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Practical Analysis of Immigration and Nationality Issues

PLENARY PAROLE: ANALYZING EXECUTIVE TREATMENT OF THE PAROLE PROVISION OF THE IMMIGRATION AND NATIONALITY ACT*

by Ben Huvos**

“Throughout the twentieth century, and up to the present, the President has used powers expressly delegated to him by Congress to advance his own immigration agenda. Importantly, these uses have often been innovative, accomplishing objectives Congress almost certainly did not intend and expanding or repurposing Congress’s original design.”¹

I. INTRODUCTION

As the United States withdrew from the War in Afghanistan in 2021 and the Taliban took power, tens of thousands of Afghan citizens fled to the United States.² In April 2022, two months into the Russian invasion of Ukraine, the Biden administration provided Ukrainian citizens a means of escape to the United States.³ In both crises, the U.S. government offered humanitarian parole to eligible individuals for the purpose of lawful entry into the United States and U.S. employment authorization.⁴ In January 2023, the Biden administration announced a new program to reduce unlawful entry into the United States at the southern border by extending humanitarian parole eligibility to qualified Cubans, Haitians, Nicaraguans, and Venezuelans (CHNV).⁵ While the CHNV program shares some similarities with past uses of parole, the administration’s goal to parole some 30,000 migrants per month marks a shift in scale from

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**Suffolk University Law School, J.D. 2025; American University, B.A. 2020. Thank you to all the staffers and editors of the Suffolk University Law Review for channeling your talents and hard work to this Note. Many thanks to Professor Ragini Shah for your direction and encouragement. My love and appreciation to my parents, Philip and Judy, and to Shoshana, Mark, Anne, Christine, and Taïoune for your abundant curiosity, engagement, and affection. This Note is dedicated to my late grandfather, Dr. Andrew Huvos, and to all those who yearn to be American.

previous parole programs under the modern refugee system.⁶ Shortly after the announcement of the CHNV program, Texas and twenty other states sued the Department of Homeland Security (DHS) seeking an injunction against what they viewed as executive overreach of statutory authority; likewise, the plaintiff states viewed the program as a circumvention of the immigration system created by Congress.⁷

Parole is a unique power in the executive immigration toolbox that allows the Secretary of Homeland Security to permit foreign nationals to legally enter and temporarily stay in the United States with work authorization, without providing a separate pathway to legal, permanent residency.⁸ The parole power has existed since the inception of the Immigration and Nationality Act (INA) in 1952 and is exercised through executive discretion.⁹ Congress designed the current language in INA § 212(d)(5)(A) to be used by the executive branch on a “case-by-case basis for urgent humanitarian reasons or significant public benefit.”¹⁰ This statutory language is the focal point of the states’ lawsuit against the CHNV program.¹¹ While some proponents and advocates of the Biden administration’s CHNV program find it compatible with the broad discretion afforded by Congress, opponents

argue that the new program fails Congress’s explicit design and even constitutes a new visa program.¹²

Although the Constitution does not delegate specific regulatory immigration powers to Congress, federal immigration authority is inferred from other enumerated powers found in the Constitution, such as through the Commerce Clause.¹³ National sovereignty, through which nations may regulate territorial entry, also implicitly grants federal immigration authority.¹⁴ In the absence of direct constitutional authority on immigration, the U.S. Supreme Court articulated the doctrine of plenary power, which gives Congress wide latitude to make immigration law due to principles of national sovereignty and judicial deference in the foreign affairs arena.¹⁵ The plenary power doctrine is a core tension in the unusual dynamics presented by immigration law to constitutional issues; for example, separation-of-powers issues between Congress and the President are apparent, with modern presidents yielding vast amounts of immigration policy control in spite of Congress’s traditional plenary power.¹⁶ Although recent review of unilateral presidential immigration actions by courts undermines the executive branch’s broad decision-making powers in immigration, the same rationales justifying Congress’s plenary power also apply to the executive branch, such as the executive role in national security and foreign affairs, allowing presidents to continue being dominant players in immigration policy.¹⁷ While the constitutional bounds of the executive branch’s immigration authority remain uncertain, the President’s abundant discretion to make decisions about how to enforce Congress’s immigration laws often amounts to unilateral control of the immigration policy agenda.¹⁸

In the absence of well-defined judicial or legislative limits on the President’s discretion to employ the powers delegated by Congress, and given the lack of immigration reform by Congress, presidents use tools like parole to craft a unilateral immigration agenda.¹⁹ This Article will first assess current separation-of-powers debates by reviewing recent scholarly and judicial perspectives on the state of the plenary power doctrine and the scope of executive discretion.²⁰ Second, this Article will examine the evolution of the parole power

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as a congressional authority delegated to the President, and situate the scope of this authority within the debate on executive discretion.²¹ Lastly, this Article will explore how executive parole power should be constrained by Congress to best avoid legal consequences for parolees: people whose futures in the United States are not only at the whims of presidential elections—as illustrated by President Biden’s welcoming of CHNV parolees and President Trump’s subsequent termination of the CHNV program—but are also subject to the unique constitutional arrangement of federal immigration authority.²²

II. HISTORY

A. Legal Status and U.S. Permanent Residence

In 1952, Congress passed the INA to facilitate a legal immigration system that regulates the flow of noncitizens into the United States, based on national interests such as family reunification, labor policy, diversity, and humanitarian concerns.²³ The INA and its subsequent amendments promote these interests by regulating entry and admission of migrants into the United States through various visa classifications and humanitarian pathways.²⁴ The purpose for which a noncitizen enters the United States is one factor that determines the legal description of their physical presence in the country.²⁵ The most desirable legal description of physical presence in the United States for a noncitizen is “status”: A noncitizen maintains status by complying with the terms of their immigrant or nonimmigrant visa used to gain admission.²⁶

A noncitizen who lacks status is “unlawfully present,” subjecting them to removal proceedings under the INA.²⁷ Nevertheless, many noncitizens without immigration status live in the United States while maintaining work authorization and temporary shielding from removal proceedings.²⁸ Congress and the President both use their immigration authority to grant lawful presence to groups previously classified as unlawfully present, such as Congress’s creation of Temporary Protected Status (TPS) and President Obama’s creation of Deferred Action for Childhood Arrivals (DACA).²⁹ When given this protection, a

noncitizen becomes lawfully present and they are authorized to stay in the United States—for either a designated period or until further notice—despite their lack of status.³⁰ Still, mere lawful presence does not afford the same protections as full immigration status, and can impose burdens such as costs from continuous renewal of work authorization, international travel restrictions, and the inability to convert lawful presence into U.S. citizenship.³¹ Noncitizens paroled under INA § 212(d)(5)(A) do not gain an immigration status but do gain lawful presence for a temporary period.³² Although parole allows otherwise inadmissible noncitizens entry, residence, and work authorization in the United States, these parolees do not enjoy the same due process rights as those noncitizens with immigration status.³³

Any noncitizen physically present in the United States must qualify under an existing legal pathway to obtain legal permanent residence—a process known as “adjustment of status.”³⁴ Congress has built these legal pathways into the INA for most visa holders maintaining lawful status.³⁵ But for noncitizens present in the United States without status, including parolees, securing legal permanent residence is much more difficult.³⁶

Although the INA makes parolees eligible for adjustment of status, they still do not enjoy a legal pathway to permanent residence arising out of their lawful presence in the United States.³⁷ Throughout the twentieth century, Congress routinely passed legislation—known as “adjustment acts”—to create pathways to legal permanent residence as a reaction to sweeping uses of parole by various presidential administrations.³⁸ However, in the twenty-first century, Congress has not always swiftly accommodated presidential usage of parole, such as for Afghan and Ukrainian parolees.³⁹ Without further implementation of adjustment acts by Congress, many parolees now face prolonged uncertainty over their future prospects to remain in the United States.⁴⁰

B. Background on Congressional and Executive Immigration Authority

The U.S. Constitution does not enumerate federal powers to regulate the flow of migration into the

United States.⁴¹ Instead, federal immigration authority is implicit in several provisions of the Constitution and from widely recognized principles of national sovereignty.⁴² The plenary power doctrine, first developed at the end of the nineteenth century in response to challenges to the Chinese Exclusion Act, recognizes congressional authority to regulate immigration.⁴³ In *Chae Chan Ping v. United States*,⁴⁴ a seminal case on the plenary power doctrine, Congress's passage of the Scott Act resulted in the exclusion of a Chinese migrant who had a valid reentry certificate.⁴⁵ In upholding the Act, the U.S. Supreme Court held that Congress's power to regulate immigration derived from the sovereignty belonging to the national government, which only the U.S. Constitution's description of foreign powers could constrain.⁴⁶ This sovereignty rationale explaining the existence of implied foreign affairs powers outside the constitutional framework, such as federal immigration authority, persisted in later decades.⁴⁷ Later jurisprudence from the Court recognized other constitutional bases—such as through the Commerce Clause, which views the flow of persons as no different than the flow of commerce—to infer expansive and exclusive federal immigration authority.⁴⁸ Other bases include the Constitution's Naturalization Clause, and the Migration or Importation Clause.⁴⁹ As such, the notion of plenary power derives from both implied powers under the U.S. Constitution and inherent powers emanating from national sovereignty.⁵⁰

The plenary power doctrine immunizes federal immigration authority from judicial review.⁵¹ Judicial deference to the executive and legislative branches is particularly high due to the inherent powers rationale—that nations hold ultimate authority to control their own borders and territorial entry—underlying the plenary power doctrine.⁵² This pattern of deference has resulted in the denial of many constitutional rights to noncitizens physically present in the United States.⁵³ In lieu of judicial review, Congress and the executive branch enjoy tremendous leeway to define the parameters of noncitizens' due process rights in immigration proceedings.⁵⁴

Despite the long history of judicial deference, courts

sometimes intervene to prevent harmful application of the plenary power doctrine.⁵⁵ For example, courts afford greater due process rights to legal permanent residents than other noncitizens in the United States, rather than limiting judicial review and allowing Congress and the executive branch to dictate the scope of a noncitizen's due process rights.⁵⁶ Unlike legal permanent residents, noncitizens that enter the United States without lawful admission do not enjoy the benefit of judicial review over their rights in immigration proceedings: rights that are completely determined by the legislative and executive branches.⁵⁷ The entry fiction doctrine—a legal fiction that treats noncitizens present in the United States as if they were still at the nation's border awaiting admission—exemplifies a harmful effect of the plenary power doctrine left uninterrupted by courts, since Congress and the executive branch can decide the scope of rights available to lawfully present noncitizens, such as parolees, with little judicial input.⁵⁸

Although the plenary power doctrine historically presupposed a lack of judicial intervention, concerns about separation-of-powers issues led to modern acceptance of some judicial review over immigration policymaking among the executive and legislative branches.⁵⁹ The use of judicial review—in spite of the doctrine's traditional presumption against it—illustrates that the separation-of-powers dynamic inherent to the plenary power doctrine has, on occasion, created undesirable constitutional results.⁶⁰ While early plenary power doctrine spoke more to Congress's immigration powers, the executive branch may use similar foreign and inherent powers to justify its own immigration agenda, challenging the idea that Congress has exclusive plenary power to craft immigration law.⁶¹ Moreover, the INA's broad delegation of congressional authority to the executive branch leaves the door open for the President to steer the immigration policy agenda and reject the classical confines of separation-of-powers principles.⁶² While separation-of-powers concerns have led to more judicial review in immigration law, the plenary power doctrine continues to lend considerable power to the legislative and executive branches, such as unchecked control over defining noncitizens' due process rights.⁶³

Today, the President's immigration powers stem from a mix of authority: The President employs inherent immigration powers, delegated authority from Congress, and de facto discretionary powers.⁶⁴ This mix of authority allows the executive branch to be a major immigration policymaker in what is characterized as a "shadow system."⁶⁵ Critics of this unilateral system point to separation-of-powers concerns that arise from a shift in the traditional focus on congressional plenary power to the emergence of presidential immigration law.⁶⁶

C. Today's Broad Executive Discretion

1. Individual and Programmatic Modes of Executive Discretion in Immigration Policymaking

Before assessing whether the executive branch has authority, it will be helpful to distinguish the different modes of discretion available to the executive branch in executing immigration law.⁶⁷ Exercises of discretion can be individual—in which prosecutors make decisions about particular noncitizens—or programmatic—in which the government determines legal outcomes for large groups based on their similar attributes, such as nationality.⁶⁸ Programmatic discretion can either be characterized as regulatory or protective, and presidential administrations often balance these approaches based on the values underpinning their policy agendas.⁶⁹ Courts especially struggle to analyze the scope of the executive branch's discretion under the programmatic mode.⁷⁰ One scholar, Professor Peter Margulies, has sought to fill the analytical gap by proposing a "presidential stewardship model" to guide courts on the parameters of executive discretion over immigration law.⁷¹

2. The Weight of Congressional Intent on the Scope of Statutory Authority

Another challenge to analyzing the limits of executive discretion is determining how much weight congressional intent should bear on the scope of statutory authority.⁷² One theory suggests that, without adherence to congressional intent, the executive branch opens itself to judicial review of its discretion.⁷³ But this argument presupposes that the President must be a

faithful agent of Congress in the field of immigration, which is not clear given that the President and Congress share immigration powers, with little constitutional or judicial guidance as to the separation of those powers.⁷⁴ Thus, some scholars assert that the President's discretion to execute immigration law is not confined by the intent of Congress as refined throughout the INA, but rather through a hybrid mix of congressional and executive priorities.⁷⁵ An alternative approach suggests the application of the major questions doctrine, which limits the scope of executive discretion when there is a comprehensive framework provided by Congress that does not address related questions of societal importance.⁷⁶ Still, to apply such a doctrine, courts must consider the INA to provide a comprehensive legislative framework.⁷⁷

3. Statutory Executive Discretion

Unilateral immigration actions taken by the last several presidential administrations provide ample opportunity to understand the scope of executive discretion within a statutory framework such as the INA.⁷⁸ In his first term, President Trump tested the limits of presidential authority by initiating the "travel ban" barring U.S. entry for noncitizens from several predominantly Muslim countries.⁷⁹ When the policy reached the U.S. Supreme Court, the Court considered, among other issues, whether President Trump properly exercised power delegated by Congress.⁸⁰ The Court upheld the travel ban, holding that the INA armed the President with a clear textual basis to exercise considerable discretionary authority delegated by Congress.⁸¹ The Court reasoned that the language of INA § 212, which governs inadmissibility of noncitizens, protected the President's broad exercise of discretion because it delegated entry-restriction decision-making to the executive branch.⁸² In doing so, the Court acknowledged the sufficiency of President Trump's national security findings to justify the nationality-based ban on noncitizen entry.⁸³ Moreover, the Court rejected further structural arguments that the travel ban infringed upon Congress's design of the INA, concluding that the Trump administration did not violate any provision of the INA.⁸⁴ The Court also rejected arguments to constrain presidential authority because of the INA's legislative history.⁸⁵

More recently, in *Biden v. Texas*,⁸⁶ the Court reviewed the Biden administration's statutory authority to rescind President Trump's Migrant Protection Protocols (MPP), commonly known as the "Remain in Mexico" policy.⁸⁷ The MPP forced asylum seekers arriving at the U.S.-Mexico border to await their immigration court dates in Mexico, instead of remaining in the United States.⁸⁸ The intersection of multiple INA provisions, which formed the statutory basis for the MPP, became relevant for the Court to decide the extent to which President Biden could use his executive discretion to rescind the program.⁸⁹ The U.S. Court of Appeals for the Fifth Circuit lambasted the administration's exercise of discretion and held that the rescission violated the APA as well as the INA.⁹⁰ The Fifth Circuit reasoned that the Biden administration misconstrued the scope of its discretion by reading the INA's provisions in isolation, rather than along with the statute's related provisions.⁹¹

Despite the lower court's sharp rebuke of the executive discretion used to end the MPP, the Supreme Court reversed, holding that President Biden properly exercised his discretion when he terminated the program.⁹² The Court rejected the Fifth Circuit's reading of Congress's intent for the individual provision's meaning within the INA's structure, which resulted in the lower court's view that the statute compels the return of asylum seekers to Mexico when the government refuses to detain a noncitizen.⁹³ To arrive at this conclusion, the Court analyzed the provision by assessing the historical context, the foreign affairs implications of an alternative interpretation, and the broader structure of the INA.⁹⁴ The Court observed the provision as discretionary rather than compulsory, as argued by the respondent states, as a codification of longstanding executive practice and pointed to its discretionary use by prior presidential administrations.⁹⁵ The Court also cautioned about the foreign policy consequences of the lower court's ruling.⁹⁶ Finally, the Court reasoned that the presence of the parole provision—INA § 212(d)(5)(A)—demonstrates that Congress intended the government to have two options when they do not detain an asylum seeker from Mexico: either return asylum seekers to Mexico, or release them into the United States by parole authority.⁹⁷

4. Nonstatutory Executive Discretion

Presidents also exercise discretion without statutory authority.⁹⁸ In 2012, the Obama administration tested executive discretion over immigration by introducing the DACA program after Congress failed to deliver a legislative path to protect undocumented noncitizens that entered the United States as minors.⁹⁹ The DACA program compelled DHS to refrain from initiating removal proceedings against eligible undocumented noncitizens, and also offered these noncitizens certain immigration benefits such as work authorization, all justified under the executive's prosecutorial discretion.¹⁰⁰ Going a step further, the Obama administration used the same authority in 2014 to introduce the Deferred Action for Parents of Americans (DAPA) program, which prevented DHS from pursuing removal proceedings for undocumented parents of U.S. citizens and legal permanent residents, absent other enforcement reasons.¹⁰¹ Shortly thereafter, dozens of states challenged the legality of the DACA and DAPA programs on statutory, constitutional, and APA grounds.¹⁰² Before the challenge reached the Supreme Court, both lower courts concluded that the Obama administration failed to adhere to the APA's required notice-and-comment rule making procedures.¹⁰³ The Supreme Court, in *United States v. Texas*,¹⁰⁴ upheld the injunction against DAPA and the expanded version of DACA, but left the original version of DACA in effect and the underlying legality of the DACA program in limbo.¹⁰⁵ Similar issues involving the APA arose in *Department of Homeland Security v. Regents of the University of California*,¹⁰⁶ when the Supreme Court rejected the Trump administration's attempt to rescind the DACA program, in part because DHS violated the APA by failing to consider the reliance interests of DACA recipients in benefiting from the program.¹⁰⁷ Thus, apart from procedural review under the APA, the Court has not had a full opportunity to review the underlying legality of President Obama's exercise of prosecutorial discretion to grant deferred action and other immigration benefits without statutory authority through DACA.¹⁰⁸

D. The Evolution of the Parole Provision and Practice

The original version of the INA, passed by Congress

in 1952, first codified the parole provision as a discretionary tool.¹⁰⁹ This statutory grant allowed several presidents to parole noncitizens into the United States *en masse*, typically in response to humanitarian crises.¹¹⁰ Notably, the original provision authorized parole “for emergent reasons or for reasons deemed strictly in the public interest.”¹¹¹ Legislative materials from the time indicate that at least some in Congress imagined that the executive branch would use parole in limited circumstances.¹¹² One of the first major tests of the parole provision occurred in 1956, when President Eisenhower paroled 15,000 Hungarian refugees after the communist government came into power.¹¹³ This mass parole of Hungarian refugees illustrated the first problem posed by the parole provision, namely that no legal pathway existed for parolees to achieve permanent residence in the United States without an act of Congress.¹¹⁴ In 1960, Congress amended the INA to clarify that parolees need not be admitted to obtain legal permanent residence, but set as a prerequisite that either the parolee secure a visa or that the parolee be eligible under a congressional adjustment act authorizing legal status to parolees.¹¹⁵

In granting the President this sole discretionary tool to address refugee crises, Congress could only react to executive exercises of parole authority, such as by passing adjustment legislation, rather than by consulting refugee policy.¹¹⁶ In 1965, in an effort to enhance congressional consultation into refugee affairs, Congress reworked the INA’s system of preference categories—which creates immigrant classifications to process visas based on Congress’s immigration priorities—to facilitate conditional entry of certain refugees deemed necessary by Congress.¹¹⁷ Nevertheless, the refugee-based preference categories did little to constrain the President from paroling classes of noncitizens that did not qualify under the conditions set out by Congress.¹¹⁸

To further address this power imbalance, Congress passed the Refugee Act of 1980, which aimed to create additional consultation between the President and Congress on refugee affairs, and constraints on parole usage for refugees.¹¹⁹ Just after the passage of the Refugee Act of 1980, the Mariel Cuban Boatlift crisis

prompted President Carter to grant an estimated 123,000 Cubans, as well as many Haitians, parole into the United States.¹²⁰ This mass use of the parole provision appeared to frustrate the purpose of the Refugee Act by providing a separate avenue for refugee admissions besides parole.¹²¹ Still, the extent to which the President has authority to use parole *en masse*, at least for populations that may qualify as refugees, remains doubtful after the passage of the Refugee Act.¹²²

In 1990, Congress indirectly attempted to narrow this vast area of executive discretion by creating TPS, which allows the President to authorize U.S. entry to noncitizens on a temporary basis under specific emergency conditions, or under circumstances approved by Congress.¹²³ Just a few years later, Congress went a step further and amended the parole provision as part of the sweeping Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, which reformed much of the existing immigration enforcement system.¹²⁴ Congress replaced the language of INA § 212(d)(5)(A) to limit executive exercises of parole authority “only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.”¹²⁵ This change is now the subject of considerable debate, particularly as it applies to exercises of parole that use nationality-based criteria to categorically permit noncitizens to enter the United States.¹²⁶ While drafting the IIRIRA, Congress considered limiting language that echoed the usages contemplated by the House Committee on the Judiciary for the parole provision back in 1952, but ultimately rejected that level of constraint in the final version.¹²⁷ Regardless of whether the IIRIRA amendment decidedly addressed instances of categorical parole, the overall legislative history indicates that Congress attempted to shrink executive parole authority through its repeated reform efforts, much to the resistance of the executive branch.¹²⁸

After Congress amended the parole provision in 1996, presidents continued to use the parole power as a means to make U.S. entry possible for noncitizens sharing common eligibility features, such as noncitizens ineligible for refugee status coming from particular countries.¹²⁹ President George W. Bush used parole to comply with foreign policy obligations, such as by

creating the Cuban Family Reunification Parole Program (CFRPP) to honor commitments made in the U.S.-Cuba Migration Accords.¹³⁰ Similar to President Bush's exercise of parole with CFRPP, President Obama exercised parole authority to assist U.S. entry of noncitizens with approved family-based immigrant petitions from specific countries with long wait times for U.S. visas.¹³¹ In 2014, President Obama's Central American Minors (CAM) program addressed the increasing migration of unaccompanied children into the United States by offering numerous alternative legal pathways available outside of the United States, including parole.¹³² In contrast, President Trump took a limited view of his parole authority and consequently rescinded many of President Obama's parole-based programs.¹³³

Notably, DHS officials in the first Trump administration repeatedly admonished the use of categorical grants of parole to bypass Congress's immigration scheme for being contrary to the plain language of the parole provision.¹³⁴ One Federal Register notice from President Trump's first term clearly explained the administration's stance on the issue of categorical parole:

DHS believes the existing broad presumption that there are significant public benefit or urgent humanitarian reasons to consider parole for new applicants who meet the specific pre-established criteria under the HFRP and FWVP programs is inconsistent with the Executive Order and Secretary Kelly's implementing guidance directing that the policy of DHS is to exercise its parole authority narrowly.¹³⁵

Despite the Trump administration's position on categorical parole, relatively few cases address this issue.¹³⁶ In *Jean v. Nelson*,¹³⁷ the Supreme Court evaluated the extent to which the Immigration and Naturalization Service (INS) discriminated against Haitian migrants in categorically denying parole applications in favor of detention, unlike similarly situated groups.¹³⁸ Although the Court held that the INS could not discriminate on the basis of race or national origin due to then-existing INS regulations, later courts interpreted this holding narrowly by deferring to the foreign policy justifications provided by policymakers.¹³⁹

President Biden took a significantly more expansive approach to interpreting the scope of his parole authority than his predecessor.¹⁴⁰ As a part of several measures against the immigration actions taken by President Trump, President Biden took steps to restore some of the Obama administration's parole-based programs.¹⁴¹ Moreover, President Biden reacted to international crises by providing parole pathways for entry into the United States.¹⁴² In January 2023, President Biden commenced the CHNV parole program, which offers legal U.S. entry to citizens of Cuba, Haiti, Nicaragua, and Venezuela who are able to secure a financial sponsor in the United States, and who meet other eligibility requirements.¹⁴³ The Biden administration's Federal Register notices explain the rationales for the program, including border security, national security, migrant safety, resource management, and foreign policy goals.¹⁴⁴ Notably, the program sought to parole a maximum of 30,000 noncitizen migrants per month.¹⁴⁵

Soon after the announcement of the CHNV program, Texas and twenty other states filed a lawsuit against DHS.¹⁴⁶ In their complaint, the plaintiff states argued that the Biden administration's use of parole authority to achieve its humanitarian objectives violated both the APA and INA.¹⁴⁷ Specifically, the plaintiff states contended that the Biden administration, in contravention of the legislative history of the parole provision, exceeded its statutory authority by creating a program that does not observe the statute's limiting principles.¹⁴⁸ Moreover, the plaintiff states argued that DHS failed to adhere to the APA's required notice-and-comment rulemaking.¹⁴⁹ The Biden administration responded by arguing against the merits of the plaintiff states' APA claims related to notice-and-comment rulemaking.¹⁵⁰ Furthermore, the government defended its interpretation of the parole provision's grant of statutory authority and decision-making under the APA.¹⁵¹ The Biden administration directly refuted the plaintiff states' claims that the CHNV parole program was unlawfully categorical, such that it failed to meet the parole provision's case-by-case limitation.¹⁵² Finally, the Biden administration rejected the reviewability of its exercise of parole authority on APA and foreign policy grounds.¹⁵³ In March 2024, a federal

judge dismissed litigation against the CHNV program on standing grounds; however, in 2025, Congress amended INA § 212(d)(5) to authorize states to sue the federal government over alleged violations of § 212(d)(5)(A), thereby preserving opportunities for states to challenge future presidential administrations' use of parole authority, and likewise for federal courts to determine whether so-called categorical exercises of parole authority actually violate the case-by-case requirement of § 212(d)(5)(A).¹⁵⁴

III. ANALYSIS

A. The Plenary Power Doctrine Is Hazardous for Parolees When Controlled by Political Branches

1. Congressional Inaction Leaves Parolees Uncertain of the Future and Vulnerable to the Effects of Plenary Power

One of the main problems for parolees is their lack of formal immigration status while being physically and lawfully present in the United States.¹⁵⁵ Additionally, many parolees' futures in the United States depend on the will of Congress to pass adjustment acts that create pathways to legal permanent residence.¹⁵⁶ Although Congress previously provided these pathways with relative ease throughout the twentieth century, the current lack of adjustment legislation for Afghan and Ukrainian evacuees is illustrative of the severe, long-term uncertainty parolees must accept when coming to the United States.¹⁵⁷ Moreover, parolees face a lower threshold of constitutional rights because the political branches treat them as mere applicants for admission.¹⁵⁸ Thus, Congress's inaction on adjustment act legislation leaves parolees vulnerable to the plenary power doctrine's harsh consequences, such as risk of removal at any time without due process—a prospect already materializing under President Trump's second term for noncitizens granted parole by the Biden administration.¹⁵⁹

2. The President Continues to Be an Independent Immigration Policymaker, Leaving Parolees in the Shadow

Along with Congress, the executive branch maintains the power to define the extent of noncitizens'

procedural due process rights, especially when they do not have the protection of legal permanent residence.¹⁶⁰ This power, whether plenary because of inherent or implied foreign powers of the President, or unilateral arising from the practical development of presidential immigration law, is worrisome because there is little framework to constrain it.¹⁶¹ As a result, parolees remain in the shadow system, in which their long term prospects in the United States become subject to the agenda-setting prerogative of whoever occupies the White House.¹⁶² Although in *INS v. Chadha*¹⁶³ the Supreme Court avoided the harsh consequences arising from the plenary power doctrine's ill-defined separation of powers, it will be difficult for the Court to find a framework that counters the effects of plenary power on parolees' individual rights.¹⁶⁴ Without protection from this shadow system of executive immigration control, parolees face the prospect of removal and fall into constitutional cracks where the political branches determine their due process rights entirely.¹⁶⁵

B. There Is No Constraining Executive Exercises of Sweeping Parole Authority

1. INA § 212(d)(5)(A)'s Plain Language Likely Supports Programmatic Discretion Exercised in Parole Programs

Since the parole provision's inception, many presidents have used the authority to permit U.S. entry and work authorization to large groups of noncitizens by nationality.¹⁶⁶ This practice comports nicely with Professor Peter Margulies's description of programmatic discretion, in which the government achieves desired legal outcomes for groups with common characteristics.¹⁶⁷ For example, President Biden's CHNV parole program aimed to use programmatic discretion to grant U.S. entry and work authorization for applicants based on their countries of origin and other eligibility criteria.¹⁶⁸

One of the central tensions concerning programmatic exercises of parole authority is the provision's plain language that parole discretion be exercised on a case-by-case basis.¹⁶⁹ The practice in parole programs of introducing numerical caps based on nationality—sometimes referred to as categorical parole—does not necessarily preclude case-by-case review, but it does

raise questions about the nature of the limiting principles built into the provision: If no numerical cap exists, did Congress intend to delegate such awesome powers to the President?¹⁷⁰ The case-by-case requirement suggests that individual adjudication may be the only built-in limitation, but that would leave the parole authority free to be exercised in proportion to the resources employed by the executive branch.¹⁷¹ Certainly, it should be considered an odd result that Congress would delegate such plenary authority to the President to confer lawful presence and work authorization to noncitizens who would otherwise be inadmissible under the immigration framework designed by Congress in the INA.¹⁷² Nevertheless, even the first Trump administration did not argue against the underlying permissibility of categorical parole; rather, the administration argued that it was its policy to interpret INA § 212(d)(5)(A) narrowly.¹⁷³

2. Legislative History Shows a Frustration with Presidents and Parole, but What Good Is That to Constraining Executive Authority?

The routinely programmatic nature of parole authority in practice contrasts sharply with the parole provision's legislative history.¹⁷⁴ As presidents in the twentieth century exercised their parole authority to permit large groups of noncitizens' entry into the United States, Congress could react only by passing adjustment legislation and taking steps to curtail its use.¹⁷⁵ After years of these congressional efforts, Congress added the "case-by-case" language—did Congress intend to constrain programmatic discretion over parole authority?¹⁷⁶ In the context of this decades-long interplay between Congress and the President over the parole authority, it appears more likely than not that their choice of language signifies intent to constrain presidential usage of the parole provision.¹⁷⁷

But even this inference leads to a necessary question: What is the extent to which Congress intended to constrain programmatic executive parole authority?¹⁷⁸ Thus, analysis of Congress's intent with the parole provision would be incomplete without also evaluating what they explicitly considered during the drafting history.¹⁷⁹ The drafting history is telling:

Congress declined to amend INA § 212(d)(5)(A) to narrow the executive discretion over parole to specified instances, such as requiring a showing of medical need to meet the provision's humanitarian requirement, or requiring a showing that the noncitizen assisted the U.S. government to meet the provision's public interest requirement.¹⁸⁰ In doing so, Congress decided against "correcting" the parole provision by rejecting adoption of the very same limitations it previously considered as early as 1952.¹⁸¹

Should courts agree that Congress never intended to constrain categorical uses of parole, that would leave the executive branch free to carry out programmatic exercises of parole authority without substantial judicial review, particularly because parolees fall under the entry fiction doctrine.¹⁸² But even if the courts read the congressional intent differently, it remains unclear whether deciphering congressional intent for the parole provision is even a useful avenue to constraining executive authority over immigration.¹⁸³ Assuming courts can interpret the INA's design to infer congressional intent over the entire statutory framework, perhaps courts will find that intent unpersuasive because of concerns about constraining the enforcement responsibilities entrusted to the executive branch.¹⁸⁴ Opponents of categorical parole might suggest applying the major questions doctrine, which emphasizes congressional intent, so as to limit the shadow system.¹⁸⁵ Employing the major questions doctrine could allow courts to dismantle categorical parole because of the doctrine's presumption that statutory silence does not permit broad executive discretion.¹⁸⁶ Still, it remains doubtful whether courts would find the INA's statutory framework comprehensive enough to merit the application of the major questions doctrine.¹⁸⁷

3. Scope of Executive Discretion over Immigration Remains Undeniably Broad

President Biden's exercise of programmatic discretion to advance the CHNV parole program aligns with the trend of unilateral immigration actions taken by recent presidents.¹⁸⁸ In fact, President Biden likely has more clear statutory discretion over parole decisions than President Obama had to advance his DAPA and

DACA programs.¹⁸⁹ Unlike the questionable prosecutorial discretion underlying the DACA and DAPA programs, President Biden's exercise of programmatic discretion pursuant to his parole authority has a statutory basis in INA § 212(d)(5)(A).¹⁹⁰ Potentially more analogous to President Biden's CHNV program is President Trump's travel ban, which survived judicial review in *Trump v. Hawaii*¹⁹¹ because of § 212, which also grants parole authority.¹⁹² Even without a specific § 212 basis for the President to categorically ban noncitizens using nationality-based criteria, the Supreme Court upheld this authority as grounded in the INA's design and § 212's overall goals in delegating discretion.¹⁹³ This outcome is consistent with the general trend in immigration where the courts award the executive branch with broad deference to enforce the INA, so long as the executive branch identifies some rationales.¹⁹⁴

Similar to the national security-based rationale offered by the Trump administration in defense of the travel ban, President Biden's administration offered rationales for the CHNV parole program that included national security, border security, and foreign policy.¹⁹⁵ If a court conducted a similar analysis of the discretion afforded by the parole provision as in *Trump v. Hawaii*, it could use the same reasoning to reject arguments against programmatic discretion that claim categorical parole infringes upon the INA's design and legislative history.¹⁹⁶ Although opponents of categorical parole may use the parole provision's legislative history and placement within § 212 to argue that categorical parole contradicts the INA's overall design, this argument will likely fail because of INA § 212(d)(5)(A)'s plain language, which has no statutory cap limiting the number of noncitizens the President can parole into the United States.¹⁹⁷ In line with the Supreme Court's decision in *Biden v. Texas*, courts may also be cautious to seize programmatic discretion of parole authority from the executive branch because of concern over interference with foreign policy.¹⁹⁸ Thus, courts do not appear to be in a position to offer substantial judicial review over the exercise of programmatic discretion derived from the parole provision.¹⁹⁹

C. The Burden Falls on Congress to Amend the Parole Provision

Without the prospect of meaningful judicial review and given its plenary powers over immigration, Congress is in the best position to reform parole and check the shadow system.²⁰⁰ In checking executive parole authority, the best approach for Congress would be to emphasize the guiding values identified by Professor Margulies: continuity, accountability, and transparency.²⁰¹ One of the greatest threats to parolees is the lack of procedural protections given them compared to the protections afforded to legal permanent residents, due to their status as mere applicants for admission.²⁰² By virtue of parolees' lack of formal immigration status, their reliance interests—the expectation of remaining in the United States for time authorized by parole period, as well as collateral benefits such as work authorization—are at risk of disruption because they do not have constitutional due process protection and may be removed at any time.²⁰³ Even worse, presidential administration changes may lead to situations where the one president invites parolees to the United States in accordance with their agenda, which then conflicts with a new President's agenda.²⁰⁴ Historically, Congress addressed these risks by passing adjustment acts, but it is unclear whether that trend will persist, thereby increasing uncertainty for parolees.²⁰⁵ Thus, Congress should consider the value of continuity when amending the parole provision for the benefit of parolees without legal status.²⁰⁶

Furthermore, the legislative history of parole clearly shows Congress's frustration with the unaccountable, nontransparent use of parole authority by presidents over many decades.²⁰⁷ Nevertheless, the plain language and drafting history of the parole provision do not constrain the President past the point of resource availability to conduct case-by-case review.²⁰⁸ Thus, it is in Congress's interest to amend the parole provision to increase consultation, as it did through the Refugee Act of 1980, to advance accountability and transparency.²⁰⁹ Limiting the President's role as an independent immigration policymaker is especially critical when there is no guarantee of substantial judicial review over programmatic exercises of parole, given today's broad executive discretion.²¹⁰ Still, parole has

proven to be a useful tool for presidents in responding to humanitarian disasters and enforcing the INA.²¹¹ Therefore, Congress must balance increasing accountability and transparency while resisting excessively tying the hands of the President to respond to urgent crises.²¹² Congress's recent amendment to the parole provision echoes the history of congressional frustration over presidential exercises of parole authority, but does not involve Congress in the solution, even as a co-equal branch with plenary power; instead, Congress decided that the values of accountability and transparency are better served by permitting states to litigate the President's legal authority in federal courts, such as the categorical parole used under President Biden's CHNV program.²¹³ Perhaps states will successfully get to the merits on the question of categorical parole's validity under the case-by-case requirement of INA § 212(d)(5)(A), but since categorical parole does not preclude case-by-case review, a future presidential administration could prevail on the merits.²¹⁴ Thus, the burden remains with Congress to amend the parole provision to ensure that the President is not circumventing the INA through a unilateral immigration policy agenda.²¹⁵

IV. CONCLUSION

President Biden's use of parole authority to address urgent humanitarian crises appears to fit the mold of presidential usage under INA § 212(d)(5)(A). While critics point to legislative history and the threats of presidential unilateralism to admonish executive actions like the CHNV parole program, there is little support in the INA or in the separation-of-powers doctrine to constrain presidential innovation of immigration policy through parole authority. Nevertheless, the intended beneficiaries of parole programs often find themselves at the whims of the political branches—whether via Congress's inaction or the executive's control over their temporary lawful presence. In a world of plenary federal immigration authority, where courts do not play a prominent role in protecting the individual rights of noncitizens—especially those without legal status or permanent residence—it is concerning that noncitizens who have escaped humanitarian crises have little to no guarantee that they can

remain in the United States. This problem is especially noteworthy because of the reliance interests formed as a result of the lives parolees begin to build in the United States.

Thus, it is imperative for Congress to amend the parole provision to reflect the values of transparency, accountability, and continuity for parolees. Continuity is a central concern for parolees, given their reliance interests in the United States and the lack of an independent pathway to legal permanent residence. Congress might accomplish this feat by building a guaranteed pathway to legal permanent residence for parolees. Moreover, when presidents wield sweeping parole authority, the possibilities that programmatic discretion could be used to categorically end lawful presence at a moment's notice also threatens continuity. Congress should also consider amending the parole provision to enhance accountability and transparency over the number of parolees permitted into the United States. The Laken Riley Act illustrates Congress's concerns with achieving these values, but ultimately obfuscates its role as a co-equal branch with plenary power to check the President's use of statutory authority and relegates that task as one that states may litigate in federal courts. Instead, increased consultation between Congress and the President should check exercise of increasingly unilateral, presidential immigration law. Still, Congress must be wary of excessively dismantling the parole authority. The parole provision is a tool that presidents should use to innovate immigration policy, act decisively, and offer to noncitizens escaping crises in their home countries. Thus, an amended parole provision must preserve the flexibility granted to the executive branch while balancing the interests of accountability and transparency for Congress, and ultimately minimize the uncertainty that parolees face upon entry into the United States.

ENDNOTES:

¹Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 Yale L.J. 104, 116-17 (2015).

²See Luke Broadwater, *Bill to Grant Afghan Evacuees a Path to Residency Hits Snags*, N.Y. Times

(Sept. 22, 2022), <https://www.nytimes.com/2022/09/22/us/politics/afghan-refugees-congress.html> [<https://perma.cc/D9UA-L9CR>] (noting Afghans evacuated to United States without legal pathway to permanent residence).

³See Miriam Jordan et al., *United States Will Welcome Up to 100,000 Ukrainian Refugees*, N.Y. Times (Mar. 24, 2022), <https://www.nytimes.com/2022/03/24/us/ukrainian-refugees-biden.html> [<https://perma.cc/8XJZ-Q7NX>] (describing different Ukrainian evacuation actions taken by Biden Administration).

⁴See Joana Jankulla, Note, *The United States Can Protect Those Who Suffer Humanitarian Emergencies: How and Why Immigration Policy Should Be Amended to Assist Crisis Migrants*, 57 New Eng. L. Rev. 237, 250-51 (2023) (detailing humanitarian parole availability to Afghan evacuees); *The Use of Parole Under Immigration Law*, Am. Immigr. Council (Jan. 10, 2023), <https://www.americanimmigrationcouncil.org/research/use-parole-under-immigration-law> [<https://perma.cc/9UMS-XUWU>] (outlining general process and common uses of parole); *An Overview of the “Uniting for Ukraine” Program*, Am. Immigr. Council (Jan. 13, 2023), <https://www.americanimmigrationcouncil.org/fact-sheet/overview-uniting-ukraine-program/> [<https://perma.cc/44PB-JQ9G>] (describing parole process under Uniting for Ukraine program).

⁵See Press Release, White House, Fact Sheet: Biden-Harris Administration Announces New Border Enforcement Actions (Jan. 5, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/05/fact-sheet-biden-harris-administration-announces-new-border-enforcement-actions/> [<https://perma.cc/A4TC-C4PV>] (announcing new parole process for Cuban, Haitian, Nicaraguan, and Venezuelan nationals).

⁶See Miriam Jordan, *Biden Opens a New Back Door on Immigration*, N.Y. Times (Apr. 23, 2023), <https://www.nytimes.com/2023/04/23/us/biden-immigration-humanitarian-parole.html> [<https://perma.cc/N428-2KWU>] (pointing to frequent parole usage by Biden administration).

⁷See Amended Complaint at 30-31, *Texas v. U.S. Dep’t of Homeland Sec.*, 722 F. Supp. 3d 688 (S.D. Tex. 2024) (No. 6:23-cv-7) (putting forth claims); Rafael Bernal, *Texas Sues to Stop Biden Immigration Parole Program*, Hill (Jan. 24, 2023), <https://thehill.com/latino/3829011-texas-sues-to-stop-biden-immigration-parole-program/> [<https://perma.cc/>]

2GPU-JC8S] (describing lawsuit against CHNV parole program). In addition to claiming that the Biden administration exceeded statutory authority, the plaintiff states allege violations of the Administrative Procedure Act (APA), including issues with notice-and-comment rulemaking and creation of an arbitrary program. See Amended Complaint, *supra*, at 30-31 (alleging violations in APA’s rulemaking procedural requirements).

⁸See Alexandra Ciullo, Note, *Humanitarian Parole: A Tale of Two Crises*, 37 Geo. Immigr. L.J. 493, 495-96 (2023) (explaining humanitarian parole and common features of such designation).

⁹See Jillian Blake, *Fragile Immigration Legality Collapses in the Trump Era*, 30 S. Cal. Interdisc. L.J. 305, 309-10 (2021) (tracing history of parole provision to original INA version).

¹⁰8 U.S.C.A. § 1182(d)(5)(A).

¹¹See Amended Complaint, *supra* note 7, at 2-3 (criticizing CHNV parole program for circumvention of INA).

¹²See David J. Bier, *What Is the Legal Authority for Biden’s Parole Programs?*, Cato Inst. (Jan. 25, 2023), <https://www.cato.org/blog/states-challenge-bidens-new-parole-program-will-they-stop-legal-migration> [<https://perma.cc/V2CT-3SPT>] (defending legal authority of executive branch to create class-based parole eligibility); Tom Jawetz, *The Biden Administration’s Use of Immigration Parole Authority Is a Smart and Lawful Approach to Today’s Migration Challenges*, Ctr. for Am. Progress (Apr. 19, 2023), <https://www.americanprogress.org/article/the-biden-administrations-use-of-immigration-parole-authority-is-a-smart-and-lawful-approach-to-todays-migration-challenges/> [<https://perma.cc/HNG9-4Y7J>] (criticizing legal challenges to executive parole authority); George Fishman, Ctr. for Immigr. Stud., *The Pernicious Perversion of Parole: A 70-Year Battle Between Congress and the President 2* (2022), https://cis.org/sites/default/files/2022-02/fishman-parole_0.pdf [<https://perma.cc/7LZY-7S4Z>] (arguing legislative history with parole provision indicates congressional intent to constrain executive branch); Amended Complaint, *supra* note 7, at 2-3 (asserting case-by-case language of statute refutes programmatic parole usage across nationality-based classes).

¹³See Thomas Alexander Aleinikoff et al., *Immigration and Citizenship: Process and Policy* 177-81 (5th ed. 2003) (describing constitutional sources of immigration authority).

¹⁴See *id.* at 183-84 (asserting inherent immigration

power arises from national sovereignty).

¹⁵See Shawn E. Fields, *The Unreviewable Executive? National Security and the Limits of Plenary Power*, 84 Tenn. L. Rev. 731, 737-42 (2017) (discussing derivation of plenary doctrine from principles of sovereignty, judicial deference, and foreign affairs power).

¹⁶See David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 Nw. U. L. Rev. 583, 609-13 (2017) (describing conflict between executive and legislative branches in allocation of immigration powers). The plenary power doctrine speaks to the powers of Congress in immigration regulation; the doctrine provides little guidance on the allocation of immigration power to the executive branch. *See id.* at 611-12 (highlighting periodic variations in allocation of immigration authority to executive).

¹⁷See Fields, *supra* note 15, at 761-62 (outlining recent challenges to broad executive discretion in immigration realm). Similar to the plenary power doctrine's pillar of judicial deference to the immigration decisions of Congress because of its broad foreign affairs powers, courts also defer to presidential immigration decisions when they invoke national security interests. *See id.* at 737-38 (noting deference given when national security interests involved).

¹⁸See Patrick J. Charles, *The Sudden Embrace of Executive Discretion in Immigration Law*, 55 Washburn L.J. 59, 84-85 (2015) (discussing variance in interpretations over inherent powers each branch possesses in immigration field). While most scholars agree that the President holds substantial powers of prosecutorial discretion—deriving from the executive law enforcement role—some caution against the view that this discretion is inherent and beyond reproach by the other branches of government. *See* Peter Margulies, *Immigration Law's Boundary Problem: Determining the Scope of Executive Discretion*, 74 Hastings L.J. 679, 684-87 (2023) (criticizing plenary discretion model's theory of broad executive discretion over congressional accountability).

¹⁹See Cox & Rodríguez, *supra* note 1, at 117-19 (characterizing executive control of immigration agenda despite congressionally crafted constraints).

²⁰See *Trump v. Hawaii*, 585 U.S. 667, 683-84 (2018) (finding President Trump acted with sufficient discretion delegated by Congress to impose travel bans); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law* 1-14 (2020) (rejecting plenary power interpretation of congressional supremacy in immigration regulation); Fields, *supra* note 15,

at 737-42 (defending plenary power doctrine when national security implicated). *But see* Margulies, *supra* note 18, at 679 (proposing stewardship model to analyze all forms of executive discretion within whole statutory framework).

²¹See Stephen H. Legomsky & Cristina M. Rodríguez, *Immigration and Refugee Law and Policy* 881-86 (5th ed. 2009) (discussing history of parole power); Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 Am. U. L. Rev. 1183, 1213-14 (2015) (pointing to presidential use of parole to explain congressional reforms). While the history of parole reforms suggests that Congress wanted to reign in the President's authority, the statutory text of the INA's parole provision leaves the scope of executive discretion in this area unclear. *See supra* note 12 and accompanying text (demonstrating various interpretations of congressional intent for scope of presidential parole authority).

²²See Legomsky & Rodríguez, *supra* note 21, at 881-82 (pointing to vulnerable position of parolees due to lack of legal status). Because parolees maintain mere lawful presence, they must rely on government-approved extensions to remain in the United States and enjoy no legal pathway to permanent residence, unless Congress passes legislation creating one. *See Explainer: Humanitarian Parole*, Nat'l Immigr. F. (Mar. 24, 2022), <https://immigrationforum.org/article/explainer-humanitarian-parole/> [<https://perma.cc/YD8H-6LJN>] (describing shortcomings of parole); *see also* Margulies, *supra* note 18, at 694 (expressing concern for reliance interests when administrations impose different agendas using broad discretion); Camilo Montoya-Galvez, *U.S. to Revoke Legal Status of More Than a Half-Million Migrants, Urges Them to Self Deport*, CBS News (Mar. 23, 2025), <https://www.cbsnews.com/news/u-s-to-revoke-legal-status-of-over-a-half-million-migrants-chnv/> [<https://perma.cc/WX5M-VTGN>] (confirming Trump administration will strip CHNV employment authorization and target them for removal). In the first week of President Trump's second term, DHS leadership issued guidance to U.S. immigration officers that reflected the President's new immigration agenda for the United States. *See* Memorandum from Dep't of Homeland Sec. Acting Sec'y Benjamin C. Huffman to U.S. Immigr. & Customs Enf't Acting Dir. Caleb Vitello et al. on Guidance Regarding How to Exercise Enforcement Discretion 1-2 (Jan. 23, 2025) (on file with DHS) [hereinafter Huffman Memorandum] (directing immigration officials to consider revoking parole status

and if removal necessary).

²³See Holly Straut-Eppsteiner, Cong. Rsch. Serv., R45020, Primer on U.S. Immigration Policy 2 (2021), <https://crsreports.congress.gov/product/pdf/R/R45020> [<https://perma.cc/LKW4-UKHL>] (detailing principles advanced by INA's design).

²⁴See *id.* at ii (outlining INA's role to permit admission and restrict entry for desired permanent and temporary immigration); Sarah K. Barr, *The Meaning of "Admission" and "Admitted" in the Immigration and Nationality Act*, 3 Immigr. L. Advisor, no. 10 (U.S. Dep't of Just., Exec. Off. for Immigr. Rev., Falls Church, VA), Oct. 2009, at 1 (distinguishing admission via lawful entry versus mere physical entry). Congress revised the INA in 1996 to distinguish legal concepts of general, physical "entry" and "lawful entry," the latter a prerequisite for the current concept of admission due to the substantive and procedural incentives afforded by unlawful entry. See Barr, *supra*, at 1-3; see also Straut-Eppsteiner, *supra* note 23, at 2 (surveying paths to permanent immigration found in INA).

²⁵See Geoffrey Heeren, *The Status of Nonstatus*, 64 Am. U. L. Rev. 1115, 1122-23 (2015) (outlining INA's creation of immigration statuses for select classes of migrants); Blake, *supra* note 9, at 309 (explaining parolees' lawful presence determined by executive granting permission to enter).

²⁶See Blake, *supra* note 9, at 307 (explaining requirements for maintenance of lawful immigration status dependent on purpose of entry). In addition to securing either a nonimmigrant or immigrant visa to ensure lawful entry, once in the United States, a noncitizen must comply with the terms of that visa, or risk losing their status and becoming subject to multi-year bars to future admission. See *id.* at 311, 329-30 (describing penalties associated with overstaying after authorized period).

²⁷See Ben Harrington, Cong. Rsch. Serv., R45993, Legalization Framework Under the Immigration and Nationality Act (INA) 1 (2019), <https://crsreports.congress.gov/product/pdf/R/R45993> [<https://perma.cc/F4ZN-Y2JV>] (discussing removal potential for noncitizens).

²⁸See Heeren, *supra* note 25, at 1165 (describing nonstatus derived from removal protection by deferred action policies). The executive branch retains the discretion to grant relief from removal. See *id.* at 1126, 1172 (discussing executive discretion and noting work authorization privilege of nonstatus).

²⁹See Blake, *supra* note 9, at 310 (noting quasi-

status results from conferral of lawful presence by TPS and DACA programs). Congress created TPS in 1990 to provide lawful presence for noncitizens already present in the United States, offering protection from the violence or disaster occurring in their home countries. See *id.* at 312 (highlighting rationale for TPS's creation). In the absence of congressional action on protection for undocumented youth, President Obama exercised executive discretion in his administration's creation of DACA. See *id.* at 316 (discussing DACA created after prolonged congressional failure to protect undocumented youths).

³⁰See *id.* at 309 (defining lawful presence by authorization of stay). But see Heeren, *supra* note 25, at 1168-69 (distinguishing nonstatus from lawful presence based on access to public benefits). Nonstatus refers to groups without immigration status, and, like other terms, describes the temporary and uncertain state in which those noncitizens remain in the United States without clear statutory authority. See *id.* at 1119 (defining nonstatus); see also Blake, *supra* note 9, at 305-06 (characterizing lawful presence by quasi-status arising from revocability ease and lack of immigration pathway).

³¹See Heeren, *supra* note 25, at 1171-72 (describing costs and burdens associated with lack of immigration status).

³²See Jankulla, *supra* note 4, at 239 (explaining legal results for noncitizens paroled under INA's parole provision).

³³See Heeren, *supra* note 25, at 1170-72 (noting lack of rights for parolees); Legomsky & Rodríguez, *supra* note 21, at 881 (remarking little process or reason required for removal of parolees). Notably, the political branches treat parolees as mere applicants for admission, meaning they are afforded few due process rights because of their lack of admission. See Heeren, *supra* note 25, at 1135 (describing entry fiction applied by courts to parolees).

³⁴See Jankulla, *supra* note 4, at 243-44 (explaining requirements of petitioning to adjust status).

³⁵See Blake, *supra* note 9, at 308-09 (noting availability of legal pathways to immigrants and nonimmigrant visa holders).

³⁶See *supra* note 31 (highlighting nonstatus creates barriers to permanent residence and citizenship). Although several categories of nonstatus presence in the United States lack legal pathways of their own, a separate pathway to permanent residence may be available to a noncitizen that meets other immigrant criteria,

such as through an immediate relative. *See* Harrington, *supra* note 27, at 11 (pointing to legal pathway for noncitizens lacking status through immediate relative petitions).

³⁷*See* Yael Schacher, *Supplementary Protection Pathways to the United States: Lessons from the Past for Today's Humanitarian Parole Policies*, Refugees Int'l (Nov. 10, 2022), <https://www.refugeesinternational.org/reports-briefs/supplementary-protection-pathways-to-the-united-states-lessons-from-the-past-for-todays-humanitarian-parole-policies/> [https://perma.cc/U4PR-BUMZ] (noting Congress amended INA in 1960); *see also* *Explainer: Humanitarian Parole*, *supra* note 22 (describing limitations of parole programs).

³⁸*See* Jankulla, *supra* note 4, at 239-40 (noting parole programs of twentieth and twenty-first centuries reacted to humanitarian crises abroad). Historical context mattered as rationale for passage of several notable adjustment acts. *See id.* at 244 (pointing to Fidel Castro's regime and Vietnam War to explain adjustment legislation passage).

³⁹*See* Jordan, *supra* note 6 (highlighting lack of congressional action on Afghan Adjustment Act); Ilya Somin, *US Needs to Protect Ukrainian Refugees in the United States*, Bos. Globe (Apr. 21, 2023), <https://www.bostonglobe.com/2023/04/21/opinion/ukrainian-migrants-permanent-residency-work-permits/> [https://perma.cc/FTZ7-VFNA] (emphasizing political urgency required to pass Ukrainian Adjustment Act). *But see* Jankulla, *supra* note 4, at 239-40 (listing adjustment acts passed by Congress in twentieth century).

⁴⁰*See* *Explainer: Humanitarian Parole*, *supra* note 22 (describing limited options for parolees without legal pathways to permanent residence).

⁴¹*See* Aleinikoff et al., *supra* note 13, at 170 (clarifying U.S. Constitution enumerates no immigration power).

⁴²*See* *supra* note 13 and accompanying text (outlining enumerated and inherent powers supporting federal immigration authority). Constitutional grounds of immigration authority may be distinguished from inherent powers grounds, in which the latter justifies unitary federal immigration powers as an aspect of national sovereignty. *See* Aleinikoff et al., *supra* note 13, at 183 (discussing development of sovereignty rationale).

⁴³*See* Aleinikoff et al., *supra* note 13, at 170-71, 188-89 (discussing state-led immigration lawmaking

prior to nineteenth century). Although states routinely exercised immigration policy by means of their police powers, courts struck down several California laws discriminating against Chinese migrants. *See id.* at 172-73 (describing historical context behind passage of federal Chinese Exclusion Acts).

⁴⁴*Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

⁴⁵*See* Aleinikoff et al., *supra* note 13, at 174 (providing background facts of case).

⁴⁶*See* *Chae Chan Ping*, 130 U.S. at 604 (noting foreign powers distinct to national government despite federalism). In writing for the Court, Justice Field emphasized the deep sovereignty issues at stake: The federal government must wield vast regulatory power over immigration or be subject to the will of foreign nations. *See Chae Chan Ping*, 130 U.S. at 603-04 (regarding regulation of nation's own territory incidental to independence).

⁴⁷*See* *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315-16 (1936) (distinguishing relevance of constitutional enumeration of powers in domestic and foreign matters).

⁴⁸*See* *Edye v. Robertson*, 112 U.S. 580, 600 (1884) (concluding congressional regulation of immigration valid under Commerce Clause); *see also* Legomsky & Rodríguez, *supra* note 21, at 116-17 (discussing invalidity of state laws attempting to regulate immigration and Commerce Clause rationale); *Edwards v. California*, 314 U.S. 160, 172 (1941) (noting transportation of persons implicates interstate commerce).

⁴⁹*See* Aleinikoff et al., *supra* note 13, at 179 (discussing early view by Congress of regulatory authority over immigration via Naturalization Clause). While Congress's enumerated authority to confer citizenship under the Naturalization Clause does not necessitate regulatory authority over physical entry of noncitizens, Congress uses this power to regulate related aspects of immigration. *See* Legomsky & Rodríguez, *supra* note 21, at 119 (demonstrating exercise of naturalization power by legal permanent residence requirement). Although a plain reading of the Migration or Importation Clause implies congressional authority to control physical entry of migrants into the United States, the Clause's history as a measure to delay ending slavery disavows it as a source of federal immigration authority. *See* Aleinikoff et al., *supra* note 13, at 179-80 (noting limited application of Migration or Importation Clause).

⁵⁰*See* Legomsky & Rodríguez, *supra* note 21, at

114 (outlining evolution of plenary power doctrine).

⁵¹See *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (noting extreme judicial deference to political branches in immigration policy).

⁵²See *Fields*, *supra* note 15, at 743 (noting inherent powers rationale for lack of judicial review over immigration); *Harisiades*, 342 U.S. at 587-90 (pointing to inherent and constitutional powers rationale to constrain judicial review).

⁵³See *Legomsky & Rodríguez*, *supra* note 21, at 113 (describing vast power enjoyed by Congress to deny constitutional rights to noncitizens).

⁵⁴See *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (restraining judicial interference in congressional or executive due process findings over noncitizen entrants); *Fong Yue Ting v. United States*, 149 U.S. 698, 728 (1893) (rejecting limitations to Congress's delegated exclusionary powers). The Court recognized Congress's ability to regulate the physical presence of noncitizens by means of expulsion—an early term for deportation or removal. See *Fong Yue Ting*, 149 U.S. at 713-714 (comparing congressional power to expel to inherent power to exclude). In exercising its own inherent powers or those delegated by Congress, the executive branch controls the due process available during immigration proceedings. See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (holding discretion to deny immigration hearing proper under legislative and executive's shared immigration authority); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 214-15 (1953) (upholding executive branch's indefinite detention of returning noncitizen never lawfully admitted into United States).

⁵⁵See *Legomsky & Rodríguez*, *supra* note 21, at 242 (emphasizing judicial statutory interpretation considerate of plenary power's effect on noncitizens); *INS v. Chadha*, 462 U.S. 919, 941 (1983) (emphasizing Congress must abide by constitutional means in formation of immigration statute); *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (rejecting government's indefinite detention rationale). The Court recognized that noncitizens within the United States, regardless of immigration status, have some due process rights subject to judicial review. See *Zadvydas*, 533 U.S. at 693-94 (noting constitutional effect of entry into United States upon noncitizens). The Court also recognizes a threshold that constrains executive authority discretion to execute the delegated plenary power of Congress. See *Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972) (holding negative exercise of discretion must show

“facially legitimate and bona fide reason”).

⁵⁶See *Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982) (observing relevance of permanent residence to constitutional status). Although the Court tied permanent residence to constitutional status, it still limited this higher status to those noncitizens bestowed the privilege of admission into the United States, as opposed to mere applicants for admission. See *Plasencia*, 459 U.S. at 32 (holding application for admission entails no constitutionally protected process).

⁵⁷See Brandon Hallett Thomas, *Separation of Powers and Thuraissigiam: The Entry Fiction as Judicial Aggrandizement*, 136 Harv. L. Rev. F. 226, 235 (2023) (reiterating plenary power doctrine's extreme deference to congressional authority to determine due process); *id.* at 236-37 (explaining available constitutional rights dependent on means of entry determination by political branches).

⁵⁸See *id.* at 228-29 (describing effect of entry fiction on plaintiff's constitutional rights). The entry fiction doctrine treats certain noncitizens as legally outside of the United States, despite their physical presence within it. See *id.* at 237 (explaining entry fiction result of plenary power doctrine); see also *supra* note 33 and accompanying text (detailing impact of entry fiction doctrine on parolees); Thomas, *supra* note 57, at 233-34 (noting parole precedent central to doctrinal development of entry fiction). In 2020, the Supreme Court reaffirmed this entry fiction doctrine and remarked that it was the product of plenary power enjoyed by the political branches. See *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 138-40 (2020) (discussing plenary authority of political branches to define due process, including judicial review, for noncitizens).

⁵⁹See *Chadha*, 462 U.S. at 953 n.16 (highlighting judicial review applies to executive action where delegated legislative authority concerned); *Legomsky & Rodríguez*, *supra* note 21, at 243 (observing *Chadha* suggests separation-of-powers challenges more susceptible to review than individual rights challenges).

⁶⁰See Rubenstein & Gulasekaram, *supra* note 16, at 611 (commenting on plenary power implications of *Chadha*); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458, 478 (2009) (noting murky separation-of-powers dynamic due to persistent inherent authority rationale for executive power).

⁶¹See Rubenstein & Gulasekaram, *supra* note 16, at 609-10 (noting lack of separation-of-powers demarcation since early plenary power precedent); *United*

States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (recognizing distinct executive power over admissibility and exclusion of noncitizens); *see also* Cox & Rodríguez, *supra* note 20, at 2-3 (rejecting congressional dominance in immigration law). *But see* Cox & Rodríguez, *supra* note 20, at 7 (dismissing plenary power doctrine support for executive plenary power). Although much of the same sovereignty rationale behind congressional plenary power applies to the executive branch, the plenary power doctrine is not the sole explanation for vast presidential immigration authority. *See id.* at 3 (arguing enforcement plays primary role in development of presidential immigration law).

⁶²*See* Rubenstein & Gulasekaram, *supra* note 16, at 623 (noting executive immigration actions appropriate under broad authority delegated by INA); *id.* at 624 (observing unclear placement of immigration within traditional separation-of-powers analysis); Charles, *supra* note 18, at 72 (stating lack of judicial review when executive branch acts within delegated plenary powers). An alternative viewpoint apart from the separation-of-powers framework argues the agenda-setting role of the President is a necessary byproduct of historical development. *See* Cox & Rodríguez, *supra* note 1, at 159-60 (rejecting applicability of immigration to traditional principal-agent model of separation of powers); *id.* at 162 (noting presidential policymaking occurs in both express and de facto delegation).

⁶³*See* Thomas, *supra* note 57, at 237-38 (pointing to separation-of-powers critique regarding political branches' plenary powers and entry fiction doctrine). There are formalist and functionalist views of separation of powers: While formalism values strict adherence to constitutional duties, functionalism accepts some interbranch encroachment of constitutional roles so long as the overall checks and balances system persists. *See id.* at 239-40 (discussing prominent theories of separation of powers). Although the separation-of-powers critique validly states the dilemma posed by the entry fiction doctrine, neither formalist nor functionalist theories advance a workable solution to political control of noncitizens' due process rights. *See id.* at 245 (observing futile separation-of-powers critique of unchecked legislative and executive branches).

⁶⁴*See* Cox & Rodríguez, *supra* note 1, at 115 (outlining models to assess development of unilateral executive authority over immigration law). In their impactful work on modern executive immigration authority, Professors Adam Cox and Cristina Rodríguez highlight the ability of the President to set the policy agenda through powers expressly delegated by

Congress, or through powers assumed as part of the enforcement prerogative. *See id.* at 115-16 (emphasizing faded relevance of inherent authority rationale). *But see* Cox & Rodríguez, *supra* note 20, at 6-7 (noting government attorneys' continued reliance on plenary power doctrine).

⁶⁵*See* Cox & Rodríguez, *supra* note 20, at 8-9 (noting impact of shadow system on separation-of-powers dynamics).

⁶⁶*See id.* at 11-12 (describing shadow system's threat to legislative supremacy). *But see* Cox & Rodríguez, *supra* note 1, at 221 (pointing to exclusive legislative power to confer legal status).

⁶⁷*See* Charles, *supra* note 18, at 71-72 (noting blurry distinction between federal plenary powers employed by Congress and executive discretion); Margulies, *supra* note 18, at 688-89 (assessing varieties of discretion arising from congressional plenary power).

⁶⁸*See* Margulies, *supra* note 18, at 688-89 (outlining distinctions between exercises of executive discretion). While individual discretion focuses on determining the lawfulness of a particular noncitizen's entry or physical presence under the INA, programmatic discretion seeks to alleviate the burden individual discretion places on government resources by categorizing noncitizens based on attributes or circumstances. *See id.* at 688-90 (contrasting discretion types).

⁶⁹*See id.* at 690 (recognizing two approaches of programmatic discretion). The regulatory approach to programmatic discretion uses categorization to better enforce the INA, while protective discretion uses categories to reduce the bias inherent in individual discretion. *See id.* at 690-91 (defining modes of programmatic discretion). While presidents have often balanced regulatory and protection discretion, President Trump in his first term tipped this balance heavily toward regulatory discretion and curtailed past efforts at protective discretion. *See id.* at 691-92 (discussing presidential use of programmatic discretion and Trump's preference for regulatory discretion).

⁷⁰*See id.* at 682-83 (describing problem of executive discretion's scope). Courts tend to award greater executive discretion in matters concerning noncitizens outside of the United States. *See id.* at 683 (highlighting judicial deference to executive). *But see id.* at 696-97 (noting inconsistent judicial approaches to uses of regulatory and protective discretion).

⁷¹*See id.* at 693 (arguing for presidential stewardship model of congressionally delegated plenary

power). Professor Peter Margulies proposes accountability, continuity, and transparency as guiding values to best evaluate the extent of permissible executive discretion given via statutory authority prescribed by Congress, through the INA. *See id.* at 694-95 (summarizing argument).

⁷²*See* Rubenstein & Gulasekaram, *supra* note 16, at 623 (observing challenge of congressional approval presented by vast delegation of authority from INA).

⁷³*See* Charles, *supra* note 18, at 81-82 (noting Supreme Court's emphasis on congressional intent in immigration precedent).

⁷⁴*See* Cox & Rodríguez, *supra* note 1, at 109-10 (rejecting congressional priorities model).

⁷⁵*See* Cox & Rodríguez, *supra* note 20, at 192-93 (proposing acceptance of vast executive discretion through two-principals model). The importance of executive value judgments in exercising discretion is one reason to view immigration as counter to the traditional principal-agent model imagined by the Take Care Clause. *See id.* at 193-94 (discussing unique prosecutorial discretion power attached to executive immigration enforcement); *id.* at 200 (asserting executive value judgments more realistic than courts parsing congressional priorities).

⁷⁶*See* Margulies, *supra* note 18, at 685-86 (defining major questions doctrine). Proponents of the major questions doctrine argue that it properly deals with elaborate statutory design by refusing to treat legislative silence as permitting broad executive discretion. *See id.* at 701-02 (explaining logic of major questions doctrine).

⁷⁷*See* Cox & Rodríguez, *supra* note 1, at 158-59 (dismissing notion of attainable legislative framework given INA's complex structure).

⁷⁸*See* Margulies, *supra* note 18, at 682 (observing notable instances of recent presidents' exercises of discretion regarding immigration).

⁷⁹*See* Michael D. Shear, *New Order Indefinitely Bars Almost All Travel from Seven Countries*, N.Y. Times (Sept. 24, 2017), <https://www.nytimes.com/2017/09/24/us/politics/new-order-bars-almost-all-travel-from-seven-countries.html> [<https://perma.cc/QY62-SF8G>] (describing effects of travel ban proclamation).

⁸⁰*See Trump v. Hawaii*, 585 U.S. 667, 683 (2018) (noting argument of plaintiffs).

⁸¹*See Trump*, 585 U.S. at 687-88 (holding President Trump's proclamation properly adhered to textual

limits).

⁸²*See Trump*, 585 U.S. at 683-85 (analyzing text of INA § 212 (codified at 8 U.S.C.A. § 1182(f))).

⁸³*See Trump*, 585 U.S. at 685-86 (discussing fact-finding steps taken by Trump administration). The Court also explained that it would permit additional deference in the context of national security. *See Trump*, 585 U.S. at 685-87 (rejecting plaintiffs' request for assessment of persuasiveness of policy rationale).

⁸⁴*See Trump*, 585 U.S. at 690-91 (noting proclamation's congruence with broader goals of INA).

⁸⁵*See Trump*, 585 U.S. at 691-93 (observing drafting history of INA suggests broad presidential authority). Despite the existence of legislative debates and previous versions of the provision suggesting that Congress envisioned this discretion within emergency circumstances, the Court refused to take such a limited view in face of the clear statutory language. *See Trump*, 585 U.S. at 693 (remarking on Congress's ability to shape delegated authority based on conditional usage). The Court also rejected a theory of historic executive practice to infer a statutory limitation. *See Trump*, 585 U.S. at 693 (stating unwillingness to restrict statutory language based on past usage).

⁸⁶*Biden v. Texas*, 597 U.S. 785 (2022).

⁸⁷*See* Adam Liptak et al., *Supreme Court Sides with Biden's Efforts to End 'Remain in Mexico' Program*, N.Y. Times (July 1, 2022), <https://www.nytimes.com/2022/06/30/us/politics/biden-remain-in-mexico-scotus.html> [<https://perma.cc/67C4-J7HQ>] (discussing Supreme Court ruling).

⁸⁸*See* The "Migrant Protection Protocols," Am. Immigr. Council (Jan. 7, 2022), <https://www.americanimmigrationcouncil.org/fact-sheet/migrant-protection-protocols/> [<https://perma.cc/4ZQ8-8MDN>] (describing purpose and results of MPP program).

⁸⁹*See* Liptak et al., *supra* note 87 (discussing INA provisions at issue).

⁹⁰*See Texas v. Biden*, 20 F.4th 928, 988 (5th Cir. 2021) (holding rescission of MPP violates APA and INA); *see also Texas*, 20 F.4th at 976 (warning separation-of-powers consequences could be "new era of lawmaking-by-PDF-document").

⁹¹*See Texas*, 20 F.4th at 977-78 (discussing applicability of MPP termination to executive discretion permitted by INA). While 8 U.S.C.A. § 1225(b)(2)(C) gave the government discretion to return a noncitizen to Mexico, the court found that the Biden administra-

tion's claim that the court lacked review authority only applied to acts of individual discretion, rather than programmatic uses. *See Texas*, 20 F.4th at 977-78 (holding INA does not shield programmatic discretion from judicial review). The court also rejected the Biden administration's authority under 8 U.S.C.A. § 1225(b)(2)(C) to release undocumented noncitizens into the United States *en masse* by terminating MPP, since it conflicts with 8 U.S.C.A. § 1225(b)(2)(A)—a detention requirement for noncitizens in removal proceedings. *See Texas*, 20 F.4th at 978 (rejecting exercise of discretion based on individual statutory provision).

⁹²*See Biden v. Texas*, 597 U.S. 785, 814 (2022) (holding termination of MPP did not violate INA).

⁹³*See Biden*, 597 U.S. at 801-03 (rejecting required use of 8 U.S.C.A. § 1225(b)(2)(C) due to discretionary language chosen by Congress).

⁹⁴*See Biden*, 597 U.S. at 804-07 (refuting statutory inference proposed by respondents).

⁹⁵*See Biden*, 597 U.S. at 804-05 (describing historical context of 8 U.S.C.A. § 1225(b)(2)(C)).

⁹⁶*See Biden*, 597 U.S. at 805-06 (noting lower court's interference with executive's constitutional, diplomatic role).

⁹⁷*See Biden*, 597 U.S. at 806-07 (discussing relevance of parole provision).

⁹⁸*See Blake*, *supra* note 9, at 317 (distinguishing statutory discretion and prosecutorial discretion).

⁹⁹*See Megan Moleski*, Article, *How to Protect DACA & Dreamers After the United States Supreme Court's Decision in Department of Homeland Security v. Regents of the University of California*, 54 U. Ill. Chi. L. Rev. 1037, 1045-46 (2021) (explaining history of DACA).

¹⁰⁰*See Blake*, *supra* note 9, at 316-17 (describing DACA program and its source of discretionary authority). To be eligible for DACA, noncitizens must have entered the United States before the age of 16, resided in the United States for at least five years, and had no criminal history, among other requirements. *See id.* (explaining eligibility for DACA). Prosecutorial discretion, as applied in DACA, is an example of protective programmatic discretion because it attempts to direct law enforcement away from a certain population viewed categorically as lower priority—in this case because of age. *See supra* text accompanying notes 68-69 (discussing modes of executive discretion); Margulies, *supra* note 18, at 691-92 (providing

examples of protective discretion).

¹⁰¹*See Blake*, *supra* note 9, at 317 (explaining DAPA program). The 2014 memo announcing DAPA also expanded DACA's eligibility and benefits parameters. *See id.* (addressing changes to DACA).

¹⁰²*See Complaint at 26-28, Texas v. United States*, 2015 WL 1540022 (S.D. Tex. Apr. 7, 2015) (No. B-14-254) (setting forth claims for relief against DACA and DAPA programs). Regarding the constitutional grounds, the states alleged that President Obama failed to faithfully execute the law as required under the Take Care Clause. *See id.* at 26 (noting presidents cannot change laws written by Congress).

¹⁰³*See Blake*, *supra* note 9, at 318 (discussing challenges to new DAPA and expanded DACA programs). Under the APA, a federal agency must undergo a period of notice-and-comment when they promulgate substantive rules. *See* 3 Jacob A. Stein et al., *Administrative Law* § 15.05 (2024) (describing notice-and-comment requirements). When an agency fails to adhere to the requirements set forth in the APA, courts are empowered to abrogate that agency's actions if they are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or in violation of a statute or the Constitution. 5 U.S.C.A. § 706.

¹⁰⁴*United States v. Texas*, 579 U.S. 547 (2016).

¹⁰⁵*See Blake*, *supra* note 9, at 319 (noting decision in *United States v. Texas*); Hillel R. Smith, Cong. Rsch. Serv., LSB10625, *The Legality of DACA: Recent Litigation Developments* 3-4 (2023), <https://crs-reports.congress.gov/product/pdf/LSB/LSB10625> [<https://perma.cc/H5XM-BYA8>] (explaining *United States v. Texas* did not rule on legality of DACA).

¹⁰⁶*Department of Homeland Security v. Regents of the University of California*, 591 U.S. 1 (2020).

¹⁰⁷*See Moleski*, *supra* note 99, at 1050-51 (discussing APA arguments for and against DACA rescission). The Trump administration argued that the APA protected DHS authority to rescind DACA because it fell under 5 U.S.C.A. § 701(a)(2), which shields agencies from judicial review when "agency action is committed to agency discretion by law." *See id.* (explaining argument of DHS (citing 5 U.S.C.A. § 701(a)(2))). The Court rejected the position that it could not review DACA under the APA on the grounds that DACA amounted to more than mere nonenforcement, but affirmative relief. *See Regents of the Univ. of Cal.*, 591 U.S. at 18 (asserting availability of judicial review). Further, the Court decided that DHS's rescission of

DACA violated the APA because the Secretary failed to take the necessary step of considering the effect of the policy change on reliant parties; here, noncitizens benefitting from deferred action against removal actions had reliance interests in the continuity of the program. *See Regents of the Univ. of Cal.*, 591 U.S. at 30-33 (deciding DHS rescission of DACA “arbitrary and capricious” since agency ignored reliance interests).

¹⁰⁸*See* Smith, *supra* note 105, at 3 (distinguishing recent DACA litigation from *Regents* decision). In 2023, a federal district court in Texas found the original, Obama-era DACA program unlawful, in addition to the Biden administration’s modified DACA rule. *See Texas v. United States*, 691 F. Supp. 3d 763, 788, 796 (S.D. Tex. 2023) (concluding “no material differences between the two programs”). In 2025, the Fifth Circuit affirmed the trial court. *See Texas v. United States*, 126 F.4th 392, 417-18 (5th Cir. 2025) (agreeing DACA runs contrary to Congress’s statutory scheme in INA). The court, however, ruled that the district court’s finding of DACA’s unlawfulness did not invalidate the whole program; rather, the district court erred in refusing to sever two distinct attributes of DACA: the grant of deferred action from removal to DACA recipients and the conferral of immigration benefits such as work authorization, the latter of which the district court found in violation of the INA. *See Texas*, 126 F.4th at 419-20 (reasoning new DACA memorandum’s severability clause precluded judicial invalidation of DACA’s policy of prosecutorial forbearance). In 2023, the Supreme Court rejected a lawsuit by states that sought relief against President Biden’s decision to prioritize immigration enforcement against suspected terrorists, dangerous criminals, or recent unlawful entrants, on the grounds that the plaintiff states lacked standing to challenge prosecutorial discretion. *See United States v. Texas*, 599 U.S. 670, 673-74, 678-81 (2023) (explaining background, plus constitutional and practical reasons states lack standing to challenge executive prosecutorial decisions).

¹⁰⁹*See* Schacher, *supra* note 37 (surveying history of parole provision); *supra* notes 8-9 and accompanying text (defining parole provision).

¹¹⁰*See* Blake, *supra* note 9, at 309 (noting class-based parole usage for noncitizens); Schacher, *supra* note 37 (describing protective nature of executive use of parole provision).

¹¹¹*See* 8 U.S.C.A. § 1182(d)(5)(A) (highlighting substituted, original language).

¹¹²*See* H.R. Rep. No. 82-1365, at 52 (1952) (discussing legislative view of discretionary authority). In its 1952 report on the INA, the House Committee on the Judiciary outlined situations that justified the parole provision’s expansive delegation of discretionary authority, such as when noncitizens required “immediate medical attention,” or where exercise of such authority is needed for judicial economy reasons. *See id.* (imagining instances in which parole possibly necessary).

¹¹³*See* Blake, *supra* note 9, at 309-10 (describing early use of parole for Hungarian Refugees).

¹¹⁴*See* Anita Casavantes Bradford, “With the Utmost Practical Speed”: Eisenhower, Hungarian Parolees, and the “Hidden Hand” Behind US Immigration and Refugee Policy, 1956-1957, 39 J. Am. Ethnic Hist. 5, 14-15 (2020) (discussing President Eisenhower’s use of parole for Hungarian refugees and request for legal pathway). In 1958, Congress passed President Eisenhower’s desired legislation, providing a legal pathway to permanent residence for Hungarian parolees. *See* Blake, *supra* note 9, at 310 (noting limits of President to confer lawful presence, rather than legal status).

¹¹⁵*See supra* text accompanying notes 35-38 (discussing role of adjustment acts); Schacher, *supra* note 37 (noting groups paroled without visas given adjustment of status pathway). Congress needed to amend the INA to create potential for legal permanent residence for parolees because of the entry fiction doctrine, under which Congress did not consider parolees admitted into the United States. *See supra* text accompanying note 58 (explaining relevance of entry fiction doctrine for parolees); Schacher, *supra* note 37 (observing 1960 amendment to INA came after Supreme Court precedent creating entry fiction doctrine).

¹¹⁶*See* Legomsky & Rodríguez, *supra* note 21, at 881 (observing congressional critique of parole’s unilateral use by executive branch). The parole provision operated as the primary method for presidents to dominate U.S. refugee policy, prompting congressional frustration. *See* Cox & Rodríguez, *supra* note 60, at 502-03 (commenting on congressional reaction to usage of parole for refugee affairs).

¹¹⁷*See* Legomsky & Rodríguez, *supra* note 21, at 881 (describing implementation of seventh preference category for designated refugee groups). The 1965 amendment to the INA eliminated the prior national origin-based quota system and replaced it with different preference categories, such as the family-based preference, to better facilitate the immigration priori-

ties of Congress. *See* Muzaffar Chishti et al., *Fifty Years On, the 1965 Immigration and Nationality Act Continues to Reshape the United States*, Migration Pol’y Inst. (Oct. 15, 2015), <https://www.migrationpolicy.org/article/fifty-years-1965-immigration-and-nationality-act-continues-reshape-united-states> [https://perma.cc/3KG2-M3C3] (describing changes by 1965 INA revision).

¹¹⁸*See* Legomsky & Rodríguez, *supra* note 21, at 882 (noting failure of refugee-based preference category to limit parole power). The seventh preference category only offered a pathway for some refugees escaping their home countries under narrowly defined circumstances, such as fear persecution from communism, which accounted for only a small portion of the overall allocation of visas. *See id.* at 881 (pointing to limitations of seventh preference category).

¹¹⁹*See* Schacher, *supra* note 37 (noting consultation feature of 1980 legislation). Importantly, the Refugee Act of 1980 also provided a statutory definition of “refugee.” *See* Legomsky & Rodríguez, *supra* note 21, at 883 (explaining statutory requirements for refugee status); Cox & Rodríguez, *supra* note 60, at 503 (emphasizing Congress’s restriction of parole usage for refugees).

¹²⁰*See* Heeren, *supra* note 25, at 1135 (noting instance of mass parole); Legomsky & Rodríguez, *supra* note 21, at 886 (mentioning inclusion of Haitians). The Mariel Boatlift crisis forced U.S. authorities to scramble in the wake of Cuban President Fidel Castro’s sudden announcement that Cubans could immigrate to the United States, provided they could arrange for maritime transportation from the Mariel port. *See* Andrew Glass, *Castro Launches Mariel Boatlift, April 20, 1980*, Politico (Apr. 20, 2018), <https://www.politico.com/story/2018/04/20/castro-launches-mariel-boatlift-april-20-1980-528819> [https://perma.cc/6XHB-FTFT] (detailing history of Mariel Boatlift).

¹²¹*See* Legomsky & Rodríguez, *supra* note 21, at 886 (observing use of parole in Mariel Boatlift juxtaposed “language and spirit of the 1980 Act”).

¹²²*See* Cox & Rodríguez, *supra* note 60, at 504-05 (questioning whether history of parole could justify similar modern treatment); *see also* *Amanullah v. Nelson*, 811 F.2d 1, 5 (1st Cir. 1987) (finding scope of parole authority near plenary). In *Amanullah*, the U.S. Court of Appeals for the First Circuit discussed the legislative history of parole as indicative of Congress’s intent to provide the President with a tool to be used under narrow circumstances. *See Amanullah*, 811 F.2d at 6 (reviewing legislative record related to creation of

parole provision). Assessing the impact of the Refugee Act’s changes to parole for non-refugee noncitizens, such as asylum seekers, the court found that the legislative history indicated Congress’s intent to preserve the original parole provision’s design of limited application. *See Amanullah*, 811 F.2d at 12-14 (concluding post-Refugee Act parole authority remains limited in line with original design of INA); *see also* H.R. Rep. No. 82-1365, at 52 (1952) (describing narrow emergency circumstances to support exercises of parole authority).

¹²³*See* Cox & Rodríguez, *supra* note 1, at 118 (noting creation of TPS for noncitizens escaping disasters).

¹²⁴*See generally* Robert Malloy, *The Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Ctr. for Immigr. Stud. (Dec. 1, 1996), <https://cis.org/Report/Illegal-Immigration-Reform-and-Immigrant-Responsibility-Act-1996> [https://perma.cc/VPQ5-2EFN] (summarizing changes to immigration enforcement regime by IIRIRA).

¹²⁵*See* 8 U.S.C.A. § 1182(d)(5)(A) (providing current parole authority).

¹²⁶*Compare* Bier, *supra* note 12 (arguing Congress did not constrain executive branch class-based eligibility determinations), *with* Fishman, *supra* note 12, at 1-2 (claiming legislative history and court precedent suggests discretion not available to parole noncitizens en masse).

¹²⁷*Compare* H.R. Rep. No. 82-1365, at 52 (1952) (outlining emergency situations justifying parole usage), *with* H.R. Rep. No. 104-469, at 77-78 (1996) (proposing changes to INA § 212(d)(5)(A) [8 U.S.C.A. § 1182(d)(5)(A)]). The House Committee on the Judiciary’s 1996 report on an early version of IIRIRA clearly expressed the frustrations of some members of Congress with the executive branch’s treatment of the parole provision as a means to facilitate categorical entry for noncitizens that would not otherwise be permitted by Congress. *See* H.R. Rep. No. 104-469, at 140-41 (1996) (lambasting executive usurpation of congressional role in immigration policymaking through parole usage). *But see id.* at 538-39 (criticizing limiting language of proposed amendment).

¹²⁸*See* Cox & Rodríguez, *supra* note 20, at 67-68 (describing presidential resistance to attempts at legislative restriction).

¹²⁹*See* Cox & Rodríguez, *supra* note 1, at 118-19 (highlighting executive-driven agenda by exercises of parole authority); Schacher, *supra* note 37 (discussing parole of former Soviet Union citizens ineligible for

refugee status); *see also* David J. Bier, *126 Parole Orders over 7 Decades: A Historical Review of Immigration Parole Orders*, Cato Inst. (July 17, 2023), <https://www.cato.org/blog/126-parole-orders-over-7-decades-historical-review-immigration-parole-orders> [<https://perma.cc/834U-UPLY>] (surveying historical use of parole).

¹³⁰*See* Andorra Bruno, Cong. Rsch. Serv., R44714, U.S. Policy on Cuban Migrants: In Brief 3 (2016), <https://crsreports.congress.gov/product/pdf/R/R44714> [<https://perma.cc/RFX7-VL8F>] (discussing agreements between Cuban and U.S. governments). The CFRPP specifically addressed the tension between the commitments made by the U.S. government to admit Cubans into the United States and the statutory caps afforded by Congress for family-based visa petitions. *See* Cuban Family Reunification Parole Program, 72 Fed. Reg. 65588, 65588 (Nov. 21, 2007) (outlining rationale for CFRPP). Notably, the Bush administration cited obligations with Cuba as serving “significant public benefit.” *See* 72 Fed. Reg. at 65588 (noting statutory authority for parole usage). *But see* Fishman, *supra* note 12, at 12 (arguing CFRPP rationale indicative of executive evasion of congressionally set policy).

¹³¹*See* Implementation of Haitian Family Reunification Parole Program, 79 Fed. Reg. 75581, 75581 (Dec. 18, 2014) (announcing parole program for Haitian beneficiaries of family-based immigration petitions); Filipino World War II Veterans Parole Policy, 81 Fed. Reg. 28097, 28097-08 (May 9, 2016) (allowing parole applications by family of Filipino World War II veterans with approved visa petitions). President Obama’s use of parole authority to further the goal of family unification for both Haitians and Filipinos illustrated the administration’s dissatisfaction with the immigration system designed by Congress. *See* Implementation of Haitian Family Reunification Parole Program, 79 Fed. Reg. at 75582 (commenting on statutorily imposed waiting times); Filipino World War II Veterans Parole Policy, 81 Fed. Reg. at 28908 (noting some Filipino nationals wait over twenty years to gain U.S. entry).

¹³²*See* Fishman, *supra* note 12, at 9 (discussing rationale for CAM program). The CAM program is a clear example of a President using parole to advance family unification in emergency circumstances, specifically for populations ineligible for alternative congressionally created pathways. *See* Schacher, *supra* note 37 (noting alternative parole pathway for those ineligible for refugee status); Blake, *supra* note 9, at 315 (describing background and accessibility of CAM

program).

¹³³*See* Hannah R. Lustman, Article, *Paroling for “Public Benefit”: Amending 8 U.S.C. § 1182 to Achieve the Benefits of Discretionary Parole for Asylum Seekers*, 29 Kan. J.L. & Pub. Pol’y 221, 232-34 (2020) (comparing interpretations of parole authority between Trump and Obama administrations). President Trump rescinded parole-based programs, including CAM, the Haitian Family Reunification Parole (HFRP) program, and the Filipino World War II Veterans Parole (FWVP) policy, as well as others. *See generally* Fishman, *supra* note 12 (reviewing immigration actions taken by Trump administration).

¹³⁴*See* Memorandum from Dep’t of Homeland Sec. Sec’y John Kelly to U.S. Customs and Border Prot. Acting Comm’r Kevin McAleenan et al. on Implementing the President’s Border Security and Immigration Enforcement Improvements Policies 9 (Feb. 20, 2017) (on file with DHS) (criticizing effects of categorical parole on U.S. immigration); Press Release, U.S. Citizenship and Immigr. Servs., USCIS to End Certain Categorical Parole Programs (Aug. 2, 2019), <https://www.uscis.gov/archive/uscis-to-end-certain-categorical-parole-programs> [<https://perma.cc/K32A-DG39>] (defining categorical parole). In his second term, President Trump has emphasized that parole authority is constrained to a “case-by-case basis in accordance with the plain language of the statute” *See* Protecting the American People Against Invasion, Exec. Order No. 14159, 90 Fed. Reg. 8443, 8446 (Jan. 29, 2025) (asserting administration’s view on scope of parole authority). *But see* Fishman, *supra* note 12, at 20 (noting first Trump administration never argued against underlying legality of prior parole interpretations). Some of the earliest guidance interpreting the legality of categorical parole considered the practice consistent with the parole provision’s language so long as review occurred on a case-by-case basis. *See* Memorandum from Immigr. and Naturalization Serv. Gen. Couns. Bo Cooper to Off. of Int’l Affs. Dir. Jeffrey L. Weiss on Parole of Individuals from the Former Soviet Union Who Are Denied Refugee Status 6 (June 15, 2001) (on file with Ctr. for Am. Progress) [hereinafter Cooper Memorandum] (arguing individual adjudication fulfills case-by-case requirement).

¹³⁵Agency Information Collection Activities, 85 Fed. Reg. 84362, 84363 (Dec. 28, 2020).

¹³⁶*See infra* notes 137-139 and accompanying text (describing related precedent).

¹³⁷*Jean v. Nelson*, 472 U.S. 846 (1985).

¹³⁸*See* Cox & Rodríguez, *supra* note 20, at 59-60

(discussing background of Jean).

¹³⁹See *Jean*, 472 U.S. at 857 (providing holding); Cox & Rodríguez, *supra* note 20, at 59-60 (commenting on limited effect of *Jean* on executive branch). Notably, the Court did not offer insight into whether the parole provision itself permits such disparate treatment by national origin. See Margulies, *supra* note 18, at 720 (observing Court's lack of statutory explanation for disparate results of individual, foreign policy-influenced parole determinations); see also Cox & Rodríguez, *supra* note 20, at 75 (noting Court remanded on issue of whether INS exceeded parole adjudication regulations).

¹⁴⁰See *supra* notes 3-6 and accompanying text (discussing President Biden's uses of parole).

¹⁴¹See Bureau of Population, Refugees, and Migration; Central American Minors Program, 88 Fed. Reg. 21694, 21694 (Apr. 11, 2023) (stating family unification rationale for restored parole pathway). In addition to the family unification justification for the restoration of the CAM program, the Biden administration cited the program's goals to manage migration flows across the U.S.-Mexico border. See 88 Fed. Reg. at 21700-01 (pointing to resource strains and foreign policy objectives). The Biden administration also announced intentions to resume processing for FWVP and HFRP in addition to new parole programs also meant to promote family unification. See *Filipino World War II Veterans Parole Program*, U.S. Citizenship and Immigr. Servs., <https://www.uscis.gov/humanitarian/humanitarian-parole/filipino-world-war-ii-veterans-parole-program> [<https://perma.cc/FJS3-RUR8>] (announcing reversal of FWVP termination); *Family Reunification Parole Processes*, U.S. Citizenship and Immigr. Servs., <https://www.uscis.gov/FRP#:~:text=InOctober023'DHSfurther,willgenerallybecompletedonline> [<https://perma.cc/2VUS-Q52C>] (discussing background of nationality-based family reunification parole processes).

¹⁴²See *supra* notes 2-3 and accompanying text (discussing parole pathways for Afghan and Ukrainian evacuees).

¹⁴³See *supra* notes 5-6 and accompanying text (providing background details of CHNV parole program). In addition to U.S. financial sponsorship, the CHNV parole program requires applicants to pass national security vetting, fly at their own expense, and generally be free of negative immigration histories. See *Implementation of a Parole Process for Haitians*, 88 Fed. Reg. 1243, 1243 (Jan. 9, 2023) (announcing Haitian eligibility); *Implementation of a Parole Pro-*

cess for Nicaraguans, 88 Fed. Reg. 1255, 1255 (Jan. 9, 2023) (detailing Nicaraguan eligibility); *Implementation of a Parole Process for Cubans*, 88 Fed. Reg. 1266, 1267 (Jan. 9, 2023) (describing Cuban eligibility); *Implementation of Changes to the Parole Process for Venezuelans*, 88 Fed. Reg. 1279, 1279 (Jan. 9, 2023) (expanding Venezuelan parole eligibility). In his second term, President Trump terminated the CHNV parole program, in addition to all other instances of categorical parole. See *Securing Our Borders*, Exec. Order No. 14165, 90 Fed. Reg. 8467, 8468 (Jan. 30, 2025) (terminating CHNV parole program, in addition to any other categorical parole program).

¹⁴⁴See *Implementation of a Parole Process for Haitians*, 88 Fed. Reg. at 1244 (providing goals of Haiti program); *Implementation of a Parole Process for Nicaraguans*, 88 Fed. Reg. at 1256 (highlighting Nicaragua program's potential benefits to United States); *Implementation of a Parole Process for Cubans*, 88 Fed. Reg. at 1267-68 (putting forth overview of Cuba program's policies and strategies).

¹⁴⁵See *supra* notes 5-6 and accompanying text (describing scale of program).

¹⁴⁶See *supra* note 7 and accompanying text (noting filing of lawsuit by Texas and other states).

¹⁴⁷See *Amended Complaint*, *supra* note 7, at 2 (observing lack of basis for parole grants from outside United States). The plaintiff states described the CHNV program as amounting to the "creation of a new visa program that allows hundreds of thousands of aliens to enter the United States." See *id.* at 2-3 (arguing CHNV program's annual parole of 360,000 bypasses Congress).

¹⁴⁸See *id.* at 2-3 (describing failure of CHNV parole program to meet statutory criteria).

¹⁴⁹See *id.* at 3 (commenting CHNV program result of unilateral judgment made by DHS). The states further contended that the creation of the CHNV program was arbitrary. See *id.* at 30 (pointing to DHS's failures to account for future parolee removal); *id.* (noting DHS did not establish legal enforcement mechanisms for sponsorship aspect of program).

¹⁵⁰See *Defendants' Response in Opposition to the Motion for Preliminary Injunction* at 38, *Texas v. U.S. Dep't of Homeland Sec.*, 722 F. Supp. 3d 688 (S.D. Tex. 2024) (No. 6:23-cv-7) (arguing against plaintiffs' notice-and-comment rulemaking claim).

¹⁵¹See *id.* at 20 (refuting plaintiff's argument on merits of statutory parole authority).

¹⁵²See *id.* at 23-24 (noting Congress rejected nar-

rower parole provision). The government attacked the plaintiffs' argument that a parole program with a predetermined numerical allowance precludes individual, case-by-case determinations. *See id.* at 25-26 (criticizing plaintiffs' "straw-man" argument).

¹⁵³*See id.* at 16-18 (reasoning individual and programmatic parole decisions committed to agency discretion); *id.* at 18-19 (emphasizing broad discretion inherent to executive's role of foreign policy actor).

¹⁵⁴*See Texas v. U.S. Dep't of Homeland Sec.*, 722 F. Supp. 3d 688, 710 (S.D. Tex. 2024) (concluding plaintiffs lack standing); Laken Riley Act, Pub. L. No. 119-1, 129 Stat. 3, 5 (2025) (codified as amended at 8 U.S.C.A. § 1182(d)(5)(C)) (permitting states to sue for alleged parole authority violations); *see also* Yael Schacher, *Q&A: What Is at Stake as the Biden Administration's CHNV Parole Program Goes on Trial?*, Refugees Int'l (Aug. 24, 2023), <https://www.refugeesinternational.org/qa-what-is-at-stake-as-the-biden-administrations-chnv-parole-program-goes-on-trial/> [<https://perma.cc/6R86-K6SP>] (discussing implications of CHNV parole lawsuit); Rebecca Noel, *Texas Challenge Against Federal Program to Allow Migrant Entry Sees First Day in Court*, Hous. Pub. Media (Aug. 24, 2023), <https://www.houstonpublicmedia.org/articles/news/politics/immigration/2023/08/24/460545/texas-challenge-against-federal-program-to-allow-migrant-entry-sees-first-day-in-court/> [<https://perma.cc/UM48-NYE4>] (displaying opposing views behind parties to litigation). Commentary on the case reveals the polarizing nature of the parole power. *Compare* Jawetz, *supra* note 12 (claiming lawsuit over CHNV lacks merit), *and* Bier, *supra* note 12 (asserting legal authority for Biden administration's parole programs), *with* Fishman, *supra* note 12, at 4 (emphasizing limited parole authority due to legislative history), *and* Andrew R. Arthur, *Biden's CHNV Parole Program—Ripe for Human Exploitation*, Ctr. for Immigr. Stud. (Aug. 25, 2023), <https://cis.org/Arthur/Bidens-CHNV-Parole-Program-Ripe-Human-Exploitation> [<https://perma.cc/ED4F-AXZA>] (arguing against Biden administration's approach to parole authority).

¹⁵⁵*See supra* note 32 and accompanying text (noting parolees' lack of immigration status).

¹⁵⁶*See* Heeren, *supra* note 25, at 1136 (noting parolees subject to burdens of nonstatus); *supra* note 40 and accompanying text (pointing to uncertainty for parolees posed by lack of pathways to legal permanent residence).

¹⁵⁷*See supra* note 39 (reflecting anxieties of Afghan

and Ukrainian parolees due to stalled legal pathways toward permanent residence).

¹⁵⁸*See supra* note 56 and accompanying text (discussing greater constitutional protection of legal permanent residents compared to applicants for admission).

¹⁵⁹*See supra* notes 53-54 (explaining political control over constitutional rights available to noncitizens); Legomsky & Rodríguez, *supra* note 21, at 881 (describing removal without due process risk for parolees); *supra* note 57 and accompanying text (noting judicial deference to political branches' determinations over sufficient due process); *see also* Montoya-Galvez, *supra* note 22 (covering Trump administration plans to revoke lawful presence of CHNV parolees and expedite their removal). In line with President Trump's termination of the CHNV parole program and other categorical parole programs, DHS issued guidance for exercising discretion in enforcing the administration's new policies, citing its prosecutorial discretion as absolute. *See* Huffman Memorandum, *supra* note 22, at 1-2 (outlining enforcement discretion choices desirable under Trump administration for parolees, including expedited removal, parole revocation).

¹⁶⁰*See supra* notes 57-58 (noting entry fiction doctrine consequence of plenary power of political branches).

¹⁶¹*See supra* notes 59, 61 and accompanying text (observing separation-of-powers dynamic under plenary power doctrine unclear); *supra* note 64 and accompanying text (referring to mixed sources of presidential immigration authority); *see also supra* note 62 (discussing different views on separation of powers).

¹⁶²*See supra* notes 65-66 and accompanying text (describing separation-of-powers concerns with presidential unilateralism in immigration).

¹⁶³*INS v. Chadha*, 462 U.S. 919 (1983).

¹⁶⁴*See* Legomsky & Rodríguez, *supra* note 21, at 243 (discussing impact of *Chadha* separation-of-powers precedent on plenary power doctrine); *see also supra* note 63 and accompanying text (identifying separation-of-powers issues with entry fiction doctrine).

¹⁶⁵*See supra* text accompanying notes 57-58 (discussing relevance of means of entry to constitutional rights available under entry fiction doctrine); Thomas, *supra* note 57, at 250 (urging criticism of entry fiction doctrine's result of political determination of rights for certain noncitizens).

¹⁶⁶*See supra* notes 113, 120, 130-132 and ac-

companying text (providing examples of parole programs which use categorization for eligibility).

¹⁶⁷See *supra* note 68 and accompanying text (explaining Professor Margulies's concept of programmatic discretion).

¹⁶⁸See *supra* notes 5-6 and accompanying text (detailing eligibility for CHNV parole program). President Biden's CHNV parole program is likely a regulatory form of programmatic discretion because his administration's rationale aims to further goals of the INA toward border security, national security, and migrant safety. See *supra* note 69 and accompanying text (distinguishing regulatory and protective forms of programmatic discretion); *supra* text accompanying notes 144-145 (discussing rationales for CHNV parole program); *supra* text accompanying note 23 (articulating goals of INA).

¹⁶⁹See *supra* notes 147-148 and accompanying text (noting issues raised in states' complaint against DHS).

¹⁷⁰See *supra* note 12 and accompanying text (observing debate over limiting principles of parole provision).

¹⁷¹See Cooper Memorandum, *supra* note 134, at 3 (noting class-based parole usage comports with INA § 212(d)(5)(A) [8 U.S.C.A. § 1182(d)(5)(A)] provided case-by-case review occurs). Although the provision's other requirements limit parole usage to "urgent humanitarian reasons or significant public benefit," Congress did not define these principles. See Bier, *supra* note 12 (pointing to Congress's rejection of specific, explanatory language).

¹⁷²Cf. Margulies, *supra* note 18, at 701 (referencing Justice Scalia's statement Congress "does not hide elephants in mouseholes").

¹⁷³See *supra* note 135 and accompanying text (demonstrating first Trump administration's view of parole authority being abused in past, rather than illegal). During his second term, President Trump seemingly echoed this view in his call to "[t]erminate all categorical parole programs that are *contrary to the policies of the United States established in my Executive Orders . . .*" Securing Our Borders, Exec. Order No. 14165, 90 Fed. Reg. 8467, 8468 (Jan. 30, 2025) (emphasis added).

¹⁷⁴See *supra* text accompanying notes 116-125 (discussing dynamic between Congress and President over parole authority).

¹⁷⁵See *supra* note 119 and accompanying text (positing legislative resistance to presidential control

over refugee affairs by passage of Refugee Act); *supra* notes 123-124 (noting history leading up to amendment of parole provision in IIRIRA).

¹⁷⁶See *supra* note 126 and accompanying text (pointing to divergence of viewpoints over meaning of case-by-case provision).

¹⁷⁷See *supra* note 128 and accompanying text (noting resistance from presidents to legislative efforts at parole reform).

¹⁷⁸See *supra* note 126 and accompanying text (suggesting debate over scope of change).

¹⁷⁹See *supra* note 127 and accompanying text (offering account of alternative language Congress considered).

¹⁸⁰See H.R. Rep. No. 104-469, at 77-78 (1996) (adding conditions to humanitarian and public interest requirements of parole in amendment proposal); see also Bier, *supra* note 12 (arguing Congress specifically rejected language limiting categorical parole).

¹⁸¹Compare H.R. Rep. No. 82-1365, at 52 (1952) (asserting House Judiciary Committee's view of parole limited to specific circumstances like medical need), with 8 U.S.C.A. § 1182(d)(5)(A) (offering no guidance for defining "urgent humanitarian reasons" or "significant public benefit"). Congress's unwillingness to alter the parole provision further compounds the issue of whether its language truly leaves room for such wide discretion as the executive branch has routinely claimed. Compare Fishman, *supra* note 12, at 11 (asserting DHS incorrect to conclude congressional omission of limiting language permits categorical parole), with Bier, *supra* note 12 (pointing out Fishman's proposal demonstrates provision permits so-called abuse).

¹⁸²See *supra* note 73 and accompanying text (tying judicial review to adherence with congressional intent). Compare *supra* note 70 and accompanying text (noting judicial tendency in matters concerning noncitizens outside United States), with *supra* text accompanying note 58 (observing entry fiction doctrine considers parolees considered legally outside of United States).

¹⁸³See Rubenstein & Gulasekaram, *supra* note 16, at 623 (noting INA's size hampers ability to understand congressional intent).

¹⁸⁴See *supra* notes 74-75 and accompanying text (describing approach defending wide latitude over executive discretion based on construing congressional intent).

¹⁸⁵See *supra* note 172 and accompanying text

(observing peculiar outcome of parole provision's seemingly enormous delegation of plenary power); *supra* note 76 and accompanying text (explaining major questions doctrine approach to limiting executive discretion); *supra* notes 65-66 (noting separation-of-powers concerns created by shadow system).

¹⁸⁶*See supra* note 76 (discussing appeal of major questions doctrine).

¹⁸⁷*See supra* note 77 and accompanying text (addressing roadblock to application of major questions doctrine).

¹⁸⁸*See supra* text accompanying note 78 (noting case studies available from recent unilateral executive action).

¹⁸⁹*See supra* notes 98-101 and accompanying text (discussing lack of statutory basis for DACA and DAPA programs).

¹⁹⁰*See* 8 U.S.C.A. § 1182(d)(5)(A) (providing room for executive discretion over parole decisions); *supra* notes 102-103 and accompanying text (noting DACA and DAPA programs failed to meet APA grounds); *supra* note 108 and accompanying text (observing lack of judicial review of underlying legality of DACA and DAPA programs); *see also supra* note 98 (noting difference between prosecutorial and statutory discretion).

¹⁹¹*Trump v. Hawaii*, 585 U.S. 667 (2018).

¹⁹²*See supra* text accompanying notes 80-82 (discussing background and outcome of *Trump v. Hawaii*). Like President Biden's CHNV parole program, President Trump's travel ban is also an exercise of programmatic, regulatory discretion. *See* Margulies, *supra* note 18, at 690-91 (categorizing President Trump's travel ban into discretion types).

¹⁹³*See supra* text accompanying note 82 (describing Court's reasoning).

¹⁹⁴*See* Fields, *supra* note 15, at 747 (discussing plenary power feature of judicial deference to national security matters); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (noting "action of the executive officer under such authority is final and conclusive"); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (describing rationale for judicial deference to executive branch); *see also Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972) (offering minimum standard of judicial review over executive determinations).

¹⁹⁵*See supra* note 144 and accompanying text (listing rationales offered by government for CHNV pa-

role program).

¹⁹⁶*See supra* text accompanying notes 84-85 (noting Court rejected structural and legislative history-based arguments because of travel ban's harmony with INA).

¹⁹⁷*See* Bier, *supra* note 12 (pointing to *Trump v. Hawaii*'s reasoning why Congress did not intend numerical cap for parole). *Compare Trump v. Hawaii*, 585 U.S. 667, 690-93 (2018) (rejecting persuasiveness of drafting history compared to statute's end result), *with Biden v. Texas*, 597 U.S. 785, 826 (2022) (Alito, J., dissenting) (noting legislative history curtailing parole power persuasive to meaning of case-by-case language).

¹⁹⁸*See Biden*, 597 U.S. at 805-06 (majority opinion) (warning about judicial interference into executive foreign policy prerogative).

¹⁹⁹*See supra* text accompanying notes 195-198 (discussing potential future arguments regarding programmatic discretion).

²⁰⁰*See supra* notes 65-66 and accompanying text (describing threat of shadow system).

²⁰¹*See supra* note 71 (referencing Professor Margulies's "presidential stewardship" model). *Compare supra* note 75 (describing vast executive discretion presented by Professors Cox and Rodríguez), *with* Margulies, *supra* note 18, at 697-700 (critiquing "two-principals" model advanced by Professors Cox and Rodríguez).

²⁰²*See supra* text accompanying note 158 (describing constitutional problem distinct to applicants for admission).

²⁰³*See* Margulies, *supra* note 18, at 686-87 (asserting stewardship model accounts for reliance interests of noncitizens' lives disrupted by drastic policy changes). Professor Margulies characterizes "reliance interests" as the human consequences that flow from policy changes made by executive discretion, such as the risk that DACA recipients would lose services and education from President Trump's attempt to rescind the program in his first term. *See id.* (giving examples of reliance interests affected by executive discretion). Concern for the effects of policy changes to the reliance interests of noncitizens reflects the value of continuity. *See id.* at 694 (emphasizing need to recognize effects of discretion on reliance interests).

²⁰⁴*Compare supra* note 19 and accompanying text (noting presidents use tools like parole to craft unilateral agenda), *with* Margulies, *supra* note 18, at 694

(warning overly expansive allowance of discretion harms continuity).

²⁰⁵*See supra* text accompanying notes 156-157 (expressing concern over recent inaction by Congress on Adjustment Act legislation).

²⁰⁶*See supra* text accompanying notes 202-205 (identifying reliance interests of parolees).

²⁰⁷*See supra* text accompanying notes 116-125 (detailing legislative history and interplay with executive branch over parole provision).

²⁰⁸*See supra* text accompanying notes 177, 180-181 (grappling legislative history with statutory result).

²⁰⁹*See supra* note 119 and accompanying text (discussing goals of Refugee Act of 1980).

²¹⁰*See supra* text accompanying notes 164, 182, 194, 199 (providing reasons limiting prospect of judicial review over programmatic discretion).

²¹¹*See* Jawetz, *supra* note 12 (lauding President Biden’s “smart” use of parole authority).

²¹²*Compare* H.R. Rep. No. 104-469, at 538-39 (1996) (warning against diminishing flexibility of parole provision), *with* Margulies, *supra* note 18, at 695 (cautioning risks like animus of unfettered programmatic discretion).

²¹³*See* Laken Riley Act, Pub. L. No. 119-1, 129 Stat. 3, 5 (2025) (codified as amended at 8 U.S.C.A. § 1182(d)(5)(C)) (providing standing to states to sue over harm attributable to exercises of parole authority).

²¹⁴*See supra* Section III.B (using plain language of statute, legislative history, and executive discretion to conclude categorical parole permissible).

²¹⁵*See supra* text accompanying notes 200-201 (arguing Congress best-positioned to serve goals of continuity, accountability, and transparency).

Readers who are interested in contributing an article or ideas for a future *Briefing*, please contact: Trisha Gabriel or Melissa Funk
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