has waited weeks or months before filing an NTA). Immigration judges must apply the law of the judicial circuit in which they sit. *Ballesteros v. Ashcroft*, 452 F.3d 1153, 1157–58 (10th Cir. 2006), *adhered to in part on reh'g sub nom.* *Ballesteros v. Gonzales*, 482 F.3d 1205 (10th Cir. 2007). A change in controlling circuit law may affect whether a noncitizen is deportable. *Compare* *United States v. Cepeda-Rios*, 530 F.3d 333, 335 (5th Cir. 2008) (holding that two or more state misdemeanor drug possession convictions qualify as an aggravated felony, thus making the noncitizen deportable), *with* *Rashid v. Mukasey*, 531 F.3d 438, 448 (6th Cir. 2008) (holding that a second state misdemeanor drug possession conviction does not qualify as an aggravated felony where the first misdemeanor conviction was not at issue in the prosecution of the second offense).

²¹¹ See 8 C.F.R. § 1003.14(a) (governing jurisdiction of immigration courts); *id.* § 1003.20(a) (governing venue of immigration courts).

²¹² See, e.g., *TRAFFICKED & TORTURED*, *supra* note 109, at 28 (reporting that eleven of fourteen individuals were not provided with a reason for their transfer, and some understood it to be retaliation for protesting detention conditions).

²¹³ See 28 U.S.C. § 1406(a) (requiring federal judges in typical civil proceedings to dismiss or transfer a case if venue is improper).

²¹⁴ See *EAGLY & SHAFER*, *supra* note 163, at 4 (reporting on the lack of legal representation in immigration proceedings).

²¹⁵ See 8 C.F.R. § 1003.20(b) (granting immigration judges discretion to change venue "for good cause").

²¹⁶ *Contra* *Matter of Rahman*, 20 I. & N. Dec. 480, 481–82 (B.I.A. 1992) (holding that a motion to change venue to immigration court closest to noncitizen's residence was insufficient to demonstrate "good cause").

presumption will increase the likelihood that noncitizens' motions to change venue are granted regardless of DHS's stance, which is not the case under the current framework.²¹⁷ In its clearer delineation of what constitutes "good cause," moreover, Congress should clarify that ICE's operational needs, without more, are insufficient to satisfy such a standard.²¹⁸ Not doing so would make this proposal a dead letter because ICE could simply cite its operational needs as a pretext to transfer detainees for any reason whatsoever.²¹⁹

There are limitations and potential unintended consequences to this proposal.²²⁰ One limitation of this proposal is that it does not solve the important problem of ICE transferring represented noncitizens to remote locations where it is more difficult for them to communicate with retained counsel.²²¹ In creating a presumption that having retained counsel near one's place of residence constitutes "good cause" for an immigration judge to grant a change of venue motion, however, this proposal provides an increased likelihood that courts will grant such a motion.²²² It also does not solve the problems faced by unrepresented noncitizens who are transferred to remote detention facilities in rural cities with few attorneys.²²³ Instead, improving access to counsel in these cases could be achieved by universal representation legislation that provides court-appointed counsel in deportation proceedings, a measure supported by sixty-seven percent of voters in August 2020.²²⁴

²¹⁷ See *Robledo-Amaya v. Holder*, 354 F. App'x 167, 169–70 (5th Cir. 2009) (upholding denial of a motion to change venue despite subjecting the noncitizen's claim to less favorable circuit law upon transfer and thus rendering him ineligible for deportation relief); *Ballesteros v. Ashcroft*, 452 F.3d 1153, 1157–58 (10th Cir. 2006) (same), *adhered to in part on reh'g sub nom.* *Ballesteros v. Gonzales*, 482 F.3d 1205 (10th Cir. 2007); *In re Espinal*, No. A38 676 094, 2006 WL 3252544, at *1–2 (B.I.A. Aug. 17, 2006) (same).

²¹⁸ See OFF. OF INSPECTOR GEN., *supra* note 140, at 2 (explaining that ICE may delay filing NTAs due to "operational" needs). Examples of legitimate reasons for ICE transfers may include medical reasons, detainee safety, or detention personnel safety.

²¹⁹ See *id.*

²²⁰ See *infra* notes 221–224 and accompanying text (discussing constraints and potential unintended ramifications associated with implementing this legislative proposal).

²²¹ See *PARKER, LOCKED UP FAR AWAY*, *supra* note 1, at 3–4 (noting that detainee transfers create a notable disruption to the attorney-client relationship to the degree that, in 2009, ICE's special advisor recommended against transferring detainees with legal representation).

²²² See 8 C.F.R. § 1003.20(b) (2024) (granting immigration judges discretion to change venue "for good cause"). But see *Matter of Rahman*, 20 I. & N. Dec. 480, 481–82 (B.I.A. 1992) (holding that changing venue to the immigration court closest to a noncitizen's residence was insufficient to demonstrate "good cause").

²²³ See *Eagly & Shafer*, *supra* note 10, at 42, 75 (finding that noncitizens have access to fewer attorneys in remote locations).

²²⁴ VERA INST. OF JUST., PUBLIC SUPPORT IN THE UNITED STATES FOR GOVERNMENT-FUNDED ATTORNEYS IN IMMIGRATION COURT 1 (2021), <https://www.vera.org/downloads/publications/taking-the-pulse-national-polling-v2.pdf> [<https://perma.cc/U7KB-Y82H>]. In 2014, New York City established a universal representation program for detained, indigent New York City residents in deportation proceedings, becoming the first city in the United States to do so. *New York City Becomes First Jurisdiction in Nation to Provide Universal Representation to Detained Immigrants Facing Deportation*,

A key component of this proposal is the initial presumption in favor of release.²²⁵ If Congress were to implement the other two components without first adopting this presumption, the proposed framework could result in worse consequences for noncitizens, particularly “arriving aliens” and those apprehended near the Southern border.²²⁶ This is because, for the majority of these noncitizens, removal proceedings would take place in the Fifth Circuit—a jurisdiction known for its immigrant-unfriendly case law.²²⁷ Finally, should Congress enact such a proposal, some noncitizens’ proceedings will undoubtedly take place in jurisdictions where laws are less favorable to their cases than the receiving jurisdiction to which ICE transferred them.²²⁸ Nonetheless, the proposal still deprives ICE of the power to forum shop in bad faith, and although unfortunate in such cases, the fact that less favorable law applies would be a function of chance rather than federal immigration authorities’ manipulation of the legal system to determine the outcome of a case.²²⁹

CONCLUSION

The U.S. government’s immigration detention system relies on transferring detainees across the country every day. In turn, venue either lies at the receiving jurisdiction, or immigration judges promptly approve change-of-

VERA INST. OF JUST. (June 26, 2014), <https://www.vera.org/newsroom/new-york-city-becomes-first-jurisdiction-in-nation-to-provide-universal-representation-to-detained-immigrants-facing-deportation> [https://perma.cc/LA2Q-PKC3].

²²⁵ See *supra* notes 199–204 and accompanying text (arguing for the adoption of a presumption of release in removal proceedings, similar to the one in the criminal context).

²²⁶ See *supra* note 204 and accompanying text (explaining why not having a presumption of release would be detrimental to “arriving aliens”). Most individuals apprehended near the Southern border would be subject to Fifth Circuit law, which is known to be less favorable to immigrants. Leopold, *supra* note 104 (describing the reputation of the Fifth Circuit Court of Appeals as a factor in America’s “anti-immigrant judicial pipeline”); *Geographic Boundaries of U.S. Courts of Appeals and U.S. District Courts*, *supra* note 4 (noting that the Fifth Circuit includes Louisiana, Mississippi, and Texas).

²²⁷ See Leopold, *supra* note 104 (characterizing the Fifth Circuit as part of an “anti-immigrant judicial pipeline”). To illustrate the sheer number of noncitizens that would be affected if Congress did not first implement a presumption of release, consider the following: during Fiscal Year 2022, immigration officials encountered noncitizens at the Southern land border 2,378,944 times. *Nation-wide Encounters*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/nationwide-encounters> [https://perma.cc/K49A-5CJJ] (Dec. 22, 2023). Importantly, that statistic does not necessarily mean 2.3 million noncitizens, but rather 2.3 million *encounters*, as the same noncitizen may have had more than one encounter. See John Gramlich & Alissa Scheller, *What’s Happening at the U.S.-Mexico Border in 7 Charts*, PEW RSCH. CTR. (Nov. 9, 2021), <https://www.pewresearch.org/fact-tank/2021/11/09/whats-happening-at-the-u-s-mexico-border-in-7-charts/> [https://perma.cc/CAK8-BKNK] (noting that “encounters refer to events, not people,” because some noncitizens have multiple encounters).

²²⁸ See generally Note, *Forum Shopping Reconsidered*, *supra* note 155.

²²⁹ See *id.* at 1687 (“Popular moral conceptions of law and justice reflect a prevailing belief that insofar as the law has unavoidable elements of chance, the parties should not be able to manipulate these elements for their own advantage.”).

venue motions for immigration authorities while frequently denying the same to detained noncitizens. This process results in a change of controlling law, often to the detriment of detainees' deportation cases. To ensure that ICE does not obtain an unfair litigation advantage through forum shopping, Congress should enact legislation that protects venue and controlling law in removal proceedings. This includes a presumption in favor of release for all noncitizens, requiring ICE to file the charging document that initiates proceedings near the noncitizen's residence or location of apprehension, requiring immigration judges to dismiss or transfer cases to the proper venue, and clearly defining what constitutes "good cause" for change of venue purposes.

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