SCOTUS ON IMMIGRATION: A REVIEW OF RECENT DECISIONS & WHAT'S TO COME

THE CARDOZO JOURNAL OF EQUAL RIGHTS AND SOCIAL JUSTICE SYMPOSIUM
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MS. HEIDI SANDOMIR: [G]ood evening, everyone. Thank you so much for coming. My name is Heidi Sandomir, and I'm the Editor-in-Chief of the Cardozo Journal of Equal Rights and Social Justice at the Benjamin N. Cardozo School of Law. It is my pleasure to welcome you all to our fall symposium, SCOTUS on Immigration: A Review of Recent Decisions and What's to Come.

We will begin tonight by introducing the event, the journal, and our speakers. We will move into our main discussion, moderated by Professor Mauricio Noroña, with opportunities to ask questions throughout.

Tonight, we invite you to listen and to learn from our esteemed panelists, and to take this opportunity to ask questions and engage with the implications of these recent developments in immigration law.

For those attorneys attending today who wish to receive New York State CLE credit for our program, please record all attendance verification codes announced during the program. In order to receive your CLE credits, you must report all such codes on our online affirmation form that will be distributed to you in our Zoom chat. Please contact us at Cardozo.ERSJ@gmail.com with any questions. We will also be providing our email address in the chat.

Now, first let me introduce you to our journal. The Cardozo Journal of Equal Rights and Social Justice, which is formerly the Journal of Law and Gender, has been a pioneering publisher of social justice related legal scholarship for over twenty years. The journal publishes three issues per year with articles and notes that address a broad range of gender, sexual orientation, race, and diversity-based topics and reflects interdisciplinary views on legal issues relating to immigration law, antiracism, human rights, international law, family law, civil rights, criminal law, and employment law. We also publish an annotated legal bibliography every issue. The journal sponsors annual symposia on topical issues featuring leading academics, activists, and practitioners.

In addition to this fall symposium, we will be co-hosting a symposium in the spring with the Cardozo International Comparative Law Review on the topic of queer liberation.

The journal is available on LexisNexis, Westlaw, HeinOnline, and hundreds of library collections, as well as through our website, CardozoERSJ.com.

This symposium would not be possible without some very important people to whom we are very grateful. A special thank you goes to OUTLaw, the Cardozo LGBTQIA+ student association, Cardozo for Immigrants' Rights and Equality, and the Kathryn O. Greenberg Immigration Justice Clinic at Cardozo.

We also want to thank the office of special events, Jacklyn Tavarez, Senior Director of Finance and Administration, Peter Walsh, CLE certification administrator, and [Professor] Betsy Ginsberg, the faculty advisor of this journal.

Last, I want to personally thank the team of incredible individuals who have worked tirelessly to make this symposium a success, despite the significant obstacles we have worked to overcome, and to whom I am so grateful for their efforts, their time, and their meticulous attention to detail. Thank you very much, Lindsay Brocki, our Managing Editor, Anda Totoreanu, one of our Online Submissions Editors, Calli Schmitt, our Senior Notes Editor, and Davis Villano, our Executive Editor, to whom I will now give the floor. Thank you all very, very much for your hard work. And, Davis, I now turn. . .

MR. DAVIS VILLANO: Hello, everyone. On behalf of CJERSJ, we're excited to welcome you all and our incredible panelists here today. My name is Davis Villano. I'm the current [] Executive Editor, of CJERSJ. I want to take a moment to thank all of our panelists for agreeing to speak on these issues, as well as our wonderful team that Heidi just mentioned, who have been working hard to prepare for today's discussion, and a special thanks to our Editor-in-Chief, Heidi Sandomir.

During today's symposium, our panelists will discuss their thoughts and reactions to recent Supreme Court decisions as they relate to U.S. immigration law, where we've been and where we are headed. We've assembled a panel of legal experts from a variety of professional backgrounds, and we hope to have a dynamic and intersectional conversation on the state of American immigration law.

I wanted to introduce Professor Mauricio Noroña. Professor Mauricio Noroña is a visiting Clinical Assistant Professor of Law in the Kathryn O. Greenberg Immigration Justice Clinic, where he supervises clinic students (like myself, last year) on individual and impact litigation matters and drives large-scale immigration policy advocacy projects.

Before joining the clinic, Professor Noroña was a supervising attorney at African Services Community, ASC, where he led the team providing comprehensive legal services to immigrants and asylum seekers in New York City. At ASC, he coordinated response strategies to emergent legal challenges to immigration law, helped develop an aggressive post-order practice, and expanded the organization's community and social media legal education outreach.

Professor Noroña received his JD from CUNY School of Law in 2010. While at CUNY, he was a Hayward Burns fellow in civil rights and human rights. His academic research focuses on immigration enforcement. Thank

you, Professor Noroña, for moderating our discussion today, and we'll give the floor to you.

MR. NOROÑA: Thank you, Davis. I would have truncated the introduction significantly. I'm sorry about that. So, thank you, also, to the members of the Cardozo Journal of Equal Rights and Social Justice, also to [OUTLaw and Cardozo for Immigrants' Rights and Equality] for sponsoring this event. I want to be as efficient as possible, since we all want to hear from these amazing panelists, whom I'll introduce in a second. So, I'll get started.

Both in the last term and the current term, the Supreme Court decided or will decide a number of cases with far-reaching impact on immigration law and policy. These cases feature issues of such consequences whether certain detained non-citizens can seek a bond hearing, the parameters of border policy, the shrinking role of the federal courts in overseeing the actions of immigration agencies, and the scope of the executive's authority in the way that it exercises and executes immigration law.

First and foremost, these cases have a significant impact on the lives of individuals and families who are migrating or will migrate or have migrated to the U.S. They also affect the practice of immigration law, and they can have an impact on other areas, including administrative and constitutional law.

To make sense of these cases and the impact of the underlying issues, we have an amazing panel of lawyers who engage with immigration law from different approaches. So, with us, we have Claudine-Annick Murphy, who's a Staff Attorney with the Legal Aid Society in their immigration law unit, where she works on the youth project. Claudine works primarily in removal defense cases for young people, including removal proceedings and in guardian and custody proceedings in family court.

We also have Julie Dona who's a Supervising Attorney at the Legal Aid Society's immigration law unit, where she specializes in federal court litigation. Julie has published several articles on immigration issues, including the legal standards governing *Matter of Joseph* custody hearings and the intent requirement for relief under the conventions against torture.

We also have Angelo Guisado, who's a Senior Staff Attorney at the Center for Constitutional Rights, where he specializes in government misconduct, racial justice, and immigrants' rights issues. His practice currently focuses on challenging oppressive state power and the denial of migrant rights at the U.S. Mexican border.

We also have with us Victoria Jeon, who's a Staff Attorney at the UnLocal Inc. They graduated from Cardozo in 2020 and was a member of Cardozo's OUTLaw during all three years of law school. Victoria became

an Equal Justice Works Fellow from 2020 to 2022 with the UnLocal Equal Justice Works organization.

We also have Professor Peter Markowitz, who's the Associate Dean of Equity in Curriculum and Teaching. He's a Professor of Law and is the Founding Faculty Member and Co-Director of the Kathryn O. Greenberg Immigration Justice Clinic. His scholarship focuses on immigration and constitutional law.

And, last, but certainly not least, we have Professor Lindsay Nash, who's an Associate Professor of Law at Cardozo. She teaches and co-directs the Kathryn O. Greenberg Immigration Justice Clinic, and her scholarship focuses on immigration enforcement and access to justice issues in the immigration context.

So, the way that we've structured this conversation is that each of our panelists is going to give us a run down of one of six Supreme Court cases chosen for discussion, after which I will follow up with a few questions, and you can send in your questions through the chat, and these questions are directed at the panelists, but other panelists may also weigh in. We have a lot to cover, but we'll try to leave some time at the end for a few open-ended questions from the audience on any particular case. I know that Davis is also going to step in at some point to give us the CLE code for those who need that credit.

So, I want to get started with a case of huge importance for individuals who are facing immigration detention. We're going to hear from Julie Donna on *Johnson v. Arteaga-Martinez*, which is a 2022 case. Julie, whenever you are ready, please go ahead.

MS. JULIE DONA: Thank you, Mauricio, and good evening, everyone. I'm going to speak for a minute about *Johnson v. Arteaga-Martinez*, which is a case that was decided in June of [2022]. It's an immigration detention case, and the basic holding of this case is that the Immigration and Nationality Act's post-order detention statute does not contain an implicit bond hearing requirement after six months of detention, or it doesn't contain any bond hearing requirement at all. That abrogated decisions in the Third Circuit and the Ninth Circuit, which had provided important procedural protections against prolonged detention for individuals with final orders of removal.

To take a step back and provide some context for that holding, the Immigration and Nationality Act has a post-order detention statute that provides that the Department of Homeland Security shall detain individuals with final administrative orders of removal for during the first ninety days after the removal order is issued, and that DHS may continue to detain those

individuals who have been ordered removed, even after that ninety-day removal period.

A couple things to note about this structure: This is civil or regulatory detention. It's not criminal detention. So, the government's interest in detention is supposed to be protecting the community and preventing individuals with removal orders from absconding before ICE can execute the removal order. But, of course, we know that many, many individuals with removal orders are not dangerous and don't present flight risks, and ICE provides only minimal protections, by which detained individuals can show that they shouldn't be detained.

Another thing to note is that the statute is structured around the assumption that individuals who are ordered removed will be removed shortly after the removal order is issued. But, in fact, this detention statute often is applied to individuals who are detained for very long periods of time, either because they're in withholding only proceedings or because there is some issue with the execution of the removal order, and there can be other examples of when [] individuals can be detained for months or years under this statute.

The Supreme Court two decades ago in a decision called *Zadvydas v. Davis* held up this statute, which has this language that the government may detain individual[s]. It held that it does not apply to individuals who have been detained for over six months, whose removal is not reasonably foreseeable, if, for example, there's an issue with the country of removal not accepting the individual.

The question here in *Arteaga-Martinez* was whether the statute also implicitly provides for a bond hearing at the six-month mark, even for individuals who might ultimately be removed, whose removal is reasonably foreseeable, a bond hearing for an immigration judge to determine whether the individual should actually be released on bond, because they're not dangerous and they don't present a flight risk.

So, that was the question that was teed up for the court. A lot of us were nervous about it. Writing for the Court, Justice Sotomayor, joined by almost the full court, said, no, there is no bond hearing requirement. She did so in a decision that was fairly limited. It seems to be sort of a damage control decision. She explained that recent decisions by the Supreme Court compelled this result. Recent decisions on constitutional avoidance, even though there might be constitutional issues that could arise, you don't read a statute that doesn't mention bond hearings at all to contain a bond hearing requirement.

The Court—Justice Sotomayor—declined to reach other issues not presented, including whether the constitutional claim that was presented at the district court, but not adjudicated, whether that could provide relief, and

there was another claim that was related to the *Zadvydas* theory that was not reached.

So, it was a limited decision, but it was important in a few different ways. One of the ways in which it was important was Justice Thomas wrote a concurrence that I think we should pay attention to. He made three basic points in his concurrence. First that he didn't believe that there was jurisdiction to hear the case at all, and Justice Gorsuch joined him. The second point that he made was that he didn't think that there was any constitutional problem working below the statute. He suggested that the due process laws [don't] apply to non-citizens in removal proceedings and that it certainly doesn't apply, in his view, to individuals with final removal orders. This is contrary to a lot of case law and the history in my view, but it's important to note that that was his perspective. The third point was that he thought that the court should overrule *Zadvydas* at its earliest opportunity.

So, this case was important for a few different reasons. The first is that it removed an important safeguard. Really, the only way out of detention for many individuals who are detained under this post-order detention statute was through these types of hearings in the Third Circuit and the Ninth Circuit. The Legal Aid Society have many clients who were detained in New Jersey, so who were protected by the Third Circuit rule that was abrogated. We have many clients who are released on these bond hearings, and the procedural protection is now gone.

It's also important because it further solidified the Supreme Court jurisprudence that applied to the constitutional avoidance cannon very narrowly in these immigration detention cases.

And, I think it was also important because a lot of us watching the court feared worse. We feared that the Supreme Court was going to go further, was going to overrule *Zadvydas*, was going to say some harmful things about due process protections, and it didn't. It held intact many important things, but Justice Thomas gave notice of where he wants the case law to go.

So, I'm happy to answer any questions that, Mauricio, you have, or other panelists, or the participants.

MR. NOROÑA: Thank you, Julie. I'll ask one question, and I think we might move on to the next case. Again, we'll try to give some time at the end for open-ended questions.

What type of plain seeking bond hearings where the INA, which is the statute governing immigration law, does not expressly provide them? Do you think [] Arteaga-Martinez?

MS. DONA: What sort of previous claims remain viable?

MR. NOROÑA: Yes.

MS. DONA: Yeah, for these—you know, we're litigating a couple of them right now. So, the Supreme Court didn't say anything—although Justice Thomas did—the majority opinion didn't say anything about the constitutional rights of individuals who are detained under the post-order detention statute, and *Zadvydas* still remains good law. It says very important things about the due process protections. So, we continue to litigate claims. You can litigate claims for individuals who are not likely to be removed. You can still raise those *Zadvydas* claims and say that they should be released.

And, individuals who are detained who perhaps are in withholding only proceedings, who can't raise those *Zadvydas* claims, most likely, can still raise procedural due process claims under theories like *Matthews v. Eldridge* procedural due process classic balancing, but the procedures under the ICE regulations are inadequate, and that they are constitutionally entitled to a bond hearing. So, just jumping in, the Third and Ninth Circuits have great constitutional analysis, even though they reach statutory holdings, and that statutory withholding was abrogated. We can still look to Diaz in the Ninth Circuit and Guerrero-Sanchez in the Third Circuit for this constitutional analysis, and that's what we're litigating for clients who have been detained for a very long period of time under this statute.

MR. NOROÑA: Thank you so much. We're going to move on. Again, we're going to try to leave some time at the end.

Next, we have a trifecta of cases where the court shrunk the role of federal courts in overseeing the actions of immigration agencies. We're going to start with *Patel v. Garland*, which is a case that Claudine is going to talk to us about. Claudine, whenever you're ready.

MS. CLAUDINE-ANNICK MURPHY: Sure. Thank you, Mauricio. In *Patel v. Garland*, the Supreme Court was deciding whether or not federal courts lacked jurisdiction to discretionary findings or factual findings, as part of granting discretionary relief. The question is whether the INA precludes judicial review of these factual findings that underlie a denial of relief, and it's a case about a jurisdiction stripping statute in the INA that strips federal court jurisdiction or appellate review of any judgement regarding the granting of relief under particular sections. Those sections really apply to 212(h) waivers, which are waivers of certain criminal grounds, waivers of other inadmissibility grounds under the misrepresentation inadmissibility ground, including, which is at question in this case, a false claim of U.S. citizenship, also voluntary departure, cancellation of removal, and grants of adjustment of status.

So, we're talking about discretionary findings relating to those types of decisions. The Supreme Court prohibited judicial review of findings regarding those particular types of discretionary relief.

A bit on the procedural background of the case, on the factual background of the case, it's about a man, Patel, who applied for adjustment of status before USCIS—United States Citizenship and Immigration Services—and his adjustment of status application was denied because, although he was eligible otherwise, he had marked on a Georgia license application that he was a U.S. citizen, and this is an inadmissibility ground. A false claim of citizenship makes somebody inadmissible.

So, after his adjustment of status application was denied, he was placed in removal proceedings, where he renewed his application in front of the immigration judge. The immigration judge thought that Patel was evasive when asked about the mistake on the license application, and that determination that Patel was evasive, not credible, and that he intentionally lied and falsely claimed to be a citizen on that application is really the discretionary judgement that we're talking about in this case, that federal courts are not able to review.

So, Patel testified that he put his A-number on the application to show that he wasn't a citizen, but the actual application showed that he did not, and for that reason and the evasive testimony, the judge found that he intentionally represented that he was a citizen.

The BIA found that the IJ's [immigration judge] factual findings were not clearly erroneous, so they held a clearly erroneous standard and upheld the IJ's decision, because the IJ's determinations were not clearly erroneous. Patel then appealed to the Eleventh Circuit. Actually, both parties did, Patel and DHS [appealed], and the Eleventh Circuit found that it did not have jurisdiction, because under this adjustment of status provision and this jurisdiction stripping provision, the judgement regarding granting relief was not reviewable, and the factual determinations that led up to that ultimate judgement were also not reviewable, because they were also judgements regarding the granting of relief.

So, the respondent's arguments were that only the ultimate judgement whether to grant adjustment of status or not is the judgement that is not reviewable under the jurisdiction stripping statute, but that sort of "preliminary decisions" or "subsidiary decisions" regarding eligibility for that relief, not whether to grant it in discretion, but eligibility, prior eligibility for the relief, are reviewable. This is Patel's stance.

The Department of Homeland Security argued that the ultimate judgement is not reviewable, so agreeing with Patel on that, but also that all discretionary determinations are not reviewable, so this required analysis of whether each determination judgement regarding each eligibility criteria is a

discretionary judgement or not. The department said that in this case the misrepresentation bar for a false claim of U.S. citizenship is not a discretionary determination. So, it actually could be reviewed.

The Eleventh Circuit found that all factual determinations made as part of considering a request for discretionary relief fall under the jurisdictional bar.

The Supreme Court then agreed with the Eleventh Circuit that all determinations made as part of considering a request for discretionary relief are barred, because jurisdiction is stripped for those questions. There's a lot of discussion about what "judgement" means. The Supreme Court discusses at length different *amici* in the case and sides with *amici*, saying that that's kind of the middle ground between what Patel's arguments are and what the department's arguments were, that a judgement is an authoritative decision, including factual findings, and that the court lacks jurisdiction to review all of those factual findings, not just the granting of relief, but any judgement relating to the granting of relief, including judgements regarding specific eligibility criteria.

There's only one exception to this jurisdictional bar in the statute, which is constitutional questions and questions of law are always reviewable.

So, the Supreme Court decided that Congress intended to reduce procedural protections in the context of discretionary relief, and, interestingly, they did not decide reviewability of USCIS decisions, saying that that question was not before the court. But, in dicta, they did say that the jurisdictional bar expressly extends to judgements made outside of removal proceedings, while still preserving review for constitutional and legal question. That would mean any factual questions in those particular discretionary grants of relief would be barred from federal court review, whether they happened in the context of removal proceedings or not. That's part of the dicta of the case.

When a statute is silent, then ability for judicial review is presumed, but when there's specific language regarding review in a statute, that overcomes that presumption, and this was specifically a jurisdiction-stripping statute that clearly indicated that judicial review was precluded.

So, I think the big take-away from this case, that probably sounds like a lot of legalese, and it's pretty complex with jurisdiction stripping, but I think the big take-away is, when litigating with an eye towards preserving issues for appeal or when filing an appeal, to make sure that you frame those questions or you frame your notice of appeal as questions of law, especially for cases regarding adjustment of status or denials of waivers or voluntary departure, cancellation of removal in those cases for those grants of relief. It's important to make sure we can try to frame things as questions of law, rather than questions of fact. So, even if it seems based on a factual issue in

the case, how does that relate to the legal question, and can this at least be a mixed question of law fact, or can you somehow tie in a question of law so that it can be reviewable and go up under judicial review?

Another interesting note is that in this particular case the misrepresentation ground of the false claim of U.S. citizenship was not added as a removal ground or removal charge by DHS, and if DHS had added it as a charge, and the judge had found Patel removable under that ground, then Patel could have appealed that decision, because that's a legal decision, and it's not part of the bar of this jurisdiction statute that only applies to those particular grants of relief. So, since that's not one of those particular grants of relief, but just a finding of removability under that ground, he could have had judicial review for that. But, since it was found as a bar to the adjustment of status application, and the judge found that that bar existed, that finding, that judgement for discretionary relief was not reviewable.

Any questions?

MR. NOROÑA: I think we're going to leave some time at the end, again, for any questions. We're going to move on to another decision where the court might limit judicial review in immigration cases. Professor Lindsay Nash, now will tell us what to expect in some areas like *Santos-Zacaria v. Garland*, which is set for argument in January. Lindsay, whenever you are ready.

MS. LINDSAY NASH: Great. Thanks, Mauricio. So, *Santo-Zacaria* is a case that, as Mauricio said, is on the docket, and it's been kind of billed as like a slightly low-profile case, and I think that's partially because it's a little bit in the weeds on procedure. So, bear with me. I'm going to try to explain some of the procedure, so that you understand what's going on and why it matters, because it does matter, and I'll tell you why in a second.

So, this is a case involving a transgender woman from Guatemala. She sought protection here from persecution in her country of origin, and she specifically sought protection under the withholding of removal statute, so she sought a form of protection that's like asylum, but it's more difficult to get. The reason why she had to seek this form of protection is because she was barred from asylum, because she had been here before and was deported.

But, the big thing for you to know is that one of the key things that you have to establish to get withholding of removal is to show that you have a well-founded fear of persecution in your country of origin. One of the big ways to do that is to show that you've been persecuted in the past. That creates a rebuttal presumption that you will be persecuted in the future, and that you have a well-founded fear of persecution if you return to your country of origin. So, that establishes this presumption.

Now, it's a presumption, so it can be rebutted, and some of the ways it can be rebutted is by showing that the person can relocate in their country of origin and be safe, or that circumstances have changed since they were persecuted in the past. So, Ms. Santos-Zacaria sought withholding of removal. She argued that she'd been persecuted in the past, based on the fact that she had been raped eighteen years before, and that the person raped her because she was gay. She argued that this was past persecution, and that should have created a rebuttable presumption that she had a well-founded fear of persecution.

The IJ disagreed. The IJ said, no, this is not past persecution. So, the IJ didn't go on to consider whether that presumption had been rebutted. She lost. And, she appealed to the Board of Immigration Appeals, which is the appellate administrative body that handles appeals from the immigration courts, so the way it normally works is you have your initial removal case in the immigration courts. If you want to appeal, you appeal to the Board of Immigration Appeals, and if you still want to challenge your removal order, the BIA agrees with the immigration court that you should be removed, and you want to challenge it, that's when you can go bring your case to the Article III Federal Judiciary, which is a court of appeals.

So, Ms. Santos-Zacaria appealed to the BIA. The BIA said, no, the IJ was wrong. Ms. Santos-Zacaria was persecuted in the past. But, then, it went to say, but, you know what, you'll lose anyway, because this presumption has been rebutted. So, the BIA went and found some facts that the IJ didn't find, and the BIA is not allowed to do that. There's a rule preventing the BIA from making those factual findings.

So, Ms. Santos-Zacaria lost before the BIA, but she went on to challenge her removal order in the Fifth Circuit, and she said my removal order is flawed, because the BIA is not allowed to make that kind of factual finding. The Fifth Circuit said *sua sponte*—meaning it raised the argument on its own, the government had a chance to raise it but it didn't—the Fifth Circuit said, we don't have jurisdiction to consider this claim, because Ms. Santos-Zacaria didn't exhaust her remedies, which is required by the statute that gives courts of appeals jurisdiction. It said she didn't exhaust her remedies. She didn't file a motion to re-open or a motion to reconsider with the BIA, and, therefore, we can't consider this kind of claim.

The other thing the Fifth Circuit said is that this is a jurisdictional rule, meaning that it's a rule that has to be followed for the court to have jurisdiction to even consider the case. That means that even if the government waived it, it doesn't matter. Even if there's a good reason why she didn't follow the rule, the court can't decide in their own discretion to waive it. The court just cannot consider the case.

So, why does this matter? Well, this matters for a couple of reasons. One is that the Fifth Circuit was essentially saying that in order for a court of appeals, the only federal court that gets to hear this case, the only instance a person could challenge a removal order in federal court, if the BIA has made an error, has introduced a new error related to the removal order, and the person doesn't file a motion to reconsider or reopen their case, the federal court loses all jurisdiction. They can't correct that error.

Now, motions to reconsider are motions that you file to ask the BIA to correct an error of law that it has made in its decision, a motion to reopen is a mechanism to ask the BIA to consider new facts or new evidence. But, these are discretionary motions, so they're not normally considered part of this standard process. So, the layering on this requirement that somebody file a motion to reopen or reconsider when the BIA has introduced a new error is a really big deal. It creates this other major step that someone has to follow to be able to challenge a new error made by the BIA in federal court.

The fact that the Fifth Circuit found that this rule requiring exhaustion was jurisdictional is also a big deal, because it means that courts can't waive this rule, and the government can't waive this rule, even when there's really good reasons that somebody didn't follow it.

So, this might seem like it's the Fifth Circuit being the Fifth Circuit, and this is just the Fifth Circuit kind of like doing its own thing, but there's actually a big circuit split on this exhaustion issue, and also a circuit split on the jurisdictional issue. So, the Supreme Court granted cert on this case on both issues, as far as I can tell, just granted the cert petition.

So, why does this matter at all? I mean it might seem like it's likely to be a decision that's, I think, fairly narrowly on the text of the statute, so it's probably going to be a sort of close reading of the statutory text. And, it might seem like it's a small issue, right? This is only if the BIA introduces a new error, but the fact is that the BIA makes a lot of errors, and it makes a lot of new errors in cases. There's twenty-four members of the BIA, twenty-four judges, and they issue about 30,000 decisions a year. So, that's 1250 decisions per judge per year. These are really sort of fact-intensive cases, so they're making a lot of decisions quickly, and they make a lot of errors.

So, this matters for—I'll give you three reasons it matters, and if you want to talk more, we can. The first is if the Supreme Court says that litigants have to file a new motion every time they want to challenge a new error from the BIA in federal court, that's a really big burden on litigants. It costs a lot if they have a lawyer to do that, and it's extremely burdensome if they don't have a lawyer, which is the case for the majority of people who are detained.

On the second issue of whether it's jurisdictional, it matters because there are tons of people that will have good reasons for not being able to comply with this requirement, and if it's jurisdictional, the court doesn't have

the ability to waive that requirement, and the government doesn't have the ability to waive that requirement by not raising it.

Then, the last reason why this case could matter a lot is because the court could say something more about jurisdiction, about limiting jurisdiction. There's some recent case laws in the Second Circuit that gives us reason to be concerned about the court shrinking its jurisdiction even further when reviewing this kind of case. So, this is maybe like deep in the weeds of procedure, but it matters a lot for folks who use these mechanisms, which is a huge number of people who are seeking really protection, but also in the immigration system generally.

So, I'll leave it there. Thanks.

MR. NOROÑA: Thank you, Lindsay. So, to complete this trio of cases, we're going to move on to a case that deals with the court for closing paths to address systemic issues. Angelo is going to talk to us about *Garland v. Aleman Gonzalez*. Angelo, whenever you're ready.

MR. ANGELO GUISADO: Thank you, Mauricio. Hey, all, Angelo (he/him), I'm going to be talking about the decision in *Garland v. Aleman Gonzalez*. I'll spend about six or seven minutes talking about the decision and a couple of minutes giving some anecdotes about how it's affected my professional practice.

The last term in *Aleman Gonzalez*, the Supreme Court held that a provision of the INA, 8 U.S.C. 1252(f)(1), forbids lower federal courts from granting class-wide injunctive relief, thereby eliminating a major remedy for immigrants challenging mass detention, especially given that—not that this wasn't expected, but this is precisely the issue that was teed up below. So, let me go through a couple of the facts.

Aleman Gonzalez entered the U.S. and was removed to Mexico in the same year, in 2000. He later re-entered the U.S., started a family, had kids, and, as it goes, in 2017, immigration officers arrested him, reinstated his prior removal, and placed him in detention. From there, he pled that he had a reasonable fear of persecution or torture in Mexico, but was still detained beyond the six-month limit.

After six months in detention, he was denied a bond hearing before an immigration judge, and he and another similarly situated detained individual filed after about six months. Both of these cases reached the Ninth Circuit challenging whether they had the right to a bond hearing after six months of detention. Both courts upheld injunctive relief in each case compelling the government to provide bond hearings up to the class after six months.

When this was teed up, obviously, we had just seen a decision in *Jennings v. Rodriguez*. Obviously, we're very concerned about the

government's routine disregard for people languishing away in detention, but also, we were concerned that the government was raising an issue that we sometimes had seen in practice, though I had never really seen it as anything more than a throwaway, and that was a decision of the court from Alito that § 1252(f)(1) stripped district courts of the jurisdiction to hear and grant requests for class-wide injunctive relief. I'll repeat that again, because it's really important.

District courts can no longer hear and grant requests for class-wide injunctive relief. The text of the statute says, regardless of the claim or the identity of the party or parties bringing the action, no court, other than the Supreme Court, shall have jurisdiction or authority to enjoin or restrain the operation of §§ 1221 to 1232 of the U.S. Code—those are all immigration statutes—other than with respect to the application of such provisions to an individual against whom such provisions have been initiated.

So, basically, what Alito said was that if you want to bring an immigration class action on the basis of the immigration statutes, district courts are no longer empowered, nor are appellate courts empowered to grant class-wide injunctive relief. And, if you are considering, like me, having a career in immigration litigation for class actions for people trying to gain asylum, trying to get out of detention, anything at all, this really spelled a really unfortunate death knell.

Justice Sotomayor really had some fairly terse, and I thought particular appropriate issues with Justice Alito's textual analysis. But, basically, she recognized what we all recognize, that the people who already face the most insurmountable barriers to access to courts, the legal system, etc., have even more than Sisyphean task ahead of them. As Justice Sotomayor held, the majorities' holding places upon each of these individuals the added burden of contesting systemic violations of their rights through discrete collateral federal court proceedings. That means, one-by-one, these individuals have to challenge the patterns and practices that come with the weight of the entire U.S. government and its institutions.

Where does that leave us now? Like individuals can challenge official government policies, but as to largescale avenues for relief, class-wide injunctions, I don't know. Some people have suggested that the remedy of vacature, vacating a particular unlawful policy under the APA is available, we may test that. Some people think that vacature of an action is unconstitutional, would be actionable, as well as the potential to allege that the issues are arbitrary and capricious.

But, what it really leaves is declaratory relief, which in some cases really is real relief. That was important in the sanctuary case in 1990 out of the district of Arizona, that the operation to persecute members of the clergy who were providing sanctuary to individuals—declaratory relief is real relief,

but it doesn't get you what you want, because when we brought the case *Al Otro Lado* v. (now) *Mayorkas*, alleging that the government's policy of turning asylum seekers back at the limit line, at the territorial border, violated the APA, which the district court had already said violated not only the statutes, but the constitution. It hamstrung the district court judge, she basically said that there's nothing else she can do.

So, even though we had won on so many respective counts, when it came time to remedies order, ordering the government to remediate its violative policy, there was nothing they could do. I just want to read a few quotes from the district court judge, who I think felt—well, I'll let her words speak for themselves.

She ruled that "the decision takes a sledgehammer to the premise that immigration enforcement agencies are bound to implement their mandatory duties prescribed by Congress, including their obligation to inspect and refer arriving non-citizens for asylum." Then, "when immigration enforcement agencies deviate from those duties, lower courts have authority to issue equitable relief to enjoin the resulting violations." Essentially, not only that the judiciary is empowered to say what the law is, but where there is a wrong and a right, there is a remedy for that. And, this decision really is a particular thorn in my side, knowing that we had just spent years convincing a court that the government's policies of punishing people for the human right to migrate, the statutory international obligation to grant asylum seekers access to the process just meant nothing, and that the court couldn't enjoin any violation. This actually leaves the potential perversity of having a really good immigration policy not being able to enjoin, as well as a bad policy.

So, we're left with a lot of questions after this, including whether, if the Supreme Court ever changed its political calibration, whether the Supreme Court, which is the only Court that's left empowered to issue an injunction class-wide relief, would be a potential venue. I remain extremely skeptical about that avenue, and if anyone has a question about that later, I'd be happy to discuss. But, in summation, *Aleman Gonzalez*, very terrible for immigrant advocates and litigators alike.

MR. NOROÑA: Thank you so much, Angelo. I think I have some questions, but I want to leave them at the end, so that we can collect a few, and I'm sure a few others might want to weigh in in a little bit. So, for our last two cases, we're going to switch to issues of broad implication for immigration enforcement, both at the border and in the interior. We'll start with Victoria, who's going to talk to us about *Biden v. Texas*, which is a 2022 decision on the misnamed migrant protection protocols. Victoria, it's all yours.

M. VICTORIA JEON: Sure. Alright, the *Biden v. Texas* was regarding the migrant protection protocols, more commonly known as the Remain in Mexico policy. So, in 2019, the Trump administration announced the migrant protection protocols, which I'll from here on just call MPPs. Effectively, what it said was that any non-citizens of Mexico who are arriving at the southwest border of the United States will be returned to Mexico to await their immigration proceedings. The MPP was supposed to be created allegedly as a response to the immigration surge at the southern border, and that Mexico said it would cooperate in administrating this on a temporary basis, and this is going to be coming back in later on.

So, the MPP was implemented pursuant to express congressional authorization in the INA, which states that if an alien arriving from a foreign country that is contiguous to the U.S., (that is, shares borders with the U.S.), the attorney general can return that alien to the territory under section 1229(a), and prior to initiating the MPP, the DHS was using that section to return certain Mexican and Canadian individuals.

There's a separate provision within the INA that states if an alien seeking admission isn't clearly entitled to admission, then they shall be detained for a proceeding. And, in reality, the DHS never really had that kind of sufficient detention capability to detain every single one of these individuals in custody. And, the motivation behind the Trump administration implementing the MPP is so that certain individuals who are trying to enter the United States illegally, including those seeking asylum, will no longer be released into the United States, and then they're concerned about them failing to file an asylum application or disappearing before an immigration judge can determine the case.

So, in any case, the DHS starts implementing the MPP as of January 2019. Then, it was suspended in January 2021 with the incoming Biden administration. So, in June 2021, Biden tried to end this policy, but Texas and Missouri challenged this action, saying that trying to rescind the MPP violated the federal immigration law and the Administrative Procedure Act. And, they were also alleging that the June First memo itself was saying that the MPP doesn't adequately or sustainably enhance management under these kinds of inhumane operations.

Texas and Missouri were challenging the June first position of the entire program, at which point the federal district court agreed with Texas and Missouri, and ordered Biden to keep implementing MPP in good faith, and they vacated the June first memo entirely.

Then, the Fifth Circuit and SCOTUS both refused to block this lower court's ruling. Then, the government appealed and sought a stay of this injunction, which both the district court and the court of appeals denied. And, while the government's appeal was pending, on October 2021 the DHS wrote

a new memo trying to end this policy, this time supported by a memo explaining their reason for the decision.

The government then decided to try to vacate the injunction on the June first memo on the basis that the new memo was going to supersede the old one. And, the court of appeals was stating that this new memo wasn't a new and separately reviewable final agency action, and that it only explained the first memo. So, then, Biden sought expedited review with the Supreme Court on whether federal immigration law requires it to maintain the MPP and whether the October decision to end the policy has any legal effect.

Ultimately, what the Supreme Court decided was that Biden effectively has the authority to end the policy, and that the second memo was a final agency action, and basically, they spent a large portion of the decision explaining that the immigration law always offered a discretionary authority to return individuals to Mexico while their case is pending, and that it's not a "shall," but rather a "may," hence the discretion.

And, as far as the October twenty-ninth memo goes, they determined that it was final, because it had decision-making process, and it also was resulting in rights and obligations being determined. They were also stating that interpreting the removal and provision as mandatory would mean there's a significant burden on the president's ability to conduct diplomatic relations with Mexico, and as you may remember, I mentioned that Mexico was saying that they would only temporarily assist with this, and putting this burden on the president was something that Congress was not probably intending.

So, this decision was determined 5-4, and then the notable dissents are Alito and Amy Coney Barret, and Alito's dissent is quite disturbing in the sense that, effectively, what he is saying is that DHS is using the excuse that it doesn't have the capacity to detain all illegal aliens to forego the option to remove them all together and just simply release them in to the country, which is a very troubling statement for a Supreme Court justice to have, of course. While, Amy Coney Barrett's descent basically agrees with the majorities' analysis of merits, but also disagrees that the Supreme Court had jurisdiction to hear this case.

So, the good news is that the Supreme Court effectively rejected the argument that the MPP is statutorily required. The bad news, I guess, it also kind of bleeds into my practice, and I would not doubt that it bleeds into other people's practices, as an immigration attorney and anybody specializing in asylum.

So, while Biden has been able to take away the MPP, there's plenty of clients that I know who, one way or another, had to stay in Mexico. These are individuals coming in from all over the place, like Venezuela, West Africa, so on and so forth, who, because of their individual circumstances, eventually had to come in through Mexico.

What I see in some of these stories is they make the journey to the United States. They approach the southern border. They are told to wait in Mexico until it is their turn to have their case adjudicated. Then, for those who don't know, what tends to come up during asylum cases sometimes is whether someone could be said to have firmly resettled in another county. And, in some of my client's cases, what's happened is they had to stay in Mexico for more than a year. It goes on, and then, subsequently, at their hearing or their interview, they get a lot of aggressive questions on "when did you go to Mexico?" "How long did you stay in Mexico?" "Why were you in Mexico?" "Did you ever get any status in Mexico?"

It's definitely disturbing, just sometimes the people asking these questions, I don't know if they fully realize that one of these reasons why they had to stay there in the first place was because of this policy. For the foreseeable future, I'm sure we're going to continue to see people with similar stories or issues that they have to present to or answer for in immigration proceedings.

And, I suppose we can—I know that you've been saving questions for later. But, I'd be happy to answer anything regarding my practice or anything.

MR. NOROÑA: Thank you, Victoria. Yes. Finally, and before we open for questions, we're going to hear from Professor Peter Markowitz on *U.S. v. Texas*, which is scheduled for argument just a few days from now. Peter, please, go ahead.

MR. PETER MARKOWITZ: Alright. I will try to keep this brief, because I know we've heard a lot of law about a lot of complicated issues on a lot of different cases and want to get to some discussion. This case involves a memorandum that was issued by the Secretary of Homeland Security, who is the cabinet member who oversees all the immigration enforcement agencies in the United States, immigration customs enforcement, ICE, and CBP at the border.

The memorandum sets forth what it sounds like. These are the individuals who the political leadership of the agency has determined should be where enforcement resources are targeted. And, likewise, it discusses factors for agents to consider about who should not be targeted. There's nothing particularly unusual or noteworthy about this memorandum, kind of much to the disappointment of many in the immigrant rights community. It's very much like many memos before it in virtually every administration dating back to Clinton—save the Trump administration—which didn't really have enforcement priorities.

The priorities are things that you've seen before and that you might expect. They prioritize people who are deemed a national security threat, people who are deemed a threat to public safety, people who are deemed a threat to border security, things like that.

The memo discusses, as many memos before it have, what are the other types of positive equities that you might consider in determining whether someone's an enforcement priority? Do they have family? Have they been here a long time? If they have criminal conduct, is the criminal conduct long ago? Have they rehabilitated, etc.? Ultimately, it vests a lot of discretion in line-level officers. It creates kind of totality of the circumstances test and says, "go ahead, you figure it out, individual officers, whether this person's an enforcement priority or not."

So, it was not particularly exciting or remarkable, but it did have some impact, mostly an impact of kind of returning us to the land of kind of harsh immigration enforcement that existed before Trump, but where there is some modicum of prioritization, and during the Trump era, there really was none. It kind of unleashed the immigration enforcement agents to gather as many people as possible with kind of predictable results. But, it wasn't having a dramatic impact.

Then, Texas sued, and they brought a few different claims, but mostly, the claims were focused on the Administrative Procedure Act, which you've heard in some of these other cases. They claimed it was arbitrary and capricious and that it should have gone through notice and comment rulemaking. And, the claim that I'm going to focus in on, because the claim that was cert was ultimately granted on, is that it was contrary to law. The laws that Texas claimed it was contrary to, one of which you've already heard about from Julie, it was the same statute that came up in *Ortega Martinez*, it was the post-order-of-detention statute, which has some language that says folks shall be detained and shall be removed. Then, there's a similar statute related to pre-order detention in INA § 236(c) that has also some "shall" language related to detention.

Texas took the position that, to the extent that this memorandum allows for totality of circumstances test, at least as to these individual, individuals that would fall under one of these statutes, that discretion is impermissible—that Congress said "shall," and Congress means "shall," and, therefore, they have no discretion, and, therefore, the memorandum is contrary to law. At least, that was Texas' position.

"Shall means shall" is something that we hear a lot in table-pounding legal arguments. But, there was something really counterintuitive about this. There isn't really any enforcement agency in the world that has a rule that the agency has to initiate enforcement proceedings, has to arrest, detain, in this case deport, against anybody and everybody who might come within a

statute. DHS kind of started their main opposition as kind of like let's be reasonable here. We live in a world of limited resources, and no enforcement agency can enforce against everybody. Decisions have to be made.

What Texas is really saying is that those decisions can't be made at a policy level. They can't be made by political appointees. They have to be kind of random and ad hoc, and that that's contrary to the inherent power in the executive. We learned in grade school that Congress makes the law, the executive enforces the law, and these are enforcement decisions that are in the unique province of the executive, not in Congress.

Then, they also have some kind of complicated statutory interpretation arguments about why that language isn't as mandatory as it might seem on first blush.

The district court, a judge appointed by Trump, didn't buy it and vacated the memorandum in its entirety, and an appeal was taken—the government first sought to stay the order. It was denied. Went to the Fifth Circuit seeking to stay the order pending appeal. It was denied, so went to SCOTUS seeking, in the first instance, just a stay of the vacature order pending appeal, but recognizing that this case could take a long time to wind its way through the court, and the Biden administration could be long gone, they offered to the Supreme Court, if you want to treat this is a cert petition and just grab the case right now and decide the merits, go for it. That's what the Supreme Court did.

So, they granted cert on three issues. The granted cert on a standing issue. Does the state have enough kind of injury? Is it redressable? Is it traceable? All those kinds of things. They granted cert on an issue that Angelo referred to, about whether kind of vacature of a memo that has kind of the same effect as a class-wide injunction, is that barred by § 1252(f)(1), so that issue presumably could be decided in this case. Then, they granted cert on the merits issue. Is this memorandum really contrary to law?

So, there's a lot at stake here. This is the way immigration enforcement has been done, as I said, back into the nineties, where political leadership has said we don't have all the money in the world, and there are kind of policy reasons why we might not want to enforce against everybody. Some of the people who fall under those mandatory statutes are people who have like a single marijuana possession conviction or a couple of petty shoplifting convictions, and do we want to enforce against those people if they have been here a long time, if they have families and businesses, and the hardships might be profound.

So, whether there can be discretion at a systemic level is at stake in this case. And, larger, depending on the way the case comes down, and it's really hard to predict, because there is a lot of Supreme Court precedent on the government side in this case, not on Texas' side. So, it could really have

implications far beyond immigration about the way prosecutorial discretion could be exercised by other agencies as well. The DOJ's memo about not going after certain marijuana-type offenses, is that at stake as well? I don't know. It'll depend on what the Supreme Court does.

But, it's a very big case about immigration enforcement and potentially would reach beyond.

MR. NOROÑA: Great. So, we have about fifteen to twenty minutes for open-ended questions. I've already been getting a few from some people. So, I'm going to get started with that. Then, depending on the time, we can do that as well. My hope is that, obviously, the person who presented on the particular case can take lead, but it would be open to anyone else who might want to weigh in as well.

The first question that I have is whether the panelists see this trend in limited federal court jurisdiction of immigration decisions is a strategic move to keep these cases out of the public eye? And, if so, wouldn't the Supreme Court, that isn't particularly immigration friendly, not want the Biden administration to have the final decision on these issues?

MS. NASH: I can start. I think that the concern is a little bit less out of the public eye and more out of the courts. This is a move that Congress has really started hugely in 1996, when it adopted several laws, just like broadly aiming to keep cases out of court. So, that's been a trend in legislation, and I think that there have been some good decisions by courts saying there's a limit to that. There are certain kinds of cases you can't keep out of court, and our constitution requires it. But, what we have seen is the Supreme Court really taking big steps, including for some of the cases we just talked about and some cases previous to them the past couple of years, to keep cases out of court, and to say that courts really don't have anything to say about this.

So, I don't think that the court is quite so worried about the Biden administration having the ability to decide these cases in the absence of courts, because the immigration system is sort of running—it's not as if the Biden administration is in the weeds on all the immigration court decisions. So, I don't think that's as big of a concern for the court. I do think there's a big, big effort to restrict the rights that non-citizens have generally and prevent them from getting into court to exercise any rights they may have.

MR. NOROÑA: …[Did] anybody else want[] to step into this question about why doesn't the Supreme Court want to just keep these cases.

MS. DONA: I think I'll just echo a little bit what Lindsay was saying. It isn't about the Supreme Court wanting to keep the cases. It's about them not wanting the district courts and the courts of appeals to have the cases. Because very, very rarely do these cases get up to the Supreme Court. So I think that they trust—to the extent that they trust anybody—the aggressive immigration authorities more than they trust the federal judiciary and just are looking to sort of—in the removal proceeding context, judicial review only goes one way. It's only something that a noncitizen can seek. If Department of Homeland Security loses before the BIA, they can't seek judicial review. So, that doesn't really get at the question of the challenging policy memos. It's just a little bit different, and I think a lot of this work is about just cutting off the noncitizen's rights regardless of the administration.

MR. NOROÑA: I have another question. It says, I'm curious to know, from Angelo's discussion about what the outcome of that case—basically the broad reading of § 1252(f)(1)—means for impact litigation moving forward and the relief that people can seek now.

MR. GUISADO: That's a terrific question. It's kind of unclear. I think with respect to the decision, which pronounced or declared that the turnback policy is unconstitutional, it's interesting. I think we bring a litany of individual cases on behalf of individuals, maybe a template form or kind of guerilla litigation tactics could be employed. But, in terms of large-scale relief, there could be ways to challenge it, pending the vacature decision that's at the Supreme Court this year. There may be other ways to challenge it. We brought a claim under the alien tort statute alleging that it violated []. Maybe trying to get someone, anyone to recognize the international human rights obligations that the United States has.

But, we're going to discuss all this and more, we're going to put our heads together at an immigration litigation conference in December. Hopefully, people much more experienced and brighter than I am perhaps will have some creative strategies. But, otherwise, our hands are kind of tied. There are some ways other than vacature, but that's kind of top-secret work product, and frankly, still a little half-baked at this inchoate juncture, but stay tuned. We'll have something for you.

MR. NOROÑA: I have a question from Julie that goes to this. Lindsay and Peter have dealt with an aggressive reading of § 1252(f)(1) in [] as a class litigation. The question is, how did you approach that one, when you hit that obstacle?

MR. MARKOWITZ: Sure. You want me to take a first stab at that?

So, this was a clinic case that was brought by the clinic at Cardozo when it was a class-action case about unlawful detention prior to access to an immigration judge—if you were being held for months without access to an immigration judge. This issue arose, where the government said you can't get class-wide relief, because of § 1252(f)(1). We fought it vigorously, and we made some arguments that have now been foreclosed by the Supreme Court.

We ultimately got the judge to issue a class-wide declaratory judgement, and Angelo spoke a little about why that's good, but not as good. A declaration has the force of law, and when you are litigating against the federal government, it tends to be the federal government's policy to adhere to declaratory judgements. And, so, in some ways, it operates like an injunction. But, you don't have those enforcement mechanisms available to use the way you do a motion to compel enforcement that you might bring if there's a class-wide injunction, monitoring and the like.

So, there are some untested mechanisms under the declaratory judgement act, under § 2202, I believe, where you can seek some follow-up injunctions that are attendant to a declaration. How those would be treated by the Supreme Court, I don't know. And, certainly, this vacature mechanism cuts in both directions. Texas is touting this mechanism right now in the case I just spoke about, where they're saying this isn't a class-wide injunction. This isn't an injunction at all. It doesn't touch § 1252(f)(1). This is simply a vacature of the memo and a vacature of the policy, and that's permitted under the APA, and it has nothing to do with § 1252(f)(1). If Texas prevails on that issue in this case, presumably, if the court treats these things even-handedly, that would be a mechanism available to us in other cases.

Then, I don't want to just gloss over kind of the most kind of traditional mechanism, which is: we bring these individual cases, and in many ways it's super frustrating, because there's a ton of resources to bring a lot of individual cases, but in theory, eventually, you end up with published decisions from the circuit in some of these cases, and those have the force of law, and the government, just as they would acquiesce to a declaration, should be acquiescing to those as well.

So, there are mechanisms that remain available, but it is frustrating and difficult and just annoying to get tied up on these procedural issues, when the merits are so difficult to begin with.

MR. NOROÑA: Thank you. Would anyone else want to weigh in? I have just one additional follow up on this. The court hasn't made it clear that, despite its § 1252(f)(1) reading, the Supreme Court retains authority to issue injunctive relief on a class-wide basis, and Barrett made a point of that in *Biden v. Texas*. How is that going to work? Anybody want to speculate?

MR. MARKOWITZ: It won't.

MS. NASH: The Supreme Court has been doing lots of things it's not supposed to be doing at that level. So, I guess they could decide to do more.

MR. NOROÑA: Yeah. So, I have another question, which is whether any of the speakers believe that there will be a favorable outcome in any of the pending cases discussed with the current breakdown? So, you have two cases that we chatted about that are pending. How are those doing to work out?

MS. NASH: I can say that on the case that I talked about, I think if it was purely a matter of substance, it would not come out well. But, I think it will be a case about a close reading of the text, and there has been at least one other case, *Nasrallah*, that came out well for noncitizens based on a close reading of the text, and people were very concerned—while they were pleasantly surprised that that came out well—they were concerned about the ramifications of that. I think this could be another one of those kind of cases. I think it's hard to say exactly how it'll read the textual argument.

I also think there's this issue I mentioned about whether the rule is jurisdictional or a claims processing rule. There have been a bunch of recent Supreme Court cases on that—not in immigration realm—and I'm not as versed in those cases. But, I think, depending on how strongly they thought it related to those cases, I guess that could come out better than it otherwise would on the substance.

MR. MARKOWITZ: I'm happy to share some thoughts on *U.S. v. Texas*, but I'm conscious of the fact I've been talking a bunch, so I want to get out of the way if somebody else wants to get in.

MR. NOROÑA: Yeah, let me do this question, and then we'll see the time.

So, on *Patel*, in your opinion, what's the state of discretionary relief in immigration after that holding?

MS. MURPHY: Yes. With some of the big takeaways that I noted, I think the outcome now is that when we're appealing cases and we're litigating them and appealing them, we'll just try to focus much more on legal questions, which I think has always been a practice, because in immigration cases, it's just harder to appeal a case based on factual questions. The BIA or a federal court is not as likely to overturn an immigration judge's factual findings, because the immigration [judge] was there listening to testimony,

assessing credibility, and looking at the evidence firsthand. So, they're always going to give deference to those decisions.

So, I think for me personally, in my practice, it's pretty alarming that jurisdiction and judicial review is so narrowed by that case. But, practically, I would still approach cases the same way that I always have, trying to make a legal question the basis for any appeal and litigating in a way that I can build my record and have record of underlying facts for everything that I need to establish eligibility for relief and make sure that everything is really well documented factually at the lower level, and then, hopefully, if there's anything left to appeal, it's a question of law or a constitutional question.

MR. NOROÑA: Thank you, Claudine. I think we might have time for one more question. So, can Victoria speak a little bit more about how they see *Biden v. Texas* impacting their immigration practice. I want to be cognizant about the fact that we just got a huge decision yesterday from the U.S. District Court of the District of Columbia vacating Title 42 policy, so that potentially impacts your answer, Victoria. Basically, what's going to happen now that the floodgates are going to open?

M. JEON: So, there's only so much I can really say, because of client confidentiality issues. But, let's see how I can state this. So, the way that it's come up so far in my practice is just, especially since I work primarily with queer individuals, they—while they're stuck down there in Mexico, they run in to all sorts of different issues, including individuals who might want to take advantage of them in all sorts of different ways. I think one striking example was where he was staying there for so long that he was running out of financial resources for himself and was ultimately pressured into a heterosexual marriage for his own survival and for his own financial upkeep and survival and such. That kind of thing just kind of ended up coming up, where it's like, okay, well, you married while you were in Mexico. You were living in Mexico. You more or less like looked like a regular heterosexual man while you were in Mexico. Then, there was a lot of grilling on his stay, everything, all the details about that.

I'm not sure if I can really answer much more on that subject. I understand that might not have been like a satisfactory answer, because of the client confidentiality issues, but if you need me to elaborate some other way, then please let me know.

MR. NOROÑA: Thank you, Victoria. I'm cognizant of the fact that I think we're coming down on time. I think that's going to be a wrap up. I'm going to pass it on to Heidi in a second. I want to just thank each of our

panelists, and I really appreciate your ability to present these tons of complex issues in a way that paints a picture of what the court is doing on immigration.

Heidi, the floor is yours. Thank you.

MS. SANDOMIR: Well, thank you all so much. I don't have much more to add, except extreme gratitude for each and every one of you who've spoken today. Thank you for enlightening us and walking us through these cases. I also want to say a special thank you to you, Mauricio. Thank you for being the one who guided us through this conversation in full. We're so appreciative to all of you for all of your planning, for all of your hard work, and thank you, again, also to our attendees and for sharing this conversation with us.

At that, we leave you the rest of your Wednesday evening, and we hope to engage in these conversations with you again soon. Good night, everyone.