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Immigration Litigation in the Time of Trump

Shoba Wadhia

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Immigration Litigation in the Time of Trump

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A number of immigration policies have been announced, implemented, or challenged in courts during the first half of Donald J. Trump's presidency. This Essay provides an update on ongoing litigation on a handful of these policies and was inspired by keynote

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remarks delivered at the Emerging Immigration Scholars Conference at Brigham Young University in June 2019. The topics covered by this Essay include: litigation affecting those covered by the travel or “Muslim Ban,” asylum policy changes, Deferred Action for Childhood Arrivals (“DACA”), unlawful presence rules, and the border wall. This Essay also discusses lessons and common themes emerging from the litigation brought in the first half of the Trump administration, including the nature of the legal claims, the limitations of litigation, and the human costs of the policies despite these lawsuits.

I. THE MUSLIM BAN

The travel or “Muslim” ban was announced on January 27, 2017, just days after President Trump’s inauguration.¹ The first two versions of the ban, issued as executive orders, blocked nationals from countries with Muslim majority populations from receiving a visa and entering the United States.² These versions also blocked the U.S. refugee admissions program.³ Litigation in the courts stopped the first two bans from being fully implemented.⁴ Version three (“Muslim Ban 3.0”) of the ban was announced on September 24, 2017, just as version two was set to expire.⁵

Muslim Ban 3.0 was issued as a proclamation and has been in effect since December 4, 2017.⁶ The proclamation currently applies to all immigrants from Iran, Libya, Yemen, North Korea, Syria, and Somalia,

¹ President Trump was inaugurated as the president of the United States on January 20, 2017. Peter Baker & Michael D. Shear, *Donald Trump Is Sworn in as President, Capping His Swift Ascent*, N.Y. TIMES (Jan. 20, 2017), <https://www.nytimes.com/2017/01/20/us/politics/trump-inauguration-day.html>. The policies and litigation discussed in this Essay are current as of September 23, 2019.

² See Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,870, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

³ See Exec. Order No. 13,769, 82 Fed. Reg. 8977; Exec. Order No. 13,870, 82 Fed. Reg. 13,209.

⁴ See Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475, 1488-94 (2018) [hereinafter *National Security*].

⁵ See Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, Proclamation No. 9,645, 82 Fed. Reg. 45,161 (Sept. 24, 2017); Wadhia, *National Security*, *supra* note 4, at 1487.

⁶ See Proclamation No. 9,645, 82 Fed. Reg. 45,161; U.S. DEP’T OF STATE, *December 4, 2017 — Court Order on Presidential Proclamation*, TRAVEL.STATE.GOV, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/presidential-proclamation-archive/2017-12-04-Presidential-Proclamation.html> (last visited Aug. 29, 2019).

in addition to certain visitors from these same countries, and a few “B” visitors from Venezuela.⁷ The proclamation lists people who are “exempt” from the ban, such as lawful permanent residents (green card holders) and dual nationals traveling on a passport not covered by the ban.⁸ It also includes a waiver process for people who are covered by the ban but who can meet requirements like “undue hardship” and “national interest.”⁹ As with the first two versions, Muslim Ban 3.0 was challenged in lower courts on statutory or constitutional grounds,¹⁰ but the Supreme Court operationalized the ban before the judicial process was complete.¹¹ The Court agreed to hear the case coming out of the Ninth Circuit on January 19, 2018, and scheduled oral arguments for April 25, 2018.¹²

The Supreme Court issued its decision in *Trump v. Hawaii* on June 26, 2018 and reversed the preliminary injunction, concluding that based on the record before the Court, the administration was likely to succeed on the merits of both its statutory and constitutional claims.¹³ Writing for the majority, Chief Justice Roberts found that Immigration and Nationality Act (“INA”) § 1182(f), which permits the president to suspend the entry of any noncitizen or class of noncitizens where such entry is “detrimental” to the interests of the United States, “exudes” deference to the president.¹⁴ The Court also found no conflict between

⁷ Proclamation No. 9,645, 82 Fed. Reg. at 45,161; see also U.S. DEP’T OF STATE, *June 26 Supreme Court Decision on Presidential Proclamation 9645*, TRAVEL.STATE.GOV, https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/presidential-proclamation-archive/june_26_supreme_court_decision_on_presidential_proclamation_9645.html (last visited Aug. 29, 2019).

⁸ Proclamation No. 9,645, 82 Fed. Reg. 45,161.

⁹ *Id.*; see also Wadhia, *National Security*, *supra* note 4, at 1486-87; PA. ST. L. CTR. FOR IMMIGRANTS’ RIGHTS CLINIC, *TRAVEL BAN 3.0 AT THE SUPREME COURT* (2018), <https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/Travel%20Ban%20Supreme%20Court%20Update.pdf> [hereinafter *TRAVEL BAN 3.0 AT THE SUPREME COURT*]; *Practice Pointer: Applying for a Waiver Pursuant to Presidential Proclamation 9645 (Travel Ban 3.0)*, AM. IMMIGRATION LAWYERS ASS’N (Nov. 29, 2018), <https://www.aila.org/infonet/applying-for-a-waiver-pursuant-to-presidential>.

¹⁰ See *TRAVEL BAN 3.0 AT THE SUPREME COURT*, *supra* note 9.

¹¹ See SUPREME COURT OF THE UNITED STATES, *ORDER OF THE COURT-TERM YEAR 2018: MISCELLANEOUS ORDER LIST: 588 U.S., MONDAY, DECEMBER 4, 2017* (2017), https://www.supremecourt.gov/orders/courtorders/120417zr1_j4ek.pdf; Amy Howe, *Opinion Analysis: Divided Court Upholds Trump Travel Ban*, SCOTUS BLOG (June 26, 2018, 12:11 PM), <https://www.scotusblog.com/2018/06/opinion-analysis-divided-court-upholds-trump-travel-ban/>.

¹² See *Trump v. Hawaii*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/trump-v-hawaii-3/> (last visited Sept. 3, 2019).

¹³ *Trump v. Hawaii*, 138 S. Ct. 2392, 2415, 2423 (2018).

¹⁴ *Id.* at 2408.

Muslim Ban 3.0 and INA § 1152(a), a provision which prohibits discrimination on the basis of a person's race, sex, nationality, place of birth, or place of residence in the issuance of immigrant visas.¹⁵ Applying a "rational basis test" to the constitutional claim, the Court found the government set forth a "sufficient national security justification to survive."¹⁶

In his dissenting opinion, Justice Breyer was highly critical of the waiver process and labeled it "window dressing."¹⁷ In his dissent, he relayed a story of a young girl with cerebral palsy who was denied a waiver and a former State Department official's confirmed affidavit calling the waiver process a sham.¹⁸

In her dissent, Justice Sonia Sotomayor was critical of the Court's adoption of a rational basis test, but held that even under rational basis, the proclamation was unlawful. She arrived at her conclusion by reasoning that "the Proclamation is 'divorced from any factual context from which we could discern a relationship to legitimate state interests,' and 'its sheer breadth [is] so discontinuous with the reasons offered for it' that the policy is 'inexplicable by anything but animus.'"¹⁹

Though the Supreme Court reversed the Ninth Circuit and vacated the decision by the Fourth Circuit,²⁰ it remanded both cases for further proceedings consistent with its ruling in *Trump v. Hawaii*.²¹ Litigation challenging the Muslim ban continues, despite efforts by the government to dismiss these cases. In *International Refugee Assistance Project v. Trump*, Judge Theodore D. Chuang allowed a constitutional and statutory challenge to proceed, concluding: "Plaintiffs have put forward factual allegations sufficient to show that the Proclamation is not rationally related to the legitimate national security and information-sharing justifications identified in the Proclamation and therefore that it was motivated only by an illegitimate hostility to Muslims."²²

In a similar lawsuit, *Arab American Civil Rights League v. Trump*, a federal court for the Eastern District of Michigan denied the government's motion to dismiss, concluding:

¹⁵ *Id.* at 2413-14.

¹⁶ *Id.* at 2423.

¹⁷ *Id.* at 2432-33 (Breyer, J., dissenting) (citations omitted).

¹⁸ *See id.*

¹⁹ *See id.* at 2441-42 (Sotomayor, J., dissenting) (citations omitted).

²⁰ *See Trump v. Int'l Refugee Assistance Project*, 138 S. Ct. 2710 (2018).

²¹ *Hawaii*, 138 S. Ct. at 2423.

²² Memorandum Order, *Int'l Refugee Assistance Project v. Trump*, No. TDC-17-0361, at *38 (D. Md. May 2, 2019).

Plaintiffs plausibly allege sufficient facts to demonstrate that the Proclamation is not rationally related to national security goals of preventing inadequately vetted individuals and inducing other nations to improve information sharing. [citations omitted] Indeed, Plaintiffs present sufficient evidence that the Proclamation is unable to be explained by anything but animus towards Muslims.²³

Litigation challenging the waiver process also looms. In *Emami v. Nielsen*, spearheaded by the organization Muslim Advocates and the law firm of Shabnam Lofti, a federal district court judge in the Northern District of California allowed a class action lawsuit challenging the waiver process to move forward based on the administrative law claims that the Department of State failed to follow its own guidelines regarding waivers.²⁴ The complaint in *Emami* showcases many plaintiffs who were separated from their loved ones without meaningful consideration for a waiver.²⁵ The complaint also argues that the absence of a waiver process violates the Due Process Clause of the Fifth Amendment.²⁶ A similar complaint was filed in *Pars Equality Center v. Pompeo*.²⁷ Decisions in both cases are pending.

The human impact of Muslim Ban 3.0 on immigrants and nonimmigrants alike has been heartbreaking. “Immigrant” is a term of art that refers to anyone who is seeking admission to the United States permanently. A common way a person obtains an immigrant visa classification is through a family relationship.²⁸ Close family members,

²³ Arab Am. Civil Rights League v. Trump, No. 17-10310, 2019 WL 3003455, at * 10 (E.D. Mich. July 10, 2019).

²⁴ *Emami v. Nielsen*, 365 F. Supp. 3d 1009, 1020-21 (N.D. Cal. 2019).

²⁵ See Second Amended Complaint, *Emami*, 365 F. Supp. 3d 1009 (N.D. Cal. 2019) (No. 3:18-cv-01587).

²⁶ *Id.* at 4; see also Sirine Shebaya, *A New Muslim Ban Challenge Seeks to Answer the Questions the Supreme Court Didn't Settle*, SLATE (Feb. 11, 2019, 3:25 PM), <https://slate.com/news-and-politics/2019/02/new-muslim-ban-case-supreme-court-first-amendment-violations.html> (arguing that the ban violates the Establishment Clause of the First Amendment).

²⁷ See Class Action Complaint, *Pars Equality Ctr. v. Pompeo*, No. C18-1122JLR, 2018 WL 4002534 (W.D. Wash July 31, 2018), 2018 WL 3730676.

²⁸ AM. IMMIGRATION COUNCIL, FAMILY IMMIGRATION: REPAIRING OUR BROKEN IMMIGRATION SYSTEM (2010), https://www.americanimmigrationcouncil.org/sites/default/files/research/Family_Solutions_011510.pdf (“Family unification has always been a pillar of the U.S. legal immigration system.”); *Family-Based*, IMMIGRATION LEGAL RES. CTR., <https://www.ilrc.org/family-based> (last visited Aug. 31, 2019) (“One of the most common ways for people to get a green card is through a family member.”); see also 8 U.S.C. §§ 1151-1153 (2019) (statutory basis for the issuance of family-based visas).

including U.S. citizens and their spouses who are in legally qualifying relationships are now unable to be together because of the ban.²⁹ “Nonimmigrants” is another term of art and refers to anyone seeking admission to the United States temporarily.³⁰ The extension of the ban to nonimmigrants has blocked parents from seeing their children graduate, witnessing the birth of their child, or visiting an ailing relative.³¹

On April 10, 2019 both chambers of Congress introduced the National Origin-Based Antidiscrimination for Nonimmigrants Act (“NO BAN Act”), legislation that sets limiting principles on the section of the immigration statute used as a foundation for all three Muslim bans.³² For example, the bill adds “religion” to the list of impermissible factors listed in INA § 1152(a) and expands that section to include “nonimmigrants.”³³ The bill requires consultation with and notification to Congress when INA § 1182(f) is invoked and includes a rebuttable presumption in favor of granting waivers based on a family relationship or humanitarian factors when a class-based restriction is imposed.³⁴ The NO BAN Act also terminates Muslim Ban 3.0 and the “asylum ban,” discussed later in this Essay.³⁵

II. ASYLUM BAN 1.0

The “asylum ban” refers to an interim final rule and proclamation issued by the administration on November 9, 2018.³⁶ Together, these

²⁹ See, e.g., Bob Ortega, *Separated by the Travel Ban, These Couples Are Taking to Video to Plead Their Case*, CNN (May 28, 2019, 7:08 AM), <https://www.cnn.com/2019/05/24/us/travel-ban-separation-video-campaign-invs/index.html> (discussing a project where American citizens, permanent residents, or prospective immigrants separated from their spouses or family members because of the ban have released videos explaining the plight of the separation); see also Shoba Sivaprasad Wadhia, *Opinion, Two Years Later, the ‘Muslim Ban’ Still Shuts the Door on Pennsylvanians*, PHILA. INQUIRER (Feb. 6, 2019, 7:11 AM), <https://www.inquirer.com/opinion/commentary/travel-ban-pennsylvania-supreme-court-20190206.html> [hereinafter *Muslim Ban Still Shuts the Door*] (criticizing the human impact of the ban).

³⁰ See 8 U.S.C. § 1101(a)(15) (2019).

³¹ See Wadhia, *Muslim Ban Still Shuts the Door*, *supra* note 29.

³² See National Origin-Based Antidiscrimination for Nonimmigrants Act (NO BAN Act), H.R. 2214, 116th Cong. (2019); National Origin-Based Antidiscrimination for Nonimmigrants Act (NO BAN Act), S.B. 1123, 116th Cong. (2019).

³³ See H.R. 2214, *supra* note 32; S.B. 1123, *supra* note 32.

³⁴ See H.R. 2214, *supra* note 32; S.B. 1123, *supra* note 32.

³⁵ See H.R. 2214, *supra* note 32; S.B. 1123, *supra* note 32; see also *infra* text accompanying notes 36–44.

³⁶ See *Addressing Mass Migration Through the Southern Border of the United States*, Proclamation No. 9,822, 83 Fed. Reg. 57,661 (Nov. 9, 2018).

policies bar individuals from seeking asylum if they are caught in between ports of entry, or, put another way, if they arrive at the border irregularly — at a location other than a port of entry.³⁷ The administration based the asylum ban on several statutes including 8 U.S.C. § 1182(f), the same statutory section used to implement the travel ban.³⁸

The asylum ban was immediately challenged in the Northern District Court of California in *East Bay Sanctuary Covenant v. Trump*.³⁹ In that case, Judge Jon S. Tigar issued a nationwide injunction blocking the administration from implementing the asylum ban. This outcome was based on a plain reading of the immigration statute, 8 U.S.C. § 1158, which states a person may apply for asylum without regard to their manner of entry.⁴⁰ The court was also concerned about the administrative law arguments, specifically whether such a policy change required notice and public comment before going into effect.⁴¹ The administration asked the Supreme Court to hear the case in papers filed on December 11, 2018,⁴² but the Supreme Court denied this request.⁴³ The administration filed an appeal with the Ninth Circuit Court of Appeals, where the case is pending.⁴⁴

³⁷ See *id.*; see also PA. ST. L. CTR. FOR IMMIGRANTS' RIGHTS CLINIC, JOINT INTERIM RULE ON ASYLUM AND PRESIDENTIAL PROCLAMATION: WHAT YOU NEED TO KNOW (2019), https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/Blocking_those_seeking_entry_policy_update_8_6_19.pdf [hereinafter WHAT YOU NEED TO KNOW].

³⁸ See, e.g., 83 Fed. Reg. 57,661; WHAT YOU NEED TO KNOW, *supra* note 37.

³⁹ 354 F. Supp. 3d 1094, 1101-02 (N.D. Cal. 2018).

⁴⁰ *East Bay Sanctuary Covenant*, 354 F. Supp. 3d at 1104. The statute states: "Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section" 8 U.S.C. § 1158 (2019).

⁴¹ See *id.* at 1113-15.

⁴² Amy Howe, *Government Asks Justices to Intervene on Asylum Ban*, SCOTUS BLOG (Dec. 11, 2018, 7:16 PM), <https://www.scotusblog.com/2018/12/government-asks-justices-to-intervene-on-asylum-ban/>.

⁴³ See Amy Howe, *Justices Rebuff Government on Asylum Ban*, SCOTUS BLOG (Dec. 21, 2018, 3:56 PM), <https://www.scotusblog.com/2018/12/justices-rebuff-government-on-asylum-ban/>.

⁴⁴ *East Bay Sanctuary Covenant v. Trump*, U.S. COURTS FOR THE NINTH CIRCUIT, https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000962 (last visited Aug. 30, 2019) (tracking ongoing filings in the case).

III. REMAIN IN MEXICO

On January 24, 2019, former Secretary of Homeland Security Kristjen M. Nielsen announced the “Migrant Protection Protocols” (“MPP”), a policy that allows certain people entering the United States without papers or without proper papers to be issued charging documents by the Department of Homeland Security (“DHS”) and directed to Mexico to wait while their immigration proceedings are processed.⁴⁵ DHS used 8 U.S.C. § 1225(b)(2)(C) to justify the implementation of MPP.⁴⁶ That statute reads: “In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.”⁴⁷

In *Innovation Law Lab v. Nielsen*, the plaintiffs challenged the MPP, arguing that the U.S. government violated humanitarian protections owed to them under U.S. and international law by forcing them to remain in Mexico.⁴⁸ A district court judge for the Northern District of California blocked the MPP on administrative law grounds.⁴⁹

The Ninth Circuit Court of Appeals issued a stay on the district court’s injunction on May 7, 2019.⁵⁰ The court’s decision centered on a statutory construction argument: whether asylum seekers who could be placed in expedited removal under § 1225(b)(1) but as a matter of prosecutorial discretion were placed in regular removal proceedings under § 1225(b)(2) are subject to the return provisions in 8 U.S.C.

⁴⁵ DEP’T OF HOMELAND SEC’Y, U.S. CITIZENSHIP & IMMIGRATION SERVS., POLICY MEMORANDUM: GUIDANCE FOR IMPLEMENTING SECTION 235(b)(2)(C) OF THE IMMIGRATION AND NATIONALITY ACT AND THE MIGRANT PROTECTION PROTOCOLS (2019), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2019/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf> [hereinafter POLICY MEMORANDUM ON GUIDANCE]; Press Release, Dep’t of Homeland Sec’y, Migrant Protection Protocols (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> [hereinafter Press Release].

⁴⁶ See Dep’t of Homeland Sec’y, Press Release, *supra* note 45; DEP’T OF HOMELAND SEC’Y, POLICY MEMORANDUM ON GUIDANCE, *supra* note 45.

⁴⁷ 8 U.S.C. § 1225(b)(2)(C) (2019).

⁴⁸ See *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110, 1114-17 (N.D. Cal. 2019).

⁴⁹ See *id.* at 1115.

⁵⁰ *Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019); *Ninth Circuit Allows “Remain in Mexico” Policy to Stay in Effect*, INNOVATION LAW LAB (May 7, 2019), <https://innovationlawlab.org/blog/ninth-circuit-allows-remain-in-mexico-policy-to-stay-in-effect/>.

§ 1225(b)(2)(C).⁵¹ The court concluded: “DHS is likely to prevail on its contention that § 1225(b)(1) ‘applies’ only to applicants for admission who are processed under its provisions. Under that reading of the statute, § 1225(b)(1) does not apply to an applicant who is processed under § 1225(b)(2)(A), even if that individual is rendered inadmissible by § 1182(a)(6)(C) or (a)(7). As a result, applicants for admission who are placed in regular removal proceedings under § 1225(b)(2)(A) may be returned to the contiguous territory from which they arrived under § 1225(b)(2)(C).”⁵²

The Ninth Circuit also found that the MPP was a “general statement[] of policy” and therefore exempt from the notice and public comment requirements of the Administrative Procedure Act (“APA”).⁵³ Strangely, two judges on the panel were critical of the MPP, indicating that the appellate court might rule differently when this case is decided on its merits.⁵⁴ The legal concerns with MPP remain, and include U.S. obligations under international law and due process protections associated with the right to counsel.⁵⁵ Left unknown is how the Ninth Circuit might rule on the merits.⁵⁶

IV. ASYLUM BAN 2.0

On July 16, 2019, the Department of Homeland Security (“DHS”) and Department of Justice (“DOJ”) published an interim final rule barring asylum to most individuals who passed through a third country before entering the United States.⁵⁷ The impact of this rule would be significant, as thousands of people who enter the United States seeking asylum invariably pass through a Central American country or Mexico before arriving to the United States. The ACLU, the Southern Poverty Law Center, and the Center for Constitutional Rights immediately

⁵¹ See *Innovation Law Lab*, 924 F.3d at 509.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See *id.* at 510-12 (Watford, J., concurring); *id.* at 512-18 (Fletcher, J., concurring).

⁵⁵ See, e.g., Sabrineh Ardalán, *Refugee Protection at Risk: Remain in Mexico and Other Efforts to Undermine the U.S. Asylum System*, HARV. L. REV. BLOG (May 26, 2019), <https://blog.harvardlawreview.org/refugee-protection-at-risk-remain-in-mexico-and-other-efforts-to-undermine-the-u-s-asylum-system/>.

⁵⁶ *Id.*

⁵⁷ See Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019); see also PA. ST. L. CTR. FOR IMMIGRANTS’ RIGHTS CLINIC, THIRD COUNTRY ASYLUM RULE: WHAT YOU NEED TO KNOW (2019), <https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/Third%20Country%20Asylum%20Fact%20Sheet.pdf>.

challenged this new asylum ban (“Asylum Ban 2.0”). Judge John S. Tigar of the Northern District of California issued a nationwide injunction.⁵⁸

After the district court issued the injunction, the government made various appeals to the Ninth Circuit, including an application for a stay.⁵⁹ On August 16, 2019, the Ninth Circuit granted a stay, but limited it to the Ninth Circuit.⁶⁰

The ping pong between the federal district court and the appellate court has continued. Most significantly, on September 11, 2019, the Supreme Court responded to the administration’s emergency application for a stay by issuing a brief unsigned order allowing Asylum Ban 2.0 to remain fully operational until the litigation process is complete.⁶¹ The human impact of this ruling is striking, as it blocks asylum for thousands of noncitizens entering the United States if they pass through another country before their arrival. To illustrate, a Guatemalan woman fleeing dangerous conditions and abuse at the hands of a guerilla group that the government is unwilling to control is now blocked from applying for asylum if she first entered Mexico before arriving in the United States.

The ruling by the Supreme Court also raises legal concerns, some of which were raised in a related amicus brief filed on behalf of immigration law scholars. The brief detailed the legal history and statutory structure Congress designed with respect to “firm resettlement” and “safe third country.”⁶²

V. DACA

Deferred Action for Childhood Arrivals, or “DACA,” is a policy that was announced by then-President Barack Obama in 2012 and implemented by the Department of Homeland Security. It was issued as a policy memorandum and allowed young people who arrived in the United States before the age of sixteen, in school or graduated, physically present on June 15, 2012, and without a certain criminal record to request a discretionary form of protection known as deferred

⁵⁸ *East Bay Sanctuary v. Trump*, 385 F. Supp. 3d 922, 960 (N.D. Cal. 2019).

⁵⁹ See Brief for Professors of Immigration Law as Amici Curiae in Support of Plaintiffs-Appellees, *East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026 (9th Cir. 2019) (No. 19-16487) [hereinafter Brief for Professors of Immigration Law], https://docs.wixstatic.com/ugd/6e1c09_4be5de181680404ead8885fcfa308105.pdf.

⁶⁰ See *East Bay Sanctuary Covenant*, 934 F.3d at 1028.

⁶¹ WHAT YOU NEED TO KNOW, *supra* note 37.

⁶² Brief for Professors of Immigration Law, *supra* note 59.

action.⁶³ DACA was wildly successful and enabled more than 800,000 people to live in the United States with some dignity and with the ability to work.⁶⁴ Before DACA, the American public was less familiar with the history of deferred action and role of prosecutorial discretion in immigration law than it is now.⁶⁵ The program has never been successfully challenged on legal grounds.⁶⁶

On September 5, 2017, former Attorney General Jeff Sessions announced the end of DACA, identifying the policy as unlawful and in violation of immigration statutes, but without a reasoned explanation.⁶⁷ Lawsuits in California, New York, Washington, D.C., Maryland, and Texas followed the announcement.⁶⁸ Three of these courts issued nationwide injunctions reinstating DACA.⁶⁹ These judicial outcomes rested on the conclusion that the administration's termination of DACA likely violates the APA and that the basis for ending the program was "arbitrary and capricious."⁷⁰

In the California case, *Regents of the University of California. v. Department of Homeland Security*, the court concluded:

Plaintiffs have shown a likelihood of success on their claim that the rescission was arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law. Specifically, plaintiffs are likely to succeed on their claims that: (1) the agency's decision to rescind DACA was based on a flawed legal premise; and (2) government counsel's supposed 'litigation risk' rationale

⁶³ *Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/archive/frequently-asked-questions> (last visited Aug. 13, 2019).

⁶⁴ See Tom K. Wong et al., *DACA Recipients' Economic and Educational Gains Continue to Grow*, CTR. FOR AM. PROGRESS (Aug. 28, 2017, 9:01 AM), <https://www.americanprogress.org/issues/immigration/news/2017/08/28/437956/daca-recipients-economic-educational-gains-continue-grow/>.

⁶⁵ See SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* (2015) [hereinafter *BEYOND DEPORTATION*].

⁶⁶ See PA. ST. LAW CTR. FOR IMMIGRANTS' RIGHTS LEGAL CLINIC, *LITIGATION ON DACA RESCISSION: WHAT WE KNOW* (2019), <https://pennstatelaw.psu.edu/sites/default/files/pictures/faculty/DACA%20Litigation%20May%2022%202019.pdf> [hereinafter *LITIGATION ON DACA RESCISSION*].

⁶⁷ See U.S. DEP'T. OF JUSTICE, *Attorney General Sessions Delivers Remarks on DACA* (Sept. 5, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca>.

⁶⁸ *LITIGATION ON DACA RESCISSION*, *supra* note 66.

⁶⁹ *Id.* The Texas court did not grant the injunction. *Id.*; see also *infra* notes 74–81.

⁷⁰ *Id.*

is a post hoc rationalization and would be, in any event, arbitrary and capricious.⁷¹

The New York⁷² and Washington, D.C., courts issued decisions with rationales similar to the California court's, though the process in the latter court was prolonged because the judge gave the Department of Homeland Security an opportunity to provide a rationale for ending the DACA policy but was ultimately unpersuaded.⁷³

The Texas case differed from the California, New York, and Washington, D.C. cases because it was brought by Texas and several other states challenging the end of DACA. However, the judge in the Texas case refused to grant a preliminary injunction because of the plaintiffs' delay in challenging DACA and the public interest. Wrote Judge Andrew Hanen: "Here, the egg has been scrambled. To try to put it back in the shell with only a preliminary injunction record, and perhaps at great risk to many, does not make sense."⁷⁴

The scope of the nationwide injunctions regarding DACA is limited to those who have held DACA status in the past, which means that otherwise qualifying individuals who never held DACA or those seeking to travel on a document called "advance parole" are now unable to do so.⁷⁵ Similar injunctions were upheld or issued on appeal by the Ninth and Fourth Circuit Courts of Appeals, with the most recent decision issued in the Fourth Circuit in *CASA de Maryland v. Department of Homeland Security* on May 17, 2019.⁷⁶

The Trump administration asked the Supreme Court to hear the DACA cases on numerous occasions.⁷⁷ The administration asked the Court to hear the DACA cases on an expedited basis, but on June 3, 2019, the Court denied the administration's motion to accelerate the

⁷¹ *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1037 (N.D. Cal. 2018).

⁷² See *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260 (E.D.N.Y. 2018).

⁷³ See *NAACP v. Trump*, 315 F. Supp. 3d 457, 473 (D.D.C. 2018).

⁷⁴ *Texas v. United States*, 328 F. Supp. 3d 662, 742 (S.D. Tex. 2018).

⁷⁵ See, e.g., Liz Robbins & Caitlin Dickerson, *What Does the Latest Court Ruling on DACA Mean? Here Are Some Answers*, N.Y. TIMES (Jan. 23, 2018), <https://www.nytimes.com/2018/01/23/us/daca-dreamers-shutdown.html>; *Frequently Asked Questions: USCIS Is Accepting DACA Renewal Applications*, NAT'L IMMIGRATION LAW CTR. (Aug. 1, 2019), <https://www.nilc.org/issues/daca/faq-uscis-accepting-daca-renewal-applications/>.

⁷⁶ See *Casa De Maryland v. U.S. Dep't of Homeland Sec.*, 924 F.3d 684 (4th Cir. 2019); see also *LITIGATION ON DACA RESCISSION*, *supra* note 66.

⁷⁷ Amy Howe, *Justices Reject Government's Request to Expedite DACA Petition*, SCOTUS BLOG (June 3, 2019, 2:38 PM), <https://www.scotusblog.com/2019/06/justices-reject-governments-request-to-expedite-daca-petition/> [hereinafter *Justices Reject Government's Request*].

process.⁷⁸ On June 28, 2019, the Supreme Court consolidated the DACA cases and scheduled oral arguments for November 12, 2019.⁷⁹ The Supreme Court's choice to hear arguments about DACA is puzzling because both circuit courts that heard challenges to how the administration ended DACA reached similar conclusions — that the plaintiffs were likely to succeed on the merits of their argument that the government's rationale for ending the program was arbitrary, capricious, and without a reasoned explanation. In other words, the Court chose to hear the case after the government asked it to several times even though there was no circuit split.

The absence of legislation has always left those with DACA in a state of immigration purgatory because deferred action is not the same thing as legal status and has always been a conditional form of protection.⁸⁰ The administration's choice to end DACA has left affected individuals and families in an even greater state of anxiety and uncertainty.⁸¹

To address the administration's policies, the House of Representatives has introduced robust legislation to provide durable status to many with DACA or similar qualities.⁸² As summarized by the American Immigration Council, the proposed legislation provides “current, former, and future undocumented high-school graduates and GED recipients a three-step pathway to U.S. citizenship through college, work, or the armed services.”⁸³ The American Dream and Promise Act passed the House Judiciary Committee on May 22, 2019, and was set

⁷⁸ *Id.*

⁷⁹ See SUPREME COURT OF THE UNITED STATES, ORDER LIST: 588 U.S. - FRIDAY JUNE 28, 2019 - CERTIORARI — SUMMARY DISPOSITIONS (2019), https://www.supremecourt.gov/orders/courtorders/062819zr_jgkn.pdf; SUPREME COURT OF THE UNITED STATES, SUPREME COURT OF THE UNITED STATES OCTOBER TERM 2019 FOR THE SESSION BEGINNING NOVEMBER 4, 2019 (2019) https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalNovember2019.pdf; see also Ted Hesson & Josh Gerstein, *Supreme Court Will Hear Arguments over DACA Termination*, POLITICO (June 28, 2019, 3:23 PM), <https://www.politico.com/story/2019/06/28/supreme-court-will-hear-arguments-over-daca-termination-1386594>.

⁸⁰ See generally WADHIA, BEYOND DEPORTATION, *supra* note 65.

⁸¹ See generally SHOBA SIVAPRASAD WADHIA, BANNED IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP (forthcoming 2019).

⁸² See Dream Act of 2019, H.R. 2820, 116th Cong. (2019); American Promise Act of 2019, H.R. 2821, 116th Cong. (2019); Venezuela TPS Act of 2019, H.R. 549, 116th Cong. (2019) (permitting Venezuelan nationals to be eligible for temporary protected status).

⁸³ AM. IMMIGRATION COUNCIL, THE DREAM ACT, DACA, AND OTHER POLICIES DESIGNED TO PROTECT DREAMERS 2 (2019), http://www.americanimmigrationcouncil.org/sites/default/files/research/the_dream_act_daca_and_other_policies_designed_to_protect_dreamers.pdf.

for a vote on the House Floor on June 4, 2019.⁸⁴ Late on June 4, 2019, the House voted by 237-to-187 to pass this legislation.⁸⁵

VI. TEMPORARY PROTECTION

In 1990, Congress created a statute that permits the Department of Homeland Security to protect nationals from countries facing compelling conditions such as an earthquake, flood, drought, epidemic, or other environmental disaster.⁸⁶ Currently, over 400,000 people live in the United States with Temporary Protected Status (“TPS”).⁸⁷ In the first two years of the Trump administration, DHS announced the end of or decided not to extend TPS designations for nationals from multiple countries.⁸⁸

In *Ramos v. Nielsen*, a federal judge in California issued an injunction blocking DHS from ending TPS for nationals from El Salvador, Haiti, Nicaragua, and Sudan.⁸⁹ Later, the Trump administration agreed to extend this hold to TPS holders from Honduras and Nepal pending the outcome in litigation.⁹⁰ *Ramos* is currently pending in the Ninth Circuit Court of Appeals.⁹¹ A hearing in *Ramos* was held on August 14, 2019.⁹²

⁸⁴ *Frequently Asked Questions: American Dream and Promise Act of 2019*, NAT’L IMMIGRATION LAW CTR. (June 24, 2019), <https://www.nilc.org/issues/immigration-reform-and-executive-actions/faq-american-dream-and-promise-act-of-2019/>.

⁸⁵ See Julie Hirschfeld Davis, *House Votes to Give “Dreamers” a Path to Citizenship*, N.Y. TIMES (June 4, 2019), <https://www.nytimes.com/2019/06/04/us/politics/dream-promise-act.html>.

⁸⁶ See 8 U.S.C. § 1254a (2019).

⁸⁷ See U.S. CITIZENSHIP & IMMIGRATION SERVS., TOTAL NUMBER OF CURRENT I-821 TEMPORARY PROTECTED STATUS (TPS) INDIVIDUALS AS OF NOVEMBER 29, 2018 (2018) (spreadsheet detailing statistics).

⁸⁸ *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (June 6, 2019), <https://www.uscis.gov/humanitarian/temporary-protected-status>.

⁸⁹ *Ramos v. Nielsen*, 336 F. Supp. 3d 1075 (N.D. Cal. 2018). For additional information on TPS, see also *Temporary Protected Status: An Overview*, AM. IMMIGRATION COUNCIL (May 21, 2019), <https://www.americanimmigrationcouncil.org/research/temporary-protected-status-overview>; Dara Lind, *Judge Blocks Trump’s Efforts to End Temporary Protected Status for 300,000 Immigrants*, VOX (Oct. 4, 2018, 11:07 AM), <https://www.vox.com/policy-and-politics/2018/10/4/17935926/tps-injunction-chen-news>.

⁹⁰ See *Temporary Protected Status*, *supra* note 88.

⁹¹ See *id.*

⁹² See *Watch Recording for Case: Crista Ramos v. Kirstjen Nielsen, No. 18-16981*, U.S. COURTS FOR THE NINTH CIRCUIT, https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000016087 (last visited Aug. 30, 2019). As of September 18, 2019, the results of the hearing are still pending.

The Dream Act and American Promise Act described above include TPS holders and would create a permanent path for thousands of people who have made America their home.⁹³

VII. STUDENTS AND SCHOLARS

For more than twenty years, students and scholars in the United States whose immigration statuses lapsed have faced immigration status questions but were not automatically deemed as accruing “unlawful presence.” “Unlawful presence” is a term of art in immigration law with significant consequences where a person has accrued more than six months of unlawful presence (“ULP”) and again seeks readmission.⁹⁴ As of August 9, 2018, students and scholars are more vulnerable to being labeled “unlawfully present” because of a policy change by the U.S. Citizenship and Immigration Services (“USCIS”).⁹⁵ Before the new policy, students and scholars admitted in “duration of status” would not accrue unlawful presence until a judge made a formal decision.⁹⁶ Now, USCIS policy starts the unlawful presence “clock” for students and scholars on the day they are out of status. In other words, students begin to accrue unlawful presence the day they fall out of status.⁹⁷

On October 23, 2018 in *Guilford College v. Nielsen*,⁹⁸ a group of higher education institutions, acting on behalf of their international students,⁹⁹ brought litigation challenging the August 9th unlawful presence

⁹³ See Dream Act of 2019, H.R. 2820, 116th Cong. (2019); American Promise Act of 2019, H.R. 2821, 116th Cong. (2019).

⁹⁴ See 8 U.S.C. § 1182(a)(9)(B) (2019); see also WADHIA, BEYOND DEPORTATION, *supra* note 65, at ch. 3; *Unlawful Presence and Bars to Admissibility*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (May 6, 2019), <https://www.uscis.gov/legal-resources/unlawful-presence-and-bars-admissibility>.

⁹⁵ See U.S. DEP’T OF HOMELAND SEC’Y, U.S. CITIZENSHIP & IMMIGRATION SERVS., POLICY MEMORANDUM: ACCRUAL OF UNLAWFUL PRESENCE AND F, J, AND M NONIMMIGRANTS (2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-08-09-PM-602-1060.1-Accrual-of-Unlawful-Presence-and-F-J-and-M-Nonimmigrants.pdf> [hereinafter POLICY MEMORANDUM ON ACCRUAL]; *Accrual of Unlawful Presence and F, J, and M Nonimmigrants*, NAFSA (May 14, 2019), https://www.nafsa.org/Professional_Resources/Browse_by_Interest/International_Students_and_Scholars/Accrual_of_Unlawful_Presence_and_F_J_and_M_Nonimmigrants/.

⁹⁶ See sources cited *supra* note 95.

⁹⁷ See sources cited *supra* note 95.

⁹⁸ Complaint, *Guilford College v. McAleenan*, 389 F. Supp. 3d 377 (M.D.N.C. May 3, 2019).

⁹⁹ See Suzanne Monyak, *Colleges Fight New Visa Policy for Foreign Students*, LAW360 (Oct. 23, 2018, 6:13 PM), <https://www.law360.com/immigration/articles/1094960/colleges-fight-new-visa-policy-for-foreign-students>.

memo.¹⁰⁰ On May 3, 2019, the United States District Court for the Middle District of North Carolina issued a nationwide preliminary injunction blocking USCIS from implementing the new policy.¹⁰¹ The court found that the plaintiffs were likely to succeed in showing that the unlawful presence policy violates the APA.¹⁰² The court also found the plaintiffs would be successful in arguing that the memo conflicts with the INA, noting: “Plaintiffs allege that by redefining ‘unlawful presence’ to begin to accrue on the day that a nonimmigrant’s lawful status lapses, the Policy Memorandum renders both concepts ‘unlawful presence’ and ‘unlawful status’ — essentially synonymous.”¹⁰³ As such, the court found that plaintiffs would prevail on their claim that Congress intended for these terms to be distinct in their definitions.

VIII. THE WALL

Since taking office, President Trump has talked about a “big, fat, beautiful wall.”¹⁰⁴ In January 2019, President Trump asked Congress for \$5.7 billion to fund border construction, but Congress allocated only a fraction of this request.¹⁰⁵ On February 15, 2019, President Trump declared the situation on the southern border a “national emergency”

¹⁰⁰ POLICY MEMORANDUM ON ACCRUAL, *supra* note 95.

¹⁰¹ *Guilford College*, 389 F. Supp. 3d 377.

¹⁰² *Id.* at 391.

¹⁰³ *See id.* at 394.

¹⁰⁴ *See* Michael Finnegan, ‘It’s Going to be a Big, Fat, Beautiful Wall!’: Trump’s Words Make His California Climb an Even Steeper Trek, L.A. TIMES (June 2, 2016, 7:23 PM), <https://www.latimes.com/politics/la-na-pol-trump-california-campaign-20160602-snap-story.html>.

¹⁰⁵ Ayesha Rascoe & Domenico Montanaro, *Democrats Reject Trump Border Wall Proposal, Calling It A ‘Non-Starter,’* NPR (Jan. 19, 2019, 4:24 PM), <https://www.npr.org/2019/01/19/686876605/trump-offers-temporary-immigrant-protections-for-5-7-billion-in-wall-money>; *see also* Erica Werner et al., *Congress Approves Border Deal to Avert Shutdown; Trump to Sign It and Seek Wall Money Elsewhere*, WASH. POST (Feb. 14, 2019), https://www.washingtonpost.com/business/economy/mcconnell-predicts-senate-passage-of-border-security-bill-hopes-trump-signs-it/2019/02/14/2f6e2c8a-306f-11e9-8ad3-9a5b113ecd3c_story.html.

and expressed his desire to redirect taxpayer funds for construction along the border.¹⁰⁶ Lawsuits followed.¹⁰⁷

On May 24, 2019, in *Sierra Club v. Trump*, Judge Haywood Gilliam of the United States District Court for the Northern District of California framed the legal question as “whether the proposed plan for funding border barrier construction exceeds the Executive Branch’s lawful authority under the Constitution and a number of statutes duly enacted by Congress.”¹⁰⁸ The court issued a preliminary injunction for building the wall, holding that the president can act “without Congress” when lawmakers refuse a funding request from the White House “does not square with fundamental separation of powers principles dating back to the earliest days of our Republic.”¹⁰⁹

On July 26, 2019, the Supreme Court stayed the district court’s ruling and allowed the administration to utilize some funds for the wall while the litigation proceeds.¹¹⁰ In a 5-4 decision, the Court held: the “The District Court’s June 28, 2019 order granting a permanent injunction is stayed pending disposition of the Government’s appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the Government’s petition for a writ of certiorari, if such writ is timely sought.”¹¹¹ Currently, *Sierra* is pending at the Ninth Circuit.¹¹²

The wall has also been challenged on other grounds. On June 3, 2019, Judge Trevor N. McFadden of the United States District Court for the

¹⁰⁶ Declaring a National Emergency Concerning the Southern Border of the United States, Proclamation No. 9,844, 84 Fed. Reg. 4,949 (Feb. 15, 2019); Damian Paletta, Mike DeBonis & John Wagner, *Trump Declares National Emergency on Southern Border in Bid to Build Wall*, WASH. POST (Feb. 15, 2019), https://www.washingtonpost.com/politics/trumps-border-emergency-the-president-plans-a-10-am-announcement-in-the-rose-garden/2019/02/15/f0310e62-3110-11e9-86ab-5d02109aeb01_story.html?utm_term=.1092054e709e.

¹⁰⁷ See, e.g., *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 891 (N.D. Cal. 2019); United States House of Representatives v. Mnuchin, 379 F. Supp. 3d (D.D.C. 2019).

¹⁰⁸ *Sierra Club*, 379 F. Supp. 3d at 891.

¹⁰⁹ *Id.* at 927; see also Press Release, Sierra Club, Federal Court Blocks Border Wall Construction in National Emergency Challenge (May 24, 2019), <https://www.sierraclub.org/press-releases/2019/05/federal-court-blocks-border-wall-construction-national-emergency-challenge>. For a list of related litigation, see Jeremy Gordon & Hadley Baker, *Border Wall Litigation Tracker*, LAWFARE (June 5, 2019, 4:43 PM), <https://www.lawfareblog.com/border-wall-litigation-tracker>.

¹¹⁰ See Adam Liptak, *Supreme Court Lets Trump Proceed on Border Wall*, N.Y. TIMES (July 26, 2019), <https://www.nytimes.com/2019/07/26/us/politics/supreme-court-border-wall-trump.html>.

¹¹¹ *Trump v. Sierra Club*, No. 19A60, 2019 WL 3369425, at *1 (U.S. July 26, 2019).

¹¹² See *Sierra Club v. Trump: Border Wall Injunction*, U.S. COURTS FOR THE NINTH CIRCUIT, https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000995 (last visited Aug. 29, 2019) (tracking ongoing filings in the case).

District of Columbia dismissed a lawsuit filed by House Democrats challenging construction of a border wall using funds Congress had denied.¹¹³ Part of the court's rationale focused on the specific roles of the branches of government. As Judge McFadden held, "while the Constitution bestows upon Members of the House many powers, it does not grant them standing to hale the Executive Branch into court claiming a dilution of Congress's legislative authority."¹¹⁴ Judge McFadden found that the plaintiffs did not have standing to sue because they had not suffered an "injury."¹¹⁵ The House appealed this ruling to an appellate court on June 10, 2019.¹¹⁶

CONCLUSION

Litigation in the time of Trump brings many lessons and recurring themes. The role and impact of the courts have been tremendous but the Muslim ban teaches us that the courts will not save us or reverse what is considered to be a bad policy or an overreach of legal authority. A second lesson is that the Constitution has not always been the legal "hook" for successful litigation. Notably, administrative and immigration law instruments have been the foundation for judicial outcomes in the vast majority of lawsuits summarized in this Essay. Consequently, explaining lawsuits and the law to the general public becomes more complicated. A related lesson is that the outcome in decisions is generally narrower in scope than the breadth of the claim brought and relief sought by a party or parties.

One theme that binds many of the policies challenged in court is the role of all three branches of government, often with the executive branch announcing a policy, a political party (or parties) challenging that policy in courts, and the legislative branch introducing legislation to set limits on said policies. A second theme that has emerged is nationwide injunctions and the administration's resistance to them, and specifically the ability for a single court to stop a national policy. Of course, in the case of some of these immigration policies, DACA and the Muslim ban included, multiple courts have weighed in and issued

¹¹³ United States House of Representatives v. Mnuchin, 379 F. Supp. 3d 8 (D.D.C. 2019); Todd Ruger, *Judge Tosses House Lawsuit over Border Wall Spending*, ROLL CALL (June 3, 2019, 9:47 PM), <https://www.rollcall.com/news/judge-tosses-house-lawsuit-border-wall-spending>.

¹¹⁴ *Mnuchin*, 379 F. Supp. 3d at 11.

¹¹⁵ *Id.* at 13.

¹¹⁶ Priscilla Alvarez, *House Democrats Appeal Judge's Ruling Against Their Border Wall Lawsuit*, CNN (June 10, 2019, 6:19 PM), <https://www.cnn.com/2019/06/10/politics/house-democrats-appeal-border-wall/index.html>.

nationwide injunctions with the purpose of upholding the rule of law and serving as a check to presidential power. A third recurring theme is the administration's desire to leap frog from a negative decision at a lower court directly to the Supreme Court, thereby bypassing an appellate court. As seen with the Muslim Ban, asylum ban, and DACA (and already successful in the case of the Muslim ban which went into effect even before the appellate courts issued decisions), the administration wants a faster entrance into the Supreme Court.¹¹⁷

Discretion is another recurring theme when considering the policies that have been litigated in the time of Trump. Every implemented policy discussed in this Essay was an act of executive discretion. In other words, there was no legal authority or mandate leading to these policies — a powerful reminder of how executive discretion can be used as an instrument for equity or greater restrictions.

A final and sobering comment is the limits of litigation. No amount of litigation will create the security sought by individuals and families affected by immigration policies in the time of Trump, nor will it restore the travesties they have caused by separating families in legal relationships, preventing parents to observe their children's successes, denying young people the opportunity to work and live with some dignity because they never had DACA, or denying asylum to those unable to cut through the rich red tape caused by an array of restrictions designed to keep refugees out of this country.

¹¹⁷ See, e.g., Howe, *Justices Reject Government's Request*, *supra* note 77.