

Review of the Supreme Court's 2021-2022 Immigration Cases

I. Introduction

During the 2021-2022 term, the Supreme Court considered a number of cases that significantly impacted immigration law and policy. Notably, *Biden v. Texas*, centering on the Trump-era [Migrant Protection Protocols](#) (“MPP”) (also known as “Remain in Mexico”), ended with a mostly favorable outcome for immigrant communities. In that case, the Supreme Court reversed lower court rulings to hold that the Biden administration could terminate MPP, which required many asylum-seekers to wait in Mexico for the duration of their immigration proceedings. The Court’s decision represented a positive outcome for migrants, many of whom faced an increased risk of kidnapping and violence in Mexico.

In contrast to *Biden v. Texas*, other Supreme Court decisions this past term are likely to have negative implications for immigrant communities. In *Johnson v. Arteaga-Martinez* and *Garland v. Aleman-Gonzalez*, the Supreme Court limited the availability of bond hearings for detained immigrants. In *Egbert v. Boule*, the Court limited the accountability of immigration enforcement officers and other federal law enforcement by removing the ability to hold federal officers personally liable for unconstitutional actions. In *Patel v. Garland*, the Supreme Court ruled that federal courts could not review factual findings related to discretionary relief, drastically limiting appellate courts’ ability to review findings made by overburdened and backlogged immigration courts.

These immigration-related cases are reviewed at length below.

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III. Case Summaries

A. Cases Involving the Biden Administration's Decision to End Certain Trump-Era Immigration Policies

The Supreme Court considered the termination of two Trump-era immigration policies: the Migrant Protection Protocols (“MPP”) and the 2019 Public Charge Rule.

[*Biden v. Texas*](#), 597 U.S. ___ (2022).

Takeaway: In a 5-4 vote, the Supreme Court held that the Biden administration may rescind the Trump-era [Migrant Protection Protocols](#) (“MPP”), also referred to as the “Remain in Mexico” program, which required asylum seekers to remain in Mexico for the duration of their immigration proceedings. In its ruling, the Supreme Court first addressed the issue of jurisdiction: finding that the lower court had lacked jurisdiction to issue the injunction requiring the government to enforce MPP in good faith until it was lawfully rescinded. The Court’s finding on jurisdiction is consistent with its holding in [Garland v. Aleman Gonzalez](#), as further discussed below.

Regarding the merits of the case, the Court found that federal law provides the Department of Homeland Security (DHS) with discretion to return migrants to contiguous countries – Canada and Mexico. In clarifying that this authority is discretionary, rather than mandatory, the Court evaluated legislative history, the foreign affairs consequences of mandating such returns, and the use of [parole](#) in processing applicants for admission.

While the Supreme Court’s decision to uphold the Biden administration’s rescission of MPP was largely a victory for immigrant communities, the Court remanded the case to the district court to address remaining Administrative Procedure Act (APA) issues, leaving some questions unresolved.

Discussion: Under MPP, certain migrants seeking asylum at the U.S./Mexico border were returned to Mexico to await the results of their immigration proceedings. MPP was implemented pursuant to [8 U.S.C. § 1225\(b\)\(2\)\(C\)](#), which provides that the DHS secretary “may return the alien to that territory pending a proceeding under section 1229a.” Migrants who were returned to Mexico under MPP were at an [increased risk of murder, rape, kidnapping, and other violent assaults](#), often lacked adequate legal counsel, and faced difficulties returning to the U.S. for their court dates.

Upon taking office in early 2021, President Biden sought to wind down MPP, ordering CBP to stop placing people into the program. Subsequently, on June 1, 2021, DHS secretary Mayorkas issued a [memorandum](#) (“June 1 Memorandum”) officially terminating MPP.

Texas and Missouri filed a lawsuit in the Northern District of Texas, arguing that the June 1 Memorandum violated the Immigration and Nationality Act (INA) and the APA. U.S. District Judge Matthew J. Kacsmaryk, [held](#) that section 1225 of the INA requires the government to either: 1) hold illegal entrants in mandatory detention; or 2) return entrants to contiguous territory (*i.e.*, Mexico). The court also found that the June 1 Memorandum was “arbitrary and capricious” in violation of the APA. Finally, the district court issued an injunction ordering the government to

“enforce and implement MPP in good faith until such a time as it has been lawfully rescinded in compliance with the APA and until such a time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under [section 1225] without releasing any aliens because of a lack of detention resources.”

After the district court issued its ruling, DHS Secretary Mayorkas issued a subsequent memorandum on October 29 (“October 29 Memorandum”) which announced and further explained the termination of MPP. The October 29 Memorandum, which would take effect upon the lifting of the district court’s injunction, explained that while MPP likely reduced migratory flows, it did so by “imposing substantial and unjustifiable human costs.” The Fifth Circuit affirmed the district court’s holding as well as finding that the October 29 Memoranda did not constitute a new a separately reviewable final agency action, meaning that it would not consider it as a later, distinct explanation of the earlier agency action. The Supreme Court ruled that the October 29 Memorandum constituted final agency action. However, on remand the district court could consider the October 29 Memorandum’s compliance with the APA.

[*Arizona v. San Francisco*](#), 596 U.S. ___ (2022).

Takeaway: The Supreme Court dismissed an attempt by Arizona and twelve other states to intervene and defend a Trump-era immigration policy that sought to deny green cards to immigrants based on their potential reliance on federal public benefits. The Trump administration’s 2019 Public Charge Rule redefined and expanded the meaning of “public charge,” applying it to encompass a much larger population of those immigrants who previously accessed or are deemed likely to rely on certain forms of public assistance, including non-cash benefits.

After the Biden administration engaged in rulemaking to return the public charge rule to its pre-2019 form and stopped defending the Trump era rule in pending litigation, thirteen states sought to intervene in that litigation. This Supreme Court case – *Arizona v. San Francisco* – was limited to the narrow question of whether those thirteen states supportive of the 2019 Public Charge Rule should have been allowed to intervene in litigation to defend the Trump-era rule. The U.S. Supreme Court dismissed this case and reasoned it should not have accepted the case in the first place. While the Supreme Court rarely explains these types of decisions, in a concurring opinion, Chief Justice Roberts explained that a “mare’s nest” of procedural complications prevented resolution of the case. Some of these procedural questions centered around the Biden administration’s litigation strategy and whether the government’s actions followed administrative law procedures.

Discussion: In 2019, the Department of Homeland Security (DHS) promulgated a new version of the Public Charge Rule, which sets out the criteria used to determine whether an applicant for admission into the country or adjustment to lawful permanent resident status (“LPR” status or “green card” status) is “likely at any time to become a public charge.” 8 U. S. C. § 1182(a)(4)(A). The 2019 rule change expanded the number of benefits the government would consider for public charge purposes and redefined a “public charge” as a non-citizen who receives one or more public benefits specified at 8 CFR § 212.21(b) for more than 12 months in the aggregate within any 36-month period. These public charge revisions deemed thousands of immigrants to be “public charges” for lawfully accepting any of a number of non-cash benefits, and created a [chilling effect](#)

on immigrant households' participation in public benefit programs (including some not covered under the rule), leading participation in TANF, SNAP, and Medicaid to decline twice as fast among noncitizens as citizens.

After publication of the 2019 rule, it faced multiple legal challenges. In one matter, in 2019, the U.S. District Court for the Northern District of Illinois struck down the rule, with the U.S. Court of Appeals for the Seventh Circuit subsequently staying the district court's ruling while the government appealed. After the Biden administration took office, President Biden engaged in formal rulemaking to return the "public charge" rule to its pre-2019 form and withdrew the U.S. Department of Justice from defending the Trump-era rule in litigation. The administration then settled the remaining challenges, causing the U.S. District Court for the Northern District of Illinois's ruling to take effect. Several states, led by Arizona, attempted to intervene in the litigation to defend the Trump-era rule, ultimately appealing to the U.S. Supreme Court. These states argued that the way in which the Biden administration's actions on public charge violated the Administrative Procedure Act.

B. Cases Involving Bond Hearings for Detained Immigrants

The Supreme Court considered two cases that restricted access to bond hearings for detained immigrants, scaling back the presumption against indefinite detention set forth in [Zadvydas v. Davis](#) in 2001.

[Johnson v. Arteaga-Martinez](#), 596 U.S. ___ (2022).

Takeaway: In an 8-1 vote, the U.S. Supreme Court held that [federal law](#) does not require the government to provide [bond hearings](#) to noncitizens detained for six months or longer. Reversing the Third Circuit, which held that the government bears the burden of proving that detained noncitizens pose a flight risk or a danger to the community. The ruling is the latest in a line of cases holding that the government is not required to provide bond hearings to detained immigrants, opening up the possibility of indefinite detention leading up to removal proceedings. The Court did not answer whether extended detention violates the due process clause of the Constitution.

Discussion: Antonio Arteaga-Martinez, a Mexican citizen, entered the U.S. four times between 2001 and 2012. In 2012, prior to his last entry, he was beaten violently by a criminal gang in Mexico, leading him to reenter the U.S. and seek asylum.

In 2018, ICE detained Arteaga-Martinez and reinstated his earlier removal order. He was permitted to seek asylum while in detention and applied to withhold or defer his removal. With his application pending, Arteaga-Martinez filed a petition for a writ of habeas corpus to obtain release from immigration detention, arguing he was entitled to a bond hearing in order to assess whether he could continue to be detained while his application was pending. Relying on relevant [precedent in the Third Circuit](#), the district court found Arteaga-Martinez was entitled to a bond hearing after six months of detention. At the bond hearing, the Immigration Judge authorized Arteaga-Martinez's release after concluding he did not pose a flight risk or danger to the community. U.S. Immigration and Customs Enforcement (ICE) appealed to the Supreme Court.

[*Garland v. Aleman Gonzalez*](#), 596 U.S. ____ (2022).

Takeaway: In a 6-3 vote, the Supreme Court limited the ability for detained migrants to request bond hearings on a class-wide basis. Reversing the Ninth Circuit, the Supreme Court held that those petitioning a right to a bond hearing must do so individually, restricting detained immigrants' requests for injunctive relief on a class-wide basis.

In a partial dissent, Justice Sotomayor wrote that the majority opinion "risks depriving many vulnerable noncitizens of any meaningful opportunity to protect their rights," arguing that the inevitable consequence of barring class-wide injunctive relief is that the systemic violation of detained immigrants' rights will go uncontested. She also questioned the requirement of individual court challenges given that class actions benefit individual class members as well as the courts by eliminating duplicative proceedings.

Discussion: Aleman Gonzalez was a class representative in two class action lawsuits that had been combined. A Mexican citizen previously removed from the U.S., he was detained after reentering the U.S. and his removal order was reinstated. In response, Aleman Gonzalez applied for withholding of removal, a form of relief for individuals fearing persecution in their home country and also filed a habeas corpus petition, seeking temporary release from detention while the withholding decision was pending.

Subsequently, Aleman Gonzalez and another respondent filed a class action lawsuit in the U.S. District Court for the Northern District of California, alleging they were wrongfully detained for more than six months without a bond hearing while their claims for relief were pending. As a class representative, Aleman Gonzalez sought relief not only for himself, but also for a class of similarly-situated individuals. Applying [Ninth Circuit precedent](#), the district court held that the class members were entitled to bond hearings after six months of detention and issued injunctive relief. The Ninth Circuit affirmed, and the federal government appealed to the Supreme Court. Aleman Gonzalez's lawsuit was combined with a separate class action lawsuit, *Tejada v. Godfrey*, for the Supreme Court's consideration.

C. Case Involving the Personal Liability of Border Patrol Agents and Federal Officers for Unconstitutional Actions

[*Egbert v. Boule*](#), 596 U.S. ____ (2022).

Takeaway: The U.S. Supreme Court ruled 6-3 that a private citizen cannot claim civil damages against a Border Patrol agent who uses excessive force and illegal retaliation in violation of the Fourth and First Amendments, respectively. The decision expanded federal officers' immunity from private lawsuits and limited citizens' ability to sue law enforcement officers in the absence of a specific law authorizing such a claim to go forward. The Court emphasized the importance of deferring to Congress instead of judicially-created remedies. [Critics argued](#) that the Supreme Court's decision in *Egbert v. Boule* had implications beyond the immigration space, making it much harder for individuals to hold Border Patrol agents and other federal officers accountable when their constitutional rights are violated.

Discussion: Robert Boule — an innkeeper who previously served as a confidential informant regarding unlawful cross-border activity — filed suit against Border Patrol Agent Erik Egbert for

retaliation and excessive force. Egbert threw Boule to the ground after being asked to leave after attempting to conduct enforcement activities at the inn. Egbert subsequently attempted to retaliate against Boule for filing a complaint against him, reporting Boule to law enforcement and tax authorities.

In his civil rights lawsuit, Boule invoked the 1971 case of [Bivens v. Six Unknown Fed. Narcotics Agents](#), which held that a private individual could sue a federal officer for damages if his fundamental rights are violated. The Court, which has dramatically scaled back the applicability of *Bivens* in recent years, declined to make its remedies available to Boule, stating that Congress would be “better suited to authorize a damages remedy.”

D. Case Involving Appellate Review of Immigration-Related Decisions

[Patel v. Garland](#), 596 U.S. ___ (2022).

Takeaway: The U.S. Supreme Court affirmed an Eleventh Circuit ruling that restricted the federal courts' jurisdiction to review certain elements of immigration court proceedings. In a 5-4 decision, the Supreme Court agreed that federal courts cannot review the factual determinations made in discretionary-relief proceedings. Discretionary relief refers to forms of immigration relief, such as cancellation of removal or asylum, amongst others, that an immigration judge can grant to an immigrant who is in removal proceedings.

The Court's ruling that federal courts cannot review factual findings related to the granting of discretionary immigration relief has significant implications for other immigration cases, [preventing](#) many noncitizens from seeking review of agency error. The immigration court system is severely [backlogged](#), and the COVID-19 pandemic has only exacerbated this issue. Jeremy McKinney, President of the American Immigration Lawyers Association (AILA) [stated](#) that “[t]his decision strips non-citizens of an important avenue for relief after incorrect decisions by immigration judges.”

Discussion: This case involved Pankaj Kumar Patel, who entered the U.S. as an undocumented immigrant, but subsequently was able to apply for lawful permanent resident status after spending decades in the U.S. Due to a misunderstanding, Patel, who was eligible for a Georgia driver's license, checked a box indicating that he was an American citizen on the license renewal application.

Years later, the government initiated removal proceedings against Patel who, in turn, tried for a second time to renew his adjustment of status. Patel sought review over whether he had testified credibly and whether he had subjectively intended to misrepresent himself as a citizen. Patel argued before an Immigration Judge that he had mistakenly checked the "citizen" box on the state application and thus lacked the subjective intent to falsely represent himself as a U.S. citizen. The Immigration Judge disagreed, denied Patel's application for discretionary adjustment of status, and ordered his removal. Subsequent appeals to both the Board of Immigration Appeals and the Eleventh Circuit failed after each found that it lacked jurisdiction to review factual determinations and consider his claim, failed. The Supreme Court held these fact determinations to be non-reviewable on appeal.

D. Case Involving Immigration Enforcement Priorities

[*Texas v. United States*](#), 40 F.4th 205 (5th Cir. 2022), *cert. granted*, 91 U.S.L.W. 3013 (U.S. Aug. 4 2022) (No.22-58).

Takeaway: After the end of the 2021-22 term, by a 5-4 vote (including newly sworn-in Justice Ketanji Brown Jackson in dissent), the Supreme Court declined to lift an injunction blocking the Biden administration’s immigration enforcement [guidelines](#). Presidential administrations of both parties have long set immigration enforcement priorities in order to most effectively utilize limited federal resources, prioritizing threats to national security and public safety.

This opinion was issued as part of the Supreme Court’s so-called [shadow docket](#), handed down on an emergency basis prior to full briefing and oral arguments. The Court will hear oral arguments in this case in December 2022, at which point it will be able to reconsider whether to vacate the lower court’s decision. In the meantime, the Biden administration is enjoined from to implementing its immigration enforcement guidelines.

Discussion: In September 2021, the Biden administration, issued immigration enforcement guidelines articulating the priorities and focus in the apprehension and removal of noncitizens. Several states, in [two separate](#) lawsuits, challenged these enforcement priorities. In June 2022, a [federal judge](#) in Texas enjoined the enforcement priorities, with the U.S. Court of Appeals for the [5th Circuit](#) subsequently declining to stay the injunction. The Supreme Court will hear the merits of the case in December 2022, but in the meantime, the guidance no longer in effect.

Critics raised concerns about the Supreme Court’s one-page order declining to stay the injunction, arguing that DHS’s authority to set immigration priorities is well-established and provided by statute, and that the decision undermined longstanding principles providing for prosecutorial discretion. In a July 8 request for an emergency stay, Solicitor General Elizabeth Prelogar warned that enjoining the enforcement priorities will have a negative impact on DHS operations, “thwarting the Secretary’s direction of the Department he leads and disrupting DHS’s efforts to focus its limited resources on the noncitizens who pose the gravest threat to national security, public safety, and the integrity of our Nation’s borders.”

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