

A RIGHTS-BASED APPROACH TO DETERMINING VENUE FOR IMMIGRATION REMOVAL HEARINGS

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I. INTRODUCTION

Immigration enforcement has been a priority of the United States for decades, but particularly since the terrorist attacks on September 11, 2001.¹ The prioritization of immigration enforcement has had numerous impacts on the efforts of the United States to stop irregular migration at its land borders. This is clear from the policies which have increased the use of military-grade technology by Customs and Border Patrol officers at the border, increased efforts to apprehend those crossing the border on foot, and increased detention and expedited removal of non-citizens.² These efforts have certainly not disappeared in recent years,³ and neither has immigration to the United States.⁴ In the fiscal year of 2023,⁵ the United States Customs and Border Protection's ("CBP") Border Patrol reported more than 2.2 million encounters with migrants along the U.S.-Mexico border.⁶ As of November 8, 2023, 35,289 people were in immigration detention, with an additional 194,632 people participating in the Alternatives to Detention ("ATD") program.⁷ Texas currently hosts the highest number of immigrant detainees, with 10,189 total detainees in fiscal year 2023.⁸ Louisiana, Arizona, and Georgia also claim three of the top five spots for the highest numbers of

¹ Camille J. Mackler, *Immigration Policy Before and After 9/11: From the INS to DHS – Where Did We Go Wrong?*, JUST SECURITY (Sept. 9, 2021), <https://www.justsecurity.org/78132/immigration-policy-before-and-after-9-11-from-the-ins-to-dhs-where-did-we-go-wrong>.

² *Id.*

³ See Mark Akkerman, *Global Spending on Immigration Enforcement is Higher than Ever and Rising*, MIGRATION POL'Y INST. (May 31, 2023), [https://www.migrationpolicy.org/article/immigration-enforcement-spending-rising#:~:text=For%20fiscal%20year%20\(FY\)%202024,product%20\(GDP\)%20of%20Iceland](https://www.migrationpolicy.org/article/immigration-enforcement-spending-rising#:~:text=For%20fiscal%20year%20(FY)%202024,product%20(GDP)%20of%20Iceland) ("The United States in recent years has spent more money on immigration enforcement than at any other point in history.").

⁴ Mackler, *supra* note 1; see also *CBP Enforcement Statistics*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics> (last visited Sept. 18, 2023) (reporting numbers of CBP encounters in each year and demonstrating an upward trend in numbers of migrant encounters at the U.S.-Mexico border and within the United States).

⁵ The CBP fiscal year runs from October 1st to September 30th of a given year. See *CBP Enforcement Statistics*, *supra* note 4.

⁶ *Id.*; 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>.

⁷ *Immigration Detention Quickfacts*, TRAC IMMIGR., <https://trac.syr.edu/immigration/quickfacts/detention.html> [<https://perma.cc/2J8U-9Y6Q>] (last visited Nov. 8, 2023). ATD programs monitor families and single individuals' compliance with final orders of removal or with release conditions while their immigration proceedings are pending on the non-detained docket. People in the ATD program could potentially be taken into ICE custody as well, which would greatly increase the overall number of non-citizens in immigration detention. *ERO Alternatives to Detention Program*, IMMIGR. AND CUSTOMS ENFT (Apr. 2021), <https://www.ice.gov/doclib/detention/atdInfographic.pdf>.

⁸ *Immigration Detention Quickfacts*, *supra* note 7.

immigrant detainees.⁹ Together, Texas and Louisiana account for nearly half of all non-citizen detainees in the United States for fiscal year 2023.¹⁰ They also share other characteristics, perhaps the most notable being that they are both under the jurisdiction of the Fifth Circuit Court of Appeals¹¹—a court known to be particularly hostile towards non-citizens.¹² In particular, the Fifth Circuit has been a key court for conservatives looking to challenge liberal policies.¹³ During the Trump administration, the former President appointed five new conservative judges to the United States Court of Appeals for the Fifth Circuit and made the circuit court the focal point for spreading and defending his political agenda.¹⁴ The Fifth Circuit Court of Appeals is considered “the country’s most politically conservative” appeals court, and with good reason.¹⁵ It is frequently at the center of the country’s most anti-immigrant litigation, handing down decisions that have wide-ranging and harmful effects on non-citizens.¹⁶ The politicization of immigration through the use of the court system has long been acknowledged,¹⁷ but is an issue that

⁹ *Id.*

¹⁰ *Id.* (combining the number of detainees in Texas and Louisiana, divided by the total number of detainees nationwide comes out to about 41% of the nation’s immigrant detainees being held in either Texas or Louisiana, with these two states also accounting for the two highest numbers of immigrant detainees in the United States).

¹¹ FIFTH CIRCUIT COURT OF APPEALS, <https://www.ca5.uscourts.gov> (last visited Nov. 18, 2023).

¹² See 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>; Press Release, America’s Voice, *The Anti-Immigrant Judicial Pipeline Rears Its Ugly Head with 5th Circuit MPP Ruling* (Dec. 14, 2021), https://americasvoice.org/press_releases/the-anti-immigrant-judicial-pipeline-rears-its-ugly-head-with-5th-circuit-mpp-ruling; Lisa Needham, *Which is the Worst Federal Appeals Court, and Why is it the Fifth Circuit?*, BALLS AND STRIKES (Jan. 19, 2022), <https://ballsandstrikes.org/legal-culture/which-is-the-worst-federal-appeals-court-and-why-is-it-the-fifth-circuit>; Lydia Wheeler & Kimberly Strawbridge Robinson, *Conservative Fifth Court is Stumbling at US Supreme Court*, BL (June 26, 2023), <https://news.bloomberglaw.com/us-law-week/conservative-fifth-circuit-is-stumbling-at-us-supreme-court>.

¹³ See, e.g., Leopold, *supra* note 12; Wheeler & Robinson, *supra* note 12.

¹⁴ Emma Platoff, *Under Trump, the 5th Circuit is Becoming Even More Conservative*, TEX. TRIB. (Aug. 30, 2018), <https://www.texastribune.org/2018/08/30/under-trump-5th-circuit-becoming-even-more-conservative>.

¹⁵ *Id.*

¹⁶ See, e.g., *Texas v. United States*, 809 F.3d 134 (5th Cir. 2022) (striking down the Deferred Action for Parents of Americans program, which sought to protect those who had no legal immigration status themselves but who had U.S. citizen children from deportation); see also *Texas v. Biden*, 20 F.4th 928 (2022) (striking down the Biden administration’s attempts to end the Migrant Protection Protocols (“MPP”) as unlawful agency action). These are just two examples of cases involving the Fifth Circuit where the court rules against progressive changes in immigration policy in favor of more restrictive practices and, generally, in favor of conservative states like Texas and Louisiana. See also Leopold, *supra* note 12; Press Release, America’s Voice, *supra* note 12.

¹⁷ See D’Vera Cohn, *How U.S. Immigration Laws and Rules Have Changed Through History*, PEW RSCH. CTR. (Sept. 30, 2015), <https://www.pewresearch.org/short-reads/2015/09/30/how-u-s-immigration-laws-and-rules-have-changed-through-history>; see generally DANIEL J. TICHENOR,

continues to warrant alarm. This is especially true given the increased migration in recent years, much of which has occurred through the use of the U.S.-Mexico border, and results in large numbers of non-citizens finding themselves in removal proceedings.¹⁸ When more non-citizens cross the border, more end up being placed in detention while they wait to be heard before an immigration judge.¹⁹

The increase in immigration and detention of non-citizens also comes at a time when many states are experiencing pushback from activists who fight to reduce the number of detained non-citizens and shut down detention centers in their states completely.²⁰ For instance, New Jersey passed a strong anti-detention law in 2021 and decided it will end Immigration and Customs Enforcement (“ICE”) detention completely by 2023.²¹ With other states following suit, it is possible that many ICE detention centers will close completely, limiting the availability of those centers to house non-citizens who are detained during the pendency of their removal proceedings. While

DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA (Princeton University Press, 2002), <http://www.jstor.org/stable/j.ctt7t9wt>.

¹⁸ James Barragan, *Migrant Encounters at the Border are Higher Today than They Were Before Gov. Greg Abbott’s Operation Lone Star Began*, TEX. TRIB. (Sept. 28, 2022), <https://www.texastribune.org/2022/09/28/greg-abbott-border-migrants> (demonstrating that migration at the U.S.-Mexico border has continued to rise); Catherine E. Shoichet, *The Number of Migrants Crossing the US-Mexico Border is Likely to Keep Growing. Here Are 3 Reasons Why*, CNN (Sept. 21, 2023), [https://www.cnn.com/2023/09/21/us/us-mexico-border-migrant-crossings-explainer-ccc/index.html#:~:text=The%20number%20of%20Mexican%20migrants%20has%20increased%20not%20ably%20and%20in%20July%202022%2C%20for%20example,than%20quadrupled%2C%20reaching%20nearly%2022%2C000](https://www.cnn.com/2023/09/21/us/us-mexico-border-migrant-crossings-explainer-ccc/index.html#:~:text=The%20number%20of%20Mexican%20migrants%20has%20increased%20not%20ably%20and%20in%20July%202022%2C%20for%20example,than%20quadrupled%2C%20reaching%20nearly%2022%2C000;); John Gramlich, *Monthly Encounters with Migrants at U.S.-Mexico Border Remain Near Record Highs*, PEW RSCH. CTR. (Jan. 13, 2023), <https://www.pewresearch.org/fact-tank/2023/01/13/monthly-encounters-with-migrants-at-u-s-mexico-border-remain-near-record-highs>.

¹⁹ Eunice Cho, *Unchecked Growth: Private Prison Corporations and Immigration Detention, Three Years into the Biden Administration*, ACLU (Aug. 7, 2023), <https://www.aclu.org/news/immigrants-rights/unchecked-growth-private-prison-corporations-and-immigration-detention-three-years-into-the-biden-administration#:~:text=The%20Number%20of%20Immigrants%20Detained%20Under%20the%20Biden%20Administration%20Continues,people%20in%20detention%20each%20day>.

²⁰ Brian Tashman, *Two-Thirds of Voters Want to Stop the Expansion of For-Profit Immigrant Detention*, ACLU (Jan. 12, 2022), <https://www.aclu.org/news/civil-liberties/two-thirds-of-voters-want-to-stop-the-expansion-of-for-profit-immigrant-detention>; see also Tony Marco & Tat Bellamy-Walker, *Activists Left Child-Sized Mannequins in Cages Around New York This Morning*, CNN (Sept. 29, 2020, 8:07 PM), <https://www.cnn.com/2019/06/12/us/migrant-children-protest-new-york-trnd/index.html> (outlining a protest by activists in NYC that left child-sized mannequins around the city in cages to protest the detention of minors under the Trump administration); Matt Katz, *NY Area’s ICE Detention Facilities are Emptying, with Local Immigrants Moved Across the Country*, GOTHAMIST (July 27, 2022), <https://gothamist.com/news/new-york-areas-ice-detention-facilities-are-emptying-with-local-immigrants-moved-across-the-country> (stating that the pressure to end ICE-contracted jails due to deplorable conditions led to the closure of three ICE facilities in North Jersey last year and litigation to close a fourth).

²¹ Nicole Miller & Chia-Chia Wang, *Victory: Ending ICE Detention in New Jersey*, AM. FRIENDS SERV. COMM. (Dec. 10, 2021), <https://afsc.org/news/victory-ending-ice-detention-new-jersey>.

a complete end to immigration detention would be ideal, it is highly unlikely.²² Shifts in where people are detained will likely rely on the availability of those detention facilities that remain open.²³

In 2020, the COVID-19 pandemic brought immigration courts across the country to a standstill.²⁴ For weeks, many immigration courts were completely closed,²⁵ and hearings were rescheduled to comply with social distancing requirements.²⁶ The courts turned to a practice that had been used before the pandemic—but only sparingly—of conducting remote hearings in order to avoid completely crushing the immigration system with a growing backlog of cases waiting to be adjudicated.²⁷ However, the new reliance on remote hearings exacerbated problems within immigration law and the immigration court system, particularly in connection with questions over detention and venue.²⁸ The question of which circuit court has proper jurisdiction over an appeal from an immigration court decision when the removal hearing was conducted remotely has become a central issue up for debate.²⁹ When conducting a remote hearing where the non-citizen and the judge are located in different jurisdictions, what law applies on appeal? The Immigration and Nationality Act (“INA”) does not provide a clear proper

²² While ICE has discretion over certain cases involving non-citizens and whether to grant them bond, there are some categories of non-citizens subject to mandatory detention, over which ICE has no discretion in deciding whether to grant them a bond hearing and be released from detention. 8 U.S.C. § 1226(c)(1) (2023) (“The Attorney General *shall* take into custody any alien...” demonstrating that some non-citizens fall into a mandatory category of ICE’s power to detain (emphasis added)). Therefore, while activists are pushing for a complete end to immigration detention, it is unlikely to ever be completely gone, as some non-citizens are subject to mandatory detention and any major move toward completely eradicating detention would have to contend with this statute. However, this issue is beyond the scope of this Note.

²³ Adrienne Pon, *Identifying Limits to Immigration Detention Transfers and Venue*, 71 STAN. L. REV. 747 (2019) (stating that decisions on where migrants are detained often depends on bed space and availability of detention centers in different states).

²⁴ GOV’T ACCOUNTABILITY OFF., COVID-19: IMPROVEMENTS NEEDED IN GUIDANCE AND STAKEHOLDER ENGAGEMENT FOR IMMIGRATION COURTS (Aug. 31, 2021), <https://www.gao.gov/products/gao-21-104404>.

²⁵ See, e.g., Mazin Sidahmed, *New York Immigration Court Closed as Court Staffer Tests Positive for COVID-19*, DOCUMENTED N.Y. (Mar. 23, 2020), <https://documentedny.com/2020/03/23/calls-for-closure-of-new-yorks-immigration-courts-grow-as-judge-is-tested-for-covid-19>.

²⁶ Jorge Loweree & Aaron Reichlin-Melnick, *The Impact of COVID-19 on Noncitizens and Across the U.S. Immigration System*, AM. IMMIGR. COUNCIL (Sept. 30, 2020), <https://www.americanimmigrationcouncil.org/research/impact-covid-19-us-immigration-system>.

²⁷ Press Release, U.S. Dep’t. of Just. Off. of the Inspector Gen., DOJ OIG Releases Report Examining EOIR’s Use of Video Conferencing for Immigration Hearings (Jun. 22, 2022), <https://oig.justice.gov/news/doj-oig-releases-report-examining-eoirs-use-video-conferencing-immigration-hearings>.

²⁸ Pon, *supra* note 23.

²⁹ *Access to Justice in Court Proceedings: Lessons from COVID-19 and Recommendations for New York Courts*, NYLAG, https://nylag.org/wp-content/uploads/2021/07/NYLAG_CourtsDuringCovid_WP_FINAL.pdf.

venue regulation governing immigration court hearings. The INA regulations state only that proper venue lies with the immigration court “where jurisdiction vests,” and that jurisdiction vests in the court where the Department of Homeland Security (“DHS”) files the Notice to Appear (“NTA”).³⁰ The language of these regulations is unclear and has caused confusion in determining which appeals court has jurisdiction over a non-citizen’s case.³¹ Within this issue is where this Note lies in its analysis.

II. BACKGROUND

A. *The Immigration Court Process*

The immigration court process begins when a non-citizen is apprehended, at which time they are likely to be placed into removal proceedings, also commonly known as deportation proceedings.³² Non-citizens may be apprehended for various reasons and in numerous ways, including but not limited to being arrested at their home or workplace if they are in the United States without authorization, or when they cross the border without inspection and are discovered by a CBP officer.³³ Another common way that people get placed into immigration removal proceedings is by presenting themselves to a CBP officer at the border and asking to be let into the United States to seek asylum or another form of humanitarian protection.³⁴ When the non-citizen is apprehended and placed into removal proceedings, they are issued an NTA, which tells them the date and time they need to present themselves to the court for the first out of two hearings before an immigration judge (“IJ”).³⁵ The first kind of hearing the non-citizen has is a Master Calendar Hearing (“MCH”), which is a short hearing used to review the NTA, allows the non-citizen or their attorney to respond to the charges asserted by DHS against the non-citizen stated in the NTA, and states

³⁰ 8 C.F.R. §§ 1003.20 (1997), 1003.14 (2003).

³¹ See generally *Practice Advisory: Video Hearings in Immigration Court: “Knotty” Issues of Venue and Choice of Law*, NAT’L IMMIGR. PROJECT (Dec. 21, 2022), <https://ninp.org/work/resources/practice-advisory-video-hearings-immigration-court-knotty-issues-venue-and-choice>.

³² Taylor Karam, *What Happens when an Undocumented Immigrant is Caught*, NOLO, <https://www.nolo.com/legal-encyclopedia/what-happens-when-undocumented-immigrant-is-caught.html> (last visited Oct. 8, 2023).

³³ *Know Your Rights with ICE*, IMMIGRANT DEF. PROJECT (Jan. 2018), <https://www.immigrantdefenseproject.org/wp-content/uploads/2016/12/IDP-ICE-Raids-Flyer-ENG-Jan-13-2018.pdf>.

³⁴ *Is It Legal to Cross the U.S. Border to Seek Asylum?*, INT’L RESCUE COMM. (Sept. 12, 2023), <https://www.rescue.org/article/it-legal-cross-us-border-seek-asylum#:~:text=Yes%2C%20seeking%20asylum%20is%20legal,seeking%20asylum%2C%E2%80%9D%20says%20Byrne>.

³⁵ *Asylum Manual*, IMMIGR. EQUAL., <https://immigrationequality.org/asylum/asylum-manual/immigration-court-proceedings> (last visited Sept. 18, 2023).

what forms of relief, if any, the non-citizen will be seeking.³⁶ Generally, non-detained non-citizens have the option of appearing for their hearing either in person or remotely, depending on the preferences of the judge, the attorneys, and the non-citizen.³⁷ For those being held in immigration detention, appearing remotely is the easiest and most common option, and is often the only option a non-citizen is given.³⁸

Once the non-citizen appears for their MCH, the IJ will set a date for the Individual Hearing (“IH”).³⁹ At the IH, the non-citizen has the opportunity to present evidence in support of their application for immigration relief.⁴⁰ For example, if the non-citizen is seeking to win asylum while in removal proceedings, they will have the chance to give their testimony about why they need asylum, present evidence to support that claim, bring in experts, and face cross-examination by the ICE attorney (the opposing counsel in these cases).⁴¹ After the IH concludes, the IJ will decide whether to grant the non-citizen’s application for relief, or deny it and order the non-citizen removed.⁴² If the non-citizen is ordered removed, ICE may take them into custody, or give them a date to come into the local ICE office to present themselves for deportation.⁴³ The non-citizen also has thirty days from the date of the IJ’s order to appeal the decision, if they choose to do so.⁴⁴ However, once the removal order becomes final, ICE is able to exercise

³⁶ *Id.*

³⁷ Memorandum from David L. Neal, Dir., Dep’t of Just. (Aug. 11, 2022).

³⁸ Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. L. REV. 933 (2015); see Katie Shepherd, *Immigration Courts’ Growing Reliance on Videoconference Hearings is Being Challenged*, IMMIGR. IMPACT, <https://immigrationimpact.com/2019/02/25/immigration-courts-videoconference-hearing-challenged> (last visited Oct. 8, 2023) (explaining that it has long been the practice of immigration courts to have detained individuals appear through video or telephone for their removal hearings. In New York City, for example, ICE announced without warning that detained immigrants would no longer be brought to court, and they would remain in detention to appear remotely for their hearings, leaving no other option for detained individuals.).

³⁹ *Asylum Manual*, *supra* note 35.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *When Is an Order of Removal From an Immigration Judge Final?*, NOLO, <https://www.nolo.com/legal-encyclopedia/when-is-order-removal-final.html#:~:text=Once%20you%20are%20subject%20to,deported%22%20as%20of%20that%20date> (last visited Oct. 1, 2023).

⁴⁴ *EOIR Self Help Guide, What if You Disagree with the Judge’s Decision?*, U.S. DEP’T OF JUST. (Jan. 2022), <https://www.justice.gov/eoir/page/file/1480826/download>; see also *When Is an Order of Removal From an Immigration Judge Final?*, *supra* note 43 (explaining that the IJ’s decision becomes final once the time for appeal runs out or the non-citizen waives their right to appeal); see also 8 C.F.R. § 1003.39 (2023).

discretion over when and how to remove the non-citizen, and the IJ no longer has control over the fate of the non-citizen.⁴⁵

B. The Immigration Appeals Process and the Circuit Courts

If a non-citizen or ICE attorney appeals the IJ's decision, the case will go to the Board of Immigration Appeals ("BIA").⁴⁶ The BIA typically conducts a "paper review" of the case on appeal and does not conduct actual proceedings.⁴⁷ The BIA will decide whether to overrule the IJ's decision or affirm it.⁴⁸ Regardless of which route the BIA decides to take, the non-citizen or the attorney for DHS may choose to further appeal the decision to the Circuit Court of Appeals that has jurisdiction.⁴⁹ At this point, the process becomes much more complicated for the non-citizen.

The Federal Circuit Courts are the highest courts of appeal before the Supreme Court of the United States.⁵⁰ They consist of thirteen courts, broken down by geographical location and encompassing different states within their respective jurisdiction.⁵¹ For example, New York City sits in the Second Circuit, while the Fourth Circuit consists of West Virginia, Virginia, and the Carolinas.⁵² The jurisdictional restrictions of the circuit courts is important because, while they are all bound by the decisions of the Supreme Court, they are not required to apply the exact same common law if the Supreme Court has not ruled on the issue previously.⁵³ In other words, the decisions of the Fourth Circuit are not binding on those of the Second Circuit. As a result, each circuit court has different laws, different practices, and different rules.⁵⁴ A circuit court's decision is, however, binding on the BIA and on IJs in that

⁴⁵ *Enforcement and Removal Operations*, U.S. IMMIGR. AND CUSTOMS ENF'T, <https://www.ice.gov/about-ice/ero> (last visited Sept. 29, 2023) (explaining that, after an IJ's removal order becomes final, ICE is responsible for executing that removal order).

⁴⁶ *Board of Immigration Appeals*, U.S. DEP'T OF JUST. (Sept. 14, 2021), <https://www.justice.gov/eoir/board-of-immigration-appeals>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Immigration Decision Appeals and Motions to Reopen – BIA Appeals*, UNHCR, <https://www.unhcr.org/us/media/immigration-decision-appeals-and-motions-reopen-bia-appeals> (last visited Oct. 1, 2023).

⁵⁰ *Court Role and Structure*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/court-role-and-structure> (last visited Sept. 18, 2023).

⁵¹ *Id.*

⁵² *About the Court*, U.S. SECOND CIR. (May 21, 2019), https://ww3.ca2.uscourts.gov/about_the_court.html.

⁵³ *The U.S. Court System Explained*, DEMOCRACY DOCKET (Feb. 10, 2022), <https://www.democracydocket.com/analysis/the-u-s-court-system-explained>.

⁵⁴ Micah Brown, *Procedures: Precedent and the U.S. Court System*, NAT'L AGRIC. L. CTR., <https://nationalaglawcenter.org/procedures-precedent-and-the-u-s-court-system> (last visited Nov. 22, 2023).

circuit court's jurisdiction.⁵⁵ Therefore, depending on which circuit court takes jurisdiction over an immigration court appeal, based on where the case's venue is determined to sit, the non-citizen could face significantly different laws or rules than other courts would apply.⁵⁶

The issue with this structure is that circuit court decisions may vary widely based on the political and personal beliefs of the judges. Each circuit court is made up of a panel of judges who are appointed by the President of the United States ("POTUS") and confirmed by the Senate, and the judges are appointed for life.⁵⁷ Therefore, when a particular president with strong feelings about immigration has the chance to appoint a circuit court judge, the president can massively impact immigration policy and law in an entire geographic area for years to come.⁵⁸ In this way, many circuit courts are influenced by the increased politicization of immigration issues, making immigration challenges by non-citizens more difficult to win.⁵⁹ This is where the issue of venue and the regulations determining venue become a major concern for non-citizens' access to justice and equal application of the law.⁶⁰

C. Venue

Venue is a concept in the law that governs all cases in a court.⁶¹ In the civil context, venue is typically dependent on either the personal or subject matter jurisdiction of the court, and parties can challenge venue or attempt to bring their case in the court that will be most favorable towards them.⁶² In

⁵⁵ *Asylum Manual*, *supra* note 35.

⁵⁶ Robyn Painter, Kate Mayer & Kate Matthews, *Which Court Is Binding?*, GEO. U. L. SCH. (2017), <https://www.law.georgetown.edu/wp-content/uploads/2018/07/Which-Court-is-Binding-HandoutFinal.pdf>.

⁵⁷ *Introduction to the Federal Court System*, U.S. DEP'T OF JUST., <https://www.justice.gov/usao/justice-101/federal-courts> (last visited Sept. 18, 2023).

⁵⁸ Matthew Weber, Caitlin Tremblay, Gilda Di Carli, Andrew Chung, Lawrence Hurley & Christine Chan, *Courting Change*, THOMAS REUTERS (Jan. 14, 2021), <https://fingfx.thomsonreuters.com/gfx/rngs/TRUMP-EFFECT-COURTS/010080E30TG/index.html>; *see also FAQs: Federal Judges*, U.S. CTS., <https://www.uscourts.gov/faqs-federal-judges> (last visited Sept. 29, 2021).

⁵⁹ Andrew Breiner, *How Did the Courts Become So Politicized*, LIBR. CONG. BLOGS (Sept. 21, 2021), <https://blogs.loc.gov/kluge/2021/09/how-did-the-courts-become-so-politicized> (discussing the increasing politicization of the court system, demonstrating that politics and changing political views are impacting the decisions of the courts).

⁶⁰ *Practice Advisory: Video Hearings in Immigration Court: "Knotty" Issues of Venue and Choice of Law*, *supra* note 31 (addressing the substantive and procedural issues and concerns regarding confusion over the immigration venue regulation and the lack of defining authority over where venue is vested).

⁶¹ *Venue Definition*, CORNELL L. SCH., <https://www.law.cornell.edu/wex/venue> (last visited Oct. 1, 2023).

⁶² *Jurisdiction and Venue for Lawsuits*, JUSTIA (Oct. 2022), <https://www.justia.com/trials-litigation/lawsuits-and-the-court-process/jurisdiction-and-venue/#:~:text=The%20court%20must%20have%20power,separate%20concept%20is%20called%20venue>.

the criminal context, venue is mostly dependent on the physical location of where a crime took place.⁶³ In immigration law, however, there is no clear boundary drawn of where an appeal will take place,⁶⁴ as will be discussed in greater detail below.

There are two controlling laws that determine venue for immigration proceedings: 8 C.F.R. § 1003.20, which states, “Venue shall lie at the Immigration Court where jurisdiction vests pursuant to § 1003.14”⁶⁵ and 8 U.S.C. § 1252(b)(2), which governs immigration court appeals and states that “The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings.”⁶⁶ The above-referenced 8 C.F.R. § 1003.14 states, “Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court[.]”⁶⁷ As is discussed in Section III below, neither of these laws make the determination of venue explicitly clear, leading to controversy and concerns over where jurisdiction in immigration court actually vests.⁶⁸

III. PROBLEM

The questions about where venue and jurisdiction vest for immigration proceedings are ongoing and have only become more prominent over time as the COVID-19 pandemic has made video teleconference (“VTC”) mainstream and widespread.⁶⁹ Given the ambiguity in the text of the statute, different circuit courts have taken different approaches in interpreting the meaning of the law in order to figure out whether they have the authority to hear a particular appeal arising from a removal case.⁷⁰ Some courts have called on the government to clarify the statute’s provision.⁷¹ Other courts have taken to interpreting the statute’s provision in other ways to come up with a more clear analysis for the operation of determining venue for

⁶³ Micah Schwartzbach, *Change of Venue in a Criminal Case*, NOLO, <https://www.nolo.com/legal-encyclopedia/change-venue-criminal-case.html#:~:text=The%20venue%20in%20a%20criminal,county%20where%20the%20crime%20occurred.>

⁶⁴ Pon, *supra* note 23.

⁶⁵ 8 C.F.R. § 1003.20.

⁶⁶ 8 U.S.C. § 1252(b)(2).

⁶⁷ 8 C.F.R. § 1003.14(a).

⁶⁸ See *infra* Section III.

⁶⁹ Press Release, DOJ OIG Releases Report Examining EOIR’s Use of Video Conferencing for Immigration Hearings, *supra* note 27.

⁷⁰ For a comprehensive overview of each circuit court’s opinion on this question, see *Practice Advisory: Video Hearings in Immigration Court: “Knotty” Issues of Venue and Choice of Law*, *supra* note 31.

⁷¹ See *Ramos v. Ashcroft*, 371 F.3d 948, 949 (7th Cir. 2004); *Thiam v. Holder*, 677 F.3d 299, 302 (6th Cir. 2012).

immigration appeals.⁷² The Fourth Circuit joined the split in June 2022, and the Second Circuit has become the most recent member of this split in its decision from October 2022 in *Sarr v. Garland* in which the court held that, despite the IJ sitting in New York, and the case caption and hearing transcript identifying Buffalo, New York as the location, the Fifth Circuit had proper venue because that was where the IJ “completed the proceedings.”⁷³ The court relied on the certified administrative record (“CAR”), which contained notices for four hearings—including for respondent’s MCH and IH—all of which listed the location of the hearings as being in Louisiana.⁷⁴ The court held that this constituted the IJ “completing” the proceedings in Louisiana, despite the IJ sitting in the Second Circuit.⁷⁵

This circuit split and the general confusion amongst courts in the absence of clarity from Congress is concerning, given the human impact of removal proceedings. The lack of statutory clarity creates numerous problems, primarily that it causes confusion for respondents.⁷⁶ It makes it difficult for attorneys and respondents to know what law the court will apply to their appeal, which could gravely impact their case.⁷⁷ Further, it allows for forum shopping⁷⁸ by ICE by allowing the agency to ship migrants to various parts of the country where the law will be more favorable to the agency, even if the migrant is not physically in the jurisdiction of that court.⁷⁹ Without a clear statement from Congress on this question of law, confusion and disorganization will continue to permeate the immigration court system. Without a clear statement of how the venue statute should be interpreted, non-citizens will continue to be subject to an unstable and unclear appeal system that ultimately hurts them and violates their due process rights.⁸⁰

⁷² See *Luziga v. Attorney General United States of America*, 937 F.3d 244 (3d Cir. 2019) (holding that it was the proper court to take an appeal from an IJ outside of its typical jurisdiction of NY, NJ, or Delaware if that IJ heard a case in one of the states within its jurisdiction remotely); see also *Lee v. Lynch*, 791 F.3d 1261 (10th Cir. 2015) (holding that it is the charging document that determines the hearing venue, regardless of where the IJ sits); *Llapa-Sinchi v. Mukasey*, 520 F.3d 897 (8th Cir. 2008) (holding that venue depends on where the administrative hearings were done); *Herrera-Alcala v. Garland*, 39 F.4th 233 (4th Cir. 2022) (holding that a straightforward reading of the statute demands that proper venue lies where the IJ sits).

⁷³ See *Sarr v. Garland*, 50 F.4th 326, 326 (2d Cir. 2022).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Pon, *supra* note 23.

⁷⁷ *Id.*

⁷⁸ Forum shopping is “the practice of choosing the court in which to bring an action from among those courts that could properly exercise jurisdiction based on a determination of which court is likely to provide the most favorable outcome.” *Forum Shopping*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/legal/forum%20shopping> (last visited Nov. 17, 2023).

⁷⁹ Roger Grantham, Jr., *Detainee Transfers and Immigration Judges: ICE Forum-Shopping Tactics in Removal Proceedings*, 53 GA. L. REV. 281 (2018).

⁸⁰ *Id.*

The problems with the lack of clarity in the law have only been compounded since the increased use of VTC hearings. Congress has permitted IJs to conduct removal proceedings remotely, via VTC,⁸¹ which, since the reopening of the immigration courts during the COVID-19 pandemic, has been greatly expanded and become more mainstream.⁸² Only about seventeen percent of removal proceedings were conducted via VTC in 2017; by 2021, nearly forty-six percent of hearings were conducted remotely.⁸³ In these VTC proceedings, the IJ, respondent, and counsel may participate from different locations.⁸⁴ While many positives have undoubtedly come from the expansion of VTC hearings, they also present many logistical and procedural problems, especially regarding the question of venue.⁸⁵ Essentially, as the law is written now, a non-citizen could enter the United States through Texas, be apprehended in that state, be transferred to a detention center in Virginia, and have to attend a remote hearing with a judge who is barred and sitting in New York. On its face, the law does not make clear what it means to “complete” the proceedings when dealing with a VTC hearing.⁸⁶ It does not define whether “completing” the proceedings means that the proceedings are held where the IJ sits, where the case is docketed, the physical location of the IJ during the hearings, or something else entirely.⁸⁷ The issue, then, is determining what law actually applies to their case. Is it the law of where the judge sits? Is it exclusively where the non-citizen’s NTA was filed? Or is it something else entirely? The circuit courts disagree on the answer to that question, and Congress has yet to provide further clarity.

This Note analyzes the venue conflict and proposes that the best avenue for solving the conflict is through clarity from the federal government on the

⁸¹ See 8 U.S.C. § 1229(a); see also 8 C.F.R. § 1003.25(c) (1997).

⁸² Press Release, DOJ OIG Releases Report Examining EOIR’s Use of Video Teleconferencing for Immigration Hearings, *supra* note 27.

⁸³ *Adjudication Statistics: Hearings Adjournments by Medium and Fiscal Year*, U.S. DEP’T OF JUST. (July 13, 2022), <https://www.justice.gov/eoir/page/file/1508566/download>.

⁸⁴ See e.g., *Sarr v. Garland*, 50 F.4th 326 (2d Cir. 2022) (stating that the parties to the case, appearing remotely, were based in varying jurisdictions).

⁸⁵ Press Release, DOJ OIG Releases Report Examining EOIR’s Use of Video Teleconferencing for Immigration Hearings, *supra* note 27; see also Jessica Zhang & Andrew Patterson, *New York Lawsuit Challenges Replacement of Immigration Court Hearings with Video Technology*, LAWFARE (Mar. 5, 2019, 9:00 AM), <https://www.lawfaremedia.org/article/new-york-lawsuit-challenges-replacement-immigration-court-hearings-video-technology>; see also *Featured Issue: Use of Video Teleconferences During Immigration Hearings*, AM. IMMIGR. LAWS. ASS’N (May 5, 2022), <https://www.aila.org/library/video-teleconferences-immigration-hearings#:~:text=For%20years%2C%20organizations%20have%20raised,access%20due%20process%20in%20hearings.>

⁸⁶ See generally 8 U.S.C. § 1252.

⁸⁷ See generally *id.*

relevant law.⁸⁸ In doing so, this Note will discuss several key factors that should be central to the government's decision on the best way to determine venue moving forward.⁸⁹ Essentially, this Note takes the same position as the Seventh Circuit in *Ramos v. Ashcroft*, arguing that it is up to the government to clarify the issue and provide a bright-line rule in clarifying it.⁹⁰ In the age of increased technology overtaking immigration courts, it is imperative that the federal government consider the impact that jurisdiction has on respondents' rights and their ability to be an active part of their case. More than anything, clarity is necessary so that non-citizens have knowledge and understanding of which law will be applied to their case on appeal so that they are guaranteed due process and can adequately prepare for their case appeal.⁹¹ It is crucial that the federal government step in to resolve this issue and offer constructive guidance that keeps non-citizens' rights at the forefront of the interpretation. This issue has become a pressing concern in the time of COVID-19 and other recent events in immigration law, such as the shipping of migrants to "sanctuary cities" like New York City and Chicago by politicians in Texas and Florida.⁹² It is an issue that demands a clear analysis and solution in order to avoid a grave injustice to respondents.

IV. PROPOSAL

The following is a discussion of various factors the government needs to consider when reworking 8 C.F.R. § 1003.20.

A. ICE venue-shopping and the timing of the filing of the NTA violates fundamental fairness and due process

The relevant laws have been used by ICE to choose where and when it files the non-citizen's NTA, effectively allowing ICE to practice forum-shopping to the detriment of the non-citizen.⁹³ None of the regulations specifically place a time limit on when ICE must file an NTA after the arrest of a non-citizen.⁹⁴ In practice, depending on a particular administration's

⁸⁸ See *infra* Part IV.

⁸⁹ *Id.*

⁹⁰ *Ramos v. Ashcroft*, 371 F.3d 948, 949 (7th Cir. 2004).

⁹¹ Pon, *supra* note 23.

⁹² Stephen Neukam, *Gov. Greg Abbott Sends Five More Buses of Migrants to New York*, TEX. TRIB. (Aug. 24, 2022), <https://www.texastribune.org/2022/08/24/greg-abbott-eric-adams-migrant-busing-new-york> (discussing the recent practice of Texas governor Greg Abbott of sending non-citizens to NY and other states).

⁹³ Pon, *supra* note 23.

⁹⁴ Memorandum from Asa Hutchinson, Undersecretary, Border and Transportation Security, Guidance on ICE Implementation of Policy and Practice Changes Recommended by the Department of Justice Inspector General, (Mar. 30, 2004) (available at <https://www.ilw.com/articles/2004,0929-ICE.pdf>).

immigration policies, ICE may have only seventy-two hours from the time of the detaining of a non-citizen to when they must file that non-citizen's NTA.⁹⁵ While that may appear to be a reasonable amount of time to perform such an administrative task, in practice it allows ICE to transfer the non-citizen to a detention center in another state or jurisdiction before filing the NTA.⁹⁶

There are several key concerns with allowing ICE to forum shop in this way. First, forum shopping is at least strongly discouraged in civil court cases⁹⁷ because it violates the underpinnings of fundamental fairness and due process inherent in and aspired to in the United States court system.⁹⁸ In immigration proceedings especially, the ability to forum shop can have drastic impacts on the outcome of a non-citizen's case. As briefly discussed in Part I of this Note,⁹⁹ different circuit courts have vastly different interpretations of the law, and some of them are known to be very unfavorable towards immigrants.¹⁰⁰

This concern is compounded by the fact that a handful of places—such as New York City and California, for example—have either shut down their detention centers completely or have discussed the potential of doing so, meaning that there could be fewer possible places for non-citizens to be detained.¹⁰¹ These locations seeking to distance themselves from immigration detention practices tend to sit in more immigrant-friendly circuit court jurisdictions, meaning that, when non-citizens are detained, they are less likely to be sent to the immigrant-friendly jurisdictions.¹⁰² This is demonstrated by the fact that the states who currently have the highest number of immigrant detainees are those sitting in the less-favorable

⁹⁵ Bryan Lonegan, *Immigration Detention and Removal: A Guide for Detainees and Their Families*, LEGAL AID SOC'Y (Feb. 2006), https://www.nilc.org/wp-content/uploads/2015/12/detentionremovalguide_2006-02.pdf.

⁹⁶ Pon, *supra* note 23.

⁹⁷ *Forum Shopping*, CORNELL L. SCH. LEGAL INFO. INST. (Dec. 2022), https://www.law.cornell.edu/wex/forum_shopping.

⁹⁸ Markus Petsche, *What's Wrong with Forum Shopping – An Attempt to Identify and Assess the Real Issues of a Controversial Practice*, 45 INT'L LAW. 1005 (2011).

⁹⁹ See *supra* Part I.

¹⁰⁰ See e.g., Platoff, *supra* note 14; Needham, *supra* note 12.

¹⁰¹ *NYC Closing Just-Opened Migrant Center Over Slowing Numbers*, AP NEWS (Nov. 10, 2022, 7:16 PM), <https://apnews.com/article/business-new-york-manhattan-city-immigration-6662cffc6b8fa60568816d9b83842602>; see Salma Allam, *New York City Protesters Demand Shutdown of Immigration Detention Center*, LIBERATION (Feb. 7, 2023), <https://www.liberationnews.org/new-york-city-protesters-demand-shutdown-of-immigration-detention-center>; Veronica Stracqualursi, *California to Shut Down Private Prisons and Immigrant Detention Centers*, CNN (Oct. 12, 2019), <https://www.cnn.com/2019/10/12/politics/california-law-ban-private-for-profit-prisons/index.html>.

¹⁰² Katz, *supra* note 20.

jurisdictions like the Fifth Circuit.¹⁰³ Therefore, where and when ICE decides to file the NTA could completely change the odds of a non-citizen winning their removal case.¹⁰⁴ ICE takes advantage of the lack of clarity in the law to forum shop by transferring detainees to remote locations, delaying the filing of the NTA, and claiming broad authority to place detainees in detention wherever they see fit, knowing that it will have a better chance to win its case and have favorable law on its side if it files in particular jurisdictions.¹⁰⁵

The government needs to not only be aware that this forum shopping is happening, but also explicitly state that it is not allowed. One solution to combat this practice is by setting a timing requirement for when ICE must file the NTA, which would prevent ICE from waiting to file the NTA until the non-citizen detainee is transferred elsewhere.¹⁰⁶ The law should require ICE to file the NTA when the citizen is detained in a shorter time frame (such as twenty-four hours, for example), not several days or weeks later, as it is able to do now.¹⁰⁷ A timing requirement would reduce ICE's control over the NTA filing and thus the location of the court listed on the NTA. As the practice of ICE is now, where they are able to wait to file the NTA until after a non-citizen has been detained, they are able to choose which court to bring a case to.¹⁰⁸ For example, if a non-citizen is apprehended in New York City, ICE might wait to file the NTA until the non-citizen is transferred to a detention facility in Texas, because they know that the law in Texas is more

¹⁰³ Platoff, *supra* note 14; Ian Millhiser, *The Trumpiest Court in America*, VOX (Dec. 27, 2022), <https://www.vox.com/policy-and-politics/2022/12/27/23496264/supreme-court-fifth-circuit-trump-court-immigration-housing-sexual-harrassment>; see Adam Cox & Maria Rodriguez, *The Fifth Circuit's Interventionist Administrative Law and the Misguided Reinstatement of Remain in Mexico*, JUST SEC. (Dec. 21, 2021), <https://www.justsecurity.org/79617/the-fifth-circuits-interventionist-administrative-law-and-the-misguided-reinstatement-of-remain-in-mexico>.

¹⁰⁴ See generally Millhiser, *supra* note 103; Cox & Rodriguez, *supra* note 103; see, e.g., *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2017-2022*, TRAC IMMIGR. (Oct. 6, 2022), <https://trac.syr.edu/immigration/reports/judge2022> (listing the asylum grant rates for each immigration judge in each jurisdiction in the United States, demonstrating that judges in certain jurisdictions have extremely low grant rates as compared to others); *Asylum Decisions*, TRAC IMMIGR. (Jan. 2023), <https://trac.syr.edu/phptools/immigration/asylum>.

¹⁰⁵ *Forum Shopping*, USLEGAL, <https://civilprocedure.uslegal.com/jurisdiction/forum-non-conveniens-and-forum-shopping/forum-shopping> (last visited Oct. 8, 2023) (stating that, in general, United States courts object to forum shopping because it "offends the sense of justice"); see also Gratham, *supra* note 79 (discussing ICE's practice of forum shopping to find favorable jurisdictions to hear the cases).

¹⁰⁶ Pon, *supra* note 23; see also Grantham, *supra* note 79.

¹⁰⁷ Memorandum from James R. McHenry, III, Acceptance of Notices to Appear and Use of the Interactive Scheduling System (Dec. 21, 2018), <https://www.justice.gov/eoir/file/1122771/download> (stating that jurisdiction of the court does not vest until ICE has filed the NTA, but does not explicitly state a timeline of when that filing must occur, demonstrating ICE's discretion in filing the NTA and in choosing to wait to file until they determine where the transferred detainee will be placed).

¹⁰⁸ Pon, *supra* note 23.

restrictive and anti-immigrant.¹⁰⁹ On the other hand, if a non-citizen is apprehended in Louisiana, for example—in the Fifth Circuit—and the non-citizen is transferred to a detention facility in California, ICE may choose to quickly file the NTA so that the location on it is stated as Louisiana and not California. That way the case remains under Fifth Circuit law, which will likely be more favorable toward ICE than the law in the Ninth Circuit.¹¹⁰ By setting a time limit or a specific timeframe in which ICE would have to file the NTA, the government could eliminate or at least reduce the number of instances of forum shopping by ICE.

There are a few notable issues with this approach. First, this is not necessarily going to improve the situation for non-citizens. Just because ICE would no longer be able to forum shop does not mean that the law of the jurisdiction where they are forced to file the NTA within the time limits will be more favorable to the agency. This is especially true for those who are apprehended by CBP officers shortly after or upon entering the United States without inspection. The vast majority of people who cross the border on foot are doing so at the U.S.-Mexico border.¹¹¹ In particular, most non-citizens who cross on foot are apprehended in Texas.¹¹² Therefore, a time limit forcing ICE to file an NTA within a short period of time of apprehension could mean that many non-citizens are forced to have the location of the NTA listed as Texas, which is both in the Fifth Circuit and generally unfavorable towards non-citizens, particularly for those who entered the United States without inspection.¹¹³ It could potentially mean that many non-citizens are subject to harsher laws than if the NTA were filed after they had been transferred to another jurisdiction. As of now, however, a large portion of

¹⁰⁹ See e.g., *US: Texas Targeting Migrants*, HUM. RTS. WATCH (Nov. 22, 2021), <https://www.hrw.org/news/2021/11/22/us-texas-targeting-migrants> (demonstrating that Texas tends to have very anti-immigrant policies and practices); see also Charlotte Scott, *Bill Seeks to Crack Down on Illegal Immigration into Texas*, SPECTRUM NEWS 1 (Mar. 16, 2023, 8:00 AM), <https://spectrumlocalnews.com/tx/south-texas-el-paso/politics/2023/03/16/bill-seeks-to-crack-down-on-illegal-immigration-into-texas>; *Texas v. US*, 809 F.3d 134 (5th Cir. 2022); see also *Texas v. Biden*, 20 F.4th 928 (2022).

¹¹⁰ The Ninth Circuit Court of Appeals generally tends to be more immigrant-friendly in their decisions, as evidenced, for example, by the recent Supreme Court decisions striking down Ninth Circuit decisions that gave immigrants more protections. Emma Winger, *Supreme Court Rejects Two Ninth Circuit Decisions That Protected Immigrants*, IMMIGR. IMPACT (June 2, 2021), <https://immigrationimpact.com/2021/06/02/supreme-court-rejects-protections-immigrants>.

¹¹¹ William Melhado, *Border Patrol Reports 2.4 Million Migrant Arrests at Southwest Border This Year, the Most Ever*, TEX. TRIB. (Oct. 22, 2022), <https://www.texastribune.org/2022/10/22/border-patrol-migrant-encounters>; see also Sean McMinn & Renee Klahr, *Where Does Illegal Immigration Mostly Occur? Here's What the Data Tell Us*, NPR (Jan. 10, 2019, 4:58 PM), <https://www.npr.org/2019/01/10/683662691/where-does-illegal-immigration-mostly-occur-heres-what-the-data-tell-us>.

¹¹² McMinn & Klahr, *supra* note 111.

¹¹³ Platoff, *supra* note 14.

non-citizens who are detained prior to or during their removal proceedings are transferred to detention centers in these states anyway, and thus this is unlikely to have a huge negative impact on the implications of the location on the NTA as compared to now.¹¹⁴ In general, the government needs to be aware of this practice by ICE of forum shopping through the NTA filing and of the positives and negatives associated with potential time constraints or other possible restrictions on ICE's practices. Otherwise, the government will not be able to address the issue of venue completely and effectively in a way that protects non-citizens' rights.

B. Detention centers are concentrated in anti-immigrant jurisdictions

The government must be aware that, as it currently stands, detention centers are concentrated in anti-immigrant jurisdictions,¹¹⁵ which may create problems in easily clarifying or rewriting the venue regulation. As stated above, most immigrants who are detained throughout their removal proceedings are detained in whichever detention center has available beds.¹¹⁶ These detention centers are run either by ICE or by private companies contracted by the government to hold detainees.¹¹⁷ However, as immigrants' rights activists push for change to the detention system and the use of detention centers in their states, some states are ending their contracts with private companies who run said detention centers, which can lead to their closure.¹¹⁸ While ICE has around two hundred detention centers scattered across the United States and the various federal court jurisdictions, data shows that the majority of non-citizens are detained in detention centers in states that are notoriously anti-immigrant and have harsher immigration policies at the circuit level.¹¹⁹ This means that when a non-citizen is detained in a detention center in a non-immigrant-friendly jurisdiction, the law that is applied can drastically affect the outcome of their case.¹²⁰ This is significant

¹¹⁴ *Immigration Detention Quickfacts*, *supra* note 7.

¹¹⁵ *State Map on Immigration Enforcement*, IMMIGRANT LEGAL RES. CTR., <https://www.ilrc.org/state-map-immigration-enforcement> (last visited Nov. 18, 2023).

¹¹⁶ Pon, *supra* note 23.

¹¹⁷ *Immigration Detention & Enforcement*, NAT'L IMMIGRANT JUST. CTR., <https://immigrantjustice.org/issues/immigration-detention-enforcement> (last visited October 8, 2023).

¹¹⁸ See, e.g., *State Legislation Bans on Immigration Detention*, DETENTION WATCH NETWORK, https://www.detentionwatchnetwork.org/sites/default/files/State%20Legislation%20Bans%20on%20Immigration%20A0Detention_DWN_12.16.2021.pdf (last visited Oct. 8, 2023).

¹¹⁹ *Immigration Detention Quick Facts*, *supra* note 7; see also Press Release, America's Voice, *supra* note 12 (specifically discussing MPP in the 5th Circuit but addressing the larger issues with the fifth circuit's rulings on immigration and the fact that it is a conservative court); Millhiser, *supra* note 103.

¹²⁰ *Asylum Decisions*, *supra* note 104 (with statistics of asylum denial rates by jurisdiction showing that many of the courts in the Fifth Circuit have higher denial rates). For example, El Paso-EPD has an overall denial rate of 91%. Laredo has a denial rate of 78% for unrepresented people. While these statistics

because, while ICE has discretion to detain non-citizens in certain cases, there are some cases where the agency does not have discretion in whether to release a non-citizen.¹²¹ Therefore, in the cases where detention is mandatory under the statute, ICE will have no option but to detain, and will have to send non-citizens to jurisdictions where there are detention centers and available bed space.

There have been increased movements by activists in recent years to shut down privately-run detention centers, with some state governments deciding to end their contracts with private corporations who run these centers.¹²² An example of this can be seen in the introduction of bills by activists seeking to ban intergovernmental service agreements (“IGSA”) at the state level and legislation to ban private prisons.¹²³ IGSA bans prohibit “local governments or law enforcement agencies from entering into an agreement, contract, or memorandum to detain people in federal immigration custody for civil immigration violations.”¹²⁴ Private prison bans aim to ban “any person, business, or local government entity from operating a private immigrant detention facility and prison.”¹²⁵ The goal of activists is to counteract the failure of the federal government to address the issues related to increased immigration detention and aim at the state to take action.¹²⁶ California was the first state to pass such an IGSA ban in 2017, and a private prison ban in 2019.¹²⁷ Since then, many other states, including Illinois, Maryland, New Jersey, New Mexico, New York, Oregon, Washington, and Wisconsin have introduced bills to restrict the operation of both public and private detention centers in their states.¹²⁸ These kinds of bans and activist movements have taken hold in a number of states in various forms.¹²⁹ However, it has notably been a goal primarily of democratic and progressive lawmakers and states to end immigration detention, and the movements have notably less support amongst conservative lawmakers and states.¹³⁰ For

vary based on a number of factors such as the individual IJ and the number of represented versus unrepresented immigrants, the point here is that where someone is sent and which immigration court is determined to have jurisdiction over their case could drastically impact their case outcomes, especially in asylum cases. *See id.*

¹²¹ The Attorney General has discretion to detain or release non-citizens except where required by statute to confine the non-citizen to detention. *See* 8 U.S.C. § 1226(a).

¹²² *State Legislation Bans on Immigration Detention*, *supra* note 118.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Adrian Carrasquillo, *Over 100 House Democrats Tell Biden to Halt Immigration Detention Expansion*, NEWSWEEK (Mar. 10, 2022, 1:39 PM), <https://www.newsweek.com/over-100-house->

instance, Texas and Louisiana are the two states with the highest number of immigrant detainees¹³¹ and have conservative-run governments at the state level.¹³² They are also both in the Fifth Circuit's jurisdiction.¹³³ Neither state has attempted to limit or end detention, and activist movements in these states have yet to make significant progress.¹³⁴ Therefore, as more states take action to limit the use of detention centers in their territory, it is possible that non-citizens who are detained will end up being sent to more conservative states since they will be the only option for detention.

Given this, it is important that the government recognizes that establishing a rule for how venue should be determined in immigration removal proceedings needs to consider that the physical location of a non-citizen during detention may undermine the ability of non-citizens to access equal opportunity to win their immigration case. While this may provide an easy interpretation of the statute, it could end up leaving many immigrants facing courts that are hostile towards them. In order to take a rights-focused approach to clarifying the regulation, the government should not simply state that the physical location of the non-citizen is what determines venue.

democrats-tell-biden-halt-immigration-detention-expansion-1686837; see also *Democratic Lawmakers Determined to Shut Down Several Immigration Detention Centers*, HACKING IMMIGR. L., <https://hackinglawpractice.com/democratic-lawmakers-determined-to-shut-down-several-immigration-detention-centers> (last visited Sept. 18, 2023); David Weigel, *Democrats Visit Detention Centers to Attack 'Zero Tolerance' Immigration Policy*, WASH. POST (June 23, 2018), <https://www.washingtonpost.com/news/powerpost/wp/2018/06/23/democrats-visit-detention-centers-to-attack-zero-tolerance-immigration-policy>.

¹³¹ *Immigration Detention Quick Facts*, *supra* note 7.

¹³² *Party Control of Louisiana State Government*, BALLOTPEdia, https://ballotpedia.org/Party_control_of_Louisiana_state_government (last visited Oct. 8, 2023) (showing that Louisiana is conservative); Jeffers Gromer, *Republican Prove Texas is the Most Conservative One-Party State in America*, DALLAS NEWS (Sept. 6, 2021), <https://www.dallasnews.com/news/politics/2021/09/06/republicans-prove-texas-is-the-most-conservative-one-party-state-in-america> (Texas is super conservative); Karen Brooks Harper, *Republican Victories Show Texas is Still Far from Turning Blue*, TEX. TRIB. (Nov. 9, 2022), <https://www.texastribune.org/2022/11/09/texas-election-results>.

¹³³ *U.S. Court of Appeals for the Fifth Circuit – Brief History*, U.S. FIFTH CIR., <https://www.ca5.uscourts.gov/about-the-court/circuit-history/brief-history#:~:text=The%20judicial%20districts%20of%20Mississippi,of%20the%20new%20Eleventh%20Circuit> (last visited Sept. 18, 2023).

¹³⁴ For example, Texas has even attempted to expand detention in the state, including through giving childcare licenses to immigration detention facilities. See *Texas is Trying to Give Childcare Licenses to Immigration Detention Centers*, HUM. RTS. FIRST (May 5, 2016), <https://humanrightsfirst.org/library/texas-is-trying-to-give-childcare-licenses-to-immigration-detention-centers>; see also John Burnett, *Immigrant Detention for Profit Faces Resistance After Big Expansion Under Trump*, NPR (Aug. 20, 2021, 5:00 AM), <https://www.npr.org/2021/04/20/987808302/immigrant-detention-for-profit-faces-growing-resistance-after-big-expansion-unde> (outlining some of the efforts to close down detention centers for immigrants). But see David Dayen, *Texas Activists Thought They'd Kicked ICE Out of Their County. Then a Secret Deal Happened*, IN THESE TIMES (Feb. 14, 2019), <https://inthesetimes.com/article/texas-activists-thought-theyd-kicked-ice-out-of-their-county-then-a-secret>.

C. Determining venue could lead to backlogs, which ultimately harms non-citizens

As of April 2022, the U.S. Citizenship and Immigration Services (“USCIS”) had 8.5 million pending cases, “with over 5 million of those cases pending beyond their usual processing time.”¹³⁵ In the United States, as of January 2023, there are nearly 2.1 million cases pending in the immigration courts.¹³⁶ In general, there are millions of immigrants waiting to see a judge to adjudicate their case, but there are only about 650 immigration judges in the United States and sixty-nine immigration courts.¹³⁷ This means that the average waiting time for a non-citizen in removal proceedings to be given the opportunity to stand before a judge and adjudicate their claims increases drastically. In 2021, the average wait time across the country was 934 days—over two and a half years.¹³⁸ In the fiscal year 2023, the average wait time was 762 days.¹³⁹

These backlogs ultimately hurt non-citizens in removal proceedings, as it takes longer and longer for them to be able to adjudicate their case before an IJ. This leaves non-citizens in limbo for long periods of time—months or years—and has “enormous implications for themselves, their families, [and] employers.”¹⁴⁰ Many applications for relief require adjudication of cases to access work permits and other benefits, and courts can place peoples’ applications essentially “on hold” until the non-citizen has moved forward with their case.¹⁴¹ For instance, someone applying for asylum defensively—

¹³⁵ Marisol Hernandez, *Immigration Backlogs and Congressional Funding*, BIPARTISAN POL’Y CTR. (Oct. 6, 2022), <https://bipartisanpolicy.org/explainer/immigration-backlogs>.

¹³⁶ *Backlog of Pending Cases in Immigration Courts as of Jan 2023*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php (last visited Sept. 18, 2023).

¹³⁷ *Office of the Chief Immigration Judge*, U.S. DEP’T OF JUST., <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios#:~:text=OCIJ%20provides%20overall%20program%20direction,adjudications%20centers%20throughout%20the%20Nation> (last visited Nov. 22, 2023).

¹³⁸ *Average Time Pending Cases Have Been Waiting in Immigration Courts as of Jan 2023*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog_avgdays.php (last visited Nov. 22, 2023).

¹³⁹ *Id.*

¹⁴⁰ Muzaffar Chishti & Julia Gelatt, *Mountain Backlogs Undermine U.S. Immigration System and Impede Biden Policy Changes*, MIGRATION POL’Y INST. (Feb. 23, 2022), <https://www.migrationpolicy.org/article/us-immigration-backlogs-mounting-undermine-biden>.

¹⁴¹ *The 180-Day Asylum EAD Clock Notice*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Aug. 2023), <https://www.uscis.gov/sites/default/files/document/notices/Applicant-Caused-Delays-in-Adjudications-of-Asylum-Applications-and-Impact-on-Employment-Authorization.pdf> (explaining the asylum 180-time clock for applying for a work permit); see also David H. Nachman, Michael Phulwani & Ludka Zimovcak, *Five Things Asylum Applicants Should Know About the 180-Day Asylum EAD Clock*, NACHMAN PHULWANI ZIMOVCAK L. GRP. P.C., https://visaserve.com/global_pictures/fivethingsasylumapplicantsshouldknowaboutthe180-dayasylumeadclock-150515163256-lva1-app6891.pdf (last visited Sept. 29, 2023).

meaning that they are already in removal proceedings and are using an asylum application as a method for relief and defense against removal—is allowed to apply for a work permit after 180 days.¹⁴² The clock “starts” on the day they file their asylum application form, but can be “stopped” if they delay their case in any way, including if they ask the IJ at their MCH for more time to look for an attorney—something that is within the rights of the non-citizen and within the discretion of the IJ.¹⁴³ At the MCH, the IJ will set a new date if the non-citizen is granted extra time, but the clock on the work permit stops for that duration.¹⁴⁴ Therefore, while the extra time may be helpful for finding an attorney or putting an application together ahead of the next MCH, long backlogs in court could mean the non-citizen will not be able to access the court again for months.¹⁴⁵ They could then also be prevented from applying for a work permit until they are able to access the court and set a date for their IH.¹⁴⁶

¹⁴² *The 180-Day Asylum EAD Clock Notice*, *supra* note 141.

¹⁴³ *Id.* (discussing the delay and time clock); see also Dagmar R. Myslinska, *What Will Happen at Your Master Calendar Hearing*, NOLO, <https://www.nolo.com/legal-encyclopedia/what-will-happen-at-your-master-calendar-hearing.html> (last visited Oct. 18, 2023) (explaining that a non-citizen can ask for more time at their initial MCH).

¹⁴⁴ *Work Permits-Resources for Asylum Workers*, ASYLUM SEEKER ADVOC. PROJECT, <https://help.asylumadvocacy.org/work-permits/#problems-delay> (last visited Oct. 1, 2023) (stating that there are “different reasons why your clock could be stopped”); *The 180-Day Asylum EAD Clock Notice*, *supra* note 141 (listing a variety of events that may stop the asylum “clock,” including if the non-citizen in removal proceedings asks the immigration court for their case “to be continued” so they can get an attorney or if the attorney or non-citizen asks “for additional time to prepare the case”). Given the increased immigration court backlogs, it is becoming harder to find an attorney, which is causing more non-citizens to have to ask for more time to find an attorney, pushing back their eligibility date to apply for their EAD. Therefore, where venue is established can impact the ability of a non-citizen to support themselves by getting a work permit if there are long backlogs in their particular jurisdiction. See Chelsea Versteegen, *An Overwhelmed Immigration System is Facing a Shortage of Attorneys Amid a Growing Backlog of Cases*, BORDERLESS MAG. (Oct. 13, 2022), <https://borderlessmag.org/2022/10/13/an-overwhelmed-immigration-system-is-facing-a-shortage-of-attorneys-amid-a-growing-backlog-of-cases>; see also Felipe De La Hoz, *Lawyers Struggle to Make Headway With Growing Immigrant Backlog*, ABA J. (Nov. 23, 2022, 11:29 AM), <https://www.abajournal.com/web/article/lawyers-struggle-to-make-headway-with-growing-immigrant-backlog>; Hurubie Meko, *NY Immigration Court Backlogs May Grow with New Migrant Influx*, N.Y. TIMES (Nov. 3, 2022), <https://www.nytimes.com/2022/11/03/nyregion/ny-immigration-courts-migrants.html> (discussing how the shipping of thousands of migrants to New York—despite these migrants having been detained in other states such as Texas and Florida—has contributed to massive backlogs in the New York immigration courts and added to the chaos and difficulties of these migrants to obtain counsel and fight their case).

¹⁴⁵ *A Mounting Asylum Backlog and Growing Wait Times*, TRAC IMMIG. (Dec. 22, 2021), <https://trac.syr.edu/immigration/reports/672> (stating that the wait for a MCH was an average of 1,136 days in certain cases).

¹⁴⁶ *The Asylum Clock and Employment Authorization for Asylum Applicants Frequently Asked Questions*, NAT’L IMMIGRANT JUST. CTR. (Nov. 2016), https://immigrantjustice.org/sites/default/files/content-type/resource/documents/2017-01/Appendix%20N%20-%20EAD%20FAQ_01%202017-final.pdf; Aditi Shah, *Without Access to Counsel, Detained Immigrants Face Increased Risks of Prolonged Detention and Unlawful Deportation*,

Additionally, the inability to get before a judge in a short amount of time especially harms those in detention.¹⁴⁷ Conditions in immigration detention centers are incredibly atrocious.¹⁴⁸ Non-citizens face “squalid conditions, overcrowding, cold temperatures, inadequate medical care, and even tragic deaths” in detention.¹⁴⁹ Prolonged detention for those who are in jurisdictions where there are significant court backlogs subjects non-citizens in detention to these conditions for longer periods of time, putting them at greater risk of health issues and even death.¹⁵⁰ Thus, enabling detained immigrants to appear before an IJ is incredibly important. This is something the government must keep in mind to be able to protect immigrants’ rights and their health.

Further, long backlogs make it incredibly difficult for non-citizens to find representation.¹⁵¹ There is a shortage of immigration attorneys in the United States, and this problem has only been worsening in recent years.¹⁵² Additionally, with changing immigration policies under the Trump administration and the immigration court closures during COVID-19, many cases that should have been adjudicated back in 2020 are only now on the docket to be heard by a judge.¹⁵³ This means that, as more immigrants are coming to the United States, they are having a harder time finding immigration attorneys to represent them at their hearings as attorneys are overwhelmed and burnt out.¹⁵⁴ This is a massive problem for non-citizens, and especially those in detention. “People in immigration detention without lawyers prevailed in only three percent of their cases” and those who have representation are “3.5 times more likely to be granted bond and up to 10.5 times more likely” to win their immigration case in removal proceedings.¹⁵⁵

ACLU, <https://www.aclu.org/news/immigrants-rights/without-access-to-counsel-detained-immigrants-face-increased-risks-of-prolonged-detention-and-unlawful-deportation> (last visited Oct. 8, 2023).

¹⁴⁷ See *Immigration Detention is Harmful to Health – Alternatives to Detention Should be Used*, WORLD HEALTH ORG. (May 4, 2022), <https://www.who.int/europe/news/item/04-05-2022-immigration-detention-is-harmful-to-health—alternatives-to-detention-should-be-used#:~:text=The%20longer%20migrants%20are%20detained,and%20support%20are%20often%20missing> (“The longer migrants are detained, the worse the effects on their mental health.”).

¹⁴⁸ *Conditions in Migrant Detention Centers*, AM. OVERSIGHT (May 23, 2023), <https://www.americanoversight.org/investigation/conditions-in-migrant-detention-centers>.

¹⁴⁹ *Id.*

¹⁵⁰ *Immigration Detention is Harmful to Health—Alternatives to Detention Should Be Used*, *supra* note 147.

¹⁵¹ Versteegen, *supra* note 144.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Nicholas Turner & Erica Bryant, *New York Could Become the First State to Provide the Right to Legal Representation in Immigration Court*, VERA INST. (Nov. 30, 2022), <https://www.vera.org/news/new-york-could-become-the-first-state-to-provide-the-right-to-legal-representation-in-immigration-court>.

For non-detained immigrants, “60 percent with lawyers win their cases compared to 17 percent of those without a lawyer.”¹⁵⁶ Those who are detained face greater difficulties not only winning their cases generally but also in finding a lawyer.¹⁵⁷ This issue will be discussed in greater detail below.¹⁵⁸

The difficulties associated with the increasing backlogs in immigration courts is a lesson on what could happen if the government does not tread carefully in determining the proper venue for removal proceedings. Simply saying that the venue will be set where the non-citizen is detained could cause a concentration of detained immigrants in certain courts, leading to greater backlogs in those courts and causing immigrants to face long wait times, difficulties accessing legal counsel, and threats to their overall well-being.

D. Venue confusion makes it harder for immigrants to find representation

The government must understand the difficulties faced by those in detention in finding legal representation and how this could be exacerbated by the venue conflict. Immigrants who are in detention struggle to find representation, which ultimately hinders their ability to win their case.¹⁵⁹ Unlike in criminal court cases, non-citizens in removal proceedings are not generally entitled to have representation with them at immigration hearings.¹⁶⁰ This means that non-citizens are on their own when it comes to finding representation, and this is made especially difficult for those in detention with limited resources and limited ability to search for lawyers.¹⁶¹ Finding an attorney while in detention is even more challenging when non-citizens are moved to remote locations and detention facilities outside their place of residence.¹⁶² Oftentimes, lawyers are unable to continue

¹⁵⁶ *Id.*

¹⁵⁷ Emma Winger & Eunice Cho, *ICE Makes It Impossible for Immigrants in Detention to Contact Lawyers*, ACLU (Oct. 29, 2021), <https://www.aclu.org/news/immigrants-rights/ice-makes-it-impossible-for-immigrants-in-detention-to-contact-lawyers>.

¹⁵⁸ See *infra* Part IV(D).

¹⁵⁹ Winger & Cho, *supra* note 157.

¹⁶⁰ 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#:~:text=Are%20immigrants%20facing%20deportation%20entitled,can't%20afford%20it%20themselves>.

¹⁶¹ Winger & Cho, *supra* note 157.

¹⁶² Kyle Kim, *Immigrants Held in Remote ICE Facilities Struggle to Find Legal Aid Before They're Deported*, L.A. TIMES (Sept. 28, 2017), <https://www.latimes.com/projects/la-na-access-to-counsel-deportation/#:~:text=About%2030%25%20of%20detained%20immigrants,legal%20aid%20was%2056%20miles>.

representing someone if they are moved to a far-away location, especially depending on what jurisdiction is determined to be the right one to take a case.¹⁶³ When ICE sends a non-citizen far away, perhaps to a different time zone and under a court with different laws, the non-citizen's lawyer may not feel that they can represent the non-citizen to the best of their ability or because the remote location makes it far too difficult to remain in contact with the non-citizen and continue gathering evidence in their case.¹⁶⁴

Given these difficulties in representing people in detention, it is important that the government understand how the venue conflict could cause attorneys to be forced to adjust to and learn the laws of the new jurisdiction or give up representing a non-citizen who has been moved outside of the attorney's typical jurisdiction. If an attorney feels they cannot represent someone sufficiently and chooses to no longer represent the client, the non-citizen will be forced to find a new attorney from the confines of detention—a task that has proven near impossible.¹⁶⁵

E. Motions to Change Venue are difficult to win

Respondents should have a say in where their case is brought. As previously mentioned, there are many factors that can affect a respondent's case and their probability of winning. Other factors include whether the respondent has family and friends nearby, whether they are in a community that shares aspects of their culture, and whether they generally have support around them when they go into removal proceedings.¹⁶⁶ Beyond those factors, respondents should be able to have a say in where their case is brought, even when their hearings are remote. If ICE can decide when and where to file an NTA in an attempt to bring a case before a particular

¹⁶³ Pon, *supra* note 23.

¹⁶⁴ *Id.*; see also *Legal Organizations Sue ICE for Illegally Preventing Attorneys from Communicating with Detained Immigrants in Four States*, AM. IMMIG. COUNCIL (Oct. 13, 2022), <https://www.americanimmigrationcouncil.org/news/legal-organizations-sue-ice-illegally-preventing-attorneys-communicating-detained-immigrants#:~:text=WASHINGTON%20%E2%80%94%20Several%20legal%20services%20organizations,Louisiana%2C%20Texas%2C%20and%20Arizona> (discussing a lawsuit filed regarding the restriction of access to detained clients in TX, LA, FL, and Arizona); Adriel Orozco, *Remote Adjudication Centers: The Latest Threat to Migrants' Due Process Rights*, N.M. IMMIGRANT L. CTR., <https://www.nmiloc.org/our-blog/blog-post-title-one-abmsr-62hzc-s98tr-thbnz-jgdha-4hg3r?locale=en> (last visited Oct. 18, 2023).

¹⁶⁵ Winger & Cho, *supra* note 157.

¹⁶⁶ Cassandra Bailey, Amanda Venta, Jorge G. Varela, Temilola Salami, Chelsea Ratcliff & Jeffrey Gardner, *What Helps Immigrants Deal with Deportation Proceedings?*, AM. PSYCH. ASS'N (Aug. 26, 2021), <https://www.apa.org/pubs/highlights/spotlight/issue-221>; see also Cassandra A. Bailey, Amanda Venta, Jorge Varela, Temilola Salami, Chelsea Ratcliff & Jeffrey Gardner, *Risk and Protective Markers for Well-Being in Latinx Immigrants in Removal Proceedings*, 45 L. HUM. BEHAV. 179 (2021) (discussing the importance of support for respondents' mental health).

adjudicator, non-citizens should be afforded the same opportunity.¹⁶⁷ One of the only ways that respondents might bring a case within their desired jurisdiction is through the filing of a Motion to Change Venue.¹⁶⁸ However, Motions to Change Venue can be difficult to win.¹⁶⁹ In order to be granted a Motion to Change Venue, the respondent must show “good cause.”¹⁷⁰ “Good cause” is determined by a balancing of a variety of factors such as “administrative convenience, the [non-citizen’s] residence, the location of witnesses, evidence and counsel, expeditious treatment of the case, and the cost of transporting witnesses and evidence to a new location.”¹⁷¹

“Good cause” does not typically include the argument that the law in a particular jurisdiction is more favorable to a non-citizen.¹⁷² If the non-citizen has no other mitigating factors warranting the granting of a Motion to Change Venue, they are unlikely to win on such an argument. Further, even if a change of venue is eventually granted, the Department of Justice (“DOJ”)’s policy states that “the assigned Immigration Judge should make every effort, consistent with procedural due process requirements, to complete as much of the case as possible in the time available.”¹⁷³ Thus, the IJ in the original jurisdiction must decide as much of the case as possible, including the “issue of deportability, removability, or inadmissibility” before the case gets transferred.¹⁷⁴ Once the case is transferred, the new IJ “is not free to hear the case *de novo*,” meaning that the previous IJ’s decision will hold despite the transfer of the case.¹⁷⁵ Therefore, once ICE transfers a non-citizen and files their NTA, many of the important decisions in the case could be decided by the judge in that jurisdiction, regardless of whether the non-citizen is able to change venue. Thus, the non-citizen, unlike ICE, has no ability to forum shop by filing a Motion to Change Venue.¹⁷⁶ This places the non-citizen at a

¹⁶⁷ Pon, *supra* note 23.

¹⁶⁸ *Information on Address Changes and Motions to Change Venue*, U.S. DEP’T OF JUST., <https://www.justice.gov/eoir/page/file/1480756/download#:~:text=YOU%20NEED%20TO%20CHANGE%20COURTS,the%20Department%20of%20Homeland%20Security> (last visited Sept. 18, 2023).

¹⁶⁹ *The Freedom of Information Act*, U.S. DEP’T OF STATE, <https://foia.state.gov/learn/foia.aspx> (last visited Sept. 18, 2023).

¹⁷⁰ See 8 C.F.R. § 1003.20; see also *Lovell v. I.N.S.*, 52 F.3d 458 (2d Cir. 1995).

¹⁷¹ *Lovell*, 52 F.3d at 460.

¹⁷² *Id.* at 460 (stating that the non-citizen must show “good cause” to win on a Motion to Change Venue); see 8 C.F.R. § 1003.20.

¹⁷³ Memorandum from The Office of the Chief Immigration Judge, Operating Policy and Procedure Memorandum 01-02—Changes in Venue (Oct. 9, 2001), <https://immpolicytracking.org/media/documents/Venue.pdf> (discussing operating policies and procedures regarding changes of venue).

¹⁷⁴ The Office of the Chief Immigration Judge, *supra* note 137, at 4.

¹⁷⁵ *Id.* (discussing operating policies and procedures for motions to change venue).

¹⁷⁶ See Grantham, Jr., *supra* note 79 (discussing ICE’s use of the NTA to forum-shop to more favorable jurisdictions in comparison to detainee’s lack of ability to do the same).

great disadvantage and goes against the ideals of fundamental fairness that are inherent in the court system and due process.¹⁷⁷

Further, the IJ who has the original jurisdiction over a case in removal proceedings is the person who decides how to rule on a Motion to Change Venue.¹⁷⁸ This decision is based primarily on the IJ's discretion, meaning that an IJ could arbitrarily decide not to grant a Motion to Change Venue for a non-citizen even where the non-citizen has shown "good cause."¹⁷⁹ Once an IH¹⁸⁰ has started, Motions to Change Venue are extremely disfavored and the IJ who makes the decision on the Motion to Change Venue is supposed to get through as much of the merits of a case as possible before it is transferred.¹⁸¹ These procedures harm the non-citizen, as the possibility of them winning in their motion to move their case can be very unlikely depending on where the original jurisdiction is vested on the case.¹⁸²

Given that Motions to Change Venue are difficult to win, it would make sense that in the age of technology and COVID-19, attorneys could appear electronically or remotely for their hearings. However, this is not always the case. In a Freedom of Information Act ("FOIA")¹⁸³ production on "Immigration Court Adjudication of Motions for Telephonic or Video Appearance" filed by the Catholic Legal Immigration Network, Inc. ("CLINIC"), it was discovered that Motions to Appear via Video Conference or Telephone are also not always easily granted.¹⁸⁴ For example, forty-eight

¹⁷⁷ David Hudson, *How Due Process Ensures Fairness and Protects from Governmental Overreach*, FIRE (Nov. 1, 2022), <https://www.thefire.org/news/how-due-process-ensures-fairness-and-protects-governmental-overreach> (fundamental fairness means that "the government must treat an individual according to rules and procedures.").

¹⁷⁸ *Change of Venue for Legal Proceedings in Immigration Court*, JUSTIA, <https://www.justia.com/immigration/deportation-removal/change-of-venue-in-immigration-court/#:~:text=The%20judge%20must%20review%20the,has%20not%20already%20been%20delayed> (last visited Sept. 18, 2023).

¹⁷⁹ *Id.*

¹⁸⁰ An "IH" in immigration court refers to a non-citizen's individual hearing, where evidence in support of and against the non-citizen's application for relief is presenting before an IJ and the ICE attorney and non-citizen's attorney can do direct exam and cross exam on any witnesses. *Merits Hearings in Legal Proceedings in Immigration Court*, JUSTIA (Oct. 2022), <https://www.justia.com/immigration/deportation-removal/merits-hearings>.

¹⁸¹ The Office of the Chief Immigration Judge, *supra* note 137 (discussing operating policies and procedures regarding changes of venue).

¹⁸² *Id.*

¹⁸³ The Freedom of Information Act ("FOIA") provides the right to any person to "request access to federal agency records or information except to the extent the records are protected from disclosure by any of nine exemptions contained in the law or by one of three special law enforcement record exclusions." *The Freedom of Information Act*, *supra* note 169.

¹⁸⁴ CATHOLIC LEGAL IMMIGR. NETWORK, INC., KEY TAKEAWAYS FROM FREEDOM OF INFORMATION ACT REQUEST ON IMMIGRATION COURT ADJUDICATION OF MOTIONS FOR TELEPHONIC OR VIDEO APPEARANCE (last updated Oct. 2, 2019) (available at: <https://www.cliniclegal.org/sites/default/files/2019-12/takeaways-from-ta-and-tv-requests-foia.pdf>).

percent of these motions in Otay Mesa, California were denied for those detained, while in Atlanta, Georgia thirty-two percent of these motions were denied.¹⁸⁵ Non-detained respondents in the immigration court in Imperial, California had a denial rate as high as ninety percent for these motions.¹⁸⁶ On the other hand, there are immigration courts with incredibly high grant rates for these motions, with some being as high as ninety-eight percent of motions granted.¹⁸⁷

The venue of one's case can greatly impact an individual's ability to attend their hearing and, as discussed, retain an attorney.¹⁸⁸ While non-citizens may file Motions to Change Venue to where they are residing, these motions are in no way guaranteed to be granted.¹⁸⁹ If their Motion to Change Venue is denied, their next option might be to appear telephonically or by video, but these motions are also not that simple to win.¹⁹⁰ Therefore, respondents may be at a huge disadvantage depending on where and when ICE files their NTA and argues that jurisdiction vests.

If the government is going to clarify the regulation at issue in this Note, the government must keep in mind these facts about the ability of non-citizens to change venue or appear telephonically and the impact this could have on the outcome of their case and their ability to obtain counsel.

V. CONCLUSION

Immigration courts are an amalgamation of complex processes and procedures which work together often at the expense of non-citizens seeking safety, opportunity, and a better life overall. Section 1252(b)(2) in 8 U.S.C and 8 C.F.R. § 1003.20, which state the relevant language regarding proper venue for an immigration hearing, are vague, unclear, and unworkable.¹⁹¹ The statutes' failure to set clear procedures and definitions of where proper venue is established for an individual's case to be played out allows ICE to take advantage of non-citizens in removal proceedings. This practice allows

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* (Kansas City, MO has 98% grant rate for telephonic appearances).

¹⁸⁸ See, e.g., *Where You Live Impacts Your Ability to Obtain Representation in Immigration Court*, TRAC IMMIGR. (Aug. 7, 2017), <https://trac.syr.edu/immigration/reports/477> (demonstrating that venue has a large impact on one's ability to access representation as there is a shortage of qualified immigration attorneys in many areas).

¹⁸⁹ See Memorandum from MaryBeth Keller, Chief Immigration Judge, Office of the Chief Immigration Judge, U.S. Dep't of Justice (Jan. 17, 2018) (discussing procedures for Motions to Change Venue and stating that these motions are generally disfavored and limited in availability); see also 8 C.F.R. § 1003.20(b) (stating that an IJ "may change venue" upon a showing of "good cause," thus demonstrating that these motions are within the discretion of the IJ and not guaranteed to be granted (emphasis added)).

¹⁹⁰ CATHOLIC LEGAL IMMIGR. NETWORK, INC., *supra* note 184.

¹⁹¹ *Practice Advisory: Video Hearings in Immigration Court: "Knotty" Issues of Venue and Choice of Law*, *supra* note 31.

ICE to forum shop and bring their cases within a jurisdiction where the law is more unfavorable to non-citizens. This is an egregious practice that must be stopped or at least limited to enable non-citizens in removal proceedings the same opportunity to have a say in where their removal proceedings take place.

To avoid confusion and forum shopping, which harms the non-citizen, the government must interfere and lend a hand to clarifying the statute, either by rewriting the language completely or by establishing a binding clarification. In doing so, it is important that the government keeps the rights of non-citizens at the forefront of the process and the language. This Note proposes that, in fixing the venue issue, the federal government must take into account several realities, including but not limited to the fact that ICE forum shops, it is difficult for non-citizens to find representation, detention centers are concentrated in anti-immigrant jurisdictions, backlogs ultimately harm non-citizens, and Motions to Change Venue and Motions to Appear remotely are extremely difficult to win. If the federal government provides clarification that is clear and supportive of immigrants' rights, while keeping the procedure and the determination of venue fair for all parties involved, this problem can be ameliorated.