Washington and Lee Journal of Civil Rights and Social Justice

Volume 27 | Issue 2 Article 11

Spring 2021

It's My Party, and I'll Do What I Want to: Making the Case for Judicial Review of National Interest Waiver Denials

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Abstract

Politics and personal beliefs have become increasingly intertwined since the founding of the United States. Few issues have divided Americans more than immigration laws and policies. This Note advances the argument that when a noncitizen's application for a National Interest Waiver is denied, there must be some recourse. The current problem is exacerbated when the United States Citizenship and Immigration Services, on behalf of the Secretary of Homeland Security, denies a waiver for what appears to be racially or religiously motivated purposes. Judicial review in an Article III court is the most neutral forum of review that a noncitizen residing in the United States has if he or she feels the denial was, at best, not well-reasoned, and, at worst, violative of constitutional protections.

* Candidate for J.D., May 2021, Washington and Lee University School of Law. I would like to thank my wife Melissa for supporting me in every way through law school and inspiring me to write about U.S. immigration policy. I am grateful to my faculty Note advisor, Dean David Baluarte, for his refusal to accept anything other than my best work and for challenging me to focus my writing. I am indebted to Professor David Izakowitz for lending me so much of his time and expertise during the editing process. I extend my gratitude to Kimberly Grant, who told me about this topic and encouraged me to explore it further. I would also like to thank my Note Editor, Ashley Duckworth, for guiding me through the Note-writing process and for motivating me between deadlines. Finally, I want to thank Professors Runge and Houck for equipping me with legal research and writing skills and for their overwhelming kindness.

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I. Introduction

Without judicial review, executive agency officials—handpicked by a President in power—can make arbitrary and capricious decisions rooted in their political principles and biases.[1] When the United States Citizenship and Immigration Services

1. *See* R. Douglas Arnold, *Political Control of Administrative Officials*, 3 J. L., ECON, & ORG. 279, 279 (1987) (explaining how elected officials, while forced to delegate some decision-making authority to administrative agencies, try to ensure that their proxies make the same or similar decisions they would make themselves); *see also* 5 U.S.C. § 706(2)(A) (2018) ("The reviewing court shall—hold unlawful and set aside agency action, findings, and conclusions found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

(USCIS) denies a national interest waiver for an employment-based visa, neither the agency nor the Secretary of the Department of Homeland Security (DHS) needs to explain its decision-making process.[2] Since there are no defined statutory procedures for when to grant or deny a national interest waiver, Article I immigration judges have developed a three-prong test through case law, which USCIS has adopted as precedent.[3] Without arbitrary and capricious judicial review when an applicant has been denied a national interest waiver, USCIS can undo federal legislation—legislation that recognizes the benefit to the American public of granting waivers—all in the name of unbridled discretion.[4]

USCIS is a component of the Department of Homeland Security.[5] USCIS "is the federal agency that oversees lawful immigration to the United States."[6] Title 8 of the Code of Federal Regulations guides most of USCIS's decisions and procedures, as "it deals with 'Aliens[7] and Nationality,' as does Title 8 of the U.S.

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2. *See* 8 U.S.C. § 1153(b)(2) (2018) (describing how the Attorney General [(now the DHS Secretary)] may grant national interest waivers for employment-based visas when the applicant does not have the required pending job offer); *see also* Poursina v. USCIS, 936 F.3d 868, 871 (9th Cir. 2019) ("Congress's use of 'may'—rather than 'must' or 'shall'—brings along the usual presumption of discretion.").

3. *See* Dhanasar, 26 I. & N. Dec. 884, 884 (Dec. 27, 2016) ("(1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that he or she is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the job offer and labor certification requirements.").

4. *See* Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1242 (2016) ("When judges defer to agency interpretations, they abandon their office of independent judgment and engage in systematic bias, and these dangers, being clear violations of Article III and the Fifth Amendment, are far more serious than the difficulties of wrestling with open-ended statutes.").

5. *See About DHS*, DEP'T OF HOMELAND SEC. (July 5, 2019), https://www.dhs.gov/about-dhs (last updated Feb. 26, 2021) (noting that DHS's more than 240,000 employees focus on border security, cybersecurity, and other jobs to protect the United States) [perma.cc/R7ZA-SDZP].

6. *What We Do*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Apr. 12, 2018), https://www.uscis.gov/about-us/what-we-do (last updated Feb. 27, 2020) [perma.cc/LFE6-WSS2].

7. The term "alien" is a statutory one and is used throughout this Note for that reason alone. President Biden has proposed replacing this term with the word "noncitizen." *See* Nicole Acevedo, *Biden Seeks to Replace 'Alien' with Less 'Dehumanizing Term' in Immigration Laws*, NBC NEWS (Jan. 22, 2021),

Code."[8] Under 8 U.S.C. § 1153(b)(2), "Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability" may be granted employment-based immigrant visas by USCIS.[9] To be qualified, applicants must be

> [M]embers of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, *and whose services in the sciences, arts, professions, or business are sought by an employer in the United States*."[10]

Furthermore, pursuant to 8 U.S.C. § 1182, employers must procure a Department of Labor (DOL) certification of no adverse effects on U.S. labor markets or wages *before* they can hire any foreign nationals.[11] However, Congress and immigration case law have carved out exceptions and procedures for both the job-offer and labor certification requirements.[12] In addition to Congress and executive agencies, federal courts have also added to the discourse regarding the employment-based visa process.[13]

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https://www.nbcnews.com/news/latino/biden-seeks-replace-alien-less-dehumanizing-term-immigration-laws-n1255350 ("The bill . . . further recognizes America as a nation of immigrants . . . ."') [perma.cc/3UUV-K8LK].

8. *Title 8, Code of Federal Regulations*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sep. 10, 2013), https://www.uscis.gov/legal-resources/8-cfr/title-8-code-federal-regulations (last updated July 9, 2020) [perma.cc/PU2L-4XWB].

9. 8 U.S.C. § 1153(b)(2) (2018).

10. *Id.* § 1153(b)(2)(A) (emphasis added).

11. *See* 8 U.S.C. § 1182(a)(5)(A)(i) (2018) (requiring a DOL confirmation that there are not currently enough qualified, capable, and willing nationals to perform the job and that such employment will not adversely affect the wages of U.S. nationals similarly employed); *see also Dhanasar*, 26 I. & N. Dec. at 885 (explaining that the employer must test the labor market to identify qualified nationals, get the DOL to confirm there are none, obtain the labor certification, and then file a petition for an employment visa).

12. *See* 8 U.S.C. § 1153(b)(2)(B) (2018) (describing the Attorney General's role in granting job-offer waivers if he or she believes it is in the best interest of the United States); 8 C.F.R. § 204.5(k)(4)(ii) (2018) ("The director may exempt the requirement of a job offer, and thus of a labor certification, for aliens of exceptional ability in the sciences, arts, or business if exemption would be in the national interest."); *see also* Dhanasar, 26 I. & N. Dec. 884, 891 (Dec. 27, 2016) ("We emphasize that, in each case, the factor(s) considered must, taken together, indicate that on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.").

13. *See, e.g.*, ANA Int'l., Inc. v. Way, 393 F.3d 886, 890 (9th Cir. 2004)

In 2004, the Ninth Circuit held that federal courts could review employment-based visa revocation decisions.[14] In 2019, the same court, however, held that "USCIS's decision to deny a national interest waiver was a discretionary decision that the court lacked jurisdiction to review"[15] even though the statutory language for revoking approved visa petitions is similar to that of granting national interest waivers.[16] Writing for the Ninth Circuit, Judge O'Scannlain stated that the 2004 precedent is "an outlier among the federal circuit courts."[17] He went on to cite seven other circuits with conflicting decisions.[18] It may be easier to understand this change of opinion by understanding how immigration laws have evolved over time.

Part I of this Note explores the vast political history of U.S. immigration law. It demonstrates how the pendulum of morality has swung back and forth over time between pro- and anti-immigrant positions. This has commonly been in response to whichever party had a President in the White House or held a

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("Because the jurisdiction-stripping provision of IIRIRA that is at issue supersedes the jurisdiction-limiting provision in the APA, we decline to reach the question whether the APA precludes judicial review of visa revocation decisions.").

14. *See id.* at 889 ("We hold that the statute does not bar judicial review of a visa revocation decision . . . .").

15. *See* Poursina v. U.S. Citizenship & Immigr. Servs., 936 F.3d 868, 870 (9th Cir. 2019).

16. *See id.* at 876 (explaining that the *ANA International* holding should be extended narrowly and is inapplicable in this case); *compare* 8 U.S.C § 1155 (2018) ("The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title."), *with* 8 U.S.C. § 1153(b)(2)(B)(i) (2018) ("[T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.").

17. *See Poursina*, 936 F.3d at 875 (stating that the Ninth Circuit is now unwilling to rule contrary to a majority of federal appellate courts).

18. *See id.* (citing Bernardo ex rel. M & K Eng'g, Inc. v. Johnson, 814 F.3d 481, 484–85 (1st Cir. 2016); Mehanna v. U.S. Citizenship & Immigr. Servs., 677 F.3d 312, 314–15 (6th Cir. 2012); Green v. Napolitano, 627 F.3d 1341, 1345 n.3 (10th Cir. 2010); Abdelwahab v. Frazier, 578 F.3d 817, 821 (8th Cir. 2009); Jilin Pharm. USA, Inc. v. Chertoff, 447 F.3d 196, 204 (3d Cir. 2006); Holy Virgin Prot. Cathedral of the Russian Orthodox Church Outside Russia v. Chertoff, 499 F.3d 658, 661–62 (7th Cir. 2007); Ghanem v. Upchurch, 481 F.3d 222, 223–25 (5th Cir. 2007)).

majority in Congress.[19] This section does not aim to prove that many recent immigration laws are potentially racist or biased—that does not need proving.[20] Instead, it shows that immigration laws over the years have reflected the racial views of the President or Congress that created them and grounds the rest of the Note to state what is at stake if non-discretionary decisions are not afforded judicial review.

Part II analyzes the legislative history and purpose of sections 1153 and 1155 of the Immigration and Nationality Act.[21] This section presents legal theories and public policy rationales for section 1153(b)(2)(B)(i), national interest waivers.[22] It explores how USCIS exercises discretion in granting national interest waivers or issuing revocations and the role Article III courts have played in resolving specific legal disputes.[23] Additionally, it reviews available data to determine how second preference employment-based visas are allocated each year as well as the geographical regions of origin of applicants who receive them.

Part III advocates for the position that Article III courts should have the ability to review national interest waiver denials issued by USCIS.[24] In addition to highlighting the language of the statute, this Part shows that if the DHS Secretary had completely unbridled discretion to grant or deny national interest waivers, he

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19. *Infra* Part I.

20. *See, e.g.*, Fatima E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 419–26 (2011) (exploring explicit and implicit racial discrimination in immigration law throughout the history of the United States especially in relation to matters of national security); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L. J. 1111, 1113 (1998) ("[T]he Supreme Court has invoked the [plenary power] doctrine to permit the federal government, and at times the states, to discriminate against immigrants with the lawful right to remain permanently in this country.").

21. *Infra* Part II; *see also* 8 U.S.C. §§ 1153, 1155 (2018).

22. *See* 8 U.S.C. § 1153(b)(2) (2018) (describing procedures for granting exceptional ability work visas and the national interest waiver when an applicant does not have a pending offer of employment).

23. *Compare* ANA Int'l, Inc. v. Way, 393 F.3d 886, 889 (9th Cir. 2004) (holding that visa revocation decisions are reviewable by Article III courts), *with* Poursina v. USCIS, 936 F.3d 868, 875 (9th Cir. 2019) (holding that denials of national interest waivers by USCIS are discretionary and not reviewable); *see also infra* Part III.A (providing a history of the distribution of employment-based visas).

24. *Infra* Part III.

or she would undoubtedly make decisions based on the political or ideological views of the President. This completely defeats the legislative purpose of national interest waivers. There must be a system in place that follows objective standards that outlast any Administration and not the exercise of discretion based on the whims or racial and ethnic biases of a sitting President. The solution, this Note argues, is to make it clear that the judiciary has the power to review national interest waiver denials to provide applicants with a politically neutral forum of review by insuring application of objective standards set by Article I courts.

II. Part I: The Political History of U.S. Immigration Law

A. From the Beginning: Race, War, and Labor

The first immigration legislation in the United States was the Naturalization Act of 1790.[25] In the beginning, U.S. citizenship was reserved for free white men of good character who had resided in the country for at least two years.[26] Congress further defined citizenship by allowing only non-violent aliens to be naturalized with the passage of the Alien Friends Act of 1798.[27] This statute gave rise to the country's first deportation laws but was short lived and ineffective.[28] In anticipation of possible international conflict,

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25. *See U.S. Immigration Timeline*, HISTORY.COM (Dec. 21, 2018), https://www.history.com/topics/immigration/immigration-united-states-timeline (last updated May 14, 2019) ("Congress passes the first law about who should be granted U.S. citizenship.") [perma.cc/U2SX-G5DG]; *see generally* 1790 Naturalization Act, 2d Sess., ch. 3, 1 Stat. 103 (1790).

26. *See* 1790 Naturalization Act, 1 Stat. at 103 ("[A]ny alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof.").

27. *See* D'Vera Cohn, *How U.S. Immigration Laws and Rules Have Changed Through History,* PEW RES. CTR. (Sept. 30, 2015), https://www.pewresearch.org/fact-tank/2015/09/30/how-u-s-immigration-laws-and-rules-have-changed-through-history/ ("The Alien Friends Act authorized the president to imprison or deport any alien who was deemed dangerous to the U.S.") [perma.cc/47N4-2QJY].

28. *See* Matthew J. Lindsay, *Immigration, Sovereignty, and the Constitution of Foreignness*, 45 CONN. L. REV. 743, 760 n.83 (2013) ("The Act expired by its own terms after two years, in 1800, and no alien was ever deported under the Act.").

Congress passed the Alien Enemies Act of 1798 to allow the executive to imprison and deport male aliens aged 14 and older during times of war.[29]

Following the War of 1812, the United States continued asserting itself as an emerging power—eager to grow its size, influence, and economy.[30] This led to laws that improved travel conditions for immigrants sailing to the United States who were determined to secure readily available manufacturing jobs.[31] President Lincoln signed the Homestead Act in 1862, in part, to entice immigrants to join the United States military and help put an end to the Civil War.[32] As the war was ending, many employers were left in search of laborers.[33] Congress responded with the

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29. *See* An Act Respecting Alien Enemies, 5th Sess., ch. 66, 1 Stat. 577 (1798) ("[W]henever there shall be a declared war between the United States and any foreign nation or government, . . . all natives, citizens, denizens, or subjects of the hostile nation or government, . . . shall be . . . removed, as alien enemies."); *see also* Robert Bernheim, *Putting the "Alien" Back into Alienage Jurisdiction: Alienage Jurisdiction and "Stateless" Persons and Corporations after Traffic Stream*, 47 AZ. L. REV. 1003, 1015 (2005) ("A "denizen" was traditionally a classification between alien and naturalized citizen, somewhat akin to the modern permanent resident alien.").

30. *See* WILLIAM EARL WEEKS, JOHN QUINCY ADAMS AND AMERICAN GLOBAL EMPIRE 42 (2002) ("Changing economic conditions had inspired a new vision of American empire based not on free trade but on protection of certain sectors of the economy.").

31. *See, e.g.*, *U.S. Immigration Timeline*, *supra* note 25 ("[T]he United States passes the Steerage Act of 1819 requiring better conditions on ships arriving to the country. The Act also calls for ship captains to submit demographic information on passengers, creating the first federal records on the ethnic composition of immigrants to the United States."); *see also* WEEKS, *supra* note 30 ("The shortages caused by embargo and war had led to the growth of an extensive manufacturing sector in the United States and a sizable constituency that wanted it protected from foreign competition, once peace was restored.").

32. *See* Robbie J. Totten, *International Relations, Material and Military Power, and United States Immigration Policy: American Strategies to Utilize Foreigners for Geopolitical Strength, 1607 to 2012*, 29 GEO. IMMIGR. L. J. 205, 226 (2015).

> [T]he Homestead Act . . . offered 160 acres of free land to foreigners (assuming upon acceptance they filed a declaration for U.S. citizenry) who worked it for five years. Shortly after its passage, Lincoln sought to further induce immigration and urged legislators to devise a direct "system for the encouragement of immigration" to attract Europeans because they constituted a "source of national wealth and strength" required as war intensified.

33. *See* Deborah A. Ballam, *Exploding the Original Myth Regarding Employment-at-Will: The True Origins of the Doctrine*, 17 BERKELEY J. EMP. &

Immigration Act of 1864 to provide foreign workers with an easier path to the United States.[34] Congress continued developing the field of immigration law with the Naturalization Act of 1870, an amendment to the 1790 Act.[35] This amendment provided aliens of African descent with a path to citizenship, but Asians and Native Americans were still statutorily excluded from seeking citizenship.[36] Much of the immigration legislation to come would be crafted to limit citizenship to immigrants who did not disrupt social, economic, and political life in the United States.[37]

B. Expanding Exclusions: The Ailing, Awry, and Asian Need Not Apply

Postbellum America was a time of desired unity and change.[38] In an attempt to distance itself from what many perceived as a

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LAB. L. 91, 101 (1996) ("The economy also affected the demand for labor. Because of the 'boom and bust cycles of the lumbering industry,' workers 'were subject to frequent lay-offs, shortages of pay, and periods of marginal employment.'").

34. *See* Wesley Allen Riddle, *The Origins of Black Sharecropping*, 49 MISS. Q. 53, 70 (1995) ("[T]he Immigration Act of 1864 legalized entry of contract labor from Europe and Asia under terms worse than those of sharecropping."); *see also* Cohn, *supra* note 27 ("To address labor shortages due to the Civil War, this act made contracts for immigrant labor formed abroad enforceable by U.S. courts.").

35. *See* Lori A. Nessel, *Instilling Fear and Regulating Behavior: Immigration Law as Social Control*, 31 GEO. IMMIGR. L. J. 525, 531 n.29 (2017) ("Designed to increase the flow of immigrant laborers to the US to ameliorate the disruptions of the Civil War, the Act provided for the appointment of a commissioner on immigration and immigrant labor contracts with funded transportation to the U.S.").

36. *See* Michael Park, *Asian American Masculinity Eclipsed: A Legal and Historical Perspective of Emasculation Through U.S. Immigration Practices*, 8 MOD. AM. 5, 7 n.36 (2013) ("The Naturalization Act of 1870 amended the naturalization law to conform with the intent of the Reconstruction amendments and allowed 'aliens of African nativity and descent' to become naturalized citizens.").

37. *See, e.g.*, Angela M. Banks, *Precarious Citizenship: Asian Immigrant Naturalization 1918 to 1925*, 37 L. & INEQ. 149, 159 (2019) ("Racial requirements for naturalization represent implicit cultural assimilation requirements. These requirements use race as a category for evaluating values, norms, or practices rather than evaluating each individual candidate based on criteria that directly measure the desired values, norms, and practices.").

38. *See* David E. Guinn, *Constitutional Intent and Interpretation: A Response to Black's View of Constitutional Rights*, 11 GEO. MASON U. CIV. RTS. L. J. 225, 247 (2001) ("As noted by the Civil War historian Shelby Foote, before the

depraved past, Congress passed legislation to prevent "immoral" immigrants from entering the country.[39] The Page Act of 1875 was one of the "first federal law[s] [explicitly] *restricting* immigration in the nation's history."[40] This Act specifically prohibited the immigration of criminals, prostitutes, and anyone of Asian descent who contracted to perform "lewd and immoral" acts in the United States.[41] With the Page Act, Congress sought to establish a new American tradition of purity and strong family values.[42] The Immigration Act of 1891 perfectly expressed this attitude of righteousness by barring those aliens who would blemish America's new "reputation."[43] This Act also established a federal bureau of immigration, to be headed by a presidentially appointed superintendent.[44]

Civil War the country was spoken of as these United States (plural) and subsequent to the war it was referred to as the United States (singular).").

39. *See, e.g.*, Kitty Calavita, *Collisions at the Intersection of Gender, Race, and Class: Enforcing the Chinese Exclusion Laws*, 40 L. & SOC'Y REV. 249, 251 (2006) ("So encompassing was the stereotype of Chinese women as prostitutes that Congress presumed it had addressed their immigration with the Page Act of 1875 barring prostitutes.").

40. Kai Bartolomeo, *Immigration and the Constitutionality of Local Self Help: Esc*, 17 S. CAL. REV. L. & SOC. JUST. 855, 860 (2008) (emphasis added).

41. *See* Act of Mar. 3, 1875 (Page Law), ch. 141, 18 Stat. 477 (repealed 1974) (explaining that consul-generals were responsible for determining whether newly arrived immigrants had entered into forbidden contracts or had fled felony convictions).

42. *See* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 643 (2005)

> The text, legislative history, historical context, and enforcement of the Page Law indicate that one of its animating purposes was to prevent the Chinese practices of polygamy and prostitution from gaining a foothold in the United States. Thus, concern about preserving traditional American conceptions of marriage and family lies at the root of our federal immigration system.

43. *See* Immigration Act of 1891, 2d Sess., ch. 551, 26 Stat. 1084 (1891)

> [Excluding] from admission into the United States . . . [a]ll idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, [and] polygamists . . . .

44. *See id.*

> The superintendent of immigration shall be an officer in the Treasury Department, under the control and supervision of the Secretary of the Treasury, to whom he shall make annual reports in writing of the transactions of his office, together with such special reports, in writing,

The Immigration Act of 1903 added to the list of excluded aliens by barring epileptics, professional beggars, anarchists, and sex traffickers.[45] Congress may have "justified" excluding from the United States aliens who shared stigmas such as mental illnesses, contagious diseases, and criminal records for the sake of American morality or values.[46] However, Congress nearly abandoned its thinly veiled attempts to hide its real purpose of keeping America as white and as male as possible with other immigration legislation of the nineteenth and twentieth centuries.[47]

Many American workers viewed the arrival of Chinese immigrants as the reason for the country's failing economy in the late 1800s.[48] This mentality seeped into the legislature and generated the Chinese Exclusion Act of 1882.[49] Under this discriminatory law, Chinese laborers were banned from entering the United States for a decade.[50] The Geary Act extended this ban and imposed further restrictions and penalties on Chinese

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as the Secretary of the Treasury shall require.

45. *See* Cohn, *supra* note 27 ("It is the first U.S. law to restrict immigration based on immigrants' political beliefs."); *see generally* Immigration Act of 1903, 2d Sess., ch. 1012, 32 Stat. 1213–22 (1903).

46. *See, e.g.*, Pooja R. Dadhania, *Deporting Undesirable Women*, 9 U.C. IRVINE L. REV. 53, 60 (2018) ("In 1903, Congress passed a comprehensive piece of immigration legislation that strengthened the provisions of the Page Law for the same purpose—to protect American morality from noncitizen women.").

47. *See, e.g.*, Chinese Exclusion Act, 1st Sess., ch. 126, 22 Stat. 58 (1882) (banning Chinese laborers from entering the United States); Immigration Act of 1917, 2d Sess., ch. 29, 39 Stat. 874 (1917) (banning the immigration of people from almost every Asian country).

48. *See Chinese Exclusion Act*, HISTORY.COM (Aug. 24, 2018), https://www.history.com/topics/immigration/chinese-exclusion-act-1882 (last updated Sep. 13, 2019) (describing how many Americans attributed the decline in wages to the influx of Chinese immigrants to the United States following the California Gold Rush) [perma.cc/CHR2-YM3V].

49. *See* Chinese Exclusion Act, *supra* note 47, at 59 ("The coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof.").

50. *See id.* (penalizing vessel masters who knowingly brought Chinese laborers into the country with a year or less of jail time and a fine of up to $500 for each laborer); Kitty Calavita, *The Paradoxes of Race, Class, Identity, and "Passing": Enforcing the Chinese Exclusion Acts, 1882–1910*, 25 L. & SOC. INQUIRY 1, 1 (2000 ("Declaring that 'the Chinese are peculiar in every respect,' Congress passed the Chinese Exclusion Act in 1882 barring the entry into the United States of all Chinese laborers for a period of 10 years." (quoting 47 CONG. REC. 2597 (1882) (statement of Sen. Sherman)).

immigrants.[51] For example, beginning in 1892, Chinese immigrants were required to present proof of residency if questioned by law enforcement officers.[52] If a court found any person of Chinese heritage or ancestry unlawfully in the country, the Geary Act authorized a sentence of up to one year of hard labor.[53]

Data on the number of aliens excluded from entry to the United States during the early 1900s are somewhat misleading.[54] At any rate, many legislators felt that federal laws restricting classes of immigrants were not effectively limiting the overall number of immigrants entering the country—a desired result at the time.[55] It is true that the eruption of World War I temporarily reduced immigration to the United States.[56] Following the Great War, however, Congress passed legislation to limit the number of immigrant visas granted each year.[57] These limitations did not

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51. *See* An Act to Prohibit the Coming of Chinese Persons into the United States, 1st Sess., ch. 60, 27 Stat. 25–26 (1892) [hereinafter the "Geary Act"] (extending the Chinese Exclusion Act by ten years, permitting the deportation of Chinese immigrants following the conviction of any crime and allowing only white witnesses to testify to the immigrants' lawful residency).

52. *See id.* (explaining that once Chinese immigrants were arrested and presented proof of their right to be in the country, justices, judges or commissioners determined whether the proof was sufficient).

53. *See id.* (noting that after serving the sentence, Chinese immigrants would be deported).

54. *See Mass Immigration and WWI*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Feb. 4, 2016), https://www.uscis.gov/history-and-genealogy/our-history/agency-history/mass-immigration-and-wwi (last updated July 30, 2020) (describing how the Immigration Act of 1917 authorized medical screens at points of foreign departure and those found ineligible to embark were not technically considered excluded from entering the United States) [perma.cc/URF3-TSQN].

55. *See The Immigration Act of 1924 (The Johnson-Reed Act)*, U.S. DEP'T OF STATE, OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1921-1936/immigration-act ("The literacy test alone was not enough to prevent most potential immigrants from entering, so members of Congress sought a new way to restrict immigration in the 1920s.") [perma.cc/Z65Q-6NFN].

56. *See* Mass Immigration, *supra* note 54 ("Between 1900 and 1920 the nation admitted over 14.5 million immigrants.").

57. *See* Emergency Quota Act of 1921, 1st Sess., ch. 8, 42 Stat. 5 (1921)

> [T]he number of aliens of any nationality who may be admitted under the immigration laws to the United States in any fiscal year shall be limited to 3 per centum of the number of foreign-born persons of such nationality resident in the United States as determined by the United States census of 1910.

apply to government officials, short-term visitors, learned professionals, or immigrants from the Western Hemisphere.[58] Notably, the introduction of the country's first numerical quota system for immigration based on nationality did not permit issuance of visas for those from Asian countries.[59]

While not directly related, the Eighteenth Amendment's prohibition on liquor going into effect in 1920 and the Immigration Act of 1924 permanently cementing the immigration limits established by the Emergency Quota Act of 1921, many tried to smuggle alcohol or foreign nationals into the United States without authorization along the nation's borders.[60] As a result, the Labor Appropriation Act of 1924 authorized legislation that established the U.S. Border Patrol, whose primary purpose was to secure the borders between lawful points of entry.[61] It was by now obvious that those in power were determined to limit legal access to the United States to those most aligned with the nation's majority and to keep all others out through restrictive legislation or by physical force.[62]

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58. *See id.* (explaining that the Act did not apply to Mexico, Central or South America, the Caribbean islands, or Newfoundland).

59. *See* Cohn, *supra* note 27 (noting that the new quota system capped the total number of immigrant visas at 350,000 and did not reverse the ban on Asian immigrants).

60. *See Border Patrol History*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/border-security/along-us-borders/history (last updated July 21, 2020) (describing the intersection of these monumental pieces of legislation and their effect on the need to increase border patrol efforts) [perma.cc/Y9HU-KLDY].

61. *See id.* (chronicling the steady expansion of U.S. Border Patrol officers' duties to cover both the Mexican and Canadian borders).

62. *See* Greg Grandin, *The Border Patrol Has Been a Cult of Brutality Since 1924*, INTERCEPT (Jan. 12, 2019), https://theintercept.com/2019/01/12/border-patrol-history/ [perma.cc/8DSB-URU9]

> As a result [of the 1924 Immigration Act], new arrivals to the United States were mostly white Protestants. Nativists were . . . [unhappy] with the fact that Mexico, due to the influence of U.S. business interests that wanted to maintain access to low-wage workers, remained exempt from the quota system.

But see Doris Marie Provine, *Institutional Racism in Enforcing Immigration Law*, 8 NORTEAMÉRICA 31, 32 (2013) ("[M]uch of the pressure for exclusion comes from citizens themselves, not from the top, where commercial interests and international diplomacy may dictate a more cosmopolitan approach.").

C. The Swinging Party Pendulum: Majority Rules

Political parties in the United States have continually evolved since the Democratic-Republican Party became the Democratic Party in 1828, and the Whig Party emerged in 1834 in protest of President Jackson's leadership.[63] The Democratic party was originally pro-slavery and particularly focused on preserving national security.[64] The Republican Party, in contrast, was founded in 1854 in opposition to the westward expansion of slavery.[65] Allegiance to the Democratic Party was later divided by geography, with Northern Democrats supporting an anti-slavery presidential nominee, and Southern Democrats nominating a pro-slavery candidate at the 1860 National Convention.[66] It was this political divide that allowed the Republican Party's candidate, Abraham Lincoln, to win the 1860 presidential election.[67]

Today, the Democratic party is known for passing Civil Rights Era legislation and healthcare reform, calling itself the party of everyday Americans.[68] Conversely, the Republican Party generally

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63. *See* MICHAEL F. HOLT, THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR 33 (1999) ("Convinced of Andrew Jackson's unpopularity in the spring of 1834 . . . , national Whig leaders hoped to transplant their party to the states in 1834 and 1835 and build momentum for the 1836 presidential election by stressing . . . presidential despotism and Democratic depression."); *see also Democratic Party*, HISTORY.COM (Apr. 4, 2018), https://www.history.com/topics/us-politics/democratic-party (last updated Jan. 20, 2021) ("By the 1840s, Democrats and Whigs were both national parties, with supporters from various regions of the country, and dominated the U.S. political system; Democrats would win all but two presidential elections from 1828 to 1856.") [perma.cc/7JQG-CP8J].

64. *See, e.g.*, Akhil Reed Amar, *Symposium on America's Constitution: A Biography*, 59 SYRACUSE L. REV. 31, 43 (2008) (describing Democratic president Andrew Jackson as hating African Americans and Native Americans and pointing out that almost all national political leaders following the Civil War were once "slavocrats").

65. *See Republican Party*, HISTORY.COM (Apr. 4, 2018), https://www.history.com/topics/us-politics/republican-party (last updated Feb. 1, 2021) (describing as one of its platforms the Republican Party's goal to protect the rights of African Americans in postbellum America) [perma.cc/U3RD-W4BH].

66. *See id.* (explaining that the point of contention was whether slavery should expand into the newly acquired western territories).

67. *See id.* (noting, however, that Lincoln only won 40% of the popular vote).

68. *See Our History*, DEMOCRATIC NAT'L COMM., https://democrats.org/who-we-are/our-history/ ("For more than 200 years, our party has led the fight for civil rights, health care, Social Security, workers' rights, and women's rights.")

believes that government should be limited, taxes should rarely increase, and the border should be secured for safety and a robust economy.[69] As is almost always the case, it is the political parties' guiding principles that are reflected in national legislation when a party holds a majority in Congress and controls the White House.[70]

The first federal law restricting immigration to the United States was passed by a Republican-controlled Congress and signed into law by Republican president Ulysses S. Grant in 1875.[71] While carefully worded to suggest it was passed in the name of morality and American values, the Page Act also had strong, albeit indirect, economic motivations.[72] Nearly 70 years later, the Bracero Agreement of 1942 was enacted in part through executive order by Democratic President Franklin D. Roosevelt to provide direct economic benefit to the United States when agricultural workers were scarce during World War II.[73] Roosevelt also signed into law

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[perma.cc/N6WW-9S6H].

69. *See Principles for American Renewal*, REPUBLICAN NAT'L COMM., https://www.gop.com/principles-for-american-renewal (describing eleven principles ranging from healthcare and poverty to security and immigration reform) [perma.cc/XG46-NQ34].

70. *See* MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 158 (2012) (describing how the party in power eventually becomes the minority party as a result of passing too much legislation to meet its own political ends instead of responding to public preferences).

71. *See Congress Profiles*, U.S. HOUSE OF REPRESENTATIVES, HIST., ART & ARCHIVES, https://history.house.gov/Congressional-Overview/Profiles/43rd/ (noting that 203 Republicans and 89 Democrats made up the 43d Congress during President Grant's second term when the Page Act became law) [perma.cc/N6ND-PH8C]; *see also* Kai Bartolomeo, *Immigration and the Constitutionality of Local Self Help: Escondido's Undocumented Immigrant Rental Ban*, 17 S. CAL. REV. L. & SOC. JUST. 855, 860 (2008) ("Although relatively narrow in scope, the Immigration Act of 1875 barred the entry of 'cooly' laborers, prostitutes, and immigrants under 'contract or agreement . . . for lewd and immoral purposes.'").

72. *See* 2 CONG. REC., 4001, 4535 (1874) (statement of Republican Sen. Page).

> What would the gentlemen who favor a high protective tariff think if these Chinese should take the place of the thousands of women and girls who are now employed in the Middle and New England States, and thereby throw out of employment thousands of this class who depend upon their daily toil for a subsistence?

73. *See* James F. Creagan, *Public Law 78: A Tangle of Domestic and International Relations*, 7 J. INTER-AM. STUD. 541, 542 (1965) ("Over 200,000 workers entered the United States under the war-time program, and the benefits were such that neither government was anxious to terminate the program after the war. A new agreement was signed in February 1948.").

the Magnuson Act of 1943, which had been introduced in the House by a Democratic Representative two months prior.[74] This legislation effectively repealed the Chinese Exclusion Act and provided new benefits to Chinese immigrants.[75] If this were seen as a national security measure and not a subtle embracing of immigrants by the Democratic party, Roosevelt's death and Truman's succession to the presidency may have been the genesis of the new Democratic party.[76]

The end of World War II brought with it the displacement of millions of Europeans.[77] Republicans, holding a majority in both the Senate and the House, passed the Displaced Persons Act of 1948.[78] Given the timing of the legislation, President Truman felt

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74. *See Record of the 78th Congress (First Session)*, CQ PRESS, https://library.cqpress.com/cqresearcher/document.php?id=cqresrre1943121500 (describing how this legislation also established a quota system to permit roughly 105 Chinese immigrants to enter the United States annually) [perma.cc/QP24-DPMC]. Notably, the Democratic Party controlled both the Senate and the House at the time. *See Congress Profiles: 78th Congress (1943–1945)*, U.S. HOUSE REPRESENTATIVES, HIST., ARTS & ARCHIVES, https://history.house.gov/Congressional-Overview/Profiles/78th/ (noting that the 78th Congress was made up by 222 Democrats and 209 Republicans in the House) [https://perma.cc/H7LK-7J84]; *Party Division*, U.S. SENATE, https://www.senate.gov/history/partydiv.htm (indicating that there were 57 Democrats and 38 Republicans in the Senate) [perma.cc/4MQW-FJ4A].

75. *See Record of the 78th Congress (First Session)*, CQ PRESS, https://library.cqpress.com/cqresearcher/document.php?id=cqresrre1943121500 (describing how this legislation also established a quota system to permit roughly 105 Chinese immigrants to enter the United States annually) [perma.cc/QP24-DPMC].

76. *See id.* ("'I regard this legislation as important in the cause of winning the war and of establishing a secure peace,' the President said."); *see also* SEAN J. SAVAGE, TRUMAN AND THE DEMOCRATIC PARTY 1 (1997)

> Truman's chronic internal conflicts and political changes closely paralleled those of the Democratic party . . . . During his lifetime it became a northern- and urban-dominated majority party whose liberal policy objectives and philosophy were committed to using a big, activist, innovative federal government for reforming and regulating big business and focusing on the special policy interests of blacks, organized labor, and major cities.

77. *See, e.g.*, Imre Ferenczi, *Relocation of Europeans*, 237 ANNALS AM. ACAD. POL. & SOC. SCI. 172, 172 (1945) ("[T]he United Nations Relief and Rehabilitation Administration (UNRRA) estimated that there were between 20,000,000 and 30,000,000 Europeans who had been uprooted from their homes by the war pending their repatriation or settlement . . . . [A year later] the number was estimated to be around 20,000,000.").

78. *See* Displaced Persons Act of 1948, 2d Sess., ch. 647, 62 Stat. 1009–10

he had no option but to sign the bill into law.[79] Truman, a lifelong Democrat, issued a statement regarding his difficult decision not to veto the bill and to point out Congress's intentional efforts to discriminate against those in desperate need of life-saving assistance.[80] Just four months after he released this statement, Truman was elected to a second term.[81] Some took this victory to mean that a majority of Americans sided with Truman's views on immigration.[82]

In 1951, the Democratic-controlled House introduced what would become the Immigration and Nationality Act of 1952.[83] This prodigious Act codified all prior immigration and naturalization laws, extended limited immigration quotas to Asian countries, and

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(1948) (listing, among other limitations, that eligible persons must have become displaced on or after September 1, 1939 and on or before December 22, 1945, and must not become a public charge to the United States); *see also Refugee Timeline*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/refugee-timeline (last updated July 28, 2020) ("The law required that admitted displaced persons find a place to live in the U.S. and a job that would not replace a worker already in the country.") [perma.cc/UAT8-2D4C].

79. *See* Milan J. Kubic, *'Keep Refugees Out!' We've Been Here Before*, NEWSWEEK (Jan. 24, 2016), https://www.newsweek.com/refugees-been-here-418862 (explaining that the Republican-controlled Congress waited until the last day of the session to present President Truman with the bill to discourage him from vetoing what he believed was discriminatory legislation) [perma.cc/5HKU-8GG9].

80. *See* Harry S. Truman, *Statement by the President Upon Signing the Displaced Persons Act*, PUB. PAPERS (June 25, 1948), https://archive.org/details/4728453.1948.001.umich.edu/page/382 ("If the Congress were still in session, I would return this bill without my approval and urge that a fairer, more humane bill be passed. In its present form this bill is flagrantly discriminatory . . . . The 80th Congress certainly had ample time to produce a satisfactory bill.") [perma.cc/EU5T-YCC9].

81. *See* Kubic, *supra* note 79 ("That November, Truman, against all expectations, won a victory that not only kept him in office but also put the Democrats in charge of both the House and the Senate.").

82. *See id.* ("The astonishing victory in part reflected voters' growing recognition that Truman was right on the immigration issue.").

83. *See The Immigration and Nationality Act of 1952 as Amended Through 1961*, 1 INT'L MIGRATION DIG. 34, 34 (1964) [hereinafter "INA as Amended Through 1961"] ("This bill was distributed to the Immigration and Naturalization Service, the Department of State and a number of non-governmental agencies for study. On the basis of their suggestions and analyses a new bill . . . was introduced . . . by [democrat] Senator McCarran."). The Senate was also controlled by Democrats. *See Party Division*, *supra* note 74 (indicating that there were 54 Democrats and 42 Republicans in the Senate).

was the first immigration law to favor skilled immigrants over relatives of U.S. citizens.[84] There was no hiding progressive President Truman's views on the restrictive provisions of the Act, which he clearly demonstrated by vetoing the legislation.[85] Nonetheless, the Democratic-controlled Congress quickly overrode Truman's veto, and the bill became law.[86]

In 1965, the Democratic-controlled 89th Congress passed, and Democratic President Lyndon B. Johnson signed into law, an amendment to the Immigration and Nationality Act to eliminate the existing national origins quota system.[87] At the same time, this legislation also created the first numerical limitation on visas granted to citizens from the Western Hemisphere.[88] Applicants from these countries were required to prove that they were capable laborers or professionals and would not displace U.S. workers, which created a bureaucratic backlog of several years for successful applicants to receive their visas.[89]

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84. *See INA as Amended Through 1961*, *supra* note 83, at 37 ("First preference (50 percent of quota plus portions not used under second and third preferences) for aliens whose services are needed urgently in the United States because of their education training, experience or ability, and their spouses and children.").

85. *See The Truman Presidency and Immigration*, BOUNDLESS (June 4, 2017), https://www.boundless.com/blog/truman/ (explaining how President Truman found the law's national origins and racially constructed quotas to be discriminatory) [perma.cc/G99M-4RK5].

86. *See INA as Amended Through 1961*, *supra* note 83, at 35 ("[The House [voted] 278 to 113 [to override the veto] with 40 Representatives not voting, and . . . the Senate did likewise by a vote of 57 to 26, with 13 Senators not voting.").

87. *See Congress Profiles: 89th Congress (1965–1967)*, U.S. HOUSE OF REPRESENTATIVES, HIST., ARTS & ARCHIVES, https://history.house.gov/Congressional-Overview/Profiles/89th/ (stating Lydon Johnson won the election in a landside) [perma.cc/8V6X-Y9A5]; *Party Division*, U.S. SENATE, https://www.senate.gov/history/partydiv.htm (indicating that there were 68 Democrats and 32 Republicans in the Senate) [perma.cc/8APK-7Q28]; *see also* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965) (replacing the former quota system with a multi-category system of preference including that of skilled immigrants).

88. *See* Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U. S.F. L. REV. 307, 328 (2009) (noting that the Western Hemisphere received only 120,000 immigrant visas each year, and applicants were required to meet extensive labor certification requirements).

89. *See id.* ("Waivers of the labor certification requirement were available, however, for certain applicants, such as parents of U.S. citizen children.").

Fortieth U.S. President Ronald Reagan was a liberal Democrat before entering politics.[90] After changing parties, serving two terms as governor of California, and winning the Republican Presidential nomination in 1980, Reagan went on to win the presidency over Democratic incumbent Jimmy Carter with more than 90% of electoral votes.[91] Halfway through his second presidential term, Reagan benefited from a Republican majority in the Senate but still had to contend with a Democratic majority in the House.[92] At that time, Republican Senator Alan Simpson introduced a bill that would become the Immigration Reform and Control Act (IRCA) of 1986 in an attempt to curb the number of undocumented immigrants in the United States.[93] It was clear that the tides had once again turned from the Democratic policy geared towards helping displaced immigrants to a Republican-controlled Senate and Executive that wanted to drastically reduce the number of immigrants seeking work in the United States.[94] In fact,

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90. *See 40. Ronald Reagan*, WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/presidents/ronald-reagan/ (contributing Reagan's shift to the Republican Party to disputes over Communism in Hollywood during his time as president of the Screen Actors Guild) [perma.cc/6W9W-R2A3].

91. *See id.* ("Reagan won 489 electoral votes to 49 for President Jimmy Carter.").

92. *See Party Division*, U.S. SENATE, https://www.senate.gov/history/partydiv.htm (indicating that there were 53 Republicans and 47 Democrats in the Senate) [perma.cc/8APK-7Q28]; *Congress Profiles: 99th Congress (1985–1987)*, U.S. HOUSE OF REPRESENTATIVES, HIST., ARTS & ARCHIVES, https://history.house.gov/Congressional-Overview/Profiles/99th/ (noting that the 99th Congress was made up of 254 Democrats and 181 Republicans in the House) [perma.cc/H4ES-JHQ6].

93. *See* Steven Alan Elberg, *Agriculture and the Immigration Reform and Control Act of 1986: Reform or Relapse?*, 3 SAN JOAQUIN AGRIC. L. REV. 197, 197 (1993) ("The product of a turbulent history, IRCA expressed Congressional intent to control the entry of undocumented workers into the U.S. by prohibiting their employment, thereby removing the economic incentive for illegal immigration."); *see also* Pamela D. Nichols, *The United States Immigration Reform and Control Act of 1986: A Critical Perspective*, 8 NW. J. INT'L L. & BUS. 503, 517 (1987) (describing how the Act also created a special agricultural worker program to provide legal entry into, and possible legal status in, the United States for immigrant workers skilled at harvesting perishable crops).

94. *See* Nichols, *supra* note 93, at 197–98 ("The primary aim of IRCA was to reduce the overall influx of illegal refugees to the U.S., while asserting greater levels of management and control over the rising tide of foreign farm workers seeking employment in U.S. agriculture.").

the IRCA authorized sanctions on employers who hired undocumented noncitizens.[95]

III. Part II: EB-2 Immigrant Visas and National Interest Waivers

A. Employment-Based Immigrant Visas

The Immigration and Nationality Act (INA), as amended, covers regulation of matters relating to Aliens and Nationality in the United States.[96] The USCIS is the executive agency in charge of following the extensive immigration procedures outlined in the INA.[97] Title II of the Act focuses specifically on immigration to the United States.[98] An overwhelming majority of immigrants receive either family- or employment-based visas to gain entry to the United States.[99] Each fiscal year, running from October 1 to

95. *See id.* at 198 ("For the first time in U.S. history, employers who knowingly hire undocumented workers can be fined or jailed.").

96. *See* Immigration and Nationality Act, Pub. L. No. 82-414, § 101, 66 Stat. 163, 167 (1952) (codified as amended at 8 U.S.C. § 1101) [hereinafter "INA of 1952"] (dividing the Act into five titles: (I) General Provisions; (II) Immigration; (III) Nationality and Naturalization; (IV) Refugee Assistance; and (V) Alien Terrorist Removal Procedures); *see also The Immigration and Nationality Act of 1952 (The McCarran-Walter Act)*, U.S. DEP'T OF STATE, OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1945-1952/immigration-act ("It revised the 1924 system to allow for national quotas at a rate of one-sixth of one percent of each nationality's population in the United States in 1920. As a result, 85 percent of the 154,277 visas available annually were allotted to individuals of northern and western European lineage.") [https://perma.cc/A75S-HLG7].

97. *See What We Do*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Apr. 12, 2018), https://www.uscis.gov/about-us/what-we-do (last updated Feb. 27, 2020) (listing eight broad services provided by USCIS, including, most notably, managing the processes of family- and employment-based immigration) [perma.cc/P73T-RMT8].

98. *See id.* (showing provisions regulating the specific areas of immigration law ranging from worldwide levels of immigration, numerical limitations, and allocation of immigrant visas to asylum, inadmissible aliens, and admission of nonimmigrants to the U.S.).

99. *See* U.S. DEP'T STATE, TABLE III: IMMIGRANT VISAS ISSUED, FISCAL YEAR 2018, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2018AnnualReport/FY18AnnualReport%20-%20TableIII.pdf (noting that of the 533,557 consular immigrant visas allocated in fiscal year 2018, 475,512—or 89.12%—were family- or employment-based visas) [perma.cc/GCQ2-D8ED]; *see also The Immigrant Visa Process*, U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/us-visas/immigrate/the-immigrant-visa-process.html ("To be eligible to apply for an immigrant visa, a foreign citizen must

September 30, there are 140,000 immigrant visas available for foreign nationals who want to immigrate to the United States based on their specific professional skills, education, or training.[100]

As originally drafted, section 203 of the INA, codified in 8 U.S.C. § 1153, was called "Allocation of Immigrant Visas Within Quotas."[101] This section of the INA designated all immigrant visas to foreign nationals in preferential tiers—the first fifty percent of available visas were allocated for employment-based applicants; the next thirty percent were for immigrants who had U.S. citizen children; and the last twenty percent were for the spouses or children of lawful permanent residents (LPRs).[102] In 1957, section 203 was amended slightly to authorize an employment-based visa holder who was already in the United States to obtain immigrant visas for his or her spouse and children still in their home country.[103] In 1959, Congress changed "children" to "unmarried sons or daughters" to extend visa privileges to adult children while intentionally excluding married children and their spouses from obtaining immigrant visas through a parent's employment-based visa.[104]

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be sponsored by a U.S. citizen relative, U.S. lawful permanent resident, or a prospective employer, with a few exceptions . . . .") [perma.cc/8HQX-K7QQ].

100. *See Permanent Workers*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/working-united-states/permanent-workers (last updated Jan. 9, 2020) (listing the five employment-based immigrant visa categories, describing the labor certification requirement, and informing applicants that all aliens working in the United States may be subject to tax liabilities) [perma.cc/GFF7-2UJV]; *see also Glossary Term: Fiscal Year*, U.S. SENATE, https://www.senate.gov/reference/glossary_term/fiscal_year.htm (defining the term 'fiscal year' as an accounting period for the federal government) [perma.cc/S7TX-CZQE]. This number also includes adjustment of status cases where foreign nationals are never issued immigrant visas.

101. *See* INA of 1952, *supra* note 96, at 178 (noting that the current code section has been amended to remove 'Within Quotas' from the title).

102. *See id.* at 178–79 (indicating that unused visas in any of the three categories would be allocated to the siblings and children of U.S. citizens so long as no more than 25% of all available immigrant visas went to such purpose).

103. *See* An Act to Amend the INA, and for Other Purposes, Pub. L. No. 85-316, 71 Stat. 639 (1957) (amending the language of the 1952 statute that only allowed such visas if the spouse or children were traveling with the immigrant visa holder at the time of entry to the United States).

104. *See* An Act to Provide for the Entry of Certain Relatives of U.S. Citizens and Lawfully Resident Aliens, Pub. L. No. 86-363, 73 Stat. 644 (1959) (adding, in addition, the requirement that spouses and unmarried sons or daughters could receive non-quota immigrant visas only if they had retained their relationship to

In 1965, section 203 was overhauled to give preference to family-based visa applicants over employment-based petitioners.[105] This amendment re-designated how the available immigrant visas would be allocated with the first twenty percent going to the unmarried sons or daughters of U.S. citizens.[106] The next twenty percent went to the spouses or unmarried sons or daughters of LPRs.[107] The next ten percent were for exceptional ability employment-based petitioners.[108] Then ten percent were re-designated for married sons or daughters of U.S. citizens.[109] The following twenty-four percent were for siblings of U.S. citizens, followed by ten percent for immigrants who could perform skilled or unskilled labor when such laborers were at a shortage in the United States.[110] The final six percent were then re-designated for asylum-based petitioners.[111] The 1976 amendments to section 203 introduced the pending offer of employment requirement for employment-based visas and required U.S. citizens to be at least twenty-one years old to sponsor foreign family members applying for family-based visas.[112]

Today, there are five categories of employment-based visas, each designated with a number ranging from EB-1 to EB-5.[113] Each

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the petitioner at the time of their arrival to the United States).

105. *See* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 912, 913 (1965) (specifying how visas would be allotted to those aliens who were subject to the numerical limitations).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *See id.* (authorizing up to half of the 6% asylum visas to be given to aliens who had been living in the United States continuously for at least two years and mandating that waiting lists be maintained under the authority of the Secretary of State for all visa tiers).

112. *See* Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2705 (1976) (requiring, in addition, aliens present in the United States to apply for any immigrant visa for which they become eligible within one year of such eligibility or risk forfeiting such procedural right).

113. *See Permanent Workers*, *supra* note 100 (providing a general description of each employment-based visa preference and indicating that the First Preference visas are further divided into three subcategories based on extraordinary ability, outstanding professors and researchers, and multinational managers or executives). EB-1 preference is reserved for persons of extraordinary ability; EB-2 is generally for those with advanced degrees or of exceptional ability;

of the first three categories, EB-1 to EB-3, is allotted no more than 28.6% of the available employment-based visas allocated worldwide annually.[114] The EB-4 and EB-5 visas, in contrast, each have a limit of 7.1% of worldwide employment-based visas allocated each year.[115] Petitioners may apply at a U.S. consulate in their home country for an employment-based immigrant visa or, if in the United States, to adjust from non-immigrant to immigrant status.[116] The second preference or category of permanent worker visas, and the focus of this Note, "is reserved for persons who are members of the professions holding advanced degrees or for persons with exceptional ability in the arts, sciences, or business."[117] During the 2018 fiscal year, which ended on September 30, 2019, there were 40,641 EB-2 visas allocated worldwide.[118] This was a 3.91% increase from 2016, a 17.18% decrease from 2014, and a 19.67% decrease from 2012.[119]

EB-3 is reserved for skilled workers; EB-4 is for special immigrants; and EB-5 is reserved for business investors. *Id.*

114. 8 U.S.C. §§ 1153(b)(1)–(3) (2018); *see also* CONG. RSCH. SERV., PERMANENT EMPLOYMENT-BASED IMMIGRATION AND THE PER-COUNTRY CEILING 4 (Dec. 21, 2018), https://fas.org/sgp/crs/homesec/R45447.pdf (noting that all unused EB-1 visas are reallocated to EB-2 petitioners; unused EB-2 visas are reallocated to EB-3 petitioners; and unused EB-3 visas are reallocated to EB-4 petitioners) [perma.cc/2KMX-E6GW].

115. *See id.* §§ 1153(b)(4)–(5).

116. *See* CONG. RSCH. SERV., *supra* note 114, at 3 ("Adjusting status refers to the process of changing from a temporary (nonimmigrant) status (e.g., F-1 student visa, H-1B skilled temporary worker visa) to LPR status.").

117. *Permanent Workers*, *supra* note 100; *see also* Elizabeth A. McGeary, *The Reconciliation of Prominence and Exceptional Ability: A Necessary Step Toward a Coordinated Immigration Policy*, 30 VA. J. INT'L L. 977, 981 (1990) ("Neither the statutory amendment nor the congressional debates preceding the enactment of the amendment adequately defined the meaning of 'exceptional ability;' however, words like 'skills and talents, outstanding talents,' and 'knowledge and unique skills' were used by various legislators to describe the immigrants who would qualify for third preference.").

118. *See* U.S. DEP'T OF STATE, TABLE V (PART 2): IMMIGRANT VISAS ISSUED AND ADJUSTMENTS OF STATUS SUBJECT TO NUMERICAL LIMITATIONS, FISCAL YEAR 2018, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2018AnnualReport/FY18AnnualReport%20-%20TableV-Part2.pdf [hereinafter "2018 EB-2 Visa Statistics"] (noting that 2,221 visas went to Africa, 22,900 went to Asia, 8,388 to Europe, 3,890 to North America, 340 to Oceania, and 2,902 went to South America) [perma.cc/5S43-THXJ].

119. *See* U.S. DEP'T OF STATE, TABLE V (PART 2): IMMIGRANT VISAS ISSUED AND ADJUSTMENTS OF STATUS SUBJECT TO NUMERICAL LIMITATIONS, FISCAL YEAR 2016, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2016Ann

B. National Interest Waivers

In 1991, Congress authorized national interest waivers of the job-offer and Permanent Labor Certification (labor certification) requirements for certain foreign nationals holding advanced degrees or of exceptional ability.[120] Congress has defined aliens of exceptional ability as applicants who can show at least three of the following:

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
> (C) A license to practice the profession or certification for a particular profession or occupation;
> (D) Evidence that the alien has commanded a salary, or other renumeration for services, which demonstrates exceptional ability;
> (E) Evidence of membership in professional associations; or
> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental

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ualReport/FY16AnnualReport-TableV-Part2.pdf [hereinafter "2016 EB-2 Visa Statistics"] (indicating that there were 39,111 EB-2 visas allocated) [perma.cc/JUC3-9YXK]; U.S. DEP'T OF STATE, TABLE V (PART 2): IMMIGRANT VISAS ISSUED AND ADJUSTMENTS OF STATUS SUBJECT TO NUMERICAL LIMITATIONS, FISCAL YEAR 2014, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2014AnnualReport/FY14AnnualReport-TableV.pdf [hereinafter "2014 EB-2 Visa Statistics"] (indicating that there were 49,071 EB-2 visas allocated) [perma.cc/3AKH-DUWF]; U.S. DEP'T OF STATE, TABLE V (PART 2): IMMIGRANT VISAS ISSUED AND ADJUSTMENTS OF STATUS SUBJECT TO NUMERICAL LIMITATIONS, FISCAL YEAR 2012, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2012AnnualReport/FY12AnnualReport-TableV-PartII.pdf [hereinafter "2012 EB-2 Visa Statistics"] (indicating that there were 50,593 EB-2 visas allocated) [perma.cc/S4A2-RKCZ].

120. *See* Employment-Based Immigrants, 56 Fed. Reg. 60,897, 60,900 (Nov. 9, 1991) (to be codified at 8 C.F.R. pt. 204) ("The Service has consulted with Congressional sources and the Department of Labor on this issue, and all parties are in agreement that exemption from, or waiver of, the job offer constitutes waiver of the labor certification. The final rule reflects this determination.").

entities, or professional or business organizations.[121]

In 2014, Secretary of Homeland Security Jeh Johnson, appointed by Democratic President Barack Obama, directed USCIS to increase the number of national interest waivers granted each year in order to boost the United States' economy.[122]

To determine if a petitioner qualifies for a national interest waiver, immigration judges turned to self-made protocols, now adopted by USCIS, as Congress has not passed legislation to guide the administration of the waivers.[123] EB-2 visa applicants seeking a waiver must demonstrate by a preponderance of the evidence:

> (1) [T]hat the foreign national's proposed endeavor has both substantial merit and national importance;
> (2) that the foreign national is well positioned to advance the proposed endeavor; and
> (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.[124]

Prior to this framework, the governing standard, also a precedent decision, required applicants to be qualified for a job of "substantial intrinsic merit," whose benefit was "national in scope," and where granting the national interest waiver would be more beneficial to the United States than requiring the labor certification.[125] One reason for the change was to clarify and

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121. Petitions for Employment-Based Immigrants, 8 C.F.R. § 204.5(k)(3)(ii) (2020).

122. *See* Memorandum from Sec'y of Homeland Sec. Jeh Johnson to U.S. Citizenship & Immigr. Servs. Dir. León Rodríguez 3 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_business_actions.pdf ("To enhance opportunities for foreign inventors, researchers, and founders of start-up enterprises wishing to conduct research and development and create jobs in the United States, I hereby direct USCIS to implement two administrative improvements to our employment-based immigration system . . . .") [perma.cc/3LRK-YRM7].

123. *See* Dhanasar, 26 I. & N. Dec. 884, 886 (Dec. 27, 2016) ("Undefined by statute and regulation, 'national interest' is a broad concept subject to various interpretations.").

124. *Id.* at 889.

125. *See* N.Y. State Dep't Transp., 22 I. & N. Dec. 215, 217–18 (Aug. 7, 1998) ("The labor certification process exists because protecting the jobs and job opportunities of U.S. workers having the same objective minimum qualifications as an alien seeking employment is in the national interest.").

prevent too narrow an interpretation of the previous three-pronged test.[126]

C. Who Is This Affecting?

While data showing the number of national interest waivers granted and denied each year are not available, the Department of State does publish the number of EB-2 visas each foreign state receives annually.[127] If national interest waivers are necessary for some EB-2 petitioners to apply for their employment-based visas, a worldwide survey of EB-2 visa allocations by continent may demonstrate potential biases in visa allocations.[128] Table 1 illustrates the percentage of EB-2 visas allocated to petitioners from each of the six inhabited regions as defined by USCIS—Africa, Asia, Europe, North America, Oceania, and South America—from fiscal years 2012 to 2018.[129] This table does not show the denial rates of EB-2 visas or national interest waivers from each region. If Congress—or the American people—sees only these statistics, the Executive will be free to make a case that there are absolutely no biases or preferential treatment when USCIS grants or denies national interest waivers.[130]

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126. *See Dhanasar*, 26 I. & N. Dec. at 887

> [T]he first prong has held up under adjudicative experience, the term 'intrinsic' adds little to the analysis . . . . Similarly, the second prong has caused relatively few problems in adjudications, but occasionally the term 'national in scope' is construed too narrowly by focusing primarily on the geographic impact of the benefit.

127. *See Visa Statistics*, U.S. DEP'T STATE, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics.html ("[P]roviding statistical information on immigrant and non-immigrant visa issuances by consular offices, as well as information on the use of visa numbers in numerically limited categories.") [perma.cc/7YFK-HR44].

128. *See infra* Table 1 (showing a significantly greater percentage of visas allocated to Asia compared to all other regions).

129. *See Visa Statistics*, *supra* note 127 (listing visa statistics from fiscal years 2000 to 2019).

130. *See* Jonathan K. Stubbs, *Perceptual Prisms and Racial Realism: The Good News about a Bad Situation*, 45 MERCER L. REV. 773, 823 (1994) ("One can use one's perceptions to see what one wants to see, be blind to what one wishes not to see, and use what one sees like a politician uses statistics; that is, one can make statistics 'say' what one wants.").

Table 1

Percentage of EB-2 Visa Allocations Per Region for Fiscal Years 2012 to 2018						
Region/ Year	Africa	Asia	Europe	North America	Oceania	South America
2012[131]	*2.77*	*74.71*	*10.93*	*5.58*	*0.38*	*5.63*
2013[132]	*3.71*	*67.74*	*14.54*	*7.82*	*0.50*	*5.69*
2014[133]	*2.36*	*78.48*	*10.26*	*4.89*	*0.36*	*3.65*
2015[134]	*4.04*	*61.83*	*18.78*	*8.97*	*0.73*	*5.65*
2016[135]	*4.64*	*57.84*	*19.65*	*9.83*	*0.65*	*7.39*

131. *See id.* (same).

132. *See* U.S. DEP'T OF STATE, TABLE V (PART 2): IMMIGRANT VISAS ISSUED AND ADJUSTMENTS OF STATUS SUBJECT TO NUMERICAL LIMITATIONS, FISCAL YEAR 2013, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2013AnnualReport/FY13AnnualReport-TableV-PartII.pdf [hereinafter "2013 EB-2 Statistics"] (listing 2,354 EB-2 visas issued for the region of Africa, 42,986 for Asia, 9,228 for Europe, 4,965 for North America, 315 for Oceania, and 3,613 for South America) [perma.cc/K6K5-F8TG].

133. *See* 2014 EB-2 Visa Statistics, *supra* note 119 (listing 1,158 EB-2 visas issued for Africa, 38,512 for Asia, 5,034 for Europe, 2,402 for North America, 175 for Oceania, and 1,790 for South America).

134. *See* U.S. DEP'T OF STATE, TABLE V (PART 2): IMMIGRANT VISAS ISSUED AND ADJUSTMENTS OF STATUS SUBJECT TO NUMERICAL LIMITATIONS, FISCAL YEAR 2015, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2015AnnualReport/FY15AnnualReport-TableV-Part2.pdf [hereinafter "2015 EB-2 Statistics"] (listing 1,796 EB-2 visas issued for Africa, 27,500 for Asia, 8,353 for Europe, 3,989 for North America, 326 for Oceania, and 2,515 for South America) [perma.cc/5CHH-J4HJ].

135. *See* 2016 EB-2 Visa Statistics, *supra* note 119 (listing 1,814 EB-2 visas issued for Africa, 22,620 for Asia, 7,687 for Europe, 3,845 for North America, 255 for Oceania, and 2,890 for South America).

2017[136]	*5.08*	*54.64*	*21.18*	*10.18*	*0.79*	*8.13*
2018[137]	*5.46*	*56.35*	*20.64*	*9.57*	*0.84*	*7.14*

IV. Part III: Why Judicial Review Is Vital

A. Granting National Interest Waivers Is Not Discretionary

Prior to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the INA clearly allowed Article III courts to review final orders of deportation and exclusion.[138] District courts were permitted to review just about any final decisions that were made during deportation proceedings often by way of habeas petitions.[139] The United States Supreme Court held, for example, that the "refusal by the Attorney General to grant a suspension of deportation is one of those 'final orders of deportation' of which direct review by Courts of Appeals is authorized under s[ection] 106(a) of the Act."[140]

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136. *See* U.S. DEP'T OF STATE, TABLE V (PART 2): IMMIGRANT VISAS ISSUED AND ADJUSTMENTS OF STATUS SUBJECT TO NUMERICAL LIMITATIONS, FISCAL YEAR 2017, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2017AnnualReport/FY17AnnualReport%20-TableV-PartII.pdf [hereinafter "2017 EB-2 Statistics"] (listing 2,032 EB-2 visas issued for Africa, 21,836 for Asia, 8,462 for Europe, 4,068 for North America, 315 for Oceania, and 3,248 for South America) [perma.cc/BXA2-R5DD].

137. *See* 2018 EB-2 Visa Statistics, *supra* note 118 (listing 2,221 EB-2 visas issued for the region of Africa, 22,900 for Asia, 8,388 for Europe, 3,890 for North America, 340 for Oceania, and 2,902 for South America).

138. *See* David B. Pakula & Lawrence P. Lataif, *Judicial Review of Administrative Immigration Decisions: Can the Doctrine of "Ejusdem Generis" Save It From Extinction?*, 78 FLA. BAR J. 32, 33 (2004) ("Section 106(a) [of the INA] granted exclusive jurisdiction to the U.S. courts of appeal to review final orders of deportation. Section 106(b) made habeas corpus the exclusive vehicle for review of exclusion orders (decisions denying entry into the U.S.).").

139. *See id.* at 33 n.5 ("Pre-IIRIRA cases relied on 8 U.S.C. §1329 as conferring subject matter jurisdiction on the district courts to review the INS' predeportation [*sic*] proceeding immigration decisions. The IIRIRA amended 8 U.S.C. §1329 to limit its applicability to suits brought by the government.").

140. Foti v. Immigr. & Naturalization Serv., 375 U.S. 217, 221 (1963).

The IIRIRA limited judicial review by providing that

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of Title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.[141]

It is also clear that this Act explicitly denies judicial review of all *discretionary* decisions made by the DHS Secretary.[142]

There are some circumstances where immigrants in the United States who are harmed by executive agency decisions are afforded judicial review.[143] It is not clear whether the plenary powers doctrine, which would preclude judicial review of executive agency decisions based on statutory authorizations, allows Congress to classify aliens by race when drafting legislation.[144] Some legal scholars have argued that the plenary power should be reexamined because the rationales the Supreme Court relied on in originating the doctrine are flawed or no longer exist.[145] At any

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141. 8 U.S.C. § 1252(b)(9) (2018).

142. *See id.* § 1252(g) ("[N]o court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter."); *see also* cases cited *infra* note 164 (describing due process protections afforded to immigrants within the United States).

143. *See, e.g.*, Margaret Mikyung Lee, *An Overview of Judicial Review of Immigration Matters*, CONG. RSCH. SERV. 4 (Sept. 11, 2013) (citing 8 U.S.C. § 1252(a)(1), which authorizes judicial review of final orders of removal).

144. *See* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 9 (1998) ("Although the . . . [INA] generally prohibits discrimination on the basis of 'race, sex, nationality, place of birth, or place or residence,' the [IIRIRA] created a substantial exception, authorizing the State Department to use race (as well as religion, sex, and other factors) in establishing visa application procedures and locations.").

145. *See, e.g.*, *id.* at 10 ("[T]he cases that created the plenary power doctrine suggest racial bias on the part of the Justice Department that prosecuted the cases and the Justices of the Supreme Court who decided them. The . . . cases may have been decided as they were because of the race of the aliens involved.").

rate, the Supreme Court has not closed the door on judicial review for immigrants denied entry to or ordered removed from the United States.[146]

Title 8 U.S.C. § 1155 authorizes the Secretary of Homeland Security to revoke an immigrant visa that he or she had previously approved so long as there is good and sufficient cause.[147] While this authority is found in section 205 of the amended INA, it was originally authorized in section 206 when the Act first passed.[148] Section 206 allowed the *Attorney General* to revoke an approved visa so long as he or she mailed a notice of revocation to the petitioner's last known address and the Secretary of State effectively notified the foreign national before she left her home country en route to the United States.[149] Today, however, the Secretary of Homeland Security is not statutorily required to ensure that visa holders are notified that their validly authorized visas have been revoked, barring the immigrants from entering the country.[150]

If an employment visa is granted and subsequently revoked by the Secretary of Homeland Security, Article III courts are allowed to review the Secretary's decision for abuse of discretion.[151] In *ANA International*, the Ninth Circuit was presented with the question of "whether the Attorney General's decision to revoke a visa pursuant to 8 U.S.C. § 1155 [was] barred from judicial

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146. *See* Fiallo v. Bell, 430 U.S. 787, 793 n.5 (1977)

> Our cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens, and there is no occasion to consider in this case whether there may be actions of the Congress with respect to aliens that are so essentially political in character as to be nonjusticiable.

147. *See* 8 U.S.C. § 1155 (2018) ("Such revocation shall be effective as of the date of approval of any such petition.").

148. *See* INA of 1952, *supra* note 96, at 181 (maintaining the same section title of "Revocation of Approval of Petitions" in both the original and current versions of the Act).

149. *See id.* (noting that the authority to revoke an approved visa now belongs to the Secretary of Homeland Security and not the Attorney General).

150. *See* § 1155 ("Such revocation shall be effective as the date of approval of any such petition.").

151. *See, e.g.*, ANA Int'l, Inc. v. Way, 393 F.3d 886, 889 (9th Cir. 2004) (holding that visa revocation decisions are reviewable by Article III courts).

review . . . ."[152] The court held that "the statute does not bar judicial review of a visa revocation decision authorized by § 1155."[153] The deciding factor in the court's analysis was Congress's inclusion of the phrase "for . . . good and sufficient cause" paired with the—at that time—Attorney General's authority to revoke the approval of an immigrant visa.[154] The day after this case was decided, Congress amended 8 U.S.C. § 1155 to replace "Attorney General" with "Secretary of Homeland Security."[155] Congress did not, however, alter the contingent language of the authority to revoke previously approved visas.[156]

Title 8 U.S.C. § 1153(b)(2)(B)(i), which gives the Secretary of Homeland Security the power to waive the job-offer and labor certification requirements for EB-2 visa petitioners, contains similarly contingent language.[157] Article III immigration judges have a three-pronged test to determine whether or not an applicant meets the criteria for a national interest waiver, which USCIS has adopted as the criteria for its decisions on national interest waiver cases.[158] Despite this, the Ninth Circuit, in 2019, held that the Secretary's decision to grant or deny a national interest waiver is purely discretionary and not subject to judicial review of any kind.[159] In *Poursina*, an Iranian citizen with a doctoral degree in

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152. *Id.* at 888.

153. *Id.* at 889.

154. *See id.* at 893–94 ("To put a purely subjective construction on the statute is to render the words 'good and sufficient cause' meaningless. Congress did not have to put those words there, and in many other instances it did not.").

155. *See* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004) (striking, in addition, the final two sentences of the section, which required effective notice sent to the petitioner to validate the revocation).

156. *See* 8 U.S.C. § 1155 (2018) (keeping the phrase "for what he deems to be good and sufficient cause" in the code section).

157. *See* 8 U.S.C. § 1153(b)(2)(B)(i) (2018) ("[T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.").

158. *See* Dhanasar, 26 I. & N. Dec. 884, 889 (Dec. 27, 2016) (listing the three prongs); *see also infra* Part III.B (describing the evolution of the three-part test as developed through case law).

159. *See* Poursina v. USCIS, 936 F.3d 868, 871 (9th Cir. 2019) ("Congress's use of 'may'—rather than 'must' or 'shall'—brings along the usual presumption of discretion.").

mechanical engineering sought a national-interest waiver to adjust from nonimmigrant student status to permanent resident.[160] When USCIS denied Poursina's waiver and he appealed the decision, the Administrative Appeals Office simply stated that the applicant failed to demonstrate that granting the waiver was in the national interest of the United States.[161] While Poursina sought appellate relief based on procedural defects, it is unclear exactly why USCIS denied his request for a national-interest waiver or whether their decision was based on issues of national security or Poursina's race.[162] Whatever their reasoning was, if left unchecked, the DHS Secretary and USCIS are free to discriminate against national interest waiver applicants based on their immutable traits.[163]

B. Competing National Interests

The Supreme Court has long held that the Due Process and Equal Protection rights of the Fifth and Fourteenth Amendments apply to all persons located within the borders of the United States regardless of their citizenship or legal status.[164] Aliens located

160. *See id.* at 869–70 (seeking an adjustment of status since he applied from within the United States after his student visa expired).

161. *See id.* at 870 (resulting in dismissal of Poursina's case).

162. *See id.* (describing the procedural history of the case without mention of whether USCIS allowed Poursina to supplement his petition with further evidence that he met the *Dhanasar* factors).

163. *Cf.* Reno v. Am.-Arab Anti-Discrimination Comm., 527 U.S. 471, 488 (1999) ("[A]n alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation.").

164. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) ("It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."); Mathews v. Diaz, 426 U.S. 67, 77 (1976) (holding that the Fifth and Fourteenth Amendments apply to aliens within the jurisdiction of the United States even if in the country unlawfully); *see also* U.S. CONST. amend. V ("No *person* shall be . . . deprived of life, liberty, or property, without due process of law.") (emphasis added); U.S. CONST. amend. XIV, § 1 ("[N]or deny to any *person* within its jurisdiction the equal protection of the laws.") (emphasis added); Plyler v. Doe, 457 U.S. 202, 202 (1982) ("Whatever his status under the immigration laws, an alien is a 'person' in any ordinary sense of that term.").

outside the United States, on the other hand, are not explicitly afforded any protections by the U.S. Constitution.[165]

In 1950, the Court, interpreting Article II powers, held that

> [T]he decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General. The action of the executive officer under such authority is final and conclusive. Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.[166]

However, when the rationales for the admission *and* exclusion or removal from the United States of an alien who fulfills the case law requirements for a national interest waiver are based on the concept of what is best for the country, the political biases of the executive officer in charge should not be the tiebreaker.[167]

Even if the DHS Secretary does not hold personal biases against certain classes of immigrants, he or she is almost always making decisions under the President's command.[168] When an executive officer defies the President, the officer is likely to be fired or forced to resign.[169] When a sitting U.S. President makes no effort

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165. *See* Johnson v. Eisentrager, 339 U.S. 763, 785 (1950) (holding that the Fifth Amendment's due process protections do not apply to aliens outside of the United States); United States v. Verdug-Urquidez, 494 U.S. 259, 271 (1990) (finding that the Fourteenth Amendment does not apply to nonresident aliens located abroad).

166. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950).

167. *Compare* 8 U.S.C. § 1153(b)(2)(B)(i) (2018) (authorizing the Attorney General to grant national interest waivers if in the interest of the United States), *with* 8 U.S.C. § 1182 (2018) (permitting the Attorney General to deem aliens inadmissible to the United States based on reasonable beliefs).

168. *Cf.* Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 867 (2012) ("The White House's influence on agency decision making is more likely to capture the strength of competing interest group pressures, but existing inequalities render an unregulated pluralistic conception of the administrative process normatively unattractive.").

169. *See, e.g.*, Peter Baker, Katie Benner, & Michael D. Shear, *Jeff Sessions Is Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html (describing Sessions' forced resignation for recusing himself from the Russia inquiry and Trump's immediate appointment of a loyalist as interim Attorney

to hide his biases and prejudices against certain immigrants—especially those from Latin America, Africa, and the Middle East—it is easy to connect the dots.[170] Both candidate and President Donald Trump relied heavily on social media to convey anti-immigrant policies and sentiments.[171] Some have even referred to Trump's immigration policies as selective xenophobia.[172] An illustration of this is the fact that former President Trump signed multiple Executive Orders to limit, restrict, and, in some cases, ban immigration from economically weak or predominantly Muslim countries.[173] To make this point

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General) [perma.cc/UMN7-7KMY].

170. *See, e.g.*, Leighton Akio Woodhouse, *Trump's 'Shithole Countries' Remark is at the Center of a Lawsuit to Reinstate Protections for Immigrants*, INTERCEPT (June 28, 2018), https://theintercept.com/2018/06/28/trump-tps-shithole-countries-lawsuit/ ("When President Donald Trump referred to Haiti, El Salvador, and an assortment of African nations as 'shithole countries' during a closed-door meeting with congressional leaders and Cabinet members in January, he may have unwittingly planted the seed for the unraveling of a critical part of his deportation agenda.") [perma.cc/V7X9-KQDL]; Matthew R. Segal, *America's Conscience: The Rise of Civil Society Groups Under President Trump*, 65 UCLA L. REV. 1574, 1577–78 (2018) ("President Trump has banned people from several Muslim-majority countries; . . . rescinded Temporary Protected Status protections for certain immigrants from countries that President Trump reportedly regards as 'shithole[s];' and taken children hostage to advance his anti-immigration policies.").

171. Twitter permanently deactivated Donald Trump's Twitter account, but several sites archived his tweets. *See, e.g.*, TRUMP TWITTER ARCHIVE, https://www.thetrumparchive.com/?searchbox=%22statement+on+preventing+Muslim+immigration%22 ("Statement on Preventing Muslim Immigration.") [perma.cc/4BGF-NHCN]; TRUMP TWITTER ARCHIVE, https://www.thetrumparchive.com/?searchbox=%22it+is+amazing+how+often+i+am+right%22 ("It is amazing how often I am right, only to be criticized by the media. Illegal immigration, take the oil, build the wall, Muslims, NATO!") [perma.cc/5QHK-ME85]; John Myers, *Newsletter: Trump's Tweets Fuel Outrage and a New Immigration Debate*, L.A. TIMES (July 15, 2019), https://www.latimes.com/politics/la-pol-ca-essential-politics-20190715-story.html ("'Why don't they go back and help fix the totally broken and crime infested places from which they came,' the president tweeted.") [perma.cc/W8GW-5ML4].

172. *See* Waleed Aly, *Donald Trump's Australia*, N.Y. TIMES (Feb. 21, 2017), https://www.nytimes.com/2017/02/21/opinion/donald-trumps-australia.html ("Perhaps, far from leading to a more thorough acceptance of migration, this constant demonization of migrants establishes a norm of selective xenophobia where exempting a group of migrants from our tolerance is unremarkable.") [perma.cc/E5QQ-V45E].

173. *See President Trump's Executive Orders on Immigration and Refugees*, CTR. MIGRATION STUD., https://cmsny.org/trumps-executive-orders-immigration-refugees/ (describing EOs that expand the use of immigrant detention, limit

clearer, former President Trump stated that he preferred immigrants from Norway—one of the whitest countries in the world—over those from Haiti, El Salvador, and Africa.[174]

C. Recommendations

An alien applying for an EB-2 classification and a national interest waiver has to wait up to a year for his case to be processed.[175] If the Secretary of Homeland Security, acting out of personal bias or to avoid losing his or her job, denies the national interest waiver and the applicant cannot otherwise obtain an employment visa, the alien should not be left without recourse.[176] The solution to this bureaucratic intolerance is not complicated: Article III courts must be afforded subject matter jurisdiction to review the Secretary's decision to deny the waiver and determine

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asylum, banning immigration from Muslim-majority countries that did not have strong economic ties to the United States) [perma.cc/SS6E-G5E4].

174. *See* Nurith Aizenman, *Trump Wishes We Had More Immigrants From Norway. Turns Out We Once Did*, NPR (Jan. 12, 2018), https://www.npr.org/sections/goatsandsoda/2018/01/12/577673191/trump-wishes-we-had-more-immigrants-from-norway-turns-out-we-once-did (describing Trump's complaint that the United States receives too many people from "shithole countries") [perma.cc/T6N7-R7VQ]; Jennifer Bendery, *Trump's Homeland Security Chief Not Sure If Norway Is Mostly White*, HUFFINGTON POST (Jan. 16, 2018), https://www.huffpost.com/entry/kirstjen-neilsen-norway-white-trump_n_5a5e2a44e4b0fcbc3a13dbb4?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAGZiHd8Y73xMjuPxu7G2VIunAKTvkDIWW2t9xLgwInyx31TTQzzWE5rrBoO6Ck79E1FvYsK_TDx63jLvkF_mbQ-TTpQbyosWyjuWHnGXtZHnJJKen9KNXE1AB3CkQPbdKe8DHqrNjImwtGo3uVHV7GAilu_miDe-mmh7NbFOAIje ("[Norway's] residents are 83 percent Norwegian, who are ethnic North Germanic people, and another 8 percent is European, according to the CIA's World Factbook.") [perma.cc/V6EC-TE33].

175. *See Check Case Processing Times*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://egov.uscis.gov/processing-times/ (listing six and a half to eight months of processing time for cases filed with the Nebraska Service Center and nine to twelve months for cases filed with the Texas Service Center) [perma.cc/9KU2-FP2C].

176. Statutorily the Attorney General is afforded the power to grant or deny the national interest visa. *See* 8 U.S.C. § 1153(b)(2)(B)(i) (2018) (authorizing the Attorney General to grant national interest waivers if in the interest of the United States). However, in practice, USCIS officers, under the purview of the Attorney General, process and decide on national interest waiver petitions. *See, e.g.*, Dhanasar, 26 I. & N. Dec. 884, 884 (Dec. 27, 2016) ("The Director of the Texas Service Center denied the petition . . . concluding that . . . a waiver of the job offer requirement would not be in the national interest of the United States.").

if the applicant's constitutional rights were violated. In the alternative, Congress should enact legislation to require the Department of Homeland Security to publish all data regarding grants and denials of national interest waivers including the country of origin of each applicant. This would make it much more difficult for the Executive to hide its biases within misleading statistics.

1. Standard of Review

Article III judges should be granted jurisdiction to review decisions of USCIS under at least an arbitrary and capricious standard of review.[177] This will allow courts to ensure the *Dhanasar* factors were properly weighed and applicants were not discriminated against when their national interest waivers were denied. Judicial review is defined as the "court's power to review the actions of other branches or levels of government; [especially] the courts' power to invalidate legislative and executive actions as being unconstitutional."[178] It was Chief Justice John Marshall who said, "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."[179] Since the Secretary of Homeland Security is statutorily authorized to both grant a national interest waiver and find an alien inadmissible for lawful entry or permanent residence based on what is in the interest of the United States, there is a potential conflict that needs resolving.[180]

When executive agencies or actors make decisions that affect private individuals, there is a presumption of judicial review that the government must overcome.[181] Judicial review of decisions that

177. If a denied applicant has evidence of discrimination based on race or national origin, strict scrutiny would be a more appropriate standard of review.

178. *Judicial Review*, BLACK'S LAW DICTIONARY (11th ed. 2019).

179. Marbury v. Madison, 5 U.S. 137, 177 (1803).

180. *Compare* 8 U.S.C. § 1153(b)(2)(B)(i) (2018) (authorizing the Attorney General to grant national interest waivers if in the interest of the United States), *with* 8 U.S.C. § 1182 (2018) (permitting the Attorney General to deem aliens inadmissible to the United States based on reasonable beliefs).

181. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967) ("[A] survey of our

appear to have political or racist motivations is even more vital.[182] Allowing judicial review "adds one safeguard that is essential to individual liberty: [I]t ensures that a pair of eyes unsupervised by the political branches agrees that the INS or State Department conclusion is based not on politics but on evidence."[183]

Immigration case law has developed a specific three-prong test to determine if an alien qualifies for a national interest waiver.[184] The Secretary of Homeland Security has the authority to grant or deny an applicant's petition for such waiver.[185] The post of the Secretary of Homeland Security, like many appointed executive positions, can be deeply intertwined with the political platforms and biases of the president.[186] Moreover, immigration judges—under the purview of the appointed Attorney General—have often been assumed to be influenced by the President.[187] Article III

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cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.").

182. *Cf.* Knoetze v. U.S. Dep't of State, 634 F.2d 207, 211 (5th Cir. 1981) ("Strong evidence of the politicalization [*sic*] of an otherwise routine, bureaucratic decision might raise a suspicion of discriminatory agency action.").

183. Zachary Margulis-Ohnuma, *Saying What the Law Is: Judicial Review of Criminal Aliens' Claims Under the Convention Against Torture*, 33 N.Y.U. J. INT'L L. & POL. 861, 884 (2001).

184. *See* Dhanasar, 26 I. & N. Dec. 884, 884 (Dec. 27, 2016) ("(1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that he or she is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the job offer and labor certification requirements.").

185. *See* § 1153(b)(2)(B)(i) (authorizing the Attorney General to grant national interest waivers if in the interest of the United States).

186. *Cf.* Charlie Savage, *Is an Attorney General Independent or Political? Barr Rekindles a Debate*, N.Y. TIMES (May 1, 2019), https://www.nytimes.com/2019/05/01/us/politics/attorney-general-barr.html [perma.cc/JYS2-TPX5]

> But even as Mr. Barr urged a high standard before accusing political opponents of a crime, Democrats accused him of putting his finger too much on the opposite end of that scale—acting more like a White House counsel, who helps the president work through legal policy issues to achieve his agenda, or even a personal lawyer, who mounts a vigorous defense against any accusations of wrongdoing.

187. *See* Catherine Y. Kim, *The President's Immigration Courts*, 68 EMORY L. J. 1, 6–7 (2018) ("The increased politicization of agency adjudications raises a host of thorny questions about the extent to which such proceedings should be insulated from political influence. Commentators often assert that presidential control over agency adjudications would be normatively, if not constitutionally,

judges should, therefore, be afforded the opportunity to review decisions of the Secretary of Homeland Security and USCIS under an arbitrary and capricious standard of review to evaluate the application of the *Dhanasar* factors and determine if the applicant's constitutional rights were violated.[188]

2. Transparency

Congress should require the Department of Homeland Security to publish all data regarding its grants and denials of national interest waivers to ensure executive transparency.[189] This will prevent, or at least deter, the Executive from claiming fair adjudication processes based solely on data related to approved EB-2 visa petitions that fail to demonstrate who is *not* receiving a visa or national interest waiver.[190] Congress relies on this mandated reporting device often to ensure that agencies and departments from all branches of government are being held accountable for their actions.[191]

Once DHS is required to publish these data, one of two things is likely to happen: Either DHS will independently adjust the number of national interest waivers it approves for individuals

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problematic.").

188. *Cf. id.* at 34 ("The extent to which agency adjudications are insulated from political interference should accommodate both the need to protect the interests of the individual as well as the need for democratic accountability. It should also adhere to the separation-of-powers principles necessary to protect against arbitrary unilateral action.").

189. *Cf.* Akua Amaning & Nathan Kasai, *Six Things Congress Should do to Reform ICE*, THIRD WAY (May 16, 2019), https://www.thirdway.org/memo/six-things-congress-should-do-to-reform-ice ("Congress should require annual, comprehensive, public reporting of the agency's activities pertaining to enforcement, detention, and personnel.") [perma.cc/K39G-XCEZ].

190. *See Transparency*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Openness; clarity; unobstructed access, esp. to business and governmental records; lack of guile and of *any attempt to hide damaging information*.") (emphasis added); *see also supra* Table 1 (reporting percentage of EB-2 visa allocations from 2012 through 2018).

191. *See, e.g.*, *Sources for Finding Mandated Reports to Congress by U.S. Federal Agencies*, L. LIBRS.' SOC'Y WASH., D.C. (Sept. 13, 2018), https://www.llsdc.org/sources-for-mandated-congressional-reports (listing dozens of examples of mandated reports Congress requires legislative, executive, and judicial officials to complete for accountability purposes) [perma.cc/27TV-5CEJ].

from neglected regions, or Congress will be able to determine whether DHS is favoring certain regions over others when deciding who should receive a national interest waiver.[192] In either case, Congress will have the data necessary to decide whether or not to make judicial review for denied national interest petitions explicit through statute.[193]

3. Overcoming Roadblocks: The Issue of Standing

A nonimmigrant foreign national who enters the United States legally on a temporary visitor-, student-, business-, or worker-visa may choose to adjust his status to apply for lawful permanent residency.[194] Once obtained, permanent residency allows an applicant to eventually apply for citizenship if certain criteria are met.[195] There is no question that these individuals—even prior to obtaining U.S. citizenship—have standing to bring due process and other constitutional claims in Article III courts while residing in the United States.[196] Even though some of the most prominent U.S. political leaders have demanded otherwise,

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192. *See* 5a U.S.C. § 2 (2018) (explaining the purpose of the Inspector General Act of 1978, which requires agencies to keep Congress informed so it may take corrective legislative actions if necessary).

193. *See, e.g.*, CONG. RSCH. SERV., CONGRESS'S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES 11 (Dec. 19, 2018) ("Congress can also exert substantial control over administrative agencies by prescribing the procedures agencies must employ when exercising delegated powers.").

194. *See Policy Manual: Chapter 2 – Eligibility Requirements*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Feb. 5, 2020), https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-2 ("The Immigration and Nationality Act (INA) and certain other federal laws provide over forty different ways for aliens to[]adjust status to lawful permanent residence.") [perma.cc/7CPU-PMV5].

195. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., I AM A PERMANENT RESIDENT: HOW DO I APPLY FOR U.S. CITIZENSHIP? 1 (Oct. 2013), https://www.uscis.gov/sites/default/files/USCIS/Resources/B3en.pdf (listing eligibility requirements including being 18 or older, an LPR for three or five years, a person of good moral character, knowledgeable of U.S. government, literate in English in most instances, and physically present in the United States) [perma.cc/68ZH-BNHC].

196. *See, e.g.*, Wo v. Hopkins, 118 U.S. 356, 369 (1886) ("The fourteenth amendment to the constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'").

the same due process protections apply to all people within the borders of the United States, regardless of their legal status.[197]

It is also settled law that noncitizens residing outside the borders of the United States are not generally afforded due process rights under the U.S. constitution.[198] However, the Supreme Court of the United States has found standing, at least indirectly, in cases brought on behalf of noncitizens who were denied entry to the United States.[199] Congress intentionally created a pathway for certain immigrants with advanced degrees or of exceptional ability to obtain employment-based visas without an offer of employment and labor certification.[200] Without judicial review, the criteria for waiving these requirements are based largely on what the DHS Secretary deems to be in the national interest of the United States.[201]

It stands to reason that when the Secretary of Homeland Security denies a national interest waiver sought by a noncitizen residing outside of the United States, a U.S. resident with a bona fide relationship with the noncitizen who can demonstrate hardship should have standing to bring suit on the noncitizen's behalf.[202] Furthermore, since all those residing in the United

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197. *See id.* ("These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."); *see also* TRUMP TWITTER ARCHIVE, https://www.thetrumparchive.com/?searchbox=%22we+cannot+allow+all+of+these+people%22 ("We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came.") [perma.cc/7AW7-7L27].

198. *See* cases cited *supra* note 165 (holding that the Fifth and Fourteenth Amendments do not apply to aliens outside the United States).

199. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2416 (2018) ("[A]n American individual who has 'a bona fide relationship with a particular person seeking to enter the country . . . can legitimately claim concrete hardship if that person is excluded.'").

200. *See* 8 U.S.C. § 1153(b)(2)(B)(i) (2018) (allowing the Attorney General to waive the job-offer and labor certification requirements for EB-2 visa petitioners).

201. *Id*; *see also* Dhanasar, 26 I. & N. Dec. 884, 884 (Dec. 27, 2016) (listing the three-prong test for determining when USCIS can grant a national interest waiver).

202. *Cf.* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2088 (2017) (preventing an Executive Order to exclude certain potential immigrants from being enforced against those foreign nationals with bona fide relationships with any person or entity in the United States).

States stand to benefit from or be harmed by the grant or denial of a national interest waiver, there is an argument—albeit a tenuous one—that any U.S. resident, regardless of his relationship to the noncitizen, should have standing to sue the federal government for denying the noncitizen's waiver.[203] Therefore, any person denied a national interest waiver, regardless of her geographic location at the time of filing, should—either directly or through a surrogate—have the right to bring her case to an Article III court for review.

V. Conclusion

Since its formation, the United States has used immigration legislation to achieve economic and moral goals by those it admits or denies entry through its borders. Political parties—while ever-evolving—have constantly done what is in their best interest to advance their own policies and agendas. Regardless of which political party controls the White House or legislature, one thing is clear: It is in the interest of the United States to admit aliens with advanced degrees and exceptional abilities into the country. To underline this understanding, Congress has authorized national interest waivers to help those who may not otherwise qualify for EB-2 visas to gain entry into the United States. Of course, there must be limits on the number of waivers granted, but the decisionmakers should not have unbridled discretion when it comes to who is worthy of a waiver. When politics, biases, racism, and xenophobia seep into and affect government decision-making with regards to how these waivers are and are not administered, there must be a remedy. Political parties cannot have carte blanche to act as they please without oversight or consequences when their actions violate Constitutional protections. Judicial review of national interest waiver denials in Article III courts can provide applicants with a politically neutral forum of review to ensure their petitions were adjudicated by USCIS following its own objective standards. In addition, requiring DHS to report to Congress how it is adjudicating national interest waiver petitions

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203. *See* Adam J. Rosser, *The National Interest Waiver of IMMACT90*, 14 GEO. IMMIGR. L. J. 165, 167 (1999) ("Congress has made clear that the immigration of such persons who fill positions requiring an advanced degree or exceptional ability, by definition, benefits the national interest.").

may help reduce racial and other constitutionally prohibited biases in the process.