Center for Gender & Refugee Studies

April 8, 2026

Via Federal e-Rulemaking Portal, https://www.regulations.gov

Jamee E. Comans
Acting Assistant Director, Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2500
Falls Church, VA 2204

Re: EOIR Docket No. EOIR-26-AB37 (RIN 1125-AB37)
Appellate Procedures for the Board of Immigration Appeals

Dear Ms. Comans:

The Center for Gender & Refugee Studies (CGRS) submits this comment opposing in the strongest possible terms the Interim Final Rule *Appellate Procedures for the Board of Immigration Appeals*, 91 Fed. Reg. 5,267 (Feb. 6, 2026) ("Rule"). The Rule is inconsistent with the United States' obligations under international law. It is also unlawful under the Administrative Procedure Act ("APA") because it is arbitrary and capricious, is contrary to constitutional right, and was issued without observance of procedure required by law. The result is a rule that will have significant deleterious impacts on noncitizens seeking review of immigration judge ("IJ") decisions, their legal representatives, and the federal courts of appeals. In particular, it will cause undue hardship to vulnerable populations such as people seeking asylum, including those at risk of gender-based violence. The Executive Office for Immigration Review (EOIR) must rescind the Rule in full. We include the following outline to guide your review.

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I. EXPERTISE OF THE CENTER FOR GENDER & REFUGEE STUDIES

The Center for Gender & Refugee Studies ("CGRS") was founded in 1999 by Professor Karen Musalo[1] following her groundbreaking legal victory in *Matter of Kasinga*[2] to advocate for asylum seekers fleeing gender-based violence. CGRS protects the fundamental human rights of refugee women, children, LGBTQ+ individuals, and others who flee persecution and torture in their home countries. CGRS is an internationally respected resource, renowned for our knowledge of the law and ability to combine sophisticated legal strategies with policy advocacy and human rights interventions.

We take the lead on emerging issues, participate as counsel or *amicus curiae* in impact litigation to advance the rights of asylum seekers,[3] produce an extensive

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[1] Bank of America Foundation Chair in International Law; Professor & Director, Center for Gender & Refugee Studies, University of California College of the Law, San Francisco.

[2] 21 I&N Dec. 357 (BIA 1996).

[3] *See, e.g.,* Al Otro Lado v. EOIR, 138 F.4th 1102 (9th Cir. 2025) (affirming in part and vacating in part district court's ruling that held unlawful metering of asylum seekers at ports of entry), cert. granted sub nom. Noem v. Al Otro Lado, 2025 WL 3198572 (Nov. 17, 2025); U.T. v. Bondi, 1:20-cv-00116-EGS (D.D.C. amended complaint filed Oct. 15, 2025) (challenging rule providing the structure for asylum cooperative agreements enabling the removal of asylum seekers to designated countries without hearing their claims in the United States); RAICES v. Noem, 793 F.Supp.3d 19 (D.D.C. 2025) (granting in part plaintiffs' motion for summary judgment and to certify class and denying preliminary injunction in case challenging Presidential proclamation that invokes INA 212(f) to "suspend the entry" of noncitizens at the southern border) appeal docketed, No. 25-05243 (D.D. Cir. Jul. 7, 2025); E.Q. v. DHS, No. 1:25-cv-00791 (D.D.C. filed Mar. 17, 2025) (challenging rule that requires asylum officers conducting initial fear screenings to make complicated determinations about applicability of mandatory bars that would render individuals ineligible for asylum); Las Americas Immigr. Advoc. Ctr. v. DHS, 783 F.Supp.3d 200 (D.D.C. May 2025) (granting in part and denying in part plaintiffs' motion for summary judgment and defendants' motion cross-motion for summary judgment (challenging "Securing the Border" rule), appeal docketed, No. 25-5313 (D.C. Cir., Sept. 2, 2025); Al Otro Lado v. Trump, No. 3:25-cv-01501 (S.D. Cal. complaint filed June 11, 2025); Al Otro Lado and Haitian Bridge Alliance v. Mayorkas, No. 3:23-cv-01367-AGS-BLM (S.D. Cal., Sept. 19, 2025) (granting joint motion to dismiss in challenge to turnbacks of arriving asylum seekers without CBP One appointments); East Bay Sanctuary Covenant v. Trump, 683 F. Supp. 3d 1025 (N.D. Cal. July 25, 2023), (granting plaintiffs summary judgment in challenge to "Circumvention of Lawful Pathways" rule), vacated, No. 23-16032 (9th Cir. Apr. 10, 2025) (vacating and remanding to district court for further proceedings); Immigr. Def. Law Ctr. v. Mayorkas, No. CV 20-9893 JGBSHKX, 2023 WL 3149243, 18-19 (C.D. Cal., Mar. 15, 2023) (granting in part and denying in part defendants' motion to dismiss challenge to implementation of MPP 1.0 and granting plaintiffs' motion for class certification), appeal docketed, No. 25-02581 (9th Cir. Apr. 22, 2025); Huisha-Huisha v. Mayorkas, 642 F. Supp. 3d 1 (D.D.C. Nov. 15, 2022) (vacating and setting aside Title 42 policy as arbitrary and capricious), cert. and stay

library of litigation support materials, maintain an unsurpassed database of asylum records and decisions, and work in coalitions with refugee, immigrant, LGBTQ+, children's, and women's rights networks.[4]

Since our founding, we have engaged in international human rights fact-finding and analysis with a strong emphasis on El Salvador, Guatemala, Haiti, Honduras, and Mexico, to address the underlying causes of forced migration that produce refugees, including climate change and environmental disasters.[5]

We have particular subject matter expertise in litigation before the Board of Immigration Appeals ("BIA" or "Board"), having successfully vindicated the rights of people seeking protection before that body since our inception.[6] In addition to our own docket of cases before the Board, CGRS has provided technical assistance in over 1,700 BIA appeals. We are one of the few organizations in the country that provide training and mentorship on appellate practice before the BIA in asylum and related claims. Hundreds of advocates have attended our webinars on BIA practice, on top of the training that CGRS provides to thousands of attorneys across the country each year, all of whom are representing asylum seekers at various stages of the legal process and who therefore must be kept fully aware of Board decisions, policies, and practices.

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granted sub nom. Arizona v. Mayorkas, 143 S. Ct. 478, 214 L. Ed. 2d 312 (2022), and vacated, No. 22-5325, 2023 WL 5921335 (D.C. Cir. Sept. 7, 2023); Pangea Legal Servs. v. DHS, 512 F. Supp. 3d 966 (N.D. Cal. 2021) (preliminarily enjoining the "Global Asylum" rule); and Grace v. Barr, 965 F.3d 883 (D.C. Cir. 2020) (affirming in part and vacating in part the district court's injunction against the use of Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018) (Matter of A-B- I), and guidance implementing Matter of A-B- in credible fear proceedings).

[4] *See, e.g.*, the Welcome With Dignity and No Turning Back campaigns.

[5] *See, e.g.*, CGRS, The IACtHR's Advisory Opinion on the Climate Emergency: An Important Step for the Protection of Climate-Displaced Individuals (2025); The Chile Declaration and Plan of Action 2024-2034: A Blueprint for Addressing Climate and Disaster-Related Displacement in the Americas (2025); Precluding Protection: Findings from Interviews with Haitian Asylum Seekers in Central and Southern Mexico (2024); "Manifesting" Fear at the Border: Lessons from Title 42 Expulsions (2024).

[6] In addition to Matter of Kasinga, *supra* n. 2, see also Matter of A-B-, 28 I&N Dec. 307 (A.G. 2021) (vacating Matter of A-B- I and Matter of A-B-, 28 I&N Dec. 199 (A.G. 2021) (Matter of A-B- II) (concerning the proper evaluation of asylum and related claims of relief based on domestic violence and fear of gang violence); Matter of A-C-A-A-, 28 I&N Dec. 351 (A.G. 2021) (vacating Matter of A-C-A-A-, 28 I&N Dec. 84 (A.G. 2020) (concerning the proper evaluation of asylum claims based on membership in a particular social group); and Matter of R-A-, 22 I&N Dec. 906 (BIA 1999). CGRS also served as amicus curiae in Matter of A-R-C-G-, 26 I&N Dec. 388 (BIA 2014).

As a critical part of our mission, CGRS serves as a resource to decision makers to promote laws and public policies that recognize the legitimate protection claims of those fleeing persecution and torture. Our goal is to ensure that the U.S. framework of law and policy respects the rights of refugees and aligns with international law.

It is in furtherance of our mission that we submit this comment urging that the Rule be rescinded in its entirety.

II. KEY PROVISIONS OF THE RULE HAVE BEEN VACATED AND SET ASIDE

On February 26, 2026, legal services organizations sued EOIR alleging the Rule violates the APA, the Due Process Clause of the Fifth Amendment, and the Regulatory Flexibility Act ("RFA").[7] CGRS agrees with the plaintiffs' claims for relief and incorporates them herein by reference.[8] On March 8, 2026, Judge Randolph Moss partially granted plaintiffs' motion for summary judgment, finding key provisions of the Rule unlawful and unenforceable and ordering them vacated and set aside.[9] These include the summary dismissal provision, the 10-day Notice of Appeal deadline, and the waiver provision. In light of this development, EOIR should rescind the Rule and propose new measures in line with the alternatives discussed *infra* to "redress inefficiencies in the administrative process and to combat the BIA's ever-increasing and now overwhelming backlog."[10]

III. THE RULE IS INCONSISTENT WITH INTERNATIONAL LAW

The Rule is inconsistent with the relevant international legal obligations of the United States. These are found in part in the 1967 Protocol Relating to the Status of Refugees ("Refugee Protocol").[11] The United States acceded to the Refugee Protocol in 1968 with no relevant declarations or reservations. By doing so, the United States undertook to apply all substantive articles of the 1951 Convention Relating to the Status of Refugees ("Refugee Convention").[12] These treaties have been

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[7] Amica Center for Immigrant Rights, et al. v. Executive Office for Immigration Review, et al., No. 1:26-cv-00696-RDM (D.D.C. filed Feb. 26, 2026).
[8] Amica, Complaint at 41-46.
[9] Amica, Order (D.D.C. Mar. 8, 2026).
[10] Amica, Memorandum Opinion at 1 (D.D.C. Mar. 8, 2026).
[11] 606 U.N.T.S. 267 (entry into force 4 Oct. 1967).
[12] 189 U.N.T.S. 137 (entry into force 22 Apr. 1954).

implemented in domestic law in the Refugee Act of 1980, other subsequent legislation, and accompanying regulations.

Article 33(1) of the Refugee Convention prohibits the expulsion or return of a refugee to any country where their life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion. As explained *infra*, the Rule will lead to erroneous IJ denials of asylum and related relief or protection going uncorrected, resulting in the removal of refugees to persecution.

Similarly, Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, ("Convention Against Torture" or "CAT")[13] contains an absolute prohibition on the return of any person to a country where there are substantial grounds for believing the person would be in danger of being subjected to torture. Because the Rule will lead to erroneous denials of protection under the Convention Against Torture going uncorrected, it will result in people being unlawfully returned to torture.

Article 16 of the Refugee Convention relates to access to courts. It provides, in part, that refugees "shall have free access to the courts of law on the territory of all Contracting States." Given the impediments that the Rule imposes on effective judicial review of EOIR decisions in the U.S. Courts of Appeals, discussed *infra*, it impermissibly prevents refugees in the United States (including those seeking to be recognized as refugees through administrative or judicial process)[14] from freely accessing the courts.

The Rule will lead directly to violations of Articles 16 and 33 of the Refugee Convention and Article 33 of CAT. It should therefore be withdrawn as inconsistent with the binding international legal obligations of the United States.

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[13] 1465 U.N.T.S. 85 (entry into force 26 June 1987).

[14] *See* United Nations High Commissioner for Refugees (UNHCR), Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, HCR/1P/4/ENG/REV. 4, April 2019 (UNHCR Handbook), para. 28 ("A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined.").

IV. THE RULE IS UNLAWFUL UNDER THE APA BECAUSE IT IS ARBITRARY AND CAPRICIOUS

The Rule is unlawful because it is arbitrary and capricious under the Administrative Procedure Act ("APA").[15] An agency rule is arbitrary and capricious if:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[16]

A rule is also arbitrary and capricious if the agency fails to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[17] An agency has a duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives, although this duty extends only to significant and viable alternatives.[18] Furthermore, an agency enacting a policy change must acknowledge the change; must demonstrate the change is permissible under the relevant statute and that there are good reasons for it; and, when the prior policy has engendered serious reliance interests that must be taken into account, must provide a more detailed justification for the change than what would suffice for a new policy.[19]

The Rule must be set aside under the APA as arbitrary and capricious because EOIR failed to consider important aspects of the problem, ignored serious reliance interests, and failed to consider responsible alternatives. It has also failed to articulate satisfactory explanations for promulgating the Rule; failed to demonstrate there are good reasons for it; and failed to provide sufficiently detailed justifications for the Rule's changes to existing policies.

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[15] 5 U.S.C. 706(2)(A).

[16] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). *See also* Texas v. United States Environmental Protection Agency, 132 F.4th 808 (5th Cir. 2025) (internal citations omitted).

[17] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal quotation omitted).

[18] *See* City of Brookings Mun. Telephone Co. v. F.C.C., 822 F.2d 1153, 1169 (D.C. Cir. 1987).

[19] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

A. EOIR Has Failed to Consider Important Aspects of the Problem

1. The Rule's 10- and 30-day deadlines will create confusion and hardship

Prior to this Rule, all IJ decisions were subject to a 30-day deadline for appeal to the BIA. The Rule slashes this timeframe to 10 days, except for asylum cases denied on the basis of the INA's exceptions to the right to apply for asylum, which remain subject to the statutory 30-day deadline. Rule at 5,272. This provision has already created confusion among IJs and parties to EOIR proceedings generally and asylum seekers in particular. As justification for this provision, EOIR cites the availability of electronic filing and the fact that the agency applies a 10-day deadline to other types of administrative appeals, then concludes "there is no reason to maintain a 30-day appeal deadline." Rule at 5,272.

This reasoning fails to account for the fact that the other types of EOIR appeals cited do not involve asylum cases. These cases have particularly high stakes due to the asylum system's unique function as a means of fulfilling our international treaty obligations to protect noncitizens in the United States from being returned to persecution or torture. It also does not account for the fact that IJs sometimes deny asylum applications on the basis of the grounds in INA 208(a)(3), 8 U.S.C. § 1158(a)(2), and on other grounds, or that IJs may deny both asylum and other forms of relief on varying bases. Many people, particularly pro se and non-English speaking respondents, have difficulty distinguishing between the bases for the denial of their asylum applications given by an IJ. Indeed, the Director of EOIR has already recognized the confusion this provision of the Rule has caused, having been forced to issue a clarifying memorandum "[t]o remind Immigration Judges of the current appellate deadline for appeals."[20]

Furthermore, as explained in Section IV.A.5., *infra*, the shortened deadline for filing appeals imposes significant burdens on respondents' representatives, for which the Rule does not adequately account. Those burdens are even heavier for respondents without counsel and those who do not understand English well. For

[20] Daren Margolin, Director, PM 26-02 "Deadline for Appealing Immigration Judge Decisions to the Board of Immigration Appeals," EOIR (Mar. 13, 2026), https://www.justice.gov/eoir/media/1431061/dl?inline.

indigent noncitizens, raising the $900 filing fee within 30 days is already exceedingly difficult, and it will be even more onerous to do so within 10 days.[21]

Additionally, because the exception to the 10-day filing deadline only applies to denials of asylum based on bars to applying, only ICE-OPLA enjoys the benefit of a uniform deadline for appeals of asylum grants, while asylum seekers are left to navigate disparate filing deadline requirements that EOIR knows IJs have already misapplied. The Rule's reversal in policy shortening the deadline for some, but not all appeals–without new evidence or a reasoned explanation–violates the APA.[22]

2. EOIR fails to account for the impact on the liberty interests of detained people and their lack of access to immigration court records

Shortening the timeline to file a Notice of Appeal from 30 to 10 days for most appeals, combined with the summary dismissal provision, disproportionately impacts detained respondents, a burden that EOIR fails to acknowledge in the Rule's discussion of these provisions. These changes impact the liberty interests of detained noncitizens, who, under the Rule, will be less likely to obtain substantive relief from the BIA (or from the IJ on remand) and therefore less likely to be released.

The combination of the shortened deadline and summary dismissal provisions, which necessitate developing more detailed arguments in the Notice of Appeal than was necessary before the Rule, makes it certain the BIA will fail to correct IJ errors in the denial of substantive relief. This is because either respondents miss the deadline or because the Board determines the Notice of Appeal fails to raise complex or novel legal issues. Before the Rule, respondents had a much fairer and more realistic opportunity to successfully convince the BIA to overturn an IJ denial or to remand with instructions to the IJ that enable respondents to establish their eligibility for relief. When that happened, they would be released upon the granting of relief as a result of a successful appeal to the BIA. Under the Rule, these respondents will instead be forced to remain in detention as they seek redress

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[21] Even though EOIR provides for a fee waiver mechanism, if denied, the Notice of Appeal will be deemed not properly filed. Form EOIR 26A ("If this fee waiver request does not establish your inability to pay the required fee, your application, motion, application, or appeal will not be deemed properly filed" *citing* 8 CFR 1003.8 and 1003.24(d).), https://www.justice.gov/eoir/page/file/1237856/dl?inline (Aug. 2022).

[22] *See* FCC v. Fox Television Stations, 556 U.S. 502, 515 (2009).

before the courts of appeals, having never been given a meaningful opportunity for appellate review by the BIA.

For detained respondents whose appeals are not summarily dismissed, the Rule's shortened briefing schedule and limitation on extensions prejudices their ability to fully present their appeals, since they generally are not able to access the digital audio recording or electronic record of proceeding as quickly as non-detained respondents. All of these considerations are compounded for detained respondents who do not understand English and for those who lack counsel, as discussed further, *infra*.

Additionally, the Rule's 10-day filing deadline applies to appeals of determinations related to bond, parole, or detention and to IJ decisions regarding custody after a final order of removal,[23] which will have an especially adverse impact on detained noncitizens who, already facing disproportionate barriers to accessing counsel, will now have only one-third the time to appeal decisions on the continued deprivation of their liberty. EOIR failed to account for the impact of the 10-day Notice of Appeal deadline on this population. Noncitizens who are able to file such appeals within 10 days already have every interest in doing so, and no interest in needlessly delaying their release from detention. These considerations are particularly salient for detained asylum seekers, many of whom may have suffered prior trauma, in some cases including arbitrary detention, which is exacerbated by being subject to immigration detention in the United States. EOIR's desire to more speedily remove noncitizens with final orders of removal cannot come at the expense of subjecting an already vulnerable population to even more draconian requirements to vindicate their fundamental rights, especially in light of the additional barriers the Rule imposes to correcting faulty IJ decisions.

3. EOIR fails to account for the impact on pro se respondents

The Rule also ignores that pro se respondents have particular difficulty preparing Notices of Appeal in sufficient detail to survive summary dismissal of the bases for appeal. This difficulty is due in part to the lack of availability of a written record for them to read prior to filing an appeal and the fact that pro se individuals, unlike

[23] However, the Rule's summary dismissal provision does not apply to such appeals. Rule at 5,270 n. 11 ("The Board will continue to adjudicate all appeals under 8 CFR 1003.1(b)(7) and (14) on their merits unless subject to summary dismissal under the regulations in place prior to this IFR to provide an additional procedural safeguard for detained aliens.").

those who are represented, cannot access the digital audio recording (DAR) until the Board dockets the appeal (and any counsel of record has entered an appearance).[24]

As an example of these problems, CGRS represented before the BIA a family fleeing politically motivated persecution who had proceeded pro se before the IJ. Only after the respondents filed their own Notice of Appeal and the BIA issued a briefing schedule did the Board produce a transcript that CGRS was able to identify as missing a master calendar hearing. The incomplete transcript left CGRS unable to ascertain whether the IJ had administered the immigration court proceedings with all required safeguards for the protection of our clients' due process rights, including sufficient notice of the right to counsel and that any waiver of the right to counsel be knowing and voluntary. Due to this defect, upon CGRS' request for a complete record of the proceedings, the BIA remanded the case to the IJ to produce the complete record or conduct further proceedings.

On remand, the IJ permitted our clients to present additional evidence and testimony that was not considered during their initial individual calendar hearing, enabling the creation of a more complete record. Because our clients on their own were unable to raise the critical due process issue in the Notice of Appeal, their appeal would have been summarily dismissed under the Rule, despite the lack of any record that showed that the required due process safeguards were properly accorded. They would have had no basis on which to raise the issue before a court of appeals in a petition for review, since the transcript revealing the missing hearing record would never have been produced.

Another client CGRS represented in a petition for review before the Ninth Circuit had represented herself in immigration court and before the BIA. A survivor of rape and religious persecution, the client could not remember the reason the IJ had given for denying her applications for asylum, withholding of removal, and protection under the Convention Against Torture. In her Notice of Appeal, the client was only able to state her belief that the IJ erred in denying her asylum claim, that there were reasons she was not able to present "all required evidence" to the immigration court, and that if given the opportunity, she would at that time be able to provide all the evidence in support of her asylum claim. After receiving the

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[24] *See* Brief of Amici Curiae Former Immigration Judges and Former Members of the Board of Immigration Appeals in Support of Plaintiff's Emergency Motion for Stay at 10, Amica (D.D.C. Mar. 2, 2026).

record in her case, she was able to prepare a simple "brief" stating in more detail her reasons for challenging the IJ's decision. Even so, the BIA denied the appeal, deeming the client to have waived a significant legal issue – that of state protection – foreclosing eligibility for all three forms of relief.

Representing the client in her petition for review, CGRS was able to secure the Ninth Circuit's grant of an unopposed motion for remand in light of intervening developments in BIA caselaw. Had the Office of Immigration Litigation not agreed to a remand, the client may have been foreclosed from pursuing certain arguments before the Court of Appeals, as they would have likely been deemed waived at the BIA stage. Fortunately, the case was ultimately remanded to the immigration court, which dismissed it due to a change in the client's posture with respect to an allegation in the Notice to Appear. The client is now pursuing her asylum claim before USCIS in a non-adversarial environment that should enable her to fully present evidence in support of her application. Had the Rule been in place at the time this client filed her Notice of Appeal, her appeal would have been unlikely to survive summary dismissal, and she may have been precipitously removed to face persecution and torture without having had a fair opportunity to remedy the erroneous outcome before the IJ.

Furthermore, the Ninth Circuit has found that the BIA erred in affirming without opinion an IJ decision that a pro se respondent sought to challenge on the basis of procedural irregularity, noting, "When a petitioner raises a claim based on a purported procedural defect of the proceedings before the IJ, the only administrative entity capable of independently addressing that claim is the BIA."[25] By issuing the Rule, EOIR enables the BIA to shirk its duty to address such claims, which will have a disproportionately negative impact on pro se respondents seeking review of IJ decisions.

4. EOIR fails to account for the impact on non-English speakers

The Rule completely ignores the barriers non-English speakers will have to accessing the IJ decision, then understanding it and appealing it. Nowhere in the Rule does EOIR acknowledge that people who do not understand English have an interest in an immigration administrative appellate process that includes safeguards to enable meaningful language access as a matter of fundamental

[25] Montes-Lopez v. Gonzalez, 486 F.3d 1163, 1165 (9th Cir. 2007). *See also* Sagaydak v. Gonzales, 405 F.3d 1035, 1040 (9th Cir. 2005) ("We think it goes without saying that IJs and the BIA are not free to ignore arguments raised by a petitioner.").

fairness. In fact, the majority of people in immigration proceedings communicate through an interpreter because they do not communicate in English.

One of CGRS's clients, a non-English speaking victim of severe child abuse, represented herself in immigration court. At the IJ's suggestion, she was not present in court when the oral decision was read in English. Only after CGRS, representing the client before the BIA, received the digital audio recording (DAR) of the individual calendar hearing and transcript of the IJ's decision were we able to identify major errors in interpretation of the client's testimony regarding significant facts -- e.g., that her abuser attempted to rape her multiple times, not just once. The IJ relied on the error in interpretation and repeated it in the decision before denying our client's applications for asylum and related protection. Had the Rule been in place at the time the IJ denied relief, this client would have faced significant barriers to identifying these issues on her own in a Notice of Appeal, since she was not present for the reading of the IJ's decision, and the transcript of the decision was produced only in English, after the Notice of Appeal was filed and a briefing schedule was in place.[26] Under the Rule, any such issues not identified in the Notice of Appeal would be deemed waived.

In another case, the DAR cut off the IJ's decision on Convention Against Torture relief for a non-English speaking client, a victim of serious gender-based violence who fled to the United States in fear for her life and that of her young son, whom CGRS represented before the BIA. On appeal, the Board discovered that the transcript of proceedings did not include the IJ's complete oral decision. The transcript and DAR of the hearing also revealed interpretation errors in testimony regarding legally significant facts related to state protection. In this case, the Board issued an automatic remand to the IJ, but under the Rule's shortened filing deadline, summary dismissal, and waiver provisions, this client would have faced insurmountable barriers on her own to obtaining a complete record of the proceedings before the IJ and identifying issues to raise in the Notice of Appeal. She would have had no practical means of alerting the Board to the need to remedy the defects in the record and order the additional factfinding needed to make legally sound decisions on her applications for relief, and the Board would not have

[26] EOIR Policy Manual, pt. III, ch. 3.2(f)(1), https://www.justice.gov/eoir/policy-manual-eoir/part-III/bia/chapter-3-2 (last visited Mar. 27, 2026) ("The Board transcribes proceedings, where appropriate, *after* receiving a properly filed appeal from the decision of an Immigration Judge.") (emphasis added).

discovered them on its own, since summary dismissal would have foreclosed the production of the incomplete transcript.

EOIR states that it "utilizes reliable digital audio recording technology that produces clear audio recordings," Rule at 5273, but it fails to acknowledge that the instructions that its CASE Portal provides for accessing DARs are given only in English and that listening to DARs requires downloading specialized software.[27] While the Rule references EOIR procedures for parties to address defective or inaccurate transcripts on appeal, *id.*, it elides the fact that transcripts are only produced after an appeal is accepted and the Board schedules briefing, so if the DAR is incomplete, respondents have no meaningful opportunity to identify issues in need of BIA review in the Notice of Appeal, and thus no opportunity to review a complete transcript of the proceedings before the IJ. Further, even if the DAR is complete, the courtroom interpreter is not always audible, in which circumstances non-English speaking respondents have no way on their own to understand the recording of their immigration court proceedings.

These barriers mean the only way for non-English speakers to understand the basis of IJ decisions is to spend additional time and expense to secure the translation and interpretation services needed to ensure language access to the DAR and transcript. The Rule's shortened timeline for filing Notices of Appeal will disproportionately impact them, making it less likely they will be able to successfully identify issues to raise on appeal. This dynamic, in turn, is compounded by the Rule's summary dismissal and waiver provisions, resulting in a scheme that, by design, will make it exceptionally difficult for non-English speakers to remedy significant errors in IJ decision-making through the administrative appeals process.

5. EOIR fails to account for the impact of the Rule's disruption to respondents' ability to access legal counsel

Access to counsel, a right provided by statute and regulation, significantly affects asylum outcomes. According to the Vera Institute for Justice, only 45 percent of respondents in immigration court proceedings are represented by counsel.[28]

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[27] *See* EOIR Courts & Appeals System, "CASE Portal Digital Audio Recording," https://www.justice.gov/eoir/media/1415286/dl?inline (last visited Mar. 29, 2026).
[28] Immigration Court Legal Representation Dashboard, VERA INSTITUTE FOR JUSTICE, https://www.vera.org/ending-mass-incarceration/reducing-incarceration/detention-of-immigrants/advancing-universal-representation-initiative/immigration-court-legal-representation-da (last visited Mar. 30, 2026).

According to a 2016 American Immigration Council study, those represented were nearly five times more likely to win their cases than those who were unrepresented.[29] In fiscal year 2025, 91 percent of respondents who were granted asylum or other relief were represented, a more than tenfold advantage over unrepresented respondents.[30] The onerous nature of the Rule's 10-day appeal deadline and briefing provision disincentivizes attorneys considering taking on cases before the BIA, and threatens to further narrow the already limited pool of qualified immigration counsel available to asylum seekers.

Other adjudicating bodies, cognizant of attorneys' competing demands, have recognized that getting the right result outweighs speedy resolution of the case, and have accordingly outlined generous briefing schedules and streamlined extensions so that attorneys have sufficient time to competently represent their clients before the courts.[31] The Rule's briefing provision ignores the practicalities of representation by arbitrarily shortening timelines and replacing the existing extension request procedures with an onerous "exceptional circumstances" standard that recognizes only extreme situations faced by the noncitizen client such as serious illness, or death of a close family member. The "exceptional circumstances" required for an extension request explicitly exclude factors affecting counsel such as workload concerns or travel plans. Rule at 5,273, 5,277-78.[32]

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[29] Ingrid Eagly and Steven Shafer, "Access to Counsel in Immigration Court," AMERICAN IMMIGRATION COUNSEL, at 2-3 (Sept. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

[30] *See* TRAC: Outcomes of Immigration Court Proceedings, https://tracreports.org/phptools/immigration/closure/ (Feb. 2026).

[31] *See* FRAP 31-2.2. Extensions of Time for Filing Briefs; U.S. Court of Appeals for Veterans Claims Rules of Practice and Procedure Rule 26: Computation and Extension of Time (the court may extend any deadline (except for filing a Notice of Appeal) for good cause by 45 days, and beyond 45 days in extraordinary circumstances); NLRB Guide to Board Procedures Rule 3.3(f) (all filing deadlines can be extended for a "reasonable period" except deadlines for filing EAJA applications and reply briefs).

[32] The Rule amends 8 C.F.R. 1003.3(c) to provide in relevant part, "The Board shall not grant an extension of the briefing schedule except, as a matter of discretion, in exceptional circumstances as defined by section 240(e)(1) of the Act. For purposes of this paragraph (c)(1), workload concerns, travel plans, or similar concerns within the control of either party, or their representatives, do not constitute exceptional circumstances." INA § 240(e)(1), 8 U.S.C. § 1229a(e)(1) defines "exceptional circumstances" as "exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of

The BIA is consistently unpredictable in its issuance of briefing schedules, which prevents attorneys from planning accordingly. For example, an attorney may over the course of a year take on representation of five separate clients before the BIA and timely file notices of appeal in those cases months apart. It is not uncommon for the Board to then issue all of the briefing schedules in those cases concurrently. Even with a several-days-long extension, the attorney would have a difficult time completing all the required briefing. However, with no extension, and other competing obligations in the attorney's practice, it would be impossible for them to provide minimally competent representation before the Board. It is already difficult for attorneys to reasonably anticipate their scheduled representation before the Board and the rigidity of the proposed simultaneous briefing and extension provisions will make it nearly impossible.

By shortening the timeframe for filing a Notice of Appeal and effectively requiring that the presentation of arguments in the Notice be sufficiently detailed and persuasive to survive summary dismissal, EOIR incorrectly assumes that applicants will be represented by the same counsel at the BIA that represented them before the IJ. This is rarely the case. Many nonprofit service organizations do not provide representation before the Board and must refer those cases out to other organizations or pro bono counsel after the immigration court proceedings. Of the scores of appeals one CGRS lawyer has briefed before the Board, only two were cases she had also litigated before the immigration court. Attorneys often do not have the file at the time of filing the Notice of Appeal and must obtain and review the prior attorney's file or a response to a Freedom of Information Act request before drafting the brief. These necessary steps are time consuming. Additionally, attorneys cannot raise challenges to oral decisions of the immigration judge or to the IJ's misstatements of testimony without time to review the transcript, which is not provided until the briefing schedule is issued (if then).

The limitations on briefing schedules and the near moratorium on extensions will chill representation by attorneys who as a group are already challenged to keep up with near-daily changes to immigration policy. Attorneys simply do not want to, and ethically cannot, take on cases if the rules of procedure make it impossible for them to provide competent representation. Consequently, the Rule will functionally deny asylum applicants seeking appellate review the right to legal representation and

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the alien." Thus, the statute does not account for any circumstances faced by counsel, and the Rule specifically excludes consideration of representatives' workload, travel, or "similar" concerns.

produce the grim result of asylum seekers either abandoning their cases or being denied relief they might otherwise be granted.

The Rule cursorily acknowledges some of its impacts on pro se respondents' ability to access counsel but fails to engage in reasoned analysis in support of its determination that these impacts are outweighed by the agency's interests in timely adjudications. Rule at 5,272, n. 16. For instance, after noting that the Rule's 10-day appeal deadline would impact the ability of pro se respondents to obtain counsel for a BIA appeal, EOIR presents as mitigating factors the observation that such respondents "have already had time to obtain counsel in their proceedings before the [IJ]" and that respondents are advised of their right to appeal and appeal deadlines, and of their ability to file a Notice of Appeal without counsel. *Id*.

Regarding this last point, the idea that providing respondents insufficient time to find an attorney for appeals is mitigated by the fact that they can appeal without counsel is disingenuous. Noncitizens have a right to counsel in their appeals, a right on which the Rule impermissibly infringes. Nor do the mitigating factors cited by EOIR in fact ease the burden on respondents. The first supposed mitigating factor merely amounts to an observation that time has passed from the initiation of removal proceedings to the issuance of the IJ's decision and fails to account for the fact that many lists of pro bono legal services providers to which EOIR refers respondents contain no providers willing and able to accept additional cases. Further, the fact that respondents are advised of their right to appeal and relevant deadlines does nothing to mitigate the impact of the deadlines themselves on pro se respondents' ability to find counsel for appeal.

The Rule similarly dismisses the impact on respondents who are able to obtain counsel after filing a Notice of Appeal pro se, but whose counsel would not have the opportunity to submit briefing due to the Rule's summary dismissal provision. *Id*. Asserting without any evidence whatsoever that it believes the population thus impacted "will be relatively small," the Rule goes on to conclude that any associated impacts are outweighed by unspecified benefits of the Rule's reforms and repeats the above meaningless observation about the prior opportunity to seek counsel.

It then implausibly attempts to equivocate the Rule's sweeping default summary dismissal provision with the narrow summary dismissal provisions in existence prior to the issuance of the Rule by observing disingenuously that "the potential for dismissal before briefing is not new with this rule." *Id*. It closes its treatment of this topic with an assurance that the Board will, regardless, "consider the entire record before it and come to an independent determination whether to consider the

appeal on the merits or to summarily dismiss." *Id*. However, this assurance rings hollow given that the record of proceedings below is not even produced if the appeal is summarily dismissed.

EOIR also failed to consider the manner in which the Rule disrupts access to counsel for respondents who rely on BIA accredited representatives. The Rule leans heavily on the availability of the petition for review mechanism to guarantee that adverse IJ decisions will continue to be subject to review in the event the BIA summarily dismisses an appeal. Rule at 5,271 *and* 5,272, n. 16. However, respondents represented by BIA accredited representatives who could have pursued administrative appellate review before the BIA in the absence of the Rule will suddenly find themselves in need of obtaining new counsel to pursue a petition for review, since only licensed attorneys properly admitted in the circuit may appear before federal courts of appeals, while BIA accredited representatives are not required to be licensed attorneys. In fact, nowhere in the Rule does EOIR even acknowledge the existence of accredited representatives.

B. The Rule Ignores Serious Reliance Interests

The Rule fails to recognize the serious reliance interests of asylum applicants in not being forcibly returned to persecution or torture. As explained in Section III, *supra,* the Rule's truncated and rushed procedures will mean that erroneous IJ denials of asylum and related protection will go uncorrected by the Board.

Attorneys representing clients before the BIA have serious reliance interests in the *status quo ante* the Rule's changes, as described in detail in Section IV.A.5, *supra*.

The Rule also disregards the significant reliance interests of organizations such as CGRS that litigate cases before the BIA and federal courts of appeals and also provide technical assistance and training to legal practitioners representing asylum seekers. For example, now that the Rule will result in the summary dismissal of almost all appeals, CGRS will have to develop new resources and capacity to provide more trainings to account for the dramatic increase in the need for practitioners to pursue petitions for review, particularly those unfamiliar with practice before the federal courts of appeals.

The Rule ignores these reliance interests, in violation of the APA.

C. The Rule Fails to Consider Responsible Alternatives

EOIR failed to meaningfully consider responsible, less disruptive alternatives, in violation of the APA. An agency has a duty to consider responsible alternatives to its

chosen policy and to give a reasoned explanation for its rejection of significant and viable alternatives.[33]

1. **EOIR failed to consider measures to improve the quality of IJ adjudications, which would lead to a more manageable appellate caseload**

Improving the quality of IJ decision making would lead to fewer appeals filed with the BIA. Numerous studies have documented a multiplicity of problems with IJ adjudications and proposed solutions to address them. One such study was co-authored by CGRS founding director Karen Musalo.[34] It is attached to this comment and incorporated herein by reference.

The study documents that "denials of relief were very often predicated on IJ incompetence and the undue influence of extralegal factors."[35] It goes on to detail "basic errors in the application of legal requirements, failure to assess evidence holistically and impartially, speculation, vague or incomprehensible analysis, and overt bias."[36] These types of systemic flaws in IJ decision making inevitably lead to higher rates of appeal, so addressing them would be a responsible alternative to summary dismissal and the Rule's other harmful provisions.

Fortunately for EOIR, the study offers several recommendations it could adopt to improve the quality of IJ decision making. They include

- eliminating IJ job performance metrics by DOJ and permitting removal only for good cause determined through formal proceedings;
- adopting more rigorous hiring standards that include a subject matter expertise requirement;
- reforming the appointment process to aim for a broad range of professional experience in both the public and private sectors;
- ensuring IJs receive improved and frequent training with the objective of maintaining a highly competent, well-informed bench; and

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[33] *See* City of Brookings Mun. Telephone Co. v. F.C.C., 822 F.2d 1153, 1169 (D.C. Cir. 1987).
[34] Karen Musalo, Anna O. Law, et al., With Fear, Favor, and Flawed Analysis: Decision-Making in U.S. Immigration Courts, 65 B.C. L. REV. 2743 (Dec. 2, 2024).
[35] Musalo at 2776.
[36] Musalo at 2776.

- reversing amendments to BIA procedures made in 1999.[37]

Unfortunately, EOIR chose to issue this Rule without prior notice and the opportunity to comment, in violation of the APA. However, CGRS previously provided EOIR with this study as part of its public comment[38] on EOIR's Interim Final Rule, *Reducing the Size of the Board of Immigration Appeals.*[39] Thus, the agency could and should have considered these alternative measures prior to issuing the Rule. Nevertheless, CGRS urges EOIR to implement them now.

Other measures that would improve the quality of IJ decision making include ensuring that noncitizens in removal proceedings have access to competent legal counsel and expanding the friend of the court and EOIR helpdesk programs. Noncitizens who have access to competent counsel during their immigration court proceedings, or, at the very least, to information about the legal processes they are undergoing and the requirements of certain forms of relief or protection from removal, are in a position to promote better IJ decision making in a number of ways.

These include raising legal issues and arguments IJs must engage with, more effectively challenging the government's evidence and arguments, identifying and proffering evidence, and framing the evidence in the record in terms of the relevant legal standards to be applied by the court. Represented applicants are also more likely to prevail in immigration court than unrepresented individuals.[40] Ensuring that more noncitizens in removal proceedings are represented by competent counsel or at least have access to critical information would improve IJ decision making in ways that would lead to fewer appeals filed with the BIA.

As an alternative to the Rule, EOIR could have considered expanding its initiatives promoting access to counsel and better understanding of the immigration court process in order to promote better IJ decision making. Instead, EOIR has recently taken actions to end or undermine critical EOIR efforts in this regard. In January 2025, EOIR issued a memorandum telling legal service providers who receive federal funding to stop providing legal orientation and other work to support

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[37] Musalo at 2797-98.
[38] CGRS Comment on Reducing the Size of the Board of Immigration Appeals IFR, Comment ID EOIR-2025-0002-1042 (May 13, 2025), https://www.regulations.gov/comment/EOIR-2025-0002-1042.
[39] 90 Fed. Reg. 15,525 (April 14, 2025).
[40] Musalo at 2761-62 (internal citations omitted).

noncitizens in immigration court.[41] The memo ordered the stoppage of work on the Legal Orientation Program; the Immigration Court Helpdesk; the Family Group Legal Orientation Program; and the Counsel for Children Initiative.[42] More recently, EOIR has gutted the Recognition and Accreditation program, which will have a particularly negative impact on the ability of indigent asylum seekers in proceedings before EOIR to access legal counsel and support.[43] EOIR should have considered reversing these actions.

Again, CGRS included these proposals in its comment on *Reducing the Size of the BIA*, so the agency was well aware of them. Instead, EOIR failed to consider the measures identified here to improve the quality of IJ decision making as a responsible alternative to summary dismissal of appeals, unreasonably short timelines for appeals and briefing, and significantly diminished opportunities to adequately examine and address the case record on appeal. The agency offered no reasonable explanation for rejecting these alternatives.

2. EOIR failed to consider implementing the staffing model of the similarly situated federal courts of appeals or increasing BIA support staff

EOIR could have looked to the federal courts of appeals as models for determining how to appropriately manage the BIA's caseload. In addition to both being federal appellate bodies, the courts of appeals and the BIA share other characteristics in common. These include the three-member panel structure; provisions for convening *en banc*; the ability and responsibility to issue precedent decisions binding on lower tribunals; and, in light of the petition for review mechanism discussed *supra*, a substantial immigration caseload. Like the BIA, federal courts of appeals must also concern themselves with efficiency, administrability, coherence, and consistency in decision making. These commonalities make the staffing models of the courts of appeals particularly important for DOJ to consider in assessing the appropriate size of the Board.

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[41] Laura Romero, *DOJ orders federally funded legal service providers to stop providing support at immigration courts*, ABC NEWS (Jan. 23, 2025), https://abcnews.go.com/US/doj-orders-federally-funded-legal-service-providers-stop/story?id=118027656 (last visited Mar. 2, 2026).
[42] *Id*.
[43] Sarah N. Lynch, *DOJ guts office that helps indigent immigrants obtain affordable legal aid, sources say*, CBS NEWS (Mar. 23, 2026), https://www.cbsnews.com/news/justice-dept-guts-office-helping-indigent-immigrants-affordable-legal-aid/.

For example, as of December 31, 2025, the U.S. Court of Appeals for the First Circuit had a pending caseload of 8,603 appeals and 29 judgeships, a case-to-judge ratio of 296:1: (the highest of all the courts of appeals).[44] The Second Circuit had a case-to-judge ratio of 260:1.[45] The Fifth Circuit had a case-to-judge ratio of 202:1.[46] The Tenth Circuit had a case-to-judge ratio of 105:1 (the lowest of all the courts of appeals).[47]

By contrast, the BIA had 202,946 appeals pending as of the end of fiscal year 2025 and provided for 15 members, a case-to-member ratio of 13,530:1. Rule at 5,271 n. 13. Put another way, each Board member is responsible for 45 times the number of cases for which a judge on the busiest federal court of appeals was responsible in 2025.

Assessing the staffing model of the federal courts of appeals would have counseled for a dramatic increase in the number of Board members, a responsible alternative to the Rule in light of the similarities between the courts of appeals and the BIA. EOIR entirely failed to consider this option, let alone offer a reasonable explanation for rejecting it.

Similarly, as EOIR observed in *Reducing the Size of the BIA*, "Without sufficient attorney advisors and other support staff, the Board cannot efficiently adjudicate its caseload…."[48] It bears mention that federal court judges generally have four law clerks each, where the Board has only a limited number of clerks shared among the members. Yet EOIR provides no indication it considered increasing the number of support staff at the BIA as an alternative to the Rule and provides no explanation for rejecting it.

In addition to these being commonsense solutions, here again, CGRS included these alternative proposals in its comment on *Reducing the Size of the BIA*, so the agency was well aware of them. Instead, EOIR failed to consider implementing a staffing model similar to the federal courts of appeals or increasing the number of BIA support staff as responsible alternatives to the Rule and offered no reasonable explanation for rejecting them.

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[44] U.S. Courts of Appeals Federal Court Management Statistics (Dec. 31, 2025), https://www.uscourts.gov/sites/default/files/document/fcms_na_appsummary1231.2025.pdf.
[45] *Id*. (pending caseload of 3,386 and 13 judgeships).
[46] *Id*. (pending caseload of 3,430 and 17 judgeships).
[47] *Id*. (pending caseload of 1,259 and 12 judgeships).
[48] 90 Fed. Reg. at 15,527.

V. THE RULE IS UNLAWFUL UNDER THE APA BECAUSE IT IS CONTRARY TO CONSTITUTIONAL RIGHT

Agency actions taken contrary to constitutional right are unlawful and must be set aside.[49] In forcing, by means of summary dismissal, the vast majority of respondents who wish to appeal IJ decisions to file petitions for review with federal courts of appeals, the Rule violates respondents' Fifth Amendment due process rights. It does so by: a) taking away a uniform stay of removal procedure available during the pendency of BIA appeals and subjecting noncitizens to varying processes and standards for seeking stays in the federal courts of appeals pending petitions for review; b) taking away a layer of review by an administrative body charged with uniformly applying the agency's jurisprudence to IJ decision-making and compelling respondents to seek review of IJ decisions directly from courts of appeals with divergent caselaw on subject matter jurisdiction; and c) forcing respondents to prepare appeals without access to the record. The Rule's waiver provision also violates the Fifth Amendment's due process clause.

A. The Rule Removes a Uniform Stay of Removal Procedure

Current regulations ensure removal orders cannot be carried out "during the time allowed for the filing of an appeal" or "while an appeal is pending." [50] For the vast majority of respondents, the Rule's Notice of Appeal deadline and summary dismissal provisions render these protections meaningless.[51] The Rule's reduced timeline for filing a Notice of Appeal has the effect of shortening the maximum length of the initial stay under those regulations from 30 days to 10 days in most cases. In addition the Rule's summary dismissal provision vitiates the regulatory language guaranteeing a stay of removal while the appeal remains pending with the BIA.

Instead, the Rule all but bypasses the uniform protections of the EOIR stay regulations to immediately subject respondents wishing to appeal IJ removal decisions to the varying procedures and standards the courts of appeals apply in determining whether to issue stays of removal. For example, the U.S. Courts of

[49] 5 U.S.C. § 706(2)(B).
[50] 8 CFR 1003.6(a).
[51] 8 CFR 1003.6(a).

Appeals for the First,[52] Third,[53] Fourth,[54] and Ninth[55] Circuits provide for an automatic stay of removal under certain circumstances. The U.S. Court of Appeals for the Second Circuit monitors the application of a government forbearance policy with similar effect to an automatic stay.[56] The other courts of appeals make no such provision.

These divergent approaches to stays of removal pending appeal, while bypassing the stay of removal that, prior to the Rule, would be issued pending the outcome of the case at the BIA, could have dire consequences. These include precipitous return to persecution, torture, or death for respondents appealing IJ decisions on applications for asylum, withholding of removal, or protection under the Convention Against Torture.[57]

B. The Rule Eliminates All Appellate Review on Some Issues

The Rule effectively eliminates appellate review of any kind – administrative or judicial – of certain IJ determinations in some circuits. This is because, for example, there is a circuit split among courts of appeals as to whether they have jurisdiction to review BIA determinations on exceptions to the right to apply for asylum, including those related to safe third country agreements, timely filing, and prior denials.[58] Some circuits have found that they lack jurisdiction to review the BIA's determination that an exception applies.[59] Therefore, when the Board summarily

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[52] Local Rule 18.0.2, U.S. Court of Appeals for the First Circuit, https://www.ca1.uscourts.gov/sites/ca1/files/rulebook.pdf (Dec. 1, 2025).
[53] Standing Order Regarding Immigration Cases, U.S. Court of Appeals for the Third Circuit, https://www.ca3.uscourts.gov/sites/ca3/files/BIA%20Standing%20Order%20final.pdf (Aug. 5, 2015).
[54] Standing Order 19-01, U.S. Court of Appeals for the Fourth Circuit, https://www.ca4.uscourts.gov/docs/pdfs/noticestandingorder19-01.pdf?sfvrsn=91fcbf09_8 (Oct. 21, 2019).
[55] General Order 6.4(c), U.S. Court of Appeals for the Ninth Circuit, https://cdn.ca9.uscourts.gov/datastore/uploads/rules/general_orders/General%20Orders.pdf (Dec. 1, 2024).
[56] In the Matter of Immig. Petitions for Review Pending in the U.S. Ct. of Appeals for the Second Circuit, 702 F.3d 160, 162 (2d Cir. 2012).
[57] INA § 242(b)(3)(B), 8 U.S.C. § 1252(b)(3)(B) (Service of a petition for review does not stay removal while the petition is pending unless the court of appeals orders otherwise).
[58] INA § 208(a)(2), 8 U.S.C. § 1158(a)(2).
[59] INA § 208(a)(3), 8 U.S.C. § 1158(a)(3), strips courts of jurisdiction to review agency determinations that these exceptions apply. However, the REAL ID Act of 2005 restored jurisdiction to the courts of appeals to review constitutional claims or questions of law. REAL ID Act of 2005, § 106, INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D). Courts of appeals have not reconciled these statutory

dismisses appeals on such questions, the default procedure under the Rule, respondents will have no recourse in these circuits.

EOIR states that "[i]n any petition for review of a final removal, [it] expects that the court of appeals would review the substance of the Immigration Judge's decision as the basis for the final order." Rule at 5,271. However, as explained *supra*, that expectation is unfounded with respect to some courts of appeals in the context of reviewing exceptions to the right to apply for asylum. The rule therefore effectively forecloses appellate review of IJ decisions regarding exceptions to the right to apply for asylum in circuits that have determined the courts of appeals lack jurisdiction to review such decisions. This foreclosure infringes on the Fifth Amendment rights of asylum seekers to due process of law, a hallmark of which is the ability to request review of administrative decisions carrying grave consequences such as deportation to persecution or torture.

C. The Rule Forces Respondents to Present Appeals Without Access to the Record

The Rule also violates due process through its waiver provision, which states that any issue not raised in the Notice of Appeal shall be deemed waived.[60] This provision forces respondents into the impossible position of identifying and developing issues and arguments for administrative appeal on the Notice of Appeal, before the transcript of the hearing and any oral IJ decision is even available. Combined with the summary dismissal provision, the waiver provision short-circuits any possibility of meaningful administrative appellate review of IJ decisions by removing respondents' ability to brief the issues on appeal with the benefit of access to the full record of immigration court proceedings. The Rule cites no other context of legal practice in which a party is expected to write an appellate argument without access to the written record of the matter being appealed.

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provisions consistently, with some finding that exceptions to the right to apply for asylum raise mixed questions of law and fact, constituting "questions of law" reviewable under the REAL ID Act, while others have not found jurisdiction over such mixed questions of law and fact. *Compare* Taslimi v. Holder, 590 F.3d 981, 985 (9th Cir. 2010), *and* Chen v. United States DOJ, 471 F.3d 315, 322 (2d Cir. 2006) *with* Viracacha v. Mukasey, 518 F.3d 511, 515 (7th Cir. 2008) *and* Zhu v. Gonzales, 493 F.3d 588, 596 (5th Cir. 2007). *See generally* American Immigration Council, "How to File a Petition for Review," at 4-5, https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/how_to_file_a_petition_for_review_2015_update.pdf (Nov. 2015).

[60] 8 CFR 1003.38(b)(3).

EOIR states that the Rule's summary dismissal provision "will allow the Board to focus on appeals with particularly novel or complex legal questions…." Rule at 5,271. While the desire for the BIA to address novel or complex legal questions is a worthy, if limited, goal, EOIR does not explain how the Board will be able to identify cases with such questions on the basis of the Notice of Appeal, without access to the administrative record or party briefs.[61] Indeed, the practical effect of the Rule will be to significantly reduce the BIA's ability to address novel or complex legal questions. Beyond being counter-productive to achieving this goal, the Rule infringes on fundamental due process rights by denying meaningful access to the records needed to pursue an effective appeal and denying anyone whose challenge does not raise novel or complex legal questions, even if the challenge is valid, from having it considered at all. It must therefore be rescinded.

VI. THE RULE IS UNLAWFUL UNDER THE APA BECAUSE IT WAS ISSUED WITHOUT OBSERVANCE OF PROCEDURE REQUIRED BY LAW

Agency actions taken without observance of procedure required by law are also unlawful and must be set aside.[62] The APA generally requires agencies to publish notices of proposed rulemaking in the Federal Register; provide interested persons an opportunity to participate in the rulemaking by submitting written data, views, or arguments; and to consider relevant matters presented.[63] Here, EOIR published the Rule as an interim final rule without issuing a notice of proposed rulemaking.

EOIR asserts that the Rule is exempt from notice-and-comment rulemaking under the APA, because it is a rule of agency management or personnel as well as a rule of agency organization, procedure, or practice, and because it involves the foreign affairs function of the United States. Rule at 5,274. However, the Rule does not meet the requirements of these exemptions and thus is subject to the APA's notice-and-comment requirements.[64]

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[61] *See* Brief of Amici Curiae Former Immigration Judges and Former Members of the Board of Immigration Appeals in Support of Plaintiff's Emergency Motion for Stay at 10, Amica (D.D.C. Mar. 2, 2026) ("[The Notice of Appeal] was never designed to serve as a full explication of arguments or a substitute for briefing. Rather, it functions as the preliminary filing necessary to initiate the appeal, with the expectation that the record will later become available and that the parties will have the opportunity to develop their arguments in written briefs.").

[62] 5 U.S.C. § 706(2)(D).

[63] 5 U.S.C. § 553(b) and (c).

[64] It was on this basis that the court in Amica set aside three key provisions of the Rule, because EOIR issued the Rule without prior notice and the opportunity to comment. Amica, Order at 2.

Additionally, EOIR failed to engage in the regulatory flexibility analysis required under the RFA.

Because EOIR failed to issue a notice of proposed rulemaking, depriving interested persons of the opportunity to participate in the rulemaking by having the agency consider data, views, or arguments submitted, and failed to engage in the regulatory flexibility analysis required under the RFA, the Rule was issued without observance of procedure required by law.

A. The Rule is not a Rule of Agency Management or Personnel

A matter relating to agency management or personnel is excepted from the APA's notice-and-comment requirements.[65] To qualify as a rule of agency management or personnel, the rule must concern internal agency operations without substantially affecting parties outside the agency.[66]

The Rule substantially affects thousands of individuals who will seek appeal of immigration court outcomes after the Rule takes effect and those who represent them. In particular, asylum seekers with future appeals before the Board will be substantially affected by the Rule's impacts on their core rights and interests as described in detail, *supra*. Therefore, it does not qualify as a "rule of agency management or personnel."

B. The Rule is not a Rule Involving the Foreign Affairs Function of the United States

The Rule improperly relies on the exception for normal rulemaking involving the "foreign affairs function of the United States."[67] Rule at 5,274-75. This exception, too, comes with a "high bar."[68] In particular, courts have warned against "[t]he dangers of an expansive reading of the foreign affairs exception" in the immigration context, where inevitable "incidental foreign affairs effects" would "eliminate[] public participation in this entire area of administrative law."[69] EOIR cannot meet that high bar here, as the potential effects on international relations that it puts

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[65] 5 U.SC. 553(a)(2).
[66] *See* Joseph v. United States Civil Service Commission, 554 F.2d 1140, 1153 n. 23 (D.C. Cir. 1977) (internal citation omitted).
[67] 5 U.S.C. § 553(a)(1).
[68] *Id.* at 55.
[69] City of New York v. Permanent Mission of India to United Nations, 618 F.3d 172, 202 (2d Cir. 2010).

forward are all speculative, tenuous, or otherwise reliant on unsupported claims of deterrence and hypothetical challenges for foreign partners. Rule at 5,275.

C. The Rule is Not Exempt from the RFA

EOIR also relies on these improperly invoked exceptions to notice-and-comment rulemaking to conclude that the Rule is exempt from the requirements of the RFA. Rule at 5,276. However, because these exceptions do not apply, the Rule is also unlawful due to EOIR's failure to conduct the initial regulatory flexibility analysis required under the RFA to assess the impact of the Rule on small entities.[70]

VII. CONCLUSION

For all of these reasons, EOIR should rescind the Rule in its entirety. The Rule is contrary to international law, arbitrary and capricious, contrary to constitutional right, and was issued without observance of procedure required by law. It rests on speculation and conclusory analysis, ignores serious impacts and reliance interests, and will cause predictable, major harm to refugees and other vulnerable populations—all due to EOIR's desire to dispense with the BIA's appellate caseload no matter the cost.

Thank you for the opportunity to submit comments on the Rule. Should you have any questions, please contact Matthew Joseph at josephmatt@uclawsf.edu.

Sincerely,

Matthew Joseph
Senior Policy Counsel

[70] 5 U.S.C. § 603(a).

WITH FEAR, FAVOR, AND FLAWED ANALYSIS: DECISION-MAKING IN U.S. IMMIGRATION COURTS

KAREN MUSALO
ANNA O. LAW
ANNIE DAHER
KATHARINE M. DONATO
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WITH FEAR, FAVOR, AND FLAWED ANALYSIS: DECISION-MAKING IN U.S. IMMIGRATION COURTS

KAREN MUSALO*
ANNA O. LAW**
ANNIE DAHER***
KATHARINE M. DONATO****
CHELSEA MEINERS*****

Abstract: Immigration judges (IJs), housed within the Executive Office for Immigration Review within the Department of Justice (DOJ), make decisions in asylum and withholding claims, which are life or death matters. And although their title is "judge," IJs are DOJ attorneys who lack independence and are particularly susceptible to political pressures. Federal court judges and scholars alike have criticized the quality and fairness of IJ decision-making, and many studies have been carried out to better understand the factors that impact it. The prior studies have relied principally on quantitative data because IJ decisions are not publicly available or searchable in any existing database.

The authors of this study had unprecedented access to more than five hundred IJ decisions, allowing for both a quantitative and qualitative analysis. Our findings were consistent with other studies in noting that IJ experience and gender made a

* Karen Musalo is Professor of Law, Bank of America Foundation Chair in International Law, and Director of the Center for Gender and Refugee Studies at the University of California College of the Law, San Francisco (previously University of California, Hastings College of the Law).

** Anna O. Law is Associate Professor of Political Science and the Herbert Kurz Chair of Constitutional Rights at CUNY Brooklyn College.

*** Annie Daher is an asylum and immigration law attorney and formerly Senior Staff Attorney at the Center for Gender and Refugee Studies.

**** Katharine M. Donato is the Donald G. Herzberg Professor of International Migration in the School of Foreign Service at Georgetown University.

***** Chelsea Meiners holds a Master of Arts in Latin American Studies from Georgetown University and currently works in international development.

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NOTE: Because not all platforms support graphs and tables, the figures in this Article are also archived at https://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/65-8/Musalo_et_al_tables.pdf [https://perma.cc/E866-ER6U].

difference in case outcomes, with male IJs and IJs with enforcement backgrounds denying protection at higher rates. We were able to identify other significant trends as well, including that the most common reasons why IJs denied protection to credible asylum seekers were their findings that they failed to meet the extremely stringent requirements of two elements of the refugee definition—elements which arguably are overly restrictive and inconsistent with international norms. We also observed patterns of incompetence and bias among these decisions.

This Article recommends several policy reforms to address the shortcomings we identify, among them: (1) the creation of Article I immigration courts, (2) improvement of IJ competence through more stringent hiring standards and continuing education, (3) increased diversity of IJs based on employment experience, (4) reduced deference to the Board of Immigration Appeals in reviewing cases, and (5) allocating additional resources to immigration adjudication.

INTRODUCTION

The fate of hundreds of thousands of non-citizens rests in the hands of Immigration judges (IJs), housed within the Executive Office for Immigration Review (EOIR) within the Department of Justice (DOJ).[1] Although they carry the title of "judge," IJs are DOJ attorneys who lack the independence we generally associate with judges in our legal system.[2] Their decisions may be appealed to the Board of Immigration Appeals (BIA),[3] also situated within EOIR, and decisions of the BIA may be appealed to the federal courts of appeals.[4] A large percentage of the cases before IJs involve requests for three forms of humanitarian relief—asylum, withholding of removal (withholding), and Convention Against Torture (CAT) protection[5]—where life and death issues are at

[1] Note, *Courts in Name Only: Repairing America's Immigration Adjudication System*, 136 HARV. L. REV. 908, 909 (2023).

[2] *See* Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 709 (2019) (noting that IJs are part of the executive, not judicial, branch of government and outlining ways in which they lack independence).

[3] 8 C.F.R. § 1003.38(a) (2024).

[4] 8 U.S.C. § 1252. The Migration Policy Institute reported that from 2013 to 2021, 26% of all BIA decisions were appealed to the federal courts. MUZAFFAR CHISHTI ET AL., MIGRATION POL'Y INST., AT THE BREAKING POINT: RETHINKING THE U.S. IMMIGRATION COURT SYSTEM 1, 18 (2023), https://www.migrationpolicy.org/sites/default/files/publications/mpi-courts-report-2023_final.pdf [perma.cc/ML2Y-22DH]. Due to principles of *Chevron* deference, federal courts of appeals were constrained in their ability to reverse BIA decisions. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2270–71 (2024). The U.S. Supreme Court overturned *Chevron* in *Loper Bright Enterprises v. Raimondo*, thus eliminating the judicial deference previously given to the BIA. *Loper Bright*, 144 S. Ct. at 2270–71. However, as discussed *infra* notes 101–107, the demise of *Chevron* will not necessarily translate into decisions that favor immigrants.

[5] *See* HOLLY STRAUT-EPPSTEINER, CONG. RSCH. SERV., R47504, ASYLUM PROCESS IN IMMIGRATION COURTS AND SELECTED TRENDS 6 (2023) (noting that "[a]t the end of FY2023 Q1, there were 749,133 pending asylum applications among the approximately 1.87 million total removal cases

stake. As asylum and withholding have similar legal requirements, we focus in this Article on those types of claims.[6]

The quality and fairness of IJ decision-making has been subject to harsh criticism over the years,[7] and numerous studies have attempted to better understand the factors that impact it.[8] However, these studies have had to rely principally on quantitative analysis because decisions by IJs are neither generally available to the public nor searchable in any available database.[9]

The authors of this Article had unprecedented access to more than five hundred IJ decisions in cases involving requests for these three forms of humanitarian relief.[10] Having access to the actual text of the IJ decisions, rather than just the case and outcome data that EOIR maintains, enabled us to engage in both a quantitative and qualitative analysis. This allowed us to assess how faithfully and competently judges applied the law to the facts and the frequency with which apparent bias or other non-legal factors influenced decision-making.[11] Analysis of our unique dataset yielded a number of significant findings.[12]

To start, using data that we coded directly from the decisions themselves, our quantitative analysis was largely consistent with prior studies in finding that IJs' employment backgrounds (specifically, whether they had experience in immigration enforcement or not) and gender made a difference with regard to claim outcomes. IJs with enforcement backgrounds and IJs who were male were more likely to deny protection than IJs without such backgrounds and IJs who were female.[13] We then turned to investigating denials of protection in more detail, discovering two notable trends.

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pending in immigration courts"); Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 28–29 (2015) (highlighting that, although unrepresented individuals rarely seek relief from removal, between 28.4% to 61.6% of individuals who were represented by counsel sought asylum during the timeframe of the study (2007–2012), depending on type of representation).

[6] *See infra* Part I.A (outlining legal requirements for asylum, withholding, and CAT relief). This Article leaves the analysis of CAT claims and related issues to a subsequent article because requirements for CAT relief differ substantially from those of asylum and withholding. *See infra* notes 55–60 and accompanying text (discussing CAT requirements). Although our analysis centers on asylum and withholding, some of our conclusions may also apply to the adjudication of CAT claims.

[7] *See infra* Part II.

[8] *See infra* Part III.

[9] *See infra* Part III.

[10] *See infra* Part IV.

[11] *See infra* Parts IV, V.

[12] This Article is not an attempt to present all of the findings. Rather, it focuses on differential outcomes depending on IJ and applicant attributes, followed by a deep quantitative and qualitative investigation of denials of protection.

[13] *See infra* Part V.A.1.

First, the most common reasons why applicants were denied protection were not related to credibility.[14] Rather, IJs most often denied protection because they concluded that applicants: (1) did not establish that they held a protected characteristic (as discussed below, the law requires that the applicant's harm relate to their race, religion, nationality, political opinion, or membership in a particular social group) or (2) failed to establish nexus (as discussed below, the law requires that the applicant's harm be inflicted "on account of" their possession of a protected characteristic).[15] Our qualitative assessment of these denials revealed that denials frequently rested on the application of highly restrictive interpretations of these determinative legal elements, which stem from BIA decisions widely considered to be at odds with the underlying goals of a humanitarian protection system.[16] We found that IJs often applied these highly restrictive interpretations to deny relief even where there was no question that applicants were credible, had suffered or were likely to suffer grievous harm upon return to their home countries, and had presented strong evidence of nexus to their protected characteristic(s).[17] We call this a "denial preference" and suggest that it is a foreseeable consequence of an adjudication system in which the administrative trial and appellate bodies lack true independence and the decision-makers are subject to overt and implicit political pressures.[18]

Second, consistent with the long-standing criticisms of scholars and federal judges who have bemoaned the low quality of IJ decision-making,[19] we found that numerous IJ decisions bore little resemblance to what we have come to expect in a reasoned judicial ruling. These decisions frequently rested on factual and legal errors, poor legal analysis, and/or express illustrations of bias.[20] The prevalence and fundamental nature of these flaws, and the fact that they so frequently led toward denial, suggest that they may be in some cases another form of "denial preference."[21] In any event, the decisions demonstrate

[14] *See infra* Part V.A.2. In order to sustain their burden of proof, applicants for asylum and withholding must set forth credible testimony and evidence to support their claims. *See* 8 U.S.C. § 1158(B)(ii) ("The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee."); § 1231(b)(3)(C) (in determining whether a withholding applicant has sustained their burden of proof, "the trier of fact . . . shall make credibility determinations").

[15] *See infra* Part V.A.2.

[16] *See infra* Part V.B.1.

[17] *See infra* Part V.B.1.

[18] *See infra* Part V.B.1; *see also* Marouf, *supra* note 2, at 783–84 (discussing political pressure on immigration judges).

[19] *See infra* Part II.

[20] *See infra* Part V.B.

[21] *See infra* Part V.B.

that the lack of competency and professionalism critics have highlighted is a systemic problem afflicting the IJ corps—one that demands reform.

I. Claims for Humanitarian Protection in U.S. Immigration Courts

Noncitizens in the United States who fear returning to their home countries may seek several forms of humanitarian-based immigration protection, including asylum, withholding, and CAT protection (though, as described above, this Article concerns itself only with the first two). Section A describes the relevant legal requirements for obtaining humanitarian-based immigration protection.[22] Section B provides an overview of the process by which such claims may be raised in immigration court.[23] This background is provided to give context for the analysis that follows.

A. Legal Requirements

The United States's humanitarian protection framework for asylum and withholding derives from its obligations under the 1967 Protocol Relating to the Status of Refugees (Protocol),[24] which incorporates by reference the 1951 United Nations (UN) Convention Relating to the Status of Refugees (Convention).[25] These international agreements were drafted in the aftermath of the Holocaust—an era of emerging concern for human rights—to protect those fleeing persecution in their home countries.[26]

The Convention and Protocol define a "refugee" as a person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion," is unable or unwilling to return to their country of nationality,[27] and provide that state parties "shall as far as possible facilitate the assimilation and naturalization of refugees."[28] They also codify the principle of *non-refoulement*, requiring that no state party "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where [their] life or freedom would be threatened on

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[22] *See infra* Part I.A.

[23] *See infra* Part I.B.

[24] *See* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

[25] *See* Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6577, 189 U.N.T.S. 150, 151–52.

[26] *See* Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT'L L. 1179, 1197–1200 (1994) (outlining the history of the Convention and Protocol agreements).

[27] Convention Relating to the Status of Refugees, *supra* note 25, art. 1; Protocol Relating to the Status of Refugees, *supra* note 24, art. I (incorporating articles 2–34 of the Convention).

[28] Convention Relating to the Status of Refugees, *supra* note 25, art. 34.

account of [their] race, religion, nationality, membership of a particular social group or political opinion."[29]

The United States enacted the 1980 Refugee Act, which amended the 1952 Immigration and Nationality Act, to bring its immigration laws into compliance with its international obligations under the Convention and Protocol.[30] The Refugee Act adopted the Convention definition of "refugee" almost verbatim,[31] and, as the U.S. Supreme Court has recognized, Congress intended the Refugee Act to conform U.S. law to the standards set forth in the Convention.[32] Thus, guidance interpreting these international agreements is properly considered in understanding the legal standards for asylum and withholding.[33]

To establish eligibility for asylum, an applicant must satisfy the definition of a "refugee."[34] To do so, they must demonstrate (1) a well-founded fear (2) of persecution (3) on account of (4) race, religion, nationality, political opinion, or membership in a particular social group, and (5) that they are unwilling or unable to return to, or avail themselves of the protection of, their country of origin because of such fear.[35] The persecution must be carried out by the gov-

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[29] *Id.* art. 33(1).

[30] *See* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

[31] *Id.* The U.S. Supreme Court described the Refugee Act's refugee definition as "virtually identical" to the Convention definition outlined in Article 1. INS v. Cardoza-Fonseca, 480 U.S. 421, 437 (1987). However, the U.S. interpretation of the Convention has brought it out of alignment in a key respect: although the Convention provides that *all* refugees are entitled to non-refoulement, the U.S. Supreme Court held that only refugees who meet a standard higher than "well-founded fear" have that right. *See* INS v. Stevic, 467 U.S. 407, 424 (1984) (concluding that meeting the "well-founded fear" is not sufficient to entitle the applicant to non-refoulement); *see also infra* note 49 and accompanying text.

[32] *See, e.g.*, *Cardoza-Fonseca*, 480 U.S. at 436–37 ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring the United States refugee law into conformance with [the Protocol, and the aspects of the Convention that the Protocol incorporated,] to which the United States acceded in 1968."); *see also* Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond* Chevron, 60 DUKE L.J. 1059, 1066–78 (2011) (outlining legislative history and explaining Congress intended congruence between the Refugee Act and the Convention and Protocol); Edward M. Kennedy, *Refugee Act of 1980*, 15 INT'L MIGRATION REV. 141, 143–45 (1981) (describing legislative history of the Refugee Act); Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 45 (1981) (same).

[33] *See Cardoza-Fonseca*, 480 U.S. at 436–37, 439 n.22 (considering definitions in the Convention and Protocol and noting that the Court's interpretation of the Refugee Act's refugee definition is "guided by" analysis found in the U.N. High Commissioner for Refugees' (UNHCR) *Handbook on Procedures and Criteria for Determining Refugee Status* (citing UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, U.N. DOC. HCR/1P/4/ENG/REV.3, https://www.unhcr.org/us/media/handbook-procedures-and-criteria-determining-refugee-status-under-1951-convention-and-1967 [perma.cc/HW59-G9Z3] [hereinafter UNHCR HANDBOOK])).

[34] 8 U.S.C. § 1158(b)(1)(A).

[35] *Id.* § 1101(a)(42)(A).

ernment of their country of origin or by a person or group that the government is unwilling or unable to control.[36] If the applicant could avoid harm by relocating elsewhere in their country, and it would be reasonable to expect them to do so, that negates their well-founded fear, making them ineligible for asylum.[37] However, notably, if the persecutor is the government, the applicant is entitled to a rebuttable presumption that persecution is countrywide and internal relocation is not possible.[38]

A person who can establish that they experienced past harm rising to the level of persecution, along with other required elements (including that persecution was on account of a protected ground, by the government or a person or group the government is unable or unwilling to control) receives a rebuttable presumption of eligibility for asylum on that basis.[39] The burden of proof then shifts to the government, which can only rebut the presumption by showing that (1) there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear or (2) the applicant could avoid future persecution by relocating to another part of the country and it would be reasonable to expect them to do so.[40] If the government overcomes the presumption, the applicant can still be granted "humanitarian asylum" by showing (1) "compelling reasons for being unwilling to return to the country of origin arising out of the severity of the past persecution" (in cases of "severe and atrocious" past persecution)[41] or (2) a reasonable possibility that they would endure other serious harm if returned (the "other serious harm" need not relate to the five protected grounds).[42] If a person satisfies the above requirements and is not subject to any mandatory bars to asylum, they are eligible to receive that form of protection.[43] However, asylum is discretionary, meaning that ad-

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[36] *See, e.g.*, Avetova-Elisseva v. INS, 213 F.3d 1192, 1196 (9th Cir. 2000) (noting that affirmative state action is not required if persecution is carried out by an entity that the government is unable or unwilling to control).

[37] 8 C.F.R. §§ 208.13(b)(2)(ii), 1208.13(b)(2)(ii) (2024).

[38] *Id.* §§ 208.13(b)(3)(ii), 1208.13(b)(3)(ii).

[39] *Id.* §§ 208.13(b)(1), 1208.13(b)(1).

[40] *Id.* §§ 208.13(b)(1)(i)(A)–(B), 1208.13(b)(1)(i)(A)–(B).

[41] *Id.* §§ 208.13(b)(1)(iii)(A), 1208.13(b)(1)(iii)(A); *see also* Matter of Chen, 20 I. & N. Dec. 16, 19 (B.I.A. 1989) (setting forth requirements for humanitarian asylum).

[42] 8 C.F.R. §§ 208.13(b)(1)(iii)(B), 1208.13(b)(1)(iii)(B); *see also* Matter of L-S-, 25 I. & N. Dec. 705, 710 (B.I.A. 2012) (discussing humanitarian asylum based on "other serious harm").

[43] *See* 8 U.S.C. § 1158(a)(2), (b)(2). A person may be prohibited from applying for asylum if they (1) fail to apply within one year of entering the United States, (2) have been previously denied asylum, or (3) can be removed pursuant to a "safe third country agreement," while they are mandatorily barred from such protection if they (1) have persecuted others, (2) have been convicted of a particularly serious crime, (3) have committed a serious nonpolitical crime, (4) are considered a danger to national security, (5) have participated in terrorist activities, or (6) have firmly resettled in another country. *Id.*

judicators can deny protection to an applicant who meets the legal standards if they determine that adverse discretionary factors outweigh positive factors.[44]

To demonstrate eligibility for withholding, an applicant must prove that their "life or freedom would be threatened" because of a protected ground.[45] The legal framework for withholding is similar in many ways to that applicable to asylum.[46] For example, both standards require proving a certain risk of harm: for asylum the harm is persecution, whereas for withholding it is a threat to life or freedom.[47] Additionally, both forms of relief require a certain likelihood of that harm occurring: for asylum a one in ten chance will suffice,[48] whereas for withholding it must be much more likely, i.e., "more likely than not."[49] Also, both asylum and withholding require establishing a nexus, or causal relationship, between the harm and a protected ground.[50]

As with asylum, a withholding applicant who establishes past persecution and the other required elements is entitled to a rebuttable presumption of eligibility which the government can only rebut by showing (1) a fundamental

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[44] *Id.* § 1158(b)(1)(A); *see also* Matter of Pula, 19 I. & N. Dec. 467, 474 (B.I.A. 1987) (noting that "the danger of persecution should generally outweigh all but the most egregious of adverse factors").

[45] 8 U.S.C. § 1231(b)(3)(a).

[46] *See, e.g.*, Garcia v. Holder, 749 F.3d 785, 791 (9th Cir. 2014) (summarizing the withholding requirements).

[47] *See* DEBORAH E. ANKER & JEFFREY S. CHASE, LAW OF ASYLUM IN THE UNITED STATES § 4:5 (2024 ed.). Adjudicators often conflate these two standards; however, it has been noted that persecution is "a seemingly broader concept" than a threat to life or freedom. INS v. Stevic, 467 U.S. 407, 428 n.22 (1984); *see also* ANKER & CHASE, *supra* (discussing standards for "persecution" and "threat to life or freedom").

[48] *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987) (requiring only a 10% chance of persecution to establish well-founded fear).

[49] *Stevic*, 467 U.S. at 424 (requiring that withholding applicants prove that persecution is more likely than not to occur). Scholars have criticized *Stevic* for essentially ignoring the Convention, which affords the right of non-refoulement to all individuals who satisfy the refugee definition (i.e., by showing a well-founded fear of persecution). *See, e.g.*, Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L L. 1, 7 (1997) (explaining how the *Stevic* case did not comport with refugee protection norms); Musalo, *supra* note 26, at 1184–85 (same). Additionally, it should be noted that although the "well-founded fear" required for asylum contains both a subjective and objective component, withholding does not require any subjective fear. *Cardoza-Fonseca*, 480 U.S. at 430.

[50] Asylum requires that a protected ground be "one central reason" for the applicant's harm. 8 U.S.C. § 1158(b)(1)(B)(i). Withholding requires showing that persecution is "because of" a protected ground. *Id.* § 1231(b)(3)(A). In light of this difference, some circuits have recognized that the withholding statute merely requires an applicant to establish that a protected ground constitutes "a reason" for the harm, a lower bar than that for asylum. *See, e.g.*, Barajas-Romero v. Lynch, 846 F.3d 351, 359–60 (9th Cir. 2017) (holding that withholding only requires an applicant to establish that a protected ground is "a reason" for their harm, which is a lower threshold than "one central reason"). *But see* Quituizaca v. Garland, 52 F.4th 103, 114 (2d Cir. 2022) (finding BIA did not err by applying the "one central reason" standard to withholding claim).

change in circumstances or (2) safe and reasonable internal relocation.[51] Withholding does not provide an equivalent to humanitarian asylum if the government rebuts the presumption of eligibility arising from past persecution.[52] However, in contrast to asylum, granting withholding is mandatory if a person satisfies these requirements and is not subject to any mandatory bars to withholding.[53]

Although asylum and withholding both prevent the U.S. government from returning individuals to countries of feared persecution, asylum is preferable for several reasons. Among the most significant is that asylum provides a pathway to lawful permanent resident status and subsequent U.S. citizenship, and that it confers derivative asylee status to a principal asylee's spouse and minor children. Withholding merely provides the right to not be returned to the country of feared harm.[54]

While not examined in this article, CAT relief is another form of humanitarian protection against removal.[55] However, it derives from a different international agreement than asylum and withholding[56] and is subject to different legal requirements.[57] For example, while asylum and withholding require establishing past or feared "persecution" or a "threat to life or freedom," CAT

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[51] 8 C.F.R. §§ 208.16(b)(1)(i)(A)–(B), 1208.16(b)(1)(i)(A)–(B) (2024) (outlining withholding requirements).

[52] *Id.* §§ 208.16(b)(1)–(2), 1208.16(b)(1)–(2).

[53] *See* 8 U.S.C. § 1231(b)(3) (containing no discretionary requirement). The statutory bars to withholding include (1) having persecuted others, (2) having been convicted of a particularly serious crime, (3) having committed a serious nonpolitical crime, (4) being considered a danger to national security, and (5) being removable pursuant to a "safe third country agreement." *Id.* § 1231(b)(3)(B).

[54] *Id.* § 1159(a)(1); 8 C.F.R. §§ 209.1, 1209.1, 208.21, 1208.21.

[55] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3(1), Dec. 10, 1984, 1465 U.N.T.S. 85.

[56] *Id.* CAT protection under U.S. law derives from the United States' obligations under Article 3 of the CAT, which prohibits it from returning a person to another country "where there are substantial grounds for believing that [they] would be in danger of being subjected to torture"; *see also* Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, Div. G., § 2242, 112 Stat. 2681, 2681-822 to -823 (codified as note to 8 U.S.C. § 1231) (incorporating CAT into U.S. law).

[57] *See* 8 C.F.R. §§ 208.16(c), 1208.16(c) (setting forth CAT withholding requirements); *see also id.* §§ 208.17(a), 1208.17(a) (outlining CAT deferral requirements). U.S. regulations implement the CAT Article 3 prohibition on returning an individual to a country of feared torture, protecting against removal where an applicant is more likely than not to be tortured. *Id.* §§ 208.16(c), 208.17(a), 1208.16(c), 1208.17(a). "Torture" is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from [them] or a third person information or a confession, punishing [them] for an act [they] or a third person has committed or is suspected of having committed, or intimidating or coercing [them] or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." *Id.* §§ 208.18(a)(1), 1208.18(a)(1) (incorporating CAT Article 1 definition of "torture" almost verbatim).

requires an applicant to fear "torture."[58] Furthermore, asylum and withholding both require a nexus between harm and an individual's protected status or beliefs, whereas CAT relief requires proving likely torture, which need not be linked to a person's status or beliefs, but must be for an impermissible purpose.[59] In cases of nongovernmental actors, CAT protection also requires a more stringent evidentiary showing than asylum or withholding—unlike those forms of protection, which require that the government be unable or unwilling to control the agent of persecution, CAT requires that feared torture be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[60]

B. Immigration Court Process

Noncitizens may apply for asylum and withholding before different government agencies depending on their circumstances. For example, the Department of Homeland Security (DHS) Office of Citizenship and Immigration Services (USCIS) adjudicates the asylum claims of unaccompanied children[61] and other individuals who are not in removal proceedings and come forward to apply for asylum "affirmatively."[62] USCIS asylum officers conduct nonadversarial interviews of these applicants.[63] Asylum officers may grant asylum; an individual not granted asylum will typically be placed in removal proceedings in immigration court.[64] The only exception is if the applicant has other immigration status in the United States protecting them from removal—if so, the person is not referred to immigration court but rather permitted to remain in their lawful status.[65]

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[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *See* 8 U.S.C. § 1158(b)(3)(C) ("[A]n asylum officer . . . shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child."). The William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008 sets forth a number of protections for unaccompanied children, including the right to present their asylum claims initially to USCIS even if they have been placed in removal proceedings). Pub. L. 110-457, 122 Stat. 5044 (2008).

[62] *See generally* JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 12–13 (2009). An affirmative applicant seeks asylum on their own accord. *Id.* Affirmative applicants may include individuals who maintain valid nonimmigrant visas (e.g., tourist or student visas), people who have overstayed their visas, or those who have entered the United States without being formally processed by an immigration official. *Id.*

[63] 8 C.F.R. § 208.9(b) (2024).

[64] *Id.* § 208.14(b)–(c), 1208.14(b)–(c) (describing the process of asylum officer review).

[65] *See id.* §§ 1208.1(b), 1208.9, 1208.14(b)–(c) (describing asylum officer review procedures for asylum applications).

Individuals who are placed in removal proceedings in immigration court may raise claims for asylum, withholding, and/or CAT relief as a "defense" against removal. Their claims are adjudicated by an IJ. DHS's enforcement arm, Immigration and Customs Enforcement (ICE), initiates removal proceedings in immigration court through the filing of a notice to appear.[66] These proceedings are adversarial, with ICE trial attorneys representing the government. While asylum seekers may be represented by counsel at their own expense, indigent applicants are not provided with legal counsel,[67] leading many to present their claims pro se.[68] IJs may issue decisions orally (which are recorded and later transcribed if appealed) or in writing.[69]

IJ decisions may be appealed by either the government or the asylum or withholding applicant. Appeals must first be taken to the BIA, within the EOIR.[70] After that, a petition for review with the federal courts of appeals may be filed in most circumstances,[71] followed in some instances by a petition for certiorari with the U.S. Supreme Court.[72]

II. The Inherent Contradictions and Criticism of Our Immigration Court System

IJs are part of the executive, rather than judicial branch. Their closest counterparts are Administrative Law Judges, who preside over adjudicatory matters of many other executive branch agencies (for example, Social Security Administration, National Labor Relations Board, et cetera). However, IJs enjoy none of the statutory protections afforded to these Administrative Law Judges under the

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[66] 8 U.S.C. § 1229.

[67] *See id.* § 1229a(b)(4)(A) ("[T]he [noncitizen] shall have the privilege of being represented, at no expense to the Government, by counsel of [their] choosing who is authorized to practice in such proceedings."); *see also* Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 554 (9th Cir. 1990) (recognizing as a due process right the right to counsel of one's choice at their own expense). Litigation created a narrow exception to the rule that individuals must pay for their own legal counsel in the case of people with severe mental disabilities. *See* Franco-Gonzales v. Holder, 767 F. Supp. 2d 1034, 1051 (C.D. Cal. 2010) (granting safeguards for mentally ill detainees in immigration court pursuant to the Rehabilitation Act); *see also* Press Release, EOIR, Department of Justice and Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions (Apr. 22, 2013), https://www.justice.gov/eoir/pr/department-justice-and-department-homeland-security-announce-safeguards-unrepresented [perma.cc/7AMC-TW2S] (announcing nationwide policy to provide safeguards such as legal representation for individuals found mentally incompetent to represent themselves because of a serious mental health condition).

[68] *See* Eagly & Shafer, *supra* note 5, at 2 (examining representation in immigration court).

[69] 8 C.F.R. § 1003.37 (2024).

[70] *Id.* § 1003.38.

[71] *See* 8 U.S.C. § 1252 (prescribing when federal courts can review decisions).

[72] *See* 28 U.S.C. § 1254 (outlining the methods by which decisions can be reviewed by the U.S. Supreme Court).

Administrative Procedure Act (APA), including job security.[73] This Part highlights the structural and functional shortcomings of immigration courts.

IJs do not have the powers in their courtrooms generally exercised by judges, such as the ability to hold a party in contempt or to control their dockets.[74] And notwithstanding their title, IJs are actually career attorneys within the DOJ, reporting through a "chain of command" to the Attorney General.[75] This makes them very susceptible to pressure from above to decide cases in a certain way.[76] Some IJs have commented that all of these factors have led to "role confusion" with the DOJ viewing IJs as attorneys representing the U.S. government, rather than serving as impartial arbiters.[77]

IJs are hired by the Attorney General, who has wide latitude; immigration experience is not a requirement for the position.[78] Although the selection of IJs is supposed to be merit-based and non-partisan,[79] hiring has often been "based almost entirely on political affiliation . . . ."[80] This was especially notable during the George W. Bush and first Trump administrations, where political considerations impacted both appointments to and removals from the bench.[81]

The administrations of former presidents George W. Bush, Barack Obama, and Donald Trump hired a majority of judges with prior employment experience with the Immigration and Naturalization Service (INS),[82] DOJ, or DHS—three agencies responsible for enforcement and "prosecuting nonciti-

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[73] Amit Jain, *Bureaucrats in Robes: Immigration "Judges" and the Trappings of "Courts*," 33 GEO. IMMIGR. L.J. 261, 275–76, 314 (2019).

[74] *See id.* at 271, 299 (demonstrating the limitations on IJs controlling their courtrooms and dockets).

[75] Marouf, *supra* note 2, at 709.

[76] *See id.* (highlighting the lack of independence that results from the hierarchy of IJs within the Department of Justice).

[77] Jain, *supra* note 73, at 292.

[78] *Courts in Name Only: Repairing America's Immigration Adjudication System*, *supra* note 1, at 911.

[79] *See* Marouf, *supra* note 2, at 710 (noting how civil service laws are meant to protect IJs from political discrimination in hiring).

[80] *Courts in Name Only: Repairing America's Immigration Adjudication System*, *supra* note 1, at 910.

[81] Marouf, *supra* note 2, at 728.

[82] INS historically oversaw U.S. immigration process, enforcement, and border patrol activities until Congress passed the Homeland Security Act of 2002 (HSA). Pub. L. 107-296, 116 Stat. 2135. Thereafter, the INS was superseded by Customs and Border Protection (CBP), ICE, and USCIS, all falling under the umbrella of DHS. *See id.*; *see also* USCIS HISTORY OFFICE AND LIBRARY, OVERVIEW OF INS HISTORY 11 (2012), uscis.gov/sites/default/files/document/fact-sheets/INSHistory.pdf [https://perma.cc/3YRL-9CF9] (explaining that the HSA "disbanded INS," and that INS's "constituent parts contributed to 3 new federal agencies"—CBP, ICE, and USCIS—"serving under the newly-formed Department of Homeland Security (DHS)").

zens."[83] In contrast, the appointments made by the Biden administration have not skewed so heavily toward enforcement.[84] As we discuss below, IJs with an enforcement background are more likely to deny humanitarian claims than those without, so this fact is significant.[85]

Immigration courts have been historically under-resourced, with far more funding spent on enforcement than on adjudication.[86] The lack of adequate funding led Dana Marks, the former head of the National Association of Immigration Judges, to dryly observe that they were "[i]n essence . . . doing death penalty cases in a traffic court setting."[87]

Considering all of these factors, the result is an adjudicatory body where appointments are often partisan, there is a preference to hire those with an enforcement background, the adjudicators do not have independence and are subject to pressures from above, and there are woefully insufficient resources allocated to support the work of the court—which now faces an unprecedented backlog of two million cases.[88]

The BIA, to which IJ decisions may be appealed,[89] does not play a corrective role because it is subject to essentially the same institutional constraints as IJs.[90] During the George W. Bush administration—in a show of just how politicized the composition of the BIA is—Attorney General Ashcroft carried out what is frequently referred to as a "purge." Ashcroft removed five BIA members, four of whom had "ruled in favor of noncitizens at the highest rates"[91] and did

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[83] Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control Over Immigration Adjudication*, 198 GEO. L.J. 579, 587 (2020).

[84] In reaching this conclusion, we reviewed the available biographical information for the 239 IJs appointed by the Biden administration through November 2023, and placed them in one of the following six categories based on the type of employment in which they had the most years of experience: (1) government: immigration enforcement (26.4%), (2) government: immigration, but not in an enforcement role (6.7%), (3) government: non-immigration (33.9%), (4) private sector or private practice (23%), (5) non-governmental organization (8.8%), and (6) academic (1.2%). *See infra* note 167 (providing additional detail on how we characterized employment background).

[85] *See infra* notes 178–184 and accompanying text.

[86] *See* CHISHTI ET AL., *supra* note 4, at 13 (indicating a vast difference in funding between different enforcement operations and the EOIR). Between the fiscal years 2003 and 2023, funding for CBP and ICE (which are responsible for immigration enforcement operations at DHS) rose from $9.15 billion to $30 billion, while EOIR's budget increased from $188 million to only $860 million. *Id.*

[87] *Death Penalty Cases in Traffic Court Setting*, IMMIGRANT L. CTR. OF MINN. (Mar. 31, 2020), https://www.ilcm.org/latest-news/death-penalty-cases-in-traffic-court-setting/ [perma.cc/C3DG-U6SX].

[88] CHISHTI ET AL., *supra* note 4, at 1.

[89] Although there is a right to appeal a negative IJ decision to the BIA, fewer than half of asylum cases are ever appealed beyond the immigration courts, meaning their decisions are determinative in the majority of cases. RAMJI-NOGALES ET AL., *supra* note 62, at 68.

[90] Marouf, *supra* note 2, at 709.

[91] Jain, *supra* note 73, at 272 (citing Peter J. Levinson, *The Facade of Quasi-Judicial Independence in Immigration Appellate Adjudications*, 9 BENDER'S IMMIGR. BULL. 1154 (2004)).

not have enforcement backgrounds.[92] The first Trump administration's appointments to the BIA were also notable for their ideological nature: the IJs that it elevated to the BIA were paradigmatic of a "denial preference"—having a denial rate of 87% or higher "compared to 58% for all other judges over the last twenty years."[93]

Notwithstanding their similarities, a key distinction between IJs and the BIA is that while the former issue decisions that only apply to the parties in the case, the BIA is empowered with issuing precedential decisions.[94] These BIA decisions thereby bind every IJ in the country—unless and until a federal court overturns the BIA precedent. Historically, federal courts of appeals often affirmed the BIA's interpretations of ambiguous statutory requirements for asylum and withholding because, pursuant to the *Chevron* doctrine, they were formally required to defer to the agency's positions unless they found them unreasonable.[95] Deference to the BIA allowed them to impose exceedingly restrictive interpretations of key eligibility elements for asylum and withholding.[96] IJs exhibited a similar inclination to interpret and apply the law in as narrow and ungenerous a manner as possible—a mode of decision-making which we refer to as a "denial preference."[97]

Federal court judges have frequently been scathing in their review of IJ and BIA decisions, criticizing their low quality as well as lack of impartiality. Judge Richard Posner of the Seventh Circuit Court of Appeals has characterized IJ decisions as "arbitrary, unreasoned, irrational, and uninformed,"[98] concluding that "both the immigration judges . . . and the Board of Immigration Appeals . . . are

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[92] *Id.*

[93] Reade Levinson, Kristina Cooke & Mica Rosenberg, *Special Report: How Trump Administration Left Indelible Mark on U.S. Immigration Courts*, REUTERS (Mar. 8, 2021), https://www.reuters.com/article/idUSKBN2B0178/ [perma.cc/3M3T-N4DN] (highlighting denial rate of 87% among BIA members appointed by the first Trump Administration); John Washington, *Trump-Appointed Immigration Judges Have Become His Robed Enforcers*, MEDIUM (Feb. 17, 2020), https://gen.medium.com/trump-appointed-immigration-judges-have-become-his-robed-enforcers-670759dd633 [https://perma.cc/2QX8-KXMV] (citing research finding that BIA members appointed by Attorney General William Barr approved asylum 2.4% of the time).

[94] 8 C.F.R. § 1003.1(d) (2024).

[95] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2270–71 (2024). The Supreme Court cited *Chevron* in directing federal courts to defer to the BIA in its interpretation of ambiguous statutory terms. INS v. Aguirre-Aguirre, 526 U.S. 415, 416 (1999) (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 448–49 (1987). As noted previously, the Supreme Court overturned *Chevron* with its decision in *Loper Bright*. *Loper Bright*, 144 S. Ct. at 2270–71; *see supra* note 4 and accompanying text.

[96] *See infra* notes 198–204 and accompanying text.

[97] *See infra* Part V.B.1.

[98] Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1679–80 (2007).

inept."[99] Numerous other federal judges have expressed similar dismay. For example, a recent law review article excerpted a sample of critical statements in published federal circuit court decisions. In addition to commenting on the poor quality of decision-making, many of them focused on lack of impartiality and the appearance of bias, calling out IJs for "hostility" or "badgering" of the asylum seeker, or for making "inappropriate or extraneous comments," or using an "extraordinarily abusive" tone during the proceedings.[100]

Flawed decision-making by IJs and the BIA developed into normative arguments against judicial deference in the immigration context. Some scholars argued that the core rationale for *Chevron* deference—agency expertise, which makes an administrative agency better suited to make educated decisions in a particular field—does not apply in immigration cases, which are mainly devoid of factors that require scientific or technical expertise.[101] Others asserted that Congress did not intend for courts to defer to the DOJ, the law enforcement agency tasked with the prosecution of non-citizens to deter future unlawful immigration, in matters of asylum and withholding, two forms of humanitarian protection which rest upon the nation's international obligation of non-refoulement.[102]

The Supreme Court's 2024 *Loper Bright* decision put an end to *Chevron* deference, ruling that courts should decide questions of law, and not defer to agencies whenever a statute is ambiguous.[103] Notwithstanding the criticism of deference in the immigration area, scholars have noted that the death of *Chevron* will not necessarily result in less restrictive interpretation of the law, in

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[99] *Id.*

[100] Jain, *supra* note 73, at 287 nn.180–82. Similar comments have also been made by federal judges. *See generally* ANNA O. LAW, THE IMMIGRATION BATTLE IN AMERICAN COURTS 179 (2010). For example, the judges bemoaned the poor quality of IJ decisions, stating that the judges were "not applying a uniform system of law," their decisions were "erratic" and "not really thoughtful statements of law." *Id.* at 179–83. The poor quality of IJ decision-making was compounded by the fact that the BIA was failing to carry out "any meaningful administrative review." *Id.* at 182. All of this led some of the judges interviewed to be reluctant to defer to the agency, as required by law. *Id.* One judge observed that he had no problem deferring to other administrative agencies such as the Social Security Administration, the Internal Revenue Service, or the National Transportation Board, because there were not "competency problems" with these agencies, but the many "bad decisions" that he saw in immigration cases made it "hard to trust the system" and to defer to the agency. *Id.* at 183–84.

[101] Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against* Chevron *Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1201 (2021).

[102] Maureen Sweeney, *Enforcing/Protection: The Danger of* Chevron *in Refugee Act Cases*, 71 ADMIN. L. REV. 127, 171–73 (2019).

[103] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2270–71 (2024).

light of the "increase in Trump-appointed judges"[104] which has resulted in "an increasingly conservative and anti-immigration judiciary . . . ."[105]

Other scholars have pointed out that there are other rules and principles regarding the judiciary's role in immigration which could result in continued deference. The plenary power doctrine requires courts to "show special restraint in reviewing congressional policy choice in immigration law."[106] In the absence of *Chevron*, "courts might determine that the best way to give [e]ffect to the plenary power doctrine is to show deference to agency legal conclusions in immigration law, even if courts are no longer deferring to agency legal conclusions in other contexts."[107] It is still too early to discern the impact of *Loper Bright* in the immigration context.

III. What Prior Studies Tell Us About Immigration Judge Decision-making

There have been a number of revealing quantitative studies on IJ decision-making. Some have focused exclusively on humanitarian relief such as asylum, withholding, and CAT claims,[108] and others have addressed a broader range of removal cases.[109] Importantly, our investigation varied significantly from all prior studies in that none of them had access to actual decisions; thus, they were unable to draw correlations between IJ attributes (for example, employment background and gender) and outcomes or examine the legal bases for denial of claims or quality of decisions. On the correlation of IJ attributes, our study coincided with the findings of prior studies regarding the outsize impact

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[104] Gilbert Alexander Cotto-Lazo, *Give Me Your Tired, Your Poor, Your Huddled Masses: An Overview of the Immigration System and* Chevron *Deference*, 99 Or. L. Rev. 419, 439 (2021).

[105] *Id.*

[106] Jill E. Family, *Immigration Law Allies and Administrative Law Adversaries*, 32 Geo. Immigr. L.J. 99, 118 (2017) (citing The Chinese Exclusion Case, 130 U.S. 581 (1889)).

[107] *Id.* at 119.

[108] *See, e.g.*, Ramji-Nogales et al., *supra* note 62; Linda Camp Keith, Jennifer S. Holmes & Banks P. Miller, *Explaining the Divergence in Asylum Grant Rates Among Immigration Judges: An Attitudinal and Cognitive Approach*, 35 Law & Pol'y 261 (2013); Banks Miller, Linda Camp Keith & Jennifer S. Holmes, Immigration Judges and U.S. Asylum Policy (2014); Daniel E. Chand, William D. Schreckhise & Marianne L. Bowers, *The Dynamics of State and Local Contexts and Immigration Asylum Hearing Decisions*, 2017 J. Pub. Admin. Res. & Theory 182; U.S. Gov't Accountability Off., GAO-08-940, U.S. Asylum System: Significant Variation Existed in Asylum Outcomes Across Immigration Courts and Judge (2008); U.S. Gov't Accountability Off., GAO-17-22, Asylum: Variation Exists in Outcomes of Applications across Immigration Courts and Judges (2016).

[109] *See, e.g.*, Mica Rosenberg, Reade Levinson & Ryan McNeill, *Special Report—They Fled Danger for a High-Stakes Bet on U.S. Immigration Courts*, Reuters (Oct. 17, 2017), https://www.reuters.com/article/world/special-report-they-fled-danger-for-a-high-stakes-bet-on-u-s-immigration-courts-idUSKBN1CM1UG/ [perma.cc/E859-9SWY] (analyzing rates of removal orders); Kim & Semet, *supra* note 83 (same).

that an IJ's employment background and gender have on grant and denial rates: judges with enforcement backgrounds deny relief at a higher rate than those without such a background, and male judges deny at a higher rate than their female counterparts.[110]

Our analysis of the legal bases for denial demonstrated widespread rejection of the claims of credible applicants who suffered or feared egregious harm for failure to meet the highly technical requirements of two elements of the refugee definition (social group membership and nexus).[111] Furthermore, our examination of the text of the decisions themselves led us to conclude—as have many others—that IJs frequently demonstrate a "denial preference" in adjudicating cases, and that the depth and rigor of their analysis often falls substantially below the level expected in a judicial opinion.[112]

In this Part, we discuss the most relevant earlier studies, outlining their findings regarding IJ background and gender, but also recognizing other notable findings.

Refugee Roulette[113] is one of the earliest and most influential studies of IJ decision-making.[114] The title comes from the study's central finding of huge disparities in asylum grant rates among judges, including between courts in different locations and even judges on the same court.[115] The authors cross-tabulated the outcomes with a number of variables[116] relating both to the applicants and the judges to identify possible correlations. Gender and employment background emerged as significant factors—the authors found that female judges granted asylum at a higher rate than their male counterparts[117] and judges without prior experience working for INS or DHS granted at higher rates than those with enforcement experience.[118]

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[110] *See infra* Part V.A.1.

[111] *See infra* Part V.A.2.

[112] *See infra* Part V.B.

[113] RAMJI-NOGALES ET AL., *supra* note 62.

[114] *Id.* The authors examined decision-making at every tier in the asylum system: Asylum Offices, Immigration Courts, the BIA, and the U.S. courts of appeals, but our focus here is on their examination of the immigration courts. *Id.*

[115] Their findings on immigration court decision-making were based on (1) data from January 2000 through August 2004, including 74,459 decisions of asylum seekers from fifteen of the countries from which asylum seekers most commonly seek protection (which the authors referred to as "Asylum Producing Countries"), and (2) IJ biographical information, which was cross-tabulated from a database of 66,443 cases. *Id.* at 34. For example, a Chinese asylum seeker had a 7% likelihood of being granted in Atlanta, but a 76% chance in Orlando, at a time when the national grant rate was 47%. *Id.* at 35–36. The grant rate for Colombians was 63% in Orlando, compared to 19% in Atlanta, and the national average grant rate was 36%. *Id.*

[116] *Id.* at 40.

[117] *Id.* at 47. The grant rate for female judges was 53.8%, while for male judges it was 37.3%. *Id.*

[118] *Id.* at 48. Judges without prior INS/DHS experience granted at a rate of 48.2%, although those with such experience granted 38.9% of the time. *Id.* Given the higher numbers of male judges who

As significant as gender and employment background were, neither of them mattered as much as representation—represented applicants had a grant rate almost three times as high as those without an attorney.[119] Other studies have reached the same conclusion while finding even greater impact. For example, a large-scale study of 1.2 million removal cases researchers found that represented individuals were 5.5 times more likely to obtain relief than those who were unrepresented.[120]

Interestingly, *Refugee Roulette* also established that applicants with dependents were more likely to be granted relief than those without. Asylum seekers without dependents had a 42.3% grant rate, compared to 48.2% for those with dependents.[121] The authors postulated that "asylum seekers who bring children or a spouse appear more credible, or that immigration judges are more sympathetic to asylum seekers who have nuclear family members to protect."[122]

Another seminal study, *Immigration Judges and U.S. Asylum Policy*,[123] also found that IJ gender[124] and "policy preferences"[125]—which were inferred from employment background[126]—were among the most significant factors bearing on outcomes.[127]

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worked for INS/DHS, the authors asked whether the gender difference (higher grants by female judges) could be both a combination of gender and the fact that fewer female judges had INS/DHS prior work experience. *Id.*

[119] *Id.* at 45–46.

[120] Eagly & Shafer, *supra* note 5, at 6, 9.

[121] RAMJI-NOGALES ET AL., *supra* note 62, at 46.

[122] *Id.*

[123] The authors Linda Camp Keith, Jennifer S. Holmes, and Banks P. Miller published an article in 2013 on disparate asylum grant rates, *Explaining the Divergence in Asylum Grant Rates Among Immigration Judges: An Attitudinal and Cognitive Approach*, *supra* note 108, followed in 2014 by their book, IMMIGRATION JUDGES AND U.S. ASYLUM POLICY (2014), *supra* note 108. Our discussion of their findings will focus on the book, which used a dataset of all asylum cases decided on the merits for the time period spanning 1990 to 2010, totaling 589,629 "observations." MILLER ET AL., *supra* note 108, at 26–27.

[124] MILLER ET AL., *supra* note 108, at 71. Female IJs were "5 to 8 percentage points more likely to vote for some form of relief than their male counterparts." *Id.*

[125] *Id.* at 73. The authors use the term "policy preferences" to refer to conservative versus liberal leanings. *Id.* at 79–80. The study's dataset spanned twenty years, and the impact of policy preferences varied over that time period. *Id.* The "average effect" of policy preference from 1990 to 1999 was thirteen percentage points; it rose to twenty-seven percent in the period from 1999 to 2010. *Id.* at 67–70.

[126] The authors explain their use of employment background to infer policy preferences:

> To this end [to identify policy preferences] we examine the IJ's career path to create a tightly focused proxy for a policy predisposition toward immigration rights and asylum. We believe that our measure is a strong proxy for asylum liberalism that likely reflects a socialization process that we discuss further below. In addition, we believe that it accounts for the early career selections of some IJs that may indicate an underlying policy proclivity that is subsequently strengthened through additional career socialization. For example, a conservative individual may be more likely to seek out a job as an Immigra-

However, in contrast to earlier studies, *Immigration Judges* reported that whether the applicant was represented had minimal impact on outcomes.[128] The authors speculated that could be due to the "potentially quite uneven" quality of representation.[129]

Two findings from *Immigration Judges* are of particular interest to the qualitative aspects of our study discussed *infra* in Part V.B. First, the study concluded that "extralegal factors" drove outcomes more than legal factors—which raises serious concerns about "fairness and consistency."[130] Our review of decisions, where we evaluated the application of the governing law to the facts, led us to similarly conclude that factors outside the law, rather than the controlling legal standards, appeared to have an inappropriate and disproportionate impact on the outcome of the cases.[131]

Second, although extralegal factors are powerful forces, IJs, nonetheless, do feel somewhat "constrained" by the law and the facts.[132] The legitimacy of our legal system rests upon the expectation that judges decide cases fairly and impartially, applying legal principles to facts without "fear or favor."[133] It is concerning that extralegal factors have such a thumb on the scales of justice. As we discuss in our qualitative review, our analysis of decisions leads us to conclude that IJs may not feel sufficiently constrained.[134] Unfortunately, their

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> tion and Naturalization Service (INS) agent or a prosecutor. These career experiences then are likely to reinforce those underlying proclivities.

Id. at 37.

[127] *Id.* at 62–67. Although we are highlighting the findings of this study most relevant to our work, we note that it broke new ground in presenting correlations between an extremely broad range of variables with outcomes. *Id.* Included among the variables were human rights abuses, as well as economic development levels in the sending countries; the political party holding the U.S. presidency, the national unemployment rate in the United States, the relationship between the United States and the sending countries in areas such as bilateral trade, and military aid, and whether the county was among the top ten source countries for migrants arriving to the United States. *Id.* The authors also looked at changes in major immigration policies in the United States over the course of their study—namely the enactment of expedited removal, the imposition of the one-year bar to asylum in 1996, and the criteria on credibility enacted in the REAL ID Act of 2005. *Id.*

[128] *Id.* at 71. Representation increased chances of relief by 5 to 6%. *Id.*

[129] *Id.*

[130] *Id.* at 70 (noting that "IJ ideology . . . [was] the most important single predictor of outcomes for applicants" during the relevant period).

[131] *See infra* Part V.B.

[132] *See* MILLER ET AL., *supra* note 108, at 55–56 ("[W]e posit that the policy preferences of IJs influence their decisions in asylum cases, but that U.S. asylum law also imposes some constraints on the use of the policy proclivities of an IJ.").

[133] Merrick Garland, Att'y Gen., U.S. Dep't of Just., Remarks as Delivered (Aug. 11, 2022), https://www.justice.gov/opa/speech/attorney-general-merrick-garland-delivers-remarks [perma.cc/EP38-L3C2]. This term is understood to mean "faithful adherence to the rule of law," as described in a recent statement by Attorney General Merrick Garland. *Id.*

[134] *See infra* Part V.B.

proclivity to ignore the law and cherry-pick facts supportive of the outcome they desire to reach may be emboldened by the fact that the BIA, which should act as a corrective force, suffers from many of the same institutional defects as does the immigration court.[135]

Whereas *Refugee Roulette* and *Immigration Judges and U.S. Asylum Policy* exclusively focused on asylum cases, other studies, which addressed a broader set of cases, bear mention for their findings on gender and employment background as well as the impact of political control exerted by the administration in power at the time of a decision. One such study analyzed more than 370,000 cases heard in the existing fifty-eight immigration courts from 2007 to 2017.[136] Approximately half of the cases studied concerned asylum, while the other half were requests for cancellation of removal as well as "other adjustments to immigration status."[137] This study concluded that "men are more likely than women to order deportation, as are judges who have worked as ICE prosecutors."[138] IJs with more experience had a higher grant rate than those with less experience.[139] Similar to *Refugee Roulette*, the researchers reported gross disparities in grant rates between courts in different locations.[140] IJs are bound by legal precedent (i.e., the legal constraints of law), and the nation's circuit courts vary in terms of favorable rulings for immigrants.[141] However, the study concluded that the extreme disparities between grant rates in immigration courts could not be explained by the difference in circuit court jurisprudence.[142]

Another large-scale study of IJ decision-making principally focused on the possible correlations between the administration in power at the time of an

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[135] *See supra* Part II.

[136] Rosenberg et al., *supra* note 109.

[137] *Id.* We assume that the study's discussion of "cancellation of deportation orders" was intended to refer to cancellation of removal. *See* 8 U.S.C. § 1229b (concerning "cancellation of removal"). The study excluded cases of individuals in detention and those who did not appear for their court hearing. *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.* ("In Charlotte, immigrants are ordered deported in 84% of cases, more than twice the rate in San Francisco, where 36% of cases end in deportation. . . . In Atlanta, 89% of cases result in a deportation order. In New York City, 24% do.").

[141] RAMJI-NOGALES ET AL., *supra* note 62, at 77. *Refugee Roulette* reported the extreme differences across circuit courts in asylum cases. *Id.* The authors there analyzed remand rates from the circuit courts for asylum cases for calendar years 2004 and 2005, finding that "[a]n asylum applicant who lives in the Fourth Circuit, known generally among lawyers as the most conservative circuit, has only a 1.9% chance of winning a remand, whereas in the Seventh Circuit, about 36.1% of asylum cases are remanded to the Board." *Id.* In their opinion, this did not reflect differences in the merits of the claims, but rather differences in the judges "with respect to asylum seekers' claims, or at least the differing degrees of their skepticism about the adequacy of Board and immigration judge decision making." *Id.* at 77–79.

[142] Rosenberg et al., *supra* note 109; *see also* RAMJI-NOGALES ET AL., *supra* note 62, at 77–79.

IJ's appointment and at the time the IJ renders a decision.[143] The authors' central finding is that, although the identity of the president who appointed the IJ has no statistically significant impact on removal rates, the identity of the president in power at the time of the decision does affect removal rates.[144] Lacking independence, IJs are especially susceptible to political influence and will be attentive—inappropriately so—to the messages they receive about the cases they adjudicate. During the first Trump administration, antipathy to immigrants and stigmatization of asylum seekers[145] were directly communicated from the highest levels.

Administrations are also able to affect decision-making more directly by issuing directives, policies, and regulations interpreting the controlling legal standards,[146] as well as by the Attorney General's exercise of power to issue precedential decisions.[147] Attorneys General under President Trump during his first administration issued more decisions than any prior administration, and these binding decisions affected both procedural rights as well as substantive definitions of the law.[148] Quite a few of the Attorney General decisions issued during this time pe-

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[143] Kim & Semet, *supra* note 83, at 606–07 (listing central questions presented for study). This study also discussed the significance of gender and employment background. *Id.* at 612–13.

[144] *Id.* at 625. For example, Kim and Semet found that, overall, IJs were less likely to order removal during the presidencies of George W. Bush and Barack Obama than during the first administration of Donald Trump. *Id.*

[145] *See* Jeff Sessions, Att'y Gen., U.S. Dep't of Just., Remarks as Prepared for Delivery to the EOIR (Oct. 12, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review [perma.cc/TWS6-2MGG]. Former Attorney General Sessions made repeated comments which disparaged asylum seekers and the lawyers who represent them; some of these comments were made at EOIR meetings, attended by IJs. *See id.* At a 2017 EOIR meeting, Sessions claimed that the majority of asylum claims were not valid. *Id.* He went on to accuse both the migrants and their attorneys of engaging in fraud, referring to "dirty immigration lawyers who are encouraging their otherwise unlawfully present clients to make false claims of asylum . . . ." *Id.*

[146] *See* JESSICA BOLTER, EMMA ISRAEL & SARAH PIERCE, MIGRATION POL'Y INST., FOUR YEARS OF PROFOUND CHANGE: IMMIGRATION POLICY DURING THE TRUMP PRESIDENCY 79–87 (Feb. 2022), https://www.migrationpolicy.org/sites/default/files/publications/mpi-trump-at-4-report-final.pdf [https://perma.cc/9BPK-LTWY] (highlighting the immigration policy of President Trump's first administration). From Trump's first week in office, his administration issued a virtually non-stop flood of policies intended to "cut off access to protection for those seeking safety in the United States." *Id.* at 79.

[147] 8 C.F.R. § 1003.1(h) (2024); *see also* Caroline Holliday, Note, *Making Domestic Violence Private Again: Referral Authority and Rights Rollback in* Matter of A-B-, 60 B.C. L. REV. 2145, 2156–60 (2019) (discussing theory behind and historical use of referral authority and highlighting that "referral decisions tend to produce results that are detrimental to the noncitizen . . . and applicable to entire classes of immigrants").

[148] For a broad overview of the Attorney General's power to issue decisions, and its use during the first Trump administration, see Sarah Pierce, *Obscure but Powerful: Shaping U.S. Immigration Policy Through Attorney General Referral and Review*, MIGRATION POL'Y INST. (Jan. 2021), https://www.migrationpolicy.org/sites/default/files/publications/rethinking-attorney-general-referral-review_final.pdf [https://perma.cc/598V-2MHD]. Trump's Attorneys General referred more cases to

riod (2017-2021) were attempts to reverse precedent favorable to asylum seekers and to preclude claims which had been commonly raised with some degree of success.[149]

IV. Data and Methods

The data for our analysis derive from a National Science Foundation (NSF)-funded project exploring administrative decision-making processes in claims for humanitarian relief.[150] In contrast to prior studies which have relied on large datasets of disaggregated quantitative data from the EOIR database,[151] the NSF study proposed a multi-methodological analysis of a unique dataset of hundreds of actual IJ and BIA decisions involving such claims.[152] The goal was to engage in a substantive quantitative and qualitative evaluation of ad-

themselves than any administration from 1953. *Id.* at 7. Many of the cases had a profound effect on the substantive and procedural rights of asylum seekers. *Id.* at 14–17. For instance, Attorney General Sessions vacated a prior BIA precedent which ruled that applicants for asylum and withholding must be afforded evidentiary hearings regarding their claims, without being required to first establish a prima facie case to justify the right to a hearing. *See* Matter of E-F-H-L-, 27 I. & N. Dec. 226, 226 (A.G. 2018), *vacating* Matter of E-F-H-L-, 26 I. & N. Dec. 319, 324 (B.I.A. 2014).

[149] Attorney General Sessions attempted to foreclose claims based on fear of domestic violence by vacating a 2014 BIA precedent decision which stated that such claims could be viable and based on the particular social group ground of the refugee definition. *See* Matter of A-B- (*A-B- I*), 27 I. & N. Dec. 316, 319 (A.G. 2018), *overruling* Matter of A-R-C-G-, 26 I. & N. Dec. 388, 392–95 (B.I.A. 2014). Sessions' ruling in *A-B- I* was later reinforced and expanded upon. *See* Matter of A-B- (*A-B- II*), 28 I. & N. Dec. 199, 200–07, 208–12 (A.G. 2021) (addressing the "completely helpless" standard for harm by nongovernmental actors and nexus requirement); Matter of A-C-A-A- (*A-C-A-A- I*), 28 I. & N. Dec. 84, 88, 90–94 (A.G. 2020) (prohibiting the BIA from accepting stipulations that elements had been established on appeal and discussing nexus requirement). In 2021, Attorney General Garland vacated all three of these decisions, restoring *Matter of A-R-C-G-* to controlling precedent. *See* Matter of A-B- (*A-B- III*), 28 I. & N. Dec. 307, 308–09 (A.G. 2021), *vacating A-B- I* and *A-B- II*; Matter of A-C-A-A- (*A-C-A-A- II*), 28 I. & N. Dec. 351, 351–53 (A.G. 2021), *vacating A-C-A-A- I*. The Attorney General's certification authority was also exercised to make claims for asylum based on family persecution much more difficult. Attorney General Barr issued *Matter of L-E-A-*, which reversed decades of precedent and held that, generally, nuclear families, without showing more, would not be found to constitute a particular social group. Matter of L-E-A- (*L-E-A- II*), 27 I. & N. Dec. 581, 589 (A.G. 2019). Attorney General Garland vacated *L-E-A- II*. *See* Matter of L-E-A-, 28 I. & N. Dec. 304 (A.G. 2021), *vacating L-E-A- II*. When Garland vacated all of the aforementioned cases, he did not issue new precedent, noting that President Biden's February 2021 Executive Order on Migration included, among other things, a commitment to issue asylum regulations addressing the issues implicated in these cases. Exec. Order No. 14,010, 86 Fed. Reg. 8267 (Feb. 2, 2021).

[150] "How Do U.S. Immigration Courts Decide Gender-Based Asylum Claims?," Nat'l Sci. Found. Grant #155655 to Anna O. Law at Brooklyn College and Grant #1556131 to Karen Musalo at University of California Law San Francisco. For the NSF study, the authors primarily used hundreds of BIA and IJ decisions collected by the Center for Gender & Refugee Studies, though this article focused on the IJ decisions alone. *Id.*

[151] *See infra* Part III.

[152] The authors also collected hundreds of BIA decisions; however, this Article focuses only on IJ decisions.

ministrative decision-making, which would allow us to identify trends and correlations of specific factors to outcomes. Section A describes the dataset used for this article.[153] Section B gives an overview of the methods employed in analyzing the dataset.[154]

A. Data

The analysis in this article is based on a dataset of 507 IJ decisions on requests for asylum and/or withholding[155] issued from 1992 to 2016. These decisions were collected by the Center for Gender and Refugee Studies (CGRS) at the University of California College of the Law, San Francisco.[156] In addition to its research, policy, and litigation work, CGRS has provided training and technical assistance to advocates representing asylum seekers across the United States for more than two decades. Through this work, it has compiled what we believe to be the largest repository of unpublished IJ decisions in the United States—decisions that are otherwise unavailable to the public unless requested through the Freedom of Information Act (FOIA). Because the U.S. government does not publish IJ decisions, the CGRS decisions are a unique data source enabling qualitative and quantitative analysis of IJ decision-making processes and reasoning, not just decision outcomes. None of the studies referenced in Part III were based on actual written decisions.

CGRS collects decisions from across the country and relating to a wide variety of applicant and claim types. For instance:

- The 507 decisions were issued by 202 different IJs. 183 of these IJs decided between one to five decisions each, sixteen decided between six and ten decisions, and two decided more than ten each.[157]
- Sixty-eight different countries of origin are represented in the dataset, the most frequent being El Salvador (19.2% of decisions), followed by Honduras (17.8% of decisions), Guatemala (16.8% of decisions), Mexico (6.5% of decisions), China (4.2% of decisions),

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[153] *See infra* Part IV.A.

[154] *See infra* Part IV.B.

[155] The dataset originally consisted of 508 IJ decisions on requests for asylum, withholding, and/or CAT relief; however, because we focus in this article on asylum and withholding only, we excluded one decision in which the applicant only applied for CAT relief and thus no asylum or withholding claims were adjudicated.

[156] CGRS engages in policy, research, and litigation around issues of humanitarian protection for individuals fleeing persecution. Although its initial focus was on the claims of women and girls, its expertise has expanded to the entire universe of claims. CGRS advocates for U.S. law and policies to be in alignment with international norms and standards. *See About CGRS*, CTR. FOR GENDER & REFUGEE STUD., https://cgrs.uclawsf.edu/about [https://perma.cc/6NHZ-HYSN].

[157] The name of the IJ was discernible in 495 of the 507 decisions.

and Albania (2.2% of decisions). All other countries of origin accounted for less than two percent of decisions each.[158]

• Of the decisions in the dataset, 91.2% involved adult primary applicants, whereas the primary applicant was a minor in 8.8% of decisions.[159]

Nevertheless, we caution readers and note that our dataset is small in comparison to the complete universe of cases. Additionally, our dataset does not represent a random sample of all IJ decisions issued during the relevant time frame. For example, because CGRS is known for having special expertise in gender-based asylum, our dataset deviates significantly from what we would expect from a random sample in terms of applicant gender. Of decisions in the dataset, 84.2% involved female primary applicants, 15.0% of decisions involved male primary applicants, and 0.8% of decisions involved transgender or nonbinary primary applicants.[160] For similar reasons, the sample likely contains a higher proportion of claims premised on protected grounds related to gender and sexual orientation.

Our dataset also reflects much higher rates of legal representation than typically expected from that of a random sample because CGRS primarily collects decisions from legal advocates who represent non-detained asylum seekers. Indeed, 91.1% of the decisions in our dataset were issued to applicants represented by legal counsel.[161] We also assume that our sample involves a much smaller proportion of detained applicants.[162]

The nature of CGRS's work and how it collects decisions also likely results in higher rates of representation and increased quality of representation. The vast majority of IJ decisions in CGRS's possession have been shared by legal practitioners to whom CGRS has provided technical assistance.[163] It

[158] The country of origin was discernible in 506 of the 507 decisions.

[159] Whether the primary applicant was a minor or an adult was discernible in 490 of the 507 decisions. For further explanation of the significance of being the "primary" applicant, see *infra* note 166.

[160] The gender of the primary applicant was discernible in 505 of the 507 decisions in our dataset, and 4 applicants were transgender or nonbinary.

[161] Whether an applicant was represented by counsel at the time their decision was issued was discernible in 495 decisions of the 507 decisions in our dataset.

[162] Although we attempted to code for detention status at the time of the applicant's individual hearing (when they presented their case), the decisions did not consistently record this information. Because of the omission of this information, we were only able to confidently determine detention status for 120 out of the 507 decisions. Of the 120 decisions we were able to code, 45.0% of applicants were detained while 55.0% were not. However, because most of the decisions lacked sufficient information to confidently determine detention status, we do not think that these percentages are a true representation of our dataset.

[163] Most of these decisions are collected by CGRS from attorneys to whom it has provided assistance in their representation of clients in immigration court removal proceedings, though this is not always the case. For example, attorneys may share IJ decisions of clients whom they are representing

seems fair to assume that these advocates, who have gone to the effort of contacting CGRS and accessing its services and resources, would likely have spent more time on their cases and be better equipped to present evidence and arguments in a compelling way than a random sample of immigration lawyers.

In an effort to offset these sampling biases, the authors obtained additional decisions of detained, and mostly unrepresented, applicants through two FOIA requests.[164] These FOIA requests allowed CGRS to obtain additional decisions constituting approximately eight percent of the decisions in the dataset.[165] Although the decisions obtained through these FOIA requests help add more diversity to the sample, especially in terms of detention status and legal representation, they do not completely remedy the sampling biases described above or render the dataset representative.

B. Methods

We employed both quantitative and qualitative methods to analyze how IJs made the decisions in our dataset. For the quantitative analysis, we developed more than forty variables corresponding to the adjudication of each primary applicant's claims.[166] These variables captured basic information such as the decision date, IJ's name, immigration court, and the outcome of the applicant's asylum and/or withholding applications. The variables also captured IJ characteristics like gender and employment background,[167] applicant charac-

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on appeal but who were unrepresented, or represented by a different attorney, in immigration court. CGRS also collects decisions shared through other means, such as via listservs of practitioner groups. *See How Our TA Program Works*, CTR. FOR GENDER & REFUGEE STUD., https://cgrs.uclawsf.edu/about-technical-assistance-program [https://perma.cc/3AU2-M37P].

[164] CGRS submitted FOIA requests in 2014 and 2016 for decisions from the T. Don Hutto Residential Center in Taylor, Texas, involving women and unrepresented individuals seeking asylum and other humanitarian relief.

[165] The FOIA request returned 43 out of the total 508 decisions with which we started.

[166] As compared to EOIR data, which tracks as individual "cases" outcomes for each individual asylum seeker (even those whose cases are heard together and decided in one consolidated decision), the CGRS dataset tracks "decisions," with the coding of each "decision" keyed to the primary applicant on that case. We considered the primary applicant to be the applicant about whom the most complete information and analysis was available. We chose to only code decisions as to the primary applicant because it ensured the most accurate and complete information. This approach was also consistent with the convention of prior researchers. *See* RAMJI-NOGALES ET AL., *supra* note 62, at 313 (explaining that the authors excluded cases of "dependents" from the same "family" as the "primary case"). Although uncommon, sometimes there was more than one decision issued for the same primary applicant (e.g., where an initial IJ decision denied protection to an applicant, the applicant appealed, and after remand the IJ issued a subsequent decision on the case).

[167] We coded six different categories of employment background, relying on information from TRAC IJ Reports, DOJ publications regarding the IJ's appointment, and other publicly available information. *See, e.g.*, *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2018–2023*, TRAC IMMIGR., https://trac.syr.edu/immigration/reports/judgereports/ [perma.cc/7CRL-248Q]. The first five categories included: (1) private immigration practice; (2) non-governmental or non-profit organiza-

teristics such as gender and country of origin, and institutional attributes like the circuit court with jurisdiction over the IJ's decision. Additionally, the variables included key claim information, such as the type of harm applicants suffered and the protected grounds (race, religion, nationality, political opinion, and/or membership in a particular social group) upon which they based their claims. The variables also tracked legal findings made by the IJ, including whether the IJ found the applicant not credible[168] and, in decisions where asylum and/or withholding was denied, the legal bases for those denials.

We categorized the variables into three groups. The first group, which consisted of variables requiring only the collection of objective information (for example, date of decision, name of IJ), was coded by one person.[169] The second group, involving variables that required some subjective assessment, was coded by two of the authors.[170] The third group, which included variables requiring a subjective assessment of the decisions and specific background knowledge of asylum law, was coded by the two authors with significant expertise in asylum law.[171] Where we refer to subjective variables in the findings below, we report scores on interrater reliability.[172]

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tion; (3) academia (e.g., professor of law or work for a legal clinic); (4) government-non-immigration (e.g., state or federal government agencies in any non-immigration capacity); and (5) government-immigration non-enforcement (e.g., INS general counsel, INS deputy assistant commissioner for naturalization, law clerk for EOIR (immigration court and/or the BIA), and attorney advisor to the Chief IJ and/or the BIA). The final category, (6) government-immigration enforcement, included employment with any agency advocating for removal of individual noncitizens, whether in immigration court, before the BIA, or in petitions for review before the federal courts (e.g., ICE trial attorney, general attorney, and/or assistant district counsel; DHS ICE assistant chief counsel; and trial attorney with DOJ's Civil Division, Office of Immigration Litigation). Where IJs had more than one type of employment experience, we applied the code corresponding to the category for which they had the greatest number of years of experience.

[168] On credibility, we coded whether the IJ (1) explicitly found the applicant not credible, (2) explicitly found the applicant credible, or (3) did not make any explicit credibility finding.

[169] These variables were coded either by one of the authors or a research assistant under the supervision of the authors.

[170] For these variables, the dataset was split, with half the decisions coded by Karen Musalo and the other half by Anna Law. Annie Daher coded the full dataset.

[171] These decisions were coded by Karen Musalo and Annie Daher.

[172] To understand consistency in coding by team members, we calculated the Kappa statistic. Although there are many statistics that test interrater reliability in the assignment of codes or scores for the same variable, we use the Kappa because it is straightforward to calculate and because it signals how much uncertainty exists in coding across two team members. In Table 2, where we present a breakdown of the legal bases for the denial of relief, we present only those bases for which the Kappa statistic was between .51 and 1.00. These values have been interpreted as ranging from moderate to substantial agreement in coding in prior studies. *See* Mary L. McHugh, *Interrater Reliability: The Kappa Statistic*, 22 BIOCHEM MED (ZAGREB), Oct. 2012, at 276–82, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3900052/#:~:text=Cohen%20suggested%20the%20Kappa%20result,1.00%20as%20almost%20perfect%20agreement [perma.cc/VM4Q-JCTM] (interpreting coding agreement as moderate to substantial agreement).

Many, if not most, of the variables we coded are not maintained by EOIR and were therefore unavailable to authors of previous studies of IJ decision-making. Additionally, unlike the disaggregated EOIR data that has been analyzed in prior studies—which is coded and maintained by the agency and may raise reliability concerns—our data was coded by a team with decades of combined expertise in asylum law and statistical analysis of legal reasoning and judicial decisions.

We employed our individually-coded data to consider whether and how extralegal factors—measured quantitatively—appear to impact outcome. For instance, our quantitative analysis revealed a correlation between enforcement background and gender. We also conducted a qualitative case analysis of the decisions assessing judges' decision-making for internal logical consistency and analytical rigor. We reviewed decisions to determine the extent to which IJs applied legal principles to the facts, and whether they made any clear legal errors. The objective of our qualitative analysis was to identify the bases on which IJs denied relief and to determine whether their rulings represented a fair, informed, and principled application of law, without the appearance of bias.

V. FINDINGS

Below, we present findings from the quantitative and qualitative analyses of decisions on claims for asylum and/or withholding. Section A presents a quantitative analysis that reveals how various IJ attributes and legal findings are associated with the denial of asylum.[173] Section B highlights key findings from a qualitative case analysis of these decisions.[174] Section C summarizes our quantitative and qualitative findings.[175]

A. Quantitative Findings

From our quantitative analysis of IJ decisions on requests for asylum, we present our findings on two discrete issues. Subsection 1 illustrates the relationship between IJ attributes and asylum outcomes.[176] Subsection 2 analyzes

[173] *See infra* Part V.A. The quantitative analysis below is based on cross-tabulations of the data. This offers a way to reveal the associations among key variables of interest. Although in theory we could have used regression analysis, in practice the descriptive findings were robust enough to establish associations, which then set the stage for the subsequent qualitative analysis of legal decisions of the cases in our sample.

[174] *See infra* Part V.B.

[175] *See infra* Part V.C.

[176] *See infra* Part V.A.1.

the legal bases for denials in cases where the applicants were considered credible.[177]

1. IJ Attributes and Outcomes

Consistent with the findings of prior studies,[178] we found that work background and gender make a difference with regard to claim outcomes. Judges with a background in immigration enforcement[179] denied asylum at a much higher rate than judges with other employment backgrounds, and male judges denied at a higher rate than female judges. This gender differential carried through whether or not the judge had an enforcement background. Table 1 illustrates our findings.

Table 1: Denial of Asylum by IJ Enforcement Background and Gender

	All IJs				**Male IJs**			**Female IJs**	
		Enforcement			Enforcement			Enforcement	
Asylum (N=451)	Total	No	Yes	Total	No	Yes	Total	No	Yes
% Denied	59.2	50.3	76.5	65.2	56.1	78.3	49.4	43.3	71.1
Total # Denials	267	150	117	182	92	90	85	58	27

Note: From the initial dataset of 507 decisions, we excluded 40 decisions involving the adjudication of claims for withholding and/or CAT relief where no asylum claim was adjudicated, leaving 467 decisions on requests for asylum (alone or in combination with another type of claim). We then excluded an additional sixteen decisions which had missing IJ information on gender and/or employment background. Thus, we were left with 451 decisions to analyze.

We note the following distinctions in grant rates:

[177] *See infra* Part V.A.2. We did not quantitatively analyze IJ adjudication of withholding claims because it would have been duplicative. In almost all decisions, individuals who requested asylum also requested withholding; only 40 decisions out of our original dataset of 507 involved the adjudication of a withholding claim without an accompanying decision on a request for asylum. And in the vast majority of the 467 decisions in which either an asylum claim or both an asylum claim and a withholding claim were adjudicated, the IJ either granted asylum, rendering the withholding claim moot (192 out of 467 decisions), or denied both forms of protection (257 out of 467 decisions).

[178] *See* RAMJI-NOGALES ET AL., *supra* note 62, at 47 (finding similar results regarding work background and gender); MILLER ET AL., *supra* note 108 (same); Rosenberg et al., *supra* note 109 (same).

[179] For a description of how we defined immigration enforcement, see *supra* note 167.

> • Judges with an enforcement background had a denial rate of 76.5%, compared to the 50.3% rate of judges without an enforcement background.
> • Even when comparing outcomes among IJs of the same gender, those with enforcement backgrounds still denied asylum much more frequently. Male judges with an enforcement background had a 78.3% denial rate, compared to 56.1% for male judges without an enforcement background. Female judges with an enforcement background had a denial rate of 71.1% compared to 43.3% for female judges without.
> • Female judges denied asylum at lower rates than their male counterparts. Overall, male IJs denied asylum 65.2% of the time, while female IJs denied asylum 49.4% of the time. Male IJs with an enforcement background had a 78.3% denial rate, compared to female IJs with an enforcement background, who had a 71.1% denial rate. Male IJs without an enforcement background had a 56.1% denial rate, compared to female IJs without an enforcement background, who had a 43.3% denial rate.

There are solid inferences than can be drawn to explain the differences in grant and denial rates between those with and without an enforcement background. An attorney who has spent her professional career in enforcement—especially those who have been employed as ICE attorneys arguing against relief in the same cases they are now asked to adjudicate—may find it difficult to fully embrace her new role as a neutral adjudicator. The recognition of the difference that a judge's background can make in the perspective they bring to the bench is illustrated by the celebration of the fact that Ketanji Brown Jackson was the first Supreme Court Justice who had worked as a public defender.[180] The stark differences in grant and denial rates based on employment background strongly argue for diversity in hiring, which we elaborate on in Part VI.

It is more difficult to explain the differences in outcome that correlate with gender. There are numerous studies depicting how gender impacts judicial decision-making, but they do not show unanimity regarding the effect of gen-

[180] *See, e.g.*, Charlie Savage, *As a Public Defender, Supreme Court Nominee Helped Clients Others Avoided*, N.Y. TIMES, https://www.nytimes.com/2022/02/26/us/politics/ketanji-brown-jackson-supreme-court.html [perma.cc/T8Z7-4NWP] (Mar. 21, 2022) (highlighting Justice Jackson's prior experience as a public defender); *How Having a Former Public Defender on the Supreme Court Could Be 'Revolutionary,'* PBS NEWS (Mar. 21, 2022), https://www.pbs.org/newshour/politics/few-public-defenders-become-federal-judges-ketanji-brown-jackson-would-be-the-supreme-courts-first [https://perma.cc/C5TS-4945] (noting the significance of Justice Jackson's employment background and discussing professional diversity).

der on judging.[181] This is true even with studies focused specifically on adjudication in the refugee context. Interestingly, although the majority of U.S. studies we discuss above[182] as well as our study demonstrate that women judges grant at a higher rate than their male counterparts, a Canadian study examining gender and decision-making in refugee cases at the Immigration and Refugee Board found the opposite.[183] Male judges granted at a higher rate than female judges regardless of the nature of the claim. Relevant to our earlier discussion on the significance of adjudicator background, the authors of this Canadian study found that adjudicators—male and female—with experience in women's rights granted at a higher rate across types of claims.[184]

2. Reasons for Denial of Asylum Among Credible Applicants

Access to written IJ decisions allowed us to identify the frequencies with which IJs denied protection based on certain legal grounds. As discussed in Part I.A, an applicant for asylum or withholding must fulfill each of the required legal elements and not be precluded from protection, including for failing to file within a year of arrival unless they can show extraordinary or changed circumstances which would excuse them from that requirement.[185] As a preliminary matter, it is notable that denials were not typically a result of applicants being found to have fabricated their stories or put forth frivolous claims. On the contrary, asylum applicants who were denied protection in our dataset were considered credible in the vast majority of cases: more than sev-

[181] *See, e.g.*, Sean Rehaag, *Do Women Refugee Judges Really Make a Difference? An Empirical Analysis of Gender and Outcomes in Canadian Refugee Determinations*, 23 CAN. J. WOMEN & L. 627, 628 (2011) (analyzing studies on gender and its effect on judicial decisions). In his article, Sean Rehaag provides an overview of studies on gender and judging in Canada as well as in the United States. *Id.* Although some studies found a gender difference, others did not. *Id.* at 629–36. Rehaag points out that a number of the studies which did find a gender difference "have been the subject of methodological critique" for their "small sample size, the failure to control for other relevant variables, and the failure to explain why gender differences appear in some parts of the data, but not in others." *Id.* at 634–35.

[182] *See* RAMJI-NOGALES ET AL., *supra* note 62, at 47 (finding that women judges granted at a higher rate); MILLER ET AL., *supra* note 108 (same); Rosenberg et al., *supra* note 109 (same).

[183] Rehaag, *supra* note 181, at 640. The study examined data on over 66,000 cases decided from 2004–2008. *Id.* The key findings were as follows: Male decision-makers granted in 51.5% of the cases overall, as compared to female adjudicators' grant rate of 48.6%. *Id.* The higher grant rate by male adjudicators held even where the refugee applicants were female (male decision-maker grant rate of 57.9% versus female decision-maker grant rate 53.5%) and had suffered gender-based persecution (male adjudicator grant rate of 52.5% versus female adjudicator grant rate of 47.6%). *Id.* at 642–43.

[184] *Id.* at 644–48.

[185] For a discussion of the requirements for asylum eligibility, see *supra* Part I.A.

enty-seven percent of decisions denying asylum involved applicants for whom the IJ did not make any adverse credibility finding.[186]

We further found that, among applicants who were considered truthful, denials were overwhelmingly based on IJs concluding that they failed to satisfy two highly technical legal requirements: nexus and the existence of a cognizable protected ground. Table 2 illustrates our findings.

Table 2: Reasons for Denial of Asylum Among Credible Applicants

Legal Basis for Denial*	**Asylum %**
No nexus (.547)	75.0
No protected ground (.547)	62.8
Home govt. able/willing to protect (.714)	32.9
Applicant could relocate within home country (.547)	23.7
Harm is not persecution [past or future] (.556)	17.9
One-year bar (.595)	14.0

Note: Applicants may have multiple legal bases for denial. The total number of credible applicants that were denied asylum was 207. However, percentages for each legal basis for denial reflect Ns that may vary slightly from the total numbers of credible applicants denied asylum because in some cases judges did not address all reasons for denial in their decisions.

*In parentheses are Kappa scores that measure agreement in coding; we only include those reasons for the denial of legal relief which had Kappa scores greater than .5.

The most common ground for denial of asylum was failure to establish nexus: it was a factor in 75.0% of the decisions we reviewed. The second most common basis was failure to establish the existence of a valid protected ground; this finding was made in 62.8% of cases. Although Table 2 does not note the protected ground that was asserted in these cases, particular social group was raised as a protected ground in 81.2% of the decisions in our dataset.[187]

The next most common bases for denial were the findings that the government was able or willing to protect or that the applicant could relocate in their home country—but these findings were made much less frequently, in only 32.9% and 23.7% of cases respectively. Notably, a finding that the harm

[186] Our dataset included 267 decisions in which the applicant was denied asylum. In 207 of those decisions, the IJ made no adverse credibility finding (i.e., the IJ either explicitly found the applicant credible or did not make any explicit adverse credibility finding).

[187] Because applicants can raise multiple protected grounds, we created two variables to capture the one or two main grounds that were raised in each decision. At least one protected ground was discernible in 458 out of the 507 decisions in our dataset, and particular social group was claimed as a protected ground in at least 412 of those decisions. We were not able to calculate Kappa scores for these variables.

was not grave enough to constitute persecution was present in less than a fifth (17.9%) of the decisions.

The qualitative analysis which follows presents the facts of claims; as will be apparent, all of the cases discussed present egregious forms of persecution suffered or feared by the asylum seekers. And all of the decisions demonstrate some form of flawed decision-making. The fact that the U.S. approach to nexus and particular social group is inconsistent with international norms,[188] and that those legal elements are the most common bases for denial, paired with the flawed decision-making by IJs, raise questions not only about immigration court reform, but about realignment of U.S. law with international standards.[189]

B. Qualitative Findings

Having observed that our dataset revealed similar patterns in factors that influence denials of protection, with the most common reasons for denial being IJs' conclusions that applicants could not satisfy the nexus or protected ground requirements, we conducted a qualitative review of decisions denying relief. Specifically, we analyzed the decisions in our dataset for patterns in the application of legal principles and legal reasoning, internal logical consistency, and rigor of analysis.

In Subsection 1, we outline our finding that denials of protection based on failure to establish a protected ground and/or failure to demonstrate a nexus (the connection between the protected ground and the persecution) often rested on IJs' extremely demanding application of already highly restrictive interpretations of the relevant legal requirements.[190] While IJs are obligated to apply controlling law, we found that IJs often applied these interpretations to deny relief even in cases of credible applicants who had suffered or were likely to suffer grievous harm upon return to their home countries and had presented strong evidence of nexus to their protected characteristics.[191] In other words, these IJs exhibited a preference to deny relief by essentially ignoring factors demonstrating fulfillment of the required legal elements.

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[188] For a discussion of divergence between the U.S. interpretation of nexus and particular social group, and international norms, see Karen Musalo, *Aligning United States Law with International Norms Would Remove Major Barriers to Protection in Gender Claims*, 36 INT'L J. REFUGEE L. 20 (2024). This is also addressed *infra* in Part V.B.1.

[189] Exec. Order No. 14,010, *supra* note 149, § 4(c)(i). On February 2, 2021, President Biden issued an Executive Order in which he directed the Attorney General and the Secretary of the Department of Homeland Security to review existing guidance pertinent to gender and fear of gang claims, and to issue regulations aligning U.S. law with international standards. *Id.* The regulations were to have been issued by November 2021; however, as of the time of publishing, they still have not been issued. *Id.*

[190] *See infra* Part V.B.1.

[191] *See infra* Part V.B.1.b.

In Subsection 2, we discuss our observation that denials of relief were very often predicated on IJ incompetence and the undue influence of extralegal factors.[192] As described below, we observed basic errors in the application of legal requirements, failure to assess evidence holistically and impartially, speculation, vague or incomprehensible analysis, and overt bias.[193] As with the decisions in which IJs applied already restrictive legal standards in an especially narrow manner to deny protection, some of these flaws can be characterized as indicating a denial preference. For example, in some decisions, IJs used language overtly displaying anti-applicant bias. In other cases, it was more difficult to discern if the IJ was predisposed to a denial preference or was simply unable to competently apply the controlling legal standard.[194]

In Subsection 3, we give examples of competent and unbiased judicial decision-making. These decisions contrast with the aforementioned patterns and illustrate the standard for competence and impartiality that should be expected of IJs.[195]

1. Decisions Denying Protection Based on the Most Demanding Application of Already Restrictive Interpretations of Legal Standards

As noted above, the two most common legal bases for denying asylum and withholding were IJs concluding that (1) the applicant did not establish a legally cognizable protected ground and (2) that the applicant did not demonstrate that their past or feared harm was or would have been on account of a protected ground (nexus). Among decisions denying protection on these grounds, we found that many of the applicants were deemed credible and testified to harrowing experiences of past persecution or fear of similarly grievous harm, thereby seeming to present the kinds of claims for protection that asylum and withholding were intended to address. However, over and over again, IJs denied protection to these individuals, in many cases relying on extremely restrictive interpretations of the relevant legal standards set forth in BIA precedent. IJs appeared predisposed to view even compelling case facts, which seemed capable of satisfying the BIA's requirements, in such a way as to conclude that they did not. As noted, we term this approach a "denial preference."

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[192] *See infra* Part V.B.2.
[193] *See infra* Part V.B.2.
[194] *See infra* Part V.B.2.
[195] *See infra* Part V.B.3.

a. Background on Legal Standards

U.S. legal standards for asylum and withholding were intended to conform U.S. law to the country's obligations under the Refugee Convention and Protocol.[196] Nevertheless, the BIA has established exceedingly narrow and restrictive interpretations of many asylum and withholding requirements which reject international guidance and are at odds with the underlying humanitarian purpose of the Convention and Protocol. This is especially evident with respect to the BIA's interpretations of the requirements for establishing a legally valid particular social group and nexus to a protected ground.[197]

The BIA's test for establishing a cognizable particular social group is more stringent than the international approach. It requires three elements: (1) immutability, meaning the group is composed of members who share a characteristic they cannot or should not be required to change because it is fundamental to their identities or consciences; (2) particularity, meaning the group has objective benchmarks for defining who is or is not part of the group; and (3) social distinction, meaning that society views it as a distinct group in society.[198]

Following the passage of the 1980 Refugee Act, the BIA initially only required demonstration of the first of these elements, immutability, to establish a cognizable group.[199] Federal circuit courts in the United States deferred to this test as a reasonable interpretation of the term "particular social group," and it became the dominant standard internationally as other countries similarly embraced it.[200] However, beginning in 2006, the BIA began imposing additional requirements which would ultimately evolve and coalesce into what we currently understand as "particularity" and "social distinction."[201]

The federal courts of appeals have largely deferred to the BIA's expanded test of particular social group cognizability under deference principles.[202]

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[196] *See supra* Part I.A.

[197] For more in-depth discussion of this topic, see Musalo, *supra* note 188.

[198] Matter of M-E-V-G-, 26 I. & N. Dec. 227, 237 (B.I.A. 2014).

[199] Matter of Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

[200] Benjamin Casper, Katherine Evans, Julia DiBartolomeo Decker & Hayley Steptoe, Matter of M-E-V-G- *and the BIA's Confounding Legal Standard for 'Membership in a Particular Social Group.*,' IMMIGR. BRIEFINGS, June 2024, at 1, 4–7.

[201] *See* Fatma Marouf, *Becoming Unconventional: Constricting the "Particular Social Group" Ground for Asylum*, 44 N.C. J. INT'L L. 487, 489–92 (2019) (summarizing evolution of additional cognizability requirements).

[202] *See* Reyes v. Lynch, 842 F.3d 1125, 1137 (9th Cir. 2016) (citing Matter of W-G-R-, 26 I. & N. Dec. 208 (B.I.A. 2014)) (finding "that the BIA's articulation of the 'particularity' and 'social distinction' requirements in *Matter of W–G–R–* is reasonable and entitled to *Chevron* deference"). *But see* Cece v. Holder, 733 F.3d 662, 666–69 (7th Cir. 2013) (en banc) (noting that the Seventh Circuit "has deferred to the Board's Acosta formulation of social group" and declined to apply a social visibility or particularity analysis). As noted *supra* notes 103–105, courts are no longer required to defer to the agency in their interpretations of ambiguous statutory terms. *See* Loper Bright Enters. v. Raimondo,

Whereas many groups were recognized as legally valid under the *Acosta* immutability test,[203] the BIA has only recognized one particular social group since the inception of its three-part test, highlighting the restrictive impact of its additional requirements.[204]

In contrast, the internationally accepted approach to cognizability is much more flexible and recognizes a broader array of groups. For example, the United Nations High Commissioner for Refugees (UNHCR), the agency tasked with supervising the interpretation and implementation of the Convention and Protocol, advises that an applicant need only show *either* that their proposed group is based on an immutable or fundamental characteristic *or* that it is perceived as a group by society.[205] It also does not require any separate demonstration of particularity.[206]

The BIA's approach to nexus is also unduly restrictive and out of step with international norms. In early decisions following the passage of the 1980 Refugee Act, it adopted a very narrow interpretation of nexus, requiring proof of the persecutor's motive or intent,[207] a standard later affirmed by the Supreme Court in the seminal case of *INS v. Elias-Zacarias*.[208] This interpretation lacked support in the plain language or legislative history of the Refugee Act or guiding international authority.[209] Proving a person's motive is always difficult, but it is especially so for refugees who face significant challenges in gathering evidence.[210] In contrast, UNHCR takes the position that applicants need

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144 S. Ct. 2244, 2270–71 (2024). However, the Supreme Court noted that its 2024 *Loper Bright* decision that it does not "call into question prior cases that relied on the *Chevron* framework." *Id.* at 2273 (2024). Courts are not required to revisit their interpretation of "particular social group" even if their decision was made as one of deference to the agency. *See id.*

[203] *See* Casper et al., *supra* note 200, at 7–17 (describing groups that were recognized).

[204] *See* Matter of A-R-C-G-, 26 I. & N. Dec. 388, 395 (B.I.A. 2014) (acknowledging that the government conceded that the respondent was a member of particular social group). Although the BIA published a decision recognizing a particular social group-based claim in 2014, it specified that the government (DHS) had stipulated in that case that the applicant's persecution was on account of her membership in a cognizable social group. *Id.*

[205] Brief for UNHCR as Amicus Curiae in Support of Petitioner at 7–11, Valdiviezo-Galdamez v. Att'y Gen. of the U.S., 663 F.3d 582 (3d Cir. 2011) (No. 08-4564), http://www.refworld.org/docid/49ef25102.html [perma.cc/6ES4-X35Q].

[206] *See* UNHCR, *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees* ¶¶ 5–13 (May 7, 2002), https://www.unhcr.org/media/guidelines-international-protection-no-2-membership-particular-social-group-within-context [perma.cc/B56F-GZSD] (finding particularity not a requirement for defining a social group). *But see* Rivera Barrientos v. Holder, 658 F.3d 1222, 1230 (10th Cir. 2011) (requiring a demonstration of particularity).

[207] *See* Campos-Guardado v. INS, 809 F.2d 285, 288 (5th Cir. 1987) (analyzing the motive of the persecutors).

[208] 502 U.S. 478, 482 (1992).

[209] Musalo, *supra* note 26, at 1181–82.

[210] *Id.*

not prove intent so long as their persecution or fear is "related to" the protected grounds, which is a much more protective standard.[211]

In 2005, with the passage of the REAL ID Act,[212] Congress tightened the statutory nexus standard for asylum. Under the amended standard, the protected ground[213] must not only be a reason for the harm, it must be at least "one central reason."[214] Soon thereafter, the BIA published a decision setting forth an exceedingly narrow interpretation of this language, specifying that an applicant cannot satisfy the "one central reason" standard if the protected characteristic was an "incidental, tangential, superficial, or subordinate" reason for the persecution.[215] This interpretation—especially its use of the term "subordinate"—suggests that the protected characteristic must be a dominant reason for the persecution compared with other non-protected reasons. It was difficult enough to prove nexus prior to the REAL ID Act—the hurdle has increased with the burden of not only showing the persecutor was motivated by a protected ground, but that any other motives are substantially less significant. Despite the Third Circuit striking down this aspect of the decision,[216] the BIA has continued to apply it to deny cases based on failure to prove nexus where it determines that the primary reason for the harm is not a protected ground, without considering whether the protected ground is also a central reason.[217]

b. Decisions Denying Relief to Credible Applicants Who Feared or Suffered Grievous Harm

We do not question that IJs are bound to follow BIA precedent. Thus, as expected, IJs applied the BIA's restrictive interpretations of the applicable legal standards to the decisions before them. However, we noted that in many cases

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[211] UNHCR HANDBOOK, *supra* note 33, ¶ 65; Musalo, *supra* note 26, at 1195–96.

[212] Pub. L. No. 109-113, 119 Stat. 231 (2005).

[213] There is disagreement among the federal courts of appeals regarding whether this amendment also applies to withholding or if withholding is subject to a lower standard given its broader statutory language. *See supra* note 50.

[214] 8 U.S.C. § 1158(b)(1)(B)(i).

[215] Matter of J-B-N- & S-M-, 24 I. & N. Dec. 208, 214 (B.I.A. 2007).

[216] *See* Ndayshimiye v. Att'y Gen. of the U.S., 557 F.3d 124, 129–30 (3d Cir. 2009) (finding the BIA's use of the term "subordinate" in interpreting the nexus standard inconsistent with the statute).

[217] *See, e.g.*, Matter of M-R-M-S-, 28 I. & N. Dec. 757, 759 (B.I.A. 2023) ("A protected ground that is incidental, tangential, superficial, or subordinate to another reason for harm does not satisfy this [one central reason] standard.") (internal quotations omitted) (quoting *J-B-N- & S-M-*, 24 I. & N. Dec. at 214). Several circuit courts have also continued citing the BIA's nexus test from *J-B-N- & S-M-*, including its "subordinate" language, notwithstanding the Third Circuit's decision in *Ndayshimiye*. *See, e.g.*, Pineda-Maldonado v. Garland, 91 F.4th 76, 85 (1st Cir. 2024); Diaz-Hernandez v. Garland, 104 F.4th 465, 472 (4th Cir. 2024); Bustamante-Leiva v. Garland, 99 F.4th 245, 252 (5th Cir. 2024); Miguel-Pena v. Garland, 94 F.4th 1145, 1159 (10th Cir. 2024); Sanchez-Castro v. U.S. Att'y Gen., 998 F.3d 1281, 1286 (11th Cir. 2021).

in which credible applicants had suffered severe past harm or feared grave harm in the future and presented claims that seemed capable of satisfying the BIA's stringent standards for social group cognizability and nexus, IJs appeared to go out of their way to find that they did not.

One such decision involved a Guatemalan woman whose husband and brother were killed by gang members.[218] The applicant and her family, including her brother, witnessed the murder of her husband.[219] After her brother shared information on the murder with the police, gang members killed him.[220] They then threatened the applicant multiple times, including at gunpoint, telling her "she would die like her husband" and that they would kill her children in front of her.[221] The IJ found the applicant credible and described her experiences as "a harrowing series of events" that rose to the level of persecution.[222] However, although the IJ conceded that the applicant presented a "close case," he went on to find her social groups ("family members of persons who were or are prosecutorial witnesses against gangs in Guatemala" and "family members of persons who sought or are seeking justice on behalf of a family member victimized by gang violence") not cognizable under the BIA's three-part test. He did so without any application of those requirements to the facts of the case.[223] The IJ also ruled that the applicant did not establish nexus, finding instead that the gang members who killed her brother and threatened her were motivated by vengeance and the gang members' criminal nature, which are not protected grounds.[224] In reaching that conclusion, the IJ gave no consideration to the applicant's evidence linking her persecution to her family relationship with her brother, which was central to her nexus argument.[225] The outcome was a denial of protection to a woman whose husband and brother were killed by the gangs, and who was threatened with death herself, in a decision which ignored relevant evidence and engaged in minimal analysis.

The outcome in this case was by no means a foregone conclusion—indeed, other IJs granted protection when faced with similar facts and arguments. In one such case, a sixteen-year-old Salvadoran boy found a body in a well and told his father, who then told the police.[226] This led to the arrest of fifteen suspected gang members, after which rumors began to spread that gang

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[218] Decision No. 920 (on file with authors).
[219] *Id.* at 6–7.
[220] *Id.* at 4–6, 9.
[221] *Id.* at 5, 9–10.
[222] *Id.* at 13–14.
[223] *Id.* at 15–18.
[224] *Id.* at 15–16.
[225] *Id.*
[226] Decision No. 495, at 7 (on file with authors).

members were going to kill the applicant.[227] Shortly thereafter, gang members killed the applicant's cousin and suspicious people began to look for the applicant.[228] The IJ granted the applicant asylum based on his membership in a particular social group of "members of a family identified as not supportive of the gangs," noting that "[c]learly, the reason why the gang members have targeted the respondent and his family has to do with their philosophy and how they carr[ied] out their philosophy in the face of the suspicious death in their well."[229]

Another example of a denial based on nexus and social group involving grievous harm involved two credible eighteen and twenty-one-year-old Salvadoran sisters who had fled "almost daily" beatings by their father.[230] They contended that this harm was on account of their membership in the particular social group "Salvadoran female children who are unable to escape abuse from their fathers due to societal acceptance of abuse in El Salvador."[231] The sisters presented compelling evidence including their own testimony of extreme physical abuse. For example, the father hung one of the girls from a post in the house, beat her "like a piñata," and threatened that, "if she ever talked to another boy, he would burn her genitals."[232] Applying the BIA's three-part test, the IJ found the sisters' particular social group immutable but concluded that they could not satisfy the social distinction and particularity requirements.[233] Whether or not a particular social group is cognizable is fact-intensive, and each case must be decided based on the record evidence. However, the IJ only cited legal precedent in which similar groups had been found not cognizable and failed to consider relevant evidence—including articles about the position of Salvadoran women and children in society, high rates of violence against them, and impunity for such crimes—which might have led to the conclusion that the social group in this case was cognizable.[234] The IJ also found the applicants failed to establish nexus, characterizing the abuse as "personal or retaliatory in nature" and a result of the father's "violent nature," despite evidence that linked the father's abuse to their status as female children and the societal acceptance of abuse against women and girls in El Salvador, all of which was well-documented in the record and noted elsewhere in the decision.[235]

Again, this outcome was by no means required by the facts and law. In a similar case, a seventeen-year-old Salvadoran boy fled severe child abuse by

[227] *Id.* at 8–9.
[228] *Id.* at 9–10.
[229] *Id.* at 18.
[230] Decision No. 628, at 10 (on file with authors).
[231] *Id.* at 11.
[232] *Id.* at 10.
[233] *Id.* at 10–13.
[234] *See id.* at 7, 10–13 (failing to analyze evidence supporting social group cognizability).
[235] *Id.* at 14.

his father and sought protection on account of membership in a social group of "child victims of domestic violence in El Salvador."[236] There, a different IJ thoroughly examined the record and applicable law—even going to far as to look at UNHCR authority and decisions of foreign countries—before finding that the applicant satisfied the requirements to prove nexus to his social group and granting asylum.[237]

Although our dataset included some examples of IJs finding that applicants' circumstances satisfied the requirements for nexus and particular social group, the two cases described above in which IJs denied protection to credible applicants with strong claims for relief are not exceptional. Rather, they are emblematic of the decisions in our dataset. It is also important to note that the extremely restrictive approach to nexus that IJs employed in these cases was not limited to claims involving persecutors who were private actors or had preexisting relationships with applicants.[238] For example, an IJ denied asylum and withholding to a young Eritrean woman who sought protection based on feared sexual abuse if forcibly conscripted into the Eritrean military.[239] The IJ found that the applicant was a member of a cognizable social group ("females of recruitment age who are of mixed ethnic heritage") and went on to note that, "[a]s a female of recruitment age who is of mixed ethnic heritage, Respondent undoubtably has a well-founded fear of persecution," citing expert testimony stating that "girls considered either 'good looking' or those of mixed parentage are at heightened risk for sexual abuse."[240] The IJ went on to find it "clear from the record that the Eritrean government has given the army a 'free hand' to engage in the rape and sexual abuse of female recruits."[241] However, she then found that "there is no evidence suggesting that the military commanders are abusing young female recruits for any reason other than simple lawlessness."[242]

We repeatedly observed IJs applying precedent in a conclusory manner, without articulating the governing legal standards or applying them to the facts. Many of these decisions seemed to indicate a denial preference, as the

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[236] Decision No. 139, at 2–3 (on file with authors).

[237] *Id.* at 3–8.

[238] Cases involving preexisting personal relationships, like those involving abuse by domestic partners, have been a particularly fraught area of the law. *See generally* Kate Jastram & Sayoni Maitra, Matter of A-B- *One Year Later: Winning Back Gender-Based Asylum Through Litigation and Legislation*, 18 SANTA CLARA J. INT'L L. 48 (2020) (summarizing developments in gender-based asylum); Marouf, *supra* note 201 (same). *But see* Matter of A-B- III, 28 I. & N. Dec. 307 (A.G. 2021) (vacating 2018 and 2021 Attorney General decisions in *A-B- I* and *A-B- II* and reinstating *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014)).

[239] Decision No. 194, at 8–10 (on file with authors).

[240] *Id.* at 9–10.

[241] *Id.* at 10.

[242] *Id.* at 11.

IJs appeared to be searching for a basis upon which to do so rather than engaging in a fair and principled application of the law to the facts.

2. Decisions Denying Protection Based on Incompetence and Bias

Decisions denying relief also revealed other troubling patterns: IJs frequently committed basic errors in analyzing the law and facts, engaged in baseless speculation and poor analysis, and demonstrated bias against applicants. These flaws—examples of which are described below—were not limited to certain claim types, legal elements, or characteristics of IJs or applicants. The flaws were also not limited to claims involving detained applicants or those unrepresented by counsel.[243] Although they appeared more frequently in the decisions of IJs with immigration enforcement employment backgrounds than those without, they also occurred in decisions of IJs with other employment backgrounds.[244] The widespread nature of this pattern suggests a systemic lack of competence and professionalism among IJs.

a. Basic Errors in Interpreting or Applying Legal Requirements

IJs committed basic errors in applying the legal requirements for asylum and withholding. For instance, they ignored controlling law, such as in a 2005 decision involving a female applicant who had undergone female genital cutting (FGC) as a child.[245] The IJ ruled that it was not bound by 1996 BIA precedent holding that FGC is persecution[246] because the First Circuit had not explicitly affirmed the decision.[247] This reflected a fundamental misunderstanding of the legal system. The First Circuit did not need to affirm *Matter of Kasinga*; it constituted binding precedent in the First Circuit so long as that court had not issued a decision overturning it, which it had not done.[248]

IJs also regularly misinterpreted basic eligibility frameworks. For example, where a persecutor is a nongovernmental actor, applicants for asylum and withholding are required to show that the government is "unable or unwilling"

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[243] *See supra* note 161 and accompanying text (noting that most of the asylum-seekers in the dataset were represented).

[244] *See, e.g.*, RAMJI-NOGALES ET AL., *supra* note 62 (finding link between enforcement background and likelihood of claim denial); *see also* Part V.A.1 (finding similar link in decisions in our dataset).

[245] Decision No. 245, at 2 (on file with authors).

[246] Matter of Kasinga, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

[247] *See* Decision No. 245, at 12 (on file with authors) (citing the absence of a First Circuit decision regarding FGC).

[248] *See, e.g.*, Ferreira v. Garland, 97 F.4th 36, 50 n.8 (1st Cir. 2024) (noting that *Matter of Kasinga* is binding on the agency).

to control the persecutor.[249] The "unable or unwilling" requirement is disjunctive, meaning that proof of either inability or unwillingness is sufficient to satisfy it.[250] However, IJs frequently failed to apply this basic legal rule correctly. For example, in one case, a Guatemalan woman sought protection from her husband whom she had been forced to marry as a child and who brutally abused her for years thereafter.[251] There, the IJ concluded that evidence showing "extensive efforts to curb domestic violence since 1997" satisfied the "unable or unwilling" test because it showed government willingness to protect against domestic violence.[252] However, though he was required to do so by the law, the IJ never addressed whether the government was actually able to do so.[253]

IJs also frequently failed to analyze cases in accordance with controlling regulations governing claims involving past persecution. These regulations provide that applicants who have suffered past persecution on account of a protected ground, and for whom the government is "unable or unwilling" to control such persecution, are presumed to have a "well-founded fear of future persecution" (for asylum) or face a clear probability of a threat to life or freedom (for withholding) on that basis.[254] The government can rebut the presumption by establishing by a preponderance of the evidence that circumstances have changed or the applicant could safely and reasonably relocate.[255]

This regulation establishing a presumption in favor of the applicant is governing law and IJs must apply it in cases involving past persecution.[256] However, in a number of cases involving grave past harm, IJs entirely failed to analyze whether that harm met the requirements which would trigger the application of the presumption. In one representative case, an IJ failed to discuss the applicability of the presumption based on past persecution notwithstanding the fact that the applicant had been kidnapped, imprisoned, and repeatedly beaten and raped[257]—even though such past harm would widely be considered sufficiently severe to constitute persecution.[258]

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[249] Kaur v. Wilkinson, 986 F.3d 1216, 1227 (9th Cir. 2021) (quoting Bringas-Rodriguez v. Sessions, 850 F.3d 1051, 1061–62 (9th Cir. 2017)).

[250] *See, e.g.*, Rosales Justo v. Sessions, 895 F.3d 154, 164 (1st Cir. 2018) (treating inability and unwillingness as disjunctive requirements).

[251] Decision No. 155, at 2 (on file with authors).

[252] *Id.* at 13.

[253] *Id.*

[254] 8 C.F.R. §§ 208.13(b)(1), 1208.13(b)(1), 208.16(b)(1), 1208.16(b)(1) (2024); *see also supra* Part I.A.

[255] 8 C.F.R. §§ 208.13(b)(1), 1208.13(b)(1), 208.16(b)(1), 1208.16(b)(1); *see also supra* Part II.

[256] Matter of D-I-M-, 24 I. & N. Dec. 448, 451 (B.I.A. 2008); Un v. Gonzales, 415 F.3d 205, 208–10 (1st Cir. 2005).

[257] Decision No. 119, at 5 (on file with authors).

[258] *See, e.g.*, Ochave v. INS, 254 F.3d 859, 864 (9th Cir. 2005) (denying asylum for an applicant who had previously been raped).

b. Failure to Assess Record Evidence Holistically and Impartially

IJs are required to impartially and holistically weigh applicants' evidence. They may not cherry-pick parts of the record that weigh against applicants' eligibility while ignoring relevant, probative evidence supporting the applicants' claims.[259] However, in many cases, IJs did just that.

In one case, a woman from El Salvador testified that her husband repeatedly beat and raped her, becoming especially violent when she refused to have sex with him.[260] To meet the requirement of proving that the Salvadoran government was unable or unwilling to protect survivors of domestic violence, the applicant testified that she knew other women who suffered similar violence whose abusers, if arrested at all, were released after a few days.[261] She submitted testimony from an expert on violence against women in El Salvador who stated that such abuse was widespread and normalized in the country, and that victims generally did not report their abuse to authorities.[262] The expert further stated that "the government tolerate[d] and acquiesce[d] in violence against women."[263] Discounting the expert evidence, the IJ gave great weight to "anecdotal testimony" that police had taken a neighbor's husband into custody following an incident of violence—notwithstanding the fact that, after being released seventy-two hours later, the husband beat his wife even more severely.[264] The IJ also cited a U.S. Department of State report referencing efforts by the Salvadoran government to address domestic violence, but failed to assess the efficacy of those efforts or to consider the extensive record evidence that weighed in the applicant's favor on this requirement.[265]

In another case, an IJ ignored relevant and probative evidence when denying protection to a child fearing forced marriage in China.[266] In concluding that the applicant failed to prove the government was unable or unwilling to protect her from forced marriage, the IJ cited the existence of laws in China that prohibited the practice.[267] The IJ held against the applicant on this element, despite acknowledging reports indicating that laws against forced marriage did not prevent them from taking place, and that girls suffered abuse when they sought help.[268]

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[259] *See* Arrey v. Barr, 916 F.3d 1149, 1160 (9th Cir. 2019).
[260] Decision No. 213, at 2–3 (on file with authors).
[261] *Id.* at 3–4.
[262] *Id.* at 7, 11.
[263] *Id.* at 11.
[264] *Id.* at 11–12.
[265] *Id.* at 12–13.
[266] Decision No. 90 (on file with authors).
[267] *Id.* at 3.
[268] *Id.* at 4–5.

In another example, an IJ went beyond cherry-picking by disregarding the basic principle that judges must decide cases based on evidence in the case at hand.[269] Specifically, the IJ relied on evidence from other cases to conclude that the applicant in the case before him—a woman from Russia whom the Chechnyan mafia repeatedly kidnapped, beat, and raped—could safely internally relocate elsewhere in Russia, a finding which would preclude asylum and withholding.[270] The IJ's finding was based on having "heard numerous Russian cases," "from previous experience," and "from reading reports and from experts that have testified" in other cases indicating that relocation in Russia is easier for "Russian" individuals (like the applicant) as compared to individuals of Chechen, Armenian, or some other descent.[271]

At times, IJs' interpretation of evidence was so strained that it bordered on absurd. For example, in one case, a woman sought protection from the constant abuse of her husband whom she had been forced to marry as a child.[272] The IJ concluded that the applicant could avoid persecution by relocating elsewhere in Guatemala, citing as evidentiary support the fact that her husband had only found her once when she previously left the town where she lived.[273] The fact that the husband found her previously should have weighed against concluding she could find safety by relocating, not in favor of that finding. Similarly, another IJ denied protection to a young woman who suffered repeated violence and threats from her common law husband, concluding that she could avoid persecution by relocating elsewhere in her home county of Honduras.[274] This was despite the fact that, as the IJ acknowledged, the applicant's husband had previously found her when she moved to another part of Honduras, and even after she fled to Mexico.[275]

c. Baseless Speculation

Rather than deciding cases by applying the law to the facts presented,[276] IJs often premised their legal findings on impermissible speculation with no evidentiary basis. For example, in one case, a Jordanian woman testified that she feared being killed by her family as a result of having premarital sex, mar-

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[269] *See* 8 U.S.C. § 1229a(c)(1)(A) (mandating that an IJ make a determination based on the evidence presented in the case before them).

[270] Decision No. 42, at 16 (on file with authors).

[271] *Id.*

[272] Decision No. 155, at 2 (on file with authors).

[273] *Id.* at 14.

[274] Decision No. 319, at 9–11, 15 (on file with authors).

[275] *Id.*

[276] *See* 8 U.S.C. § 1229a(c)(1)(A) (providing the legal framework for and basis on which immigration judges should evaluate asylum claims).

rying against her father's will, and leaving the country without her family's permission, all in violation of her family's religious beliefs and cultural norms.[277] Among other evidence, the applicant had submitted letters from her sister stating that their father had ordered members of the family to kill her after learning of her transgressions, as well as articles and a U.S. Department of State report on human rights in Jordan noting that violence against women, including "honor killings," was common and met with impunity in that country.[278] Yet, the IJ speculated without any basis that when the applicant's father found out she had children from her condemned marriage, it "might mitigate the fierceness of his reaction."[279] On this logic, the IJ concluded that the applicant failed to demonstrate a "well-founded fear" of persecution, which defeated her claims.[280]

IJs also frequently relied on speculation with no factual basis to find applicants not credible, again leading to denials of protection.[281] In a case concerning a Guatemalan woman, the applicant testified that her husband repeatedly beat her, dragged her by her hair, and threatened to kill her, in private and in public, and, at times, with the assistance of his mother.[282] The applicant recounted a particularly harrowing incident in which he tied her up with a rope and raped her at knifepoint in front of their daughter.[283] Faced with such facts, the IJ found her not credible on the basis that "the history of the abuse is so horrific that it is beyond belief."[284] The IJ further assumed that "[t]here would be no reason" for the applicant's abuser's mother to stalk and threaten to kill her, and that, if she had truly been beaten as badly as she said, she would have sought police assistance.[285] These findings were not based on any facts in the record but rather on the IJ's own baseless speculation.

d. Vague or Incomprehensible Analysis

IJs are required to explain their decisions so that a reviewing court can understand their conclusions and reasoning. IJs "must 'consider the issues raised and announce [their] decision in terms sufficient to enable a reviewing court to perceive that [they have] heard and thought and not merely react-

[277] Decision No. 54, at 2–4 (on file with authors).
[278] *Id.* at 8–9, 11.
[279] *Id.* at 8.
[280] *Id.* at 11–12.
[281] *See, e.g.*, Shah v. INS, 220 F.3d 1062, 1071 (9th Cir. 2000) (overturning IJ's adverse credibility determination because it was based on speculation and conjecture).
[282] Decision No. 896, at 2–4 (on file with authors).
[283] *Id.* at 2–3.
[284] *Id.* at 5.
[285] *Id.* at 5–6.

ed.'"[286] Yet often IJs' recitations of the facts or their analyses were so vague or confusing that it was impossible to understand their reasoning or findings. For example, in one decision, an IJ noted "the [applicant's] abuse . . . did not arise from a political race,"[287] leaving it unclear whether the IJ was finding that the applicant failed to establish nexus to a political opinion or race. In many other decisions, it was impossible to determine the facts of the case, the legal theories raised, or the bases for denial.[288]

IJs also frequently failed to engage with the required legal elements. A 2002 decision, for example, involved a woman from Jordan who testified to having suffered many years of severe abuse by her husband, harm she claimed was on account of her membership in a particular social group based on her gender.[289] At the time, there was ongoing controversy over asylum and withholding eligibility based on domestic violence. In 1999, the BIA had issued a published decision rejecting a domestic violence claim and making broad assertions against the viability of such claims,[290] but in 2001, Attorney General Janet Reno vacated that decision.[291] Against this backdrop,[292] the IJ failed to assess whether the facts presented satisfied the legal requirements for asylum or withholding, as he was required to do. Instead, he expressed skepticism about the viability of domestic violence claims as a general matter and appeared to deny the applicant protection on that basis.[293]

In other cases, IJs went so far as to deny cases based on legal precedent and evidence unrelated to the applicants' claims. For example, one IJ repeatedly discussed evidence relating to Honduras, including its U.S. Department of State report on human rights, to support denying the claim of a Guatemalan applicant.[294] That same IJ also inexplicably found that having been beaten severely, threatened, and raped in front of one's child did not constitute past per-

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[286] Tan v. U.S. Att'y Gen., 446 F.3d 1369, 1374 (11th Cir. 2006) (quoting Vergara-Molina v. INS, 956 F.2d 682, 685 (7th Cir. 1992)).

[287] Decision No. 119, at 11 (on file with authors).

[288] Decision Nos. 253, 295 (on file with authors).

[289] *See* Decision No. 163, at 1–4 (on file with authors) (outlining facts of the applicant's claim, which centered on domestic violence by her husband).

[290] *See* Matter of R-A-, 22 I. & N. Dec. 906, 914–28 (B.I.A. 1999) (finding the applicant failed to establish nexus and a cognizable particular social group based on domestic violence and casting doubt on the viability of such claims as a general matter).

[291] *See* Matter of R-A-, 22 I. & N. Dec. 906 (A.G. 2001), *vacating* 22 I. & N. Dec. 906 (B.I.A. 1999).

[292] *See* Decision No. 163, at 3 (on file with authors) (noting an "unfortunate void in terms of just what are the standards to be applied with regard to adjudicating asylum claims that sound in domestic violence" following Attorney General Reno's vacatur of the *R-A-* decision).

[293] *See id.* at 3–6 (expressing skepticism regarding domestic violence as a basis for asylum and failing to address whether facts presented met legal standards).

[294] Decision No. 896, at 7–8 (on file with authors).

secution.[295] To justify this holding, she characterized the applicant's harm as "[u]nfulfilled death threats and general mistreatment, compounded by a failure to seek timely medical treatment, [which] is insufficient to establish past persecution."[296]

e. Anti-Applicant Bias

IJs are required to provide asylum seekers a full and fair opportunity to present their claims and decide them based on the evidence presented and applicable law, not their own bias stemming from extralegal factors such as personal antagonism toward certain applicant groups or claim types.[297] However, many IJ decisions exhibited just that.

Some IJs noted dissatisfaction with the breadth of protection available to asylum seekers. For instance, one IJ stated that the United States had shown an "extremely generous willingness" to grant protection, that the Ninth Circuit Court of Appeals (which had jurisdiction over the case before him) had been "exceedingly generous," and that the definition of persecution was "ever expanding."[298] In other decisions, IJs expressed concern that recognizing individual claims would "open the floodgates" to too many other potential asylum seekers. For example, in one such decision, an IJ expressly noted his fear that recognizing the applicant's claim for asylum based on domestic violence could result in "perhaps the migration of millions of people."[299] Although, on a policy level, it may be legitimate to consider such broader impacts, and to develop a coordinated response that might involve "burden sharing" among countries, it is clearly inappropriate for an IJ to base his adjudication of an individual person's case on such considerations.

Other IJs demonstrated bias against asylum seekers by discussing issues unrelated to the legal elements for relief. Among the most common examples were references to applicants entering or living in the United States "illegally"—even though the law permits individuals to seek asylum regardless of their manner of entry[300]—and commentary regarding female applicants' conduct as mothers. For example, in one decision involving a woman who fled severe domestic violence, the IJ emphasized that she was living in the United States "illegally" and that she had left behind her daughter in Guatemala when

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[295] *Id.* at 5–6.

[296] *Id.* at 6 (citing Matter of A-, 23 I. & N. Dec. 737, 740 (B.I.A. 2005)).

[297] *See, e.g.*, Floroiu v. Gonzales, 481 F.3d 970, 973–75 (7th Cir. 2007) (reversing and remanding where the IJ had "departed from his judicial role" as a result of his personal bias against the applicants, thus denying them their right to due process).

[298] Decision No. 55, at 2, 7 (on file with authors).

[299] Decision No. 250, at 10 (on file with authors).

[300] 8 U.S.C. § 1158(a)(1).

she fled, even though both of those facts were irrelevant as to whether she satisfied the necessary legal requirements to prove her eligibility for relief.[301]

Other decisions relied on stereotypes and illustrated discriminatory perspectives, including misogynistic views. One example involved a young Chinese woman who, as a teenager, had been sold into marriage to her village mayor's son.[302] After the applicant fled to the United States, her family suffered retaliation, including physical assaults, fines, extra taxes, and threats to confiscate their land.[303] The IJ commented that the applicant's forced marriage to the mayor's son did not constitute persecution because it was a matter of contract law that should be litigated in civil court.[304] Forced marriage, with its requirement of engaging in non-consensual sex, is clearly a violation of a woman's fundamental human rights and rises to the level of persecution.[305] Furthermore, the actions taken in retaliation for refusal, which included physical harms, could also constitute persecution. Instead of focusing on these key facts, the IJ likened the applicant to a piece of chattel and concluded that her forced marriage was a mere contract law dispute.

3. Some Decisions Contained Competent and Unbiased Reasoning

Although, as described above, we observed many examples of poor and biased reasoning in decisions denying protection, we also looked for decisions containing thoughtful legal analysis and reasonable applications of the law to the facts. We reviewed every decision in our dataset in an effort to find well-reasoned decisions denying protection; however, almost all contained some aspect of the type of problematic patterns described above.[306] Thus, we describe just one well-reasoned decision denying protection below. But we also outline the analysis in two decisions granting protection to further illustrate the type of principled and logical analysis that should be the standard expected from IJs.

In one decision denying protection, a Russian woman sought protection based on having received improper or substandard medical care when she was hospitalized in her home country.[307] She did not testify to having suffered any physical harm or psychological trauma stemming from the incident or fearing similar harm if returned; rather, she submitted evidence of discrimination

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[301] Decision No. 155, at 14 (on file with authors).

[302] Decision No. 68, at 3–5 (on file with authors).

[303] *Id.* at 5.

[304] *Id.* at 13.

[305] *See, e.g.*, Gao v. Gonzales, 440 F.3d 62, 71 (2d Cir. 2006), *vacated on other grounds*; Keisler v. Hong Yin Gao, 552 U.S. 801 (2007) (considering forced marriage as persecution); Kaur v. Wilkinson, 986 F.3d 1216, 1227 (9th Cir. 2021) (holding that attempted rape constitutes persecution).

[306] *See supra* Parts V.B.1, V.B.2.

[307] Decision No. 832, at 2–4 (on file with authors).

against people with disabilities.[308] The IJ denied asylum and withholding based on his conclusion that the applicant submitted insufficient evidence to demonstrate that her past treatment rose to the level of persecution or that the treatment she might endure if returned would amount to persecution, findings which appear reasonable based on the IJ's application of the facts presented to controlling law.[309]

In a decision granting asylum from 1994, an IJ assessed the case of a Jordanian woman who suffered extreme violence at the hands of her husband over the course of several decades.[310] The decision began with a detailed account of the facts and evidence presented.[311] It then cited the legal standards and referred to the relevant evidence when assessing whether each legal element had been met.[312] For instance, while noting the U.S. government's argument that the case presented a "personal marital dispute" inappropriate for immigration court, the IJ analyzed whether the evidence demonstrated persecution on account of a protected ground, citing relevant case law.[313] The IJ concluded that the applicant had established her husband abused her on account of her membership in the particular social group, "women who espouse Western values," as well as her political opinion based on her belief in Western values like individual freedom for women and children.[314] At the time, there was little guidance for ways in which a case based on domestic violence might fit into the asylum framework. Thus, it was notable that the IJ did not simply deny the case in a conclusory way based on the narrowest possible interpretation of relevant authority (as described in the examples above).[315] Instead, the IJ assessed the elements independently, digging into precedent decisions to understand their underlying reasoning and how it could be fairly applied to the case before him based on the applicant's evidence.[316]

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[308] *Id.* at 4–5.

[309] *See id.* at 5 (denying the asylum seeker's application citing facts and controlling law).

[310] Decision No. 6, at 2–5 (on file with authors).

[311] *Id.* at 2–13.

[312] *Id.* at 14–15.

[313] *Id.* at 14–19 (first citing Matter of Acosta, 19 I. & N. Dec. 211 (B.I.A. 1985); and then citing Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993)).

[314] *Id.*

[315] *See id.* at 16 (engaging in reasoned analysis rather than a conclusory denial).

[316] *See id.* The IJ referenced *Fatin v. INS*, in which the Third Circuit recognized that the social group of "Iranian women who refuse to conform to the government's gender-specific laws and social norms . . . may well satisfy the BIA's definition." Decision No. 6, at 16 (on file with authors) (citing *Fatin*, 12 F.3d at 1241). Although noting that the Third Circuit had held that denial of the applicant's social group claim was proper in that case because she had not sufficiently proven that she would refuse to comply with such laws and social norms, he concluded—based on his review of testimony and relevant country conditions evidence—that the applicant in the case before him had done so by leaving her husband and seeking protection in the United States, which would be interpreted as a challenge to both her husband's authority and "the system of submission" in Jordan, as well as an espousal

In a recent well-reasoned decision from 2012, an IJ granted asylum to a woman from Guatemala who had been subjected to repeated beatings, verbal abuse, and sexual violence by her domestic partner.[317] The IJ detailed the facts presented, correctly applied the controlling legal framework, and cited evidence when analyzing each required element.[318] For example, in assessing the applicant's credibility, the IJ noted the applicant did not initially disclose to a border official who interviewed her that she was afraid to return to Guatemala.[319] However, unlike in the many decisions we reviewed in which IJs found applicants not credible based on very minor inconsistencies without assessing the applicant's explanation for them,[320] here the IJ assessed and accepted the applicant's reasonable explanation, which was also corroborated by other evidence, that she was very ill during that interview and not entirely lucid at the time.[321]

In addressing particular social group, the protected ground at issue in the case, the IJ applied the legal requirements (the BIA's three-part test) to the applicant's proffered group, "Guatemalan women who are unable to leave their domestic relationship." Citing the applicant's testimony and examining country conditions evidence about women's place in Guatemalan society, the IJ found that the group satisfied the BIA's test.[322] This stands in contrast to decisions discussed previously in which IJs found groups did not satisfy the cognizability requirements without any analysis of the facts and evidence presented.[323]

In assessing nexus, the IJ cited the applicant's testimony about her partner's efforts to control her and detailing that abuse often arose when she did not conform to his conception of her proper role within the household.[324] The IJ thus found the applicant established that her partner's persecution of her "was directly linked to his feelings of entitlement and ownership" by virtue of her status in the domestic relationship and thus demonstrated nexus to her particular social group.[325] Notably, although the IJ conceded that the applicant's partner "may have had other reasons" for abusing her, "such as his alcohol abuse," she went on to assess whether the applicant had nevertheless "met her

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of her belief "that she is an individual." *Id.* He thus granted her asylum based on both her particular social group and her political opinion. *Id.* at 16–18.

[317] Decision No. 513, at 6–10 (on file with authors).

[318] *Id.* at 4, 6–17.

[319] *Id.* at 4–5.

[320] *See, e.g.*, Decision No. 155, at 9–10 (on file with authors) (citing very minor inconsistencies or omissions with no opportunity to explain).

[321] Decision No. 513, at 4–5 (on file with authors).

[322] *Id.* at 13–15.

[323] *See, e.g.*, Decision No. 920, at 13–18 (on file with authors) (finding applicant did not establish a cognizable social group without analyzing the evidence presented).

[324] *Id.* at 15–16.

[325] *Id.* at 15.

burden of establishing that her status in the relationship was 'one central reason' for the abuse," and concluded that she had based on the evidence presented. Thus, unlike some decisions discussed earlier in which IJs apparently found the existence of any other motive necessarily negated the existence of nexus to a protected ground, in this decision the IJ applied the correct legal standard and fairly assessed whether the facts met the standard.

In each of the above decisions, IJs engaged in a competent, impartial weighing of the evidence and application of the law to the facts presented, demonstrating skills and temperament that we should expect of all IJs.

C. Summing Up Our Quantitative and Qualitative Findings

Our quantitative analysis showed that IJs with an enforcement background deny at a higher rate than those without, and male judges deny at a higher rate than females. These findings track those of other studies, discussed *supra*, in Part III.

Because we had actual IJ decisions, we were able to go further than other studies, and to identify the most common legal bases for denial. We found that the most common reasons applicants were denied relief were not that they were believed to be lying, or that they did not suffer grievous harm, but that they failed to establish a protected ground (most often the social group ground) or to prove nexus. As discussed, U.S. law on these two elements is profoundly inconsistent with international norms, and our qualitative review revealed that IJs perpetuated an apparent "denial preference" by applying these already restrictive legal interpretations as the shortest path between hearing a case and denying protection.

We were also able to evaluate the quality of decision-making, examining whether there was a fair application of the law to the facts of the case. We found numerous instances where IJs did not appear to understand the relevant legal principles, or applied them in a conclusory fashion, rather than engaging in a rigorous analysis based on the facts of the case and applicable law. We also identified numerous expressions of bias or the consideration of improper or extraneous factors. At least some of these flaws—for instance, anti-applicant bias—could be considered expressions of a "denial preference," though it is hard on the face of the decisions to discern the line between incompetence and a preference to deny relief.

These findings are especially notable given the nature of our dataset and its sampling bias. As described above, the decisions in our dataset largely concern applicants who were represented by counsel—counsel who we assume were especially conscientious and well-informed—and not detained. These factors should arguably cause IJ decisions to be clearer and better-reasoned than aver-

age, because the arguments raised would have been presented more clearly and/or because IJs might assume that applicants were more likely to appeal.

Although we cannot draw a straight line from the structural defects of the immigration court system to the problematic correlations and poor decision-making we have identified, there is clearly enough of a relationship between them to call for reform. In the following Part, we provide an overview and endorsement of recent recommendations for immigration court (and BIA) reform.

VI. RECOMMENDATIONS

We join other academics and jurists in criticizing the poor quality of decision-making and influence of extralegal factors which permeate IJ decision-making. The lack of independence and susceptibility of IJs to political influence are significant factors in explaining the well-documented failings of the immigration courts. As others have written, the most direct and effective way to improve the immigration courts is to make them "real" courts.[326] Such courts would exist independently of the DOJ and their operation would be brought into alignment with norms generally applicable to independent tribunals. Assuming that is not politically feasible at this point,[327] there are a number of measures that could be undertaken to create a more professional and diverse corps of adjudicators, with greater insulation from political pressure, and adequate resources to carry out their responsibilities. Section A argues that immigration courts should be made into independent Article I courts.[328] Section B suggests other measures that could be taken to improve IJ decision-making.[329]

A. Immigration Courts (and the BIA) Should Be "Real" Courts

The most effective solution for the systemic issues currently plaguing immigration courts, including the findings in this study, is to replace them with

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[326] Rebecca Baibak, Comment, *Creating an Article I Immigration Court*, 86 U. CIN. L. REV. 997, 997 (2018); Jain, *supra* note 73, at 324 (highlighting the importance of establishing independent immigration courts while also warning that other structural issues need to be addressed to avoid ending up with a situation where "'[r]ogue' adjudicators might be even more shielded from accountability than they are now"); Marouf, *supra* note 2, at 781; Jill E. Family, *Immigration Adjudication Bankruptcy*, 21 U. PA. J. CONST. L. 1025, 1049 (2019).

[327] *See* Baibak, *supra* note 326, at 1013 (highlighting the political nature of immigration reform). Scholars have noted that immigration court reform is "unlikely in the current political climate." *Id.* The primary resistance to independent courts would come from "the Attorney General and administrative state [that] does not want to relinquish its power over the immigration adjudicatory system," and would also stem from congressional resistance to budget the additional funding believed to be necessary for the restructuring of the courts. *Id.*

[328] *See infra* Part VI.A.

[329] *See infra* Part VI.B.

a truly independent court system. Article I of the Constitution grants Congress the power to create courts (referred to as "legislative" or "Article I" courts) and delineate duties consistent with the general powers conferred to Congress by the Constitution.[330] The idea of creating independent Article I immigration courts is not a new one; it has been analyzed over the years by numerous scholars,[331] recommended to the American Bar Association[332] and by a member of the Federal Bar Association,[333] and endorsed by IJs themselves.[334] In 2022, Congresswoman Zoe Lofgren introduced H.R. 6577,[335] a bill that proposed creating Article I immigration courts divided into appellate, trial, and administrative divisions, to "tak[e] politics out of the immigration courts for good."[336] We agree with H.R. 6577's overall approach, including in regards to its proposed restructuring of the immigration system, reforms regarding appointment and removal of judges, requirements for continuing education, and other proposals aimed at promoting greater independence, professionalism, and competence.[337]

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[330] *See* Am. Ins. Co. v. Canter, 26 U.S. 511, 512 (1828) (applying the Constitution to analyze whether the courts in question were Article I courts). Article I judges are different from Article III judges in that they "are not necessarily nominated by the President and approved by the Senate, do not have lifetime tenure, and do not have Art. III salary protection." Baibak, *supra* note 326, at 1007.

[331] Baibak, *supra* note 326, at 1007.

[332] ARNOLD & PORTER LLP, AM. BAR ASS'N COMM'N ON IMMIGR., REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 19 (2010).

[333] Tara Lundstrom, *Lasting Lessons from the Border Surge: It's Time We Fund an Independent Immigration Court System*, FED. LAW., Jan./Feb. 2015, at 3, 5.

[334] Dana Leigh Marks, *Let Immigration Judges Be Judges*, THE HILL: CONG. BLOG (May 9, 2013), https://thehill.com/blogs/congress-blog/judicial/150115-let-immigration-judges-be-judges/ [perma.cc/UGN7-4BFU].

[335] Real Courts, Rule of Law Act of 2022, H.R. 6577, 117th Cong. (2022).

[336] Press Release, U.S. Congresswoman Zoe Lofgren, Lofgren Introduces Landmark Legislation to Reform the U.S. Immigration Court System (Feb. 3, 2022), https://lofgren.house.gov/media/press-releases/lofgren-introduces-landmark-legislation-reform-us-immigration-court-system#:~:text=WASHINGTON,%20DC%20%E2%80%93%20Today,%20U.S. [https://perma.cc/TW3N-TKVZ].

[337] Among the most significant of H.R. 6577's proposals are:

- The creation of an immigration court system with a trial division (assuming the current role of IJs), an appellate division (assuming the current role of the BIA), and an administrative division (implementing and administering rules, policies and procedures).
- The appointment of appellate judges in a manner consistent with federal judge appointments through presidential nomination and Senate approval.
- The appointment of trial judges by the appellate division on the basis of recommendations made by a merit selection panel, which would be comprised of individuals with diverse backgrounds, located within the court's administrative division. To the greatest extent possible, the trial judge division should include individuals with backgrounds in both the public and private sectors.
- The appointment of appellate and trial judges to 15-year terms, with the possibility of reappointment, and removal for cause only.

These and other provisions of the "Real Courts" proposed legislation would accomplish a number of desired objectives. First, and most importantly, the creation of independent courts, with judges subject to removal only for cause, would help to remove the influence and political pressure that is inherent in the current structure. The establishment of criteria and procedures for appointment, with an emphasis on relevant experience, and diverse backgrounds, as well as the rejection of partisan affiliation, provides the potential for improving the quality of personnel. Furthermore, the requirement that decisions be written whenever practicable, and set forth facts and reasoning, responds to the criticism of many—including the authors of this study—that IJ opinions are often poorly reasoned to the degree of being incoherent.

B. Other Measures

Proposals to establish an independent immigration court system—like H.R. 6577—or simply a system with greater protection from partisan influence, have been introduced since the late 1990s,[338] but have yet to gather enough support to be enacted.[339] However, even without the establishment of independent courts outside the DOJ, there are measures that can be taken to insulate judges from political pressure, institute changes to the appointment process to create a more balanced bench, and improve the quality of decision-making. This would include the institution of a less deferential standard of review by the federal courts.

- The creation of a complaint procedure against trial division judges, and the application of the Judicial Conference complaint process for appellate division judges.
- The establishment of objective criteria regarding relevant experience, temperament, and integrity for the appointment of trial and appellate judges, with the explicit prohibition of party affiliation or political ideology.
- The requirement of continuing education for judges.
- The requirement that decisions by trial judges be "based only on the evidence" and include "findings of fact, reasoning to support discretionary determinations and conclusions of law."
- The requirement that, subject to approved exceptions, appeals be heard by three judge panels.
- The requirement that, to the greatest extent possible, decisions of the trial and appellate division be released in written form.
- The requirement that opinions of the appellate division be subject to judicial review in federal courts of appeals.

Real Courts, Rule of Law Act of 2022, H.R. 6577, 117th Cong. (2022).

[338] Leonard Birdsong, *Reforming the Immigration Courts of the United States: Why Is There No Will to Make It an Article I Court?*, 19 BARRY L. REV. 17, 44 (2013) (discussing congressional efforts in the late 1990s to establish immigrations courts as Article I courts); *see also* Mimi Tsankov, *An Article I Immigration Court*, 5 AILA L.J. 121, 128–29 (2023) (discussing prior efforts to establish Article I immigration courts).

[339] *See* Tsankov, *supra* note 338, at 129 (describing "death" of H.R. 6577 at the close of the 117th Congress).

First, to the greatest degree possible, the measures which protect Administrative Law Judges from undue pressure could be extended to IJs. These would include eliminating IJ job performance metrics by the DOJ and permitting removal only for good cause determined through formal proceedings. A judge should not have to fear that her position is in jeopardy if she decides cases in a fair and principled manner which she perceives as inconsistent with the current administration's politics and policies toward asylum seekers.

Second, the quality of personnel could be improved by the adoption of more rigorous hiring standards. Currently, the DOJ requires only the most basic of qualifications for IJs: an LL.B., J.D., or LL.M. degree, active bar membership, and seven years of post-bar admission legal experience.[340] There is no requirement that candidates have an adjudication or litigation background.[341] The requirements for appointment to the BIA are identical to those for IJs, but for one additional consideration: the seven years of post-bar admission experience must include litigation and/or administrative law experience.[342]

Neither IJs nor BIA members are required to have important subject matter expertise including knowledge of immigration and human rights law, experience working cross-culturally, or with survivors of trauma.[343] In contrast, Canada requires its Refugee Protection Division members, who adjudicate claims, to have at least one year of decision-making authority in an administrative tribunal and possess key competencies, including cross-cultural sensitivity, reasoning skills, and the ability to maintain impartiality.[344]

We also recommend a goal of professional diversity among IJs and BIA members. The appointment process should aim for a broad range of professional experience in both the public and private sectors. And given the findings of numerous studies that adjudicators with an enforcement background deny claims at a higher rate than those without, fairness demands that individuals with enforcement backgrounds not make up a disproportionate number of trial or appellate judges.

Additionally, IJs should receive improved and frequent training with the objective of maintaining a highly competent, well-informed bench. Although newly hired IJs undergo six weeks of training, there is a lack of clarity regarding

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[340] EOIR, *Make a Difference: Apply for an Immigration Judge Position*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/Adjudicators [perma.cc/85YQ-FDAV] (Oct. 11, 2023).

[341] RAMJI-NOGALES ET AL., *supra* note 62, at 106.

[342] EOIR, *Appellate Immigration Judge (Board Member)*, U.S. DEP'T OF JUST., https://www.justice.gov/legal-careers/job/appellate-immigration-judge-board-member [perma.cc/N8M4-TC97] (Sept. 21, 2018).

[343] RAMJI-NOGALES ET AL., *supra* note 62, at 106.

[344] Gov't of Canada, *Member, Refugee Protection Division—Inventory*, GC JOBS, https://emploisfp-psjobs.cfp-psc.gc.ca/psrs-srfp/applicant/page1800?toggleLanguage=en&poster=916744 [https://perma.cc/3H4Z-B9DD] (Oct. 15, 2024); *see also* RAMJI-NOGALES ET AL., *supra* note 62, at 106–07.

the nature or frequency of ongoing training programs on substantive immigration law.[345] Besides substantive immigration law trainings, we also recommend trainings in other key competencies, including cultural competence, interpreting country conditions evidence, and judicial temperament.[346] The prevalence of trauma among asylum seekers[347] and of vicarious trauma among IJs[348] underscores the need for training around trauma's impact on applicant and judge alike.

As a result of amendments to BIA procedures implemented in 1999, there has been a much less rigorous review of IJ decisions, eliminating the positive corrective provided by serious appellate review. These procedures include single-member reviews of IJ decisions and summary affirmances without an opinion (i.e., affirming the decision of an IJ without any discussion of facts or evidence), with limited exceptions.[349] We recommend reversing these measures; cases should be reviewed by more than one member, and the practice of issuing summary affirmances without an opinion should likewise cease. It is more likely that BIA members will engage seriously with issues if they have to come to consensus sitting as a three-person panel, and the requirement of issuing a written decision would potentially lead to better reasoned opinions. The issuance of written decisions would also increase efficiency by providing a clear explication of the BIA's reasoning for federal court of appeals review.

We welcome the end of deference to the BIA in the interpretation of ambiguous statutory terms, which was effectuated by the Supreme Court's *Loper Bright* decision.[350] The rationale for deference—that the BIA had subject matter expertise and was well-suited to fill in any gaps posed by ambiguity—was drawn into question in light of its lack of independence and susceptibility to political pressures, as well as the "frequently appalling" performance of IJs and the BIA.[351]

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[345] *See* EOIR, FACT SHEET: EXECUTIVE OFFICE FOR IMMIGRATION REVIEW IMMIGRATION JUDGE TRAINING (June 2022), https://www.justice.gov/eoir/page/file/1513996/dl?inline [perma.cc/Z28S-BPRF] (providing little clarity regarding the ongoing training requirements).

[346] RAMJI-NOGALES ET AL., *supra* note 62, at 110–12.

[347] *See* Stuart L. Lustig, *Symptoms of Trauma Among Political Asylum Seekers: Don't Be Fooled*, 31 HASTINGS INT'L & COMP. L. REV. 725, 727–28 (2008) (discussing studies chronicling frequency with which asylum seekers suffer trauma).

[348] Stuart L. Lustig et al., *Burnout and Stress Among Immigration Judges*, 13 BENDER'S IMMIGR. BULL. 22, 23 (2008).

[349] For a more fulsome discussion of the changes, see Baibak, *supra* note 326, at 1005–06.

[350] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2270–71 (2024).

[351] Joel Cohen, Richard A. Posner & Jed S. Rakoff, *Judges vs. Bureaucrats: Who Should Defer to Whom?*, SLATE MAG. (Oct. 18, 2017), https://slate.com/news-and-politics/2017/10/two-judges-explain-why-they-dont-buy-the-logic-of-chevron-deference.html [perma.cc/L3FE-Z2BP]. In a 2017 interview with *Slate Magazine*, Judge Richard Posner argued for less deferential review especially in "immigration cases where the performance of the immigration court and Board of Immigration Appeals is frequently appalling . . . ." *Id.*; *see also* Cox, *supra* note 98, at 1672 (describing Judge Posner's perspective as a "trend" among federal judges).

We also would recommend reduced deference to the agency on factual findings. The traditional standard of review of factual issues is "substantial evidence."[352] Congress heightened the level of deference afforded to the agency in its 1996 immigration reform legislation, which provided that "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary."[353] As our study found, IJs often cherry-pick facts, frequently ignoring those that benefit the claimant. On appeal, federal courts should be able to undertake a more searching record review, aligned with the traditional substantial evidence standard. Pursuant to this standard, federal courts would only defer to factual findings supported by substantial evidence.

Finally, we recommend allocating increased funding to immigration courts so that they have the resources necessary to carry out their responsibilities. There exists a serious imbalance in the immigration system when the funding for enforcement is exponentially greater than that for adjudication.[354] Increased enforcement, to some degree, leads to more removal cases in the courts, and funding for EOIR must be increased to help the courts keep up with their dockets.

CONCLUSION

In our system of justice, we expect judges to be fair and independent. A defining hallmark of due process is to have one's rights adjudicated by an impartial jurist[355] who is not swayed by outside influences. Unfortunately, the current immigration adjudication system suffers from a profound structural flaw which "makes the immigration courts and their judges subject to, not independent of, one of the parties to the cases before them, a prosecutorial party motivated by political policy objectives rather than the impartial administration of justice."[356]

Although the focus of this article is on IJs, the same can be said for the BIA, which is equally "prone to political manipulation"[357] for the same reasons.

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[352] 8 U.S.C. § 1252(b)(4)(B).

[353] *Id.*

[354] *See supra* note 86 and accompanying text.

[355] Catherine Y. Kim, *The President's Immigration Courts*, 68 EMORY L.J. 1, 37 (2018) ("[D]ue process . . . at its most fundamental, requires an independent, impartial decision maker.").

[356] Joan V. Churchill, *Compelling Reasons for an Article I Immigration Court*, 61 JUDGES J., Winter 2022, at 1, 1. Churchill served as an IJ for nearly twenty-five years and had stints as a Temporary Member of the BIA. *Id.* at 9; *see also* Mimi Tsankov, *The Immigration Court: Zigzagging on the Road to Judicial Independence*, 93 U. COLO. L. REV. 303, 304 (2022) ("[W]hile IJs are charged with protecting constitutional procedural due process and exercising decisional independence, they do not have independent authority to apply constitutionally mandated due process standards."). Tsankov is a sitting IJ and has also served as President of the National Association of Immigration Judges. Tsankov, *supra*, at 303.

[357] Tatum P. Rosenfeld, *Time to Go* Auer *Separate Ways: Why the BIA Should Not Say What the Law Is*, 94 S. CAL. L. REV. 1279, 1281 (2021).

This is especially troubling given the deference historically accorded to BIA interpretations of law, which has given the BIA outsize ability to define the rules of game.[358] The BIA's factual decisions are also subject to a deferential standard of review (courts can only reverse if a reasonable factfinder would be compelled to find otherwise),[359] which likewise insulates decisions from more searching scrutiny by the federal courts.

The structural flaws of the immigration adjudicatory system have had especially devastating consequences for asylum seekers, where the stakes at issue are literally life or death.[360] As noted above, when Congress enacted the 1980 Refugee Act, it made clear its intent to conform to its international treaty obligations to those fleeing persecution.[361] But the issue of immigration has been so politically charged, with a bias toward limiting protection, that time and time again, the BIA has interpreted the refugee definition in a manner at odds with international norms.[362]

The patterns in decisions discussed above demonstrate how the current approach to adjudicating asylum cases has often played out. Although applicants are found credible, and they have suffered or fear grievous human rights violations, they are denied protection because of the restrictive interpretation of the refugee definition adopted by the BIA. And all too many IJs apply the BIA's precedent in the most extreme way possible, cherry-pick the facts, and ignore precedent which might result in a different outcome.

It is past time to remedy the problem with our immigration adjudication system, which makes a mockery of the maxim to pursue justice "without fear or favor." The solutions are obvious: the creation of real immigration courts, with judges who are beholden to no one and who are capable of and free to mete out just and fair decisions in accordance with the law and our international obligations.

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[358] *See supra* Part VI; *see also supra* notes 101–107 and accompanying text (discussing historical deference to the BIA, impact of *Loper Bright* decision, and potential for continued deference).

[359] INS v. Elias-Zacarias, 502 U.S. 478, 483–84 (1992); *see also supra* Part VI.

[360] *See, e.g.*, Sarah Stillman, *When Deportation Is a Death Sentence*, NEW YORKER (Jan. 8, 2018), https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence [https://perma.cc/A2ZH-RZRD] (discussing killings, as well as kidnapping, extortion, and sexual assault suffered by migrants deported under former presidents Obama and Trump).

[361] *See supra* notes 30–33 and accompanying text.

[362] A striking example is *Matter of M-E-V-G-*, where the BIA fully acknowledged that its interpretation of particular social group contradicted the UNHCR, which is charged with providing guidance on the interpretation of the 1951 Convention and its 1967 Protocol. 26 I. & N. Dec. 227, 248 (B.I.A. 2014) (acknowledging and disregarding international norms). The BIA asserted that its interpretation of U.S. obligations under the Refugee Protocol was superior to that of UNHCR. *Id.*