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Tortured Language: Lawful Permanent Residents and the 212(h) Waiver

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TORTURED LANGUAGE: LAWFUL PERMANENT RESIDENTS AND THE 212(H) WAIVER

*Julianne Lee**

Recent amendments to the Immigration and Nationality Act have greatly expanded the grounds for removal of lawful permanent residents (LPRs) and, at the same time, constricted judicial review of agency decisions to deport immigrants. Language added to the 212(h) waiver of inadmissibility has increased the number of LPRs that are now ineligible for relief from removal by barring certain LPRs from applying for a waiver if, since the date of their admission, they have committed an aggravated felony or have failed to accrue seven years of continuous presence. The controversy discussed in this Note stems from differing interpretations of this statutory provision.

Nine courts of appeals have ruled that an aggravated felony or lack of continuous residence bars relief under section 212(h) only for those noncitizens who were admitted to the country as LPRs following inspection at a port of entry. In removal proceedings outside of those circuits, the Board of Immigration Appeals (BIA) holds that relief is unavailable to all LPRs convicted of an aggravated felony or who fail to meet the residence requirements after acquiring LPR status, regardless of the manner in which they acquired that status. The Eighth Circuit alone has followed that ruling (leaving only the First and Twelfth Circuits without an opinion on the issue).

This Note describes the split over section 212(h) against the backdrop of current trends in immigration law around statutory interpretation and the agency deference doctrine. It analyzes the current state of U.S. Supreme Court deference to the BIA to understand how this issue might play out in the Court and argues that the plain meaning of the statute supports the

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holdings by the majority of courts of appeals. It concludes by arguing for application of the immigration rule of lenity.

INTRODUCTION.....	1202
I. THE IMMIGRATION SCHEME AND SECTION 212(H): A HIDEOUS CREATURE	1205
A. <i>Getting In: LPR Status</i>	1206
B. <i>Kicked Out: Grounds for Removal</i>	1206
C. <i>Waivers and Discretionary Relief</i>	1208
D. <i>Judicial Review of Removal Orders and Applications for Relief</i>	1211
II. THE 212(H) CONFLICT	1214
A. <i>The Question's Debut in the Fifth Circuit</i>	1214
B. <i>Courts Following the Fifth Circuit</i>	1216
1. The Definition Section of the INA.....	1216
2. The Immigration Rule of Lenity	1219
C. <i>The BIA and the Eighth Circuit</i>	1220
1. The Meaning of "Admission" in Other Provisions of the INA Makes the Use of "Admitted" in 212(h) Ambiguous	1222
2. Absurdity Arguments.....	1224
3. Arguments for Deference to the BIA	1227
D. <i>Supreme Court Deference to the BIA: Where Is the Court Headed?</i>	1227
1. 2009–2013: Opinions Withholding Deference	1227
2. 2009–2013: Opinions Granting Deference	1230
3. Theory About Deference in the Immigration Context	1232
III. RESOLVING THE CONFLICT.....	1236
A. <i>The Meaning of Section 212(h) Is Clear</i>	1237
B. <i>The BIA's Interpretation Is Not Permissible: A Call for Lenity</i>	1240
C. <i>Where Is the Court Going?</i>	1242
CONCLUSION	1244

INTRODUCTION

Nine-year-old Shaun Roberts traveled from his native Bahamas to the United States on a temporary visitor visa.¹ He did not leave when his visa expired and fell out of status until becoming a lawful permanent resident (LPR) two years later.² Over the next few decades, Roberts built a life in

1. Roberts v. Holder, 745 F.3d 928, 929 (8th Cir. 2014).

2. *Id.* at 929. Most likely, Roberts was able to adjust status under an amnesty or legalization provision despite overstaying his visa. See RICHARD D. STEEL, STEEL ON IMMIGRATION LAW § 9:22, Westlaw (database updated Sept. 2015).

the United States—a life that was interrupted in 2011 when he received a Notice to Appear in immigration court for a removal hearing.³ Immigration and Customs Enforcement (ICE) had learned that Roberts, now almost forty years old, had two criminal convictions in his home state of Minnesota.⁴ Although his most recent conviction occurred more than ten years prior to his removal hearing, the immigration judge found that his crimes rendered Roberts removable under the Immigration and Nationality Act⁵ (INA).

The immigration judge held that Roberts's convictions rendered him statutorily ineligible for every form of relief he sought: cancellation of removal, adjustment of status, and a waiver of inadmissibility.⁶ The Board of Immigration Appeals (BIA) affirmed.⁷ Roberts appealed to the Eighth Circuit, which affirmed the BIA's holding that his third-degree assault conviction constituted an aggravated felony, making him removable and statutorily barring him from seeking cancellation of removal.⁸ The court had only to decide whether Roberts was eligible for an INA section 212(h) waiver of inadmissibility⁹—his last chance to remain in the United States.¹⁰ Some foreign nationals who have been convicted of an aggravated felony are ineligible for a 212(h) waiver.¹¹ Roberts's fate—and those of countless LPRs—hinged on the interpretation of a single phrase: “No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if . . . since the date of such admission the alien has been convicted of an aggravated felony.”¹²

The BIA has interpreted that phrase as barring 212(h) relief for *all* LPRs convicted of an aggravated felony after acquiring LPR status, regardless of how they acquired that status.¹³ The Eighth Circuit chose to follow the BIA's interpretation, finding Roberts ineligible for relief and ordering him removed to the Bahamas, a place in which he had not set foot for over thirty years.¹⁴

In withholding 212(h) relief from Roberts, the Eighth Circuit diverged from every other circuit court that has grappled with the quoted statutory

3. *Roberts*, 745 F.3d at 929. A Notice to Appear is a document that alleges facts and specifies the statutory removal grounds ICE is charging. See STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 1, 515 (5th ed. 2009).

4. *Roberts*, 745 F.3d at 929.

5. *Id.* The immigration judge found that Roberts's convictions constituted crimes involving moral turpitude and included one aggravated felony. See *infra* Part I.B.

6. *Roberts*, 745 F.3d at 929.

7. *Id.* at 929–30.

8. *Id.* at 931.

9. See Immigration & Nationality Act § 212(h), 8 U.S.C. § 1182(h) (2012).

10. *Roberts*, 745 F.3d at 931.

11. See *infra* Part I.C.

12. *Roberts*, 745 F.3d at 932 (quoting 8 U.S.C. § 1182(h)(2)). One court has referred to this provision as “tortured language.” *Papazoglou v. Holder*, 724 F.3d 790, 793 (7th Cir. 2013).

13. See *Matter of Rodriguez*, 25 I. & N. Dec. 784, 789 (B.I.A. 2012); *Matter of Koljenovic*, 25 I. & N. Dec. 219, 224 (B.I.A. 2010).

14. *Roberts*, 745 F.3d at 929.

language. To date, the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have all held that the statute's unambiguous language bars only those LPRs who entered the country *already holding* LPR status from eligibility for a 212(h) waiver.¹⁵ In those circuits, the aggravated felony bar does not apply to foreign nationals who entered the country with a different status or without any status at all and later attained LPR status post-admission. Under this interpretation, Roberts would have been eligible for the 212(h) waiver, having entered the United States under temporary visitor status, and later adjusted to LPR status. Put differently, had he lived in a different state, his appeal's outcome might have been different.

This Note considers the lopsided circuit split over whether all LPRs are barred from seeking a 212(h) waiver of inadmissibility regardless of whether they, like Roberts, adjusted to LPR status after their initial entry or whether they entered the country holding that status. The split raises questions of traditional statutory interpretation and judicial deference to the immigration agency. There are two strong reasons the U.S. Supreme Court should step in to settle the meaning of section 212(h). First, in the removal context, issues of statutory interpretation have profound and direct consequences on individual lives.¹⁶ Second, the Court has said that federal laws should be uniformly enforced where possible.¹⁷ Given the split—with a lone circuit siding with the agency and nine circuits against it—the question is ripe for a Supreme Court ruling.

Part I describes the 212(h) waiver within the context of removal and relief. It provides background information on immigration's statutory scheme, as well as describes the dwindling avenues for relief and narrowing of judicial review of BIA decisions. Part II presents the circuit split and the BIA decision relating to LPRs' eligibility for 212(h) waivers. It also describes different theories on where the Court is headed in terms of its deference (or lack thereof) to the BIA based on immigration decisions from the 2009 to 2013 Terms. Part III argues that the majority of the courts of

15. See *Medina-Rosales v. Holder*, 778 F.3d 1140 (10th Cir. 2015); *Husic v. Holder*, 776 F.3d 59 (2d Cir. 2015); *Stanovsek v. Holder*, 768 F.3d 515 (6th Cir. 2014); *Negrete-Ramirez v. Holder*, 741 F.3d 1047 (9th Cir. 2014); *Papazoglou v. Holder*, 725 F.3d 790 (7th Cir. 2013); *Leiba v. Holder*, 699 F.3d 346 (4th Cir. 2012); *Bracamontes v. Holder*, 675 F.3d 380 (4th Cir. 2012); *Hanif v. Att'y Gen.*, 694 F.3d 479 (3d Cir. 2012); *Lanier v. Att'y Gen.*, 631 F.3d 1363 (11th Cir. 2011); *Martinez v. Mukasey*, 519 F.3d 532 (5th Cir. 2008).

16. See, e.g., *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (citing *Delgado v. Carmichael*, 332 U.S. 388 (1947)) (noting that deportation can equate to "banishment or exile" and that stakes in removal hearings are high); *Fung Ho v. White*, 259 U.S. 276, 284 (1922) (noting that removal leads to "loss of both property and life; or of all that makes life worth living"); *Aris v. Mukasey*, 517 F.3d 595, 600 (2d Cir. 2008) ("In immigration matters, so much is at stake—the right to remain in this country, to reunite a family, or to work."); see also Jennifer L. Colyer et al., *The Representational and Counseling Needs of the Immigrant Poor*, 78 FORDHAM L. REV. 461, 463–64 (2009) (noting the particular vulnerability of immigrants subject to removal proceedings).

17. See, e.g., *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 2000 (2011) (Sotomayor, J., dissenting) (discussing Congress's goal of uniform enforcement of immigration laws).

appeals are correct in their interpretation of section 212(h). That part resolves the larger statutory interpretation and policy issues implicated by an analysis of section 212(h). It argues that, given the complexity of the immigration scheme, strict interpretations of the INA should trump agency deference arguments. This Note concludes by arguing that the Supreme Court should rule against the BIA and the Eighth Circuit if it considers the section 212(h) issue.

I. THE IMMIGRATION SCHEME AND SECTION 212(H): A HIDEOUS CREATURE

Part I provides background information on the structure of the INA to show how section 212(h) fits within the larger immigration context. This part describes important modern immigration trends, including diminishing opportunities for relief from deportation and narrowing of judicial review, against the historical backdrop of judicial deference in the immigration arena.

The U.S. Constitution authorizes Congress “[t]o establish an uniform Rule of Naturalization.”¹⁸ The Court has long held that Congress has broad power to decide whom to admit and exclude from the United States—that power being an integral and inherent part of national sovereignty.¹⁹ Under this longstanding plenary power doctrine, Congress exercises nearly unreviewable power to regulate immigration.²⁰

While the first attempt to restrict immigration dates back to the Alien Act of 1798, Congress passed the bulk of immigration legislation in the twentieth century.²¹ In 1952, Congress overhauled the existing immigration scheme and enacted the INA, which, together with decades of amendments, provides the current statutory framework for modern immigration law.²² The INA sets forth intricate rules for who may enter the country and what they must do to stay; its notoriously complex nature has led one commentator to call it a “hideous creature.”²³

18. U.S. CONST. art. I, § 8, cl. 4.

19. See *Fong Yue Ting v. United States*, 149 U.S. 698, 713–14, 762 (1893) (holding that the right of a nation to exclude or expel foreigners is absolute and unqualified); *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (holding that Congress has the power to set admission and exclusion rules).

20. See Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1616–17 (2000). See generally Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

21. STEEL, *supra* note 2, § 1:1.

22. Immigration and Nationality Act (INA) of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8, 18, 22 U.S.C.).

23. LEGOMSKY & RODRÍGUEZ, *supra* note 3, at 1. Some have called immigration law “equal in complexity to tax law.” Anna Marie Gallagher, *Ethics, Professionalism, and Immigration Law*, 11-12 IMMIGR. BRIEFINGS 1, 1 (2011), Westlaw.

A. *Getting In: LPR Status*

Anyone who has waited in line at New York's John F. Kennedy Airport or another major international hub has witnessed how U.S. immigration law divides people into categories. The first major division is between citizens and noncitizens.²⁴ Noncitizens are further categorized as immigrants, nonimmigrants, or undocumented persons.²⁵ Nonimmigrants include students, tourists, business visitors, workers, and anyone coming to the United States for temporary purposes.²⁶ Immigrants, on the other hand, intend to remain in the United States on a permanent basis,²⁷ usually as LPRs—popularly known as “green-card holders.”²⁸ In general, after at least five years as an LPR, a person can apply for naturalization and become a citizen.²⁹

To qualify for LPR status, a noncitizen must show eligibility based on family- or employment-based ties to the United States, or a valid refugee or asylee claim.³⁰ Furthermore, she must prove that she is not “inadmissible” for any reason.³¹ There are two different processes for obtaining LPR status. A person residing abroad can obtain an immigrant visa from a consular officer and present it to an inspector upon entering the United States.³² Once the inspector authorizes the visa, the person has been “admitted” as an LPR.³³ Alternatively, a person already physically present in the United States can obtain LPR status without leaving the country through “adjustment of status”³⁴ (AOS).

B. *Kicked Out: Grounds for Removal*

Immigration categories are important not only for practical reasons, but also because they influence a person's rights and responsibilities.³⁵ For example, a person on a student visa cannot generally accept employment in the United States, while an LPR can work and must file income tax returns.³⁶ Only a citizen can vote in elections and pass citizenship on to her

24. The INA uses the term “alien” to describe noncitizens. Many immigration scholars choose to avoid that dehumanizing term in favor of “noncitizen” except for when directly quoting statutes or other sources. *See, e.g.*, LEGOMSKY & RODRÍGUEZ, *supra* note 3, at 1. This Note follows that practice.

25. STEEL, *supra* note 2, § 2:23.

26. INA § 101(a)(15)(A)–(V), 8 U.S.C. § 1101(a)(15)(A)–(V) (2012).

27. *See* 8 U.S.C. § 1101(a)(15)(A).

28. *Id.* § 1101 (a)(20).

29. LEGOMSKY & RODRÍGUEZ, *supra* note 3, at 6.

30. STEEL, *supra* note 2, § 2:24. Visas are subject to quota numbers. *Id.* § 2:25.

31. *Id.* § 2:26.

32. *Id.* § 7:1 (describing “consular processing”).

33. “Admission” and “admitted” mean “the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.” 8 U.S.C. § 1101(a)(13)(A). The meaning of the word “admitted” in various contexts is contentious. *See* Elwin Griffith, *The Meaning of Admission and the Effect of Waivers Under the Immigration and Nationality Act*, 55 *How. L.J.* 1, 6 (2011).

34. *See* STEEL, *supra* note 2, § 7:1.

35. *See* LEGOMSKY & RODRÍGUEZ, *supra* note 3, at 1373–77.

36. *See id.* at 250.

children,³⁷ and citizens have the strongest claim to remaining in the United States permanently.³⁸ Although LPRs can live and work in the United States “permanently,” changes in immigration law have made the threat and possibility of removal ever more present.

The INA lists several reasons a noncitizen may be removed, which include public health concerns, criminal convictions, drug violations, and national security.³⁹ Noncitizens who have not been formally admitted to the United States (such as those seeking admission from abroad or those present without proper documentation) are subject to “inadmissibility” or “exclusion” grounds under section 212(a).⁴⁰ Noncitizens already admitted to the United States are subject to deportability grounds set forth in section 237(a).⁴¹

Since its inception, the INA has evoked criticism for its harshness.⁴² Today’s INA is significantly tougher than the body of laws passed in 1952. The Immigration Act of 1990 substantially restructured the grounds for removal and made sweeping changes to deportation procedures and remedies, making them far stricter, especially when related to drug or criminal charges.⁴³ Congress passed several restrictive revisions in the decade that followed, which coincided with the heavy anti-immigrant sentiment of the period.⁴⁴ Most notably, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) greatly expanded the grounds for removal.⁴⁵ In particular, IIRIRA vastly expanded which crimes fall under the definition of “aggravated felony.”⁴⁶ Prior to 1996, only murder and trafficking in drugs or firearms were considered aggravated

37. *See id.* at 1374.

38. It is difficult to strip someone of citizenship. *See generally* Charles E. Hooker, *The Past As Prologue: Schneiderman v. United States and Contemporary Questions of Citizenship and Denationalization*, 19 EMORY INT’L L. REV. 305 (2005).

39. *See* INA § 212(a), 8 U.S.C. § 1182(a) (2012); INA § 237(a), 8 U.S.C. § 1227(a).

40. 8 U.S.C. § 1182(a); *see* CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 71.01 (Matthew Bender ed., 2014), LexisNexis.

41. 8 U.S.C. § 1227(a). Prior to 1996, noncitizens were subject to legal distinctions depending on whether they were seeking entry into the United States or had already made it inside. *See* Matthew F. Soares, Note, *Agencies and Aliens: A Modified Approach to Chevron Deference in Immigration Cases*, 99 CORNELL L. REV. 925, 929 (2014). “Exclusion” referred to refusal to admit someone at the border, whereas “deportation” referred to removal of a person already inside. *Id.* The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 consolidated both into “removal” proceedings. *Id.* Nonetheless, the original distinction remains functionally important because it determines which grounds of removal apply. *See id.*; *see also* Matthew J. Geyer, Note, *Involuntary Return and the “Found in” Clause of 8 U.S.C. § 1326(a): An Immigration Conundrum*, 83 FORDHAM L. REV. 2091, 2097 (2015).

42. The INA was enacted over President Truman’s veto; Truman questioned the severity of exclusion, deportation, and denaturalization grounds. CHARLES GORDON ET AL., *supra* note 40, § 2.03.

43. STEEL, *supra* note 2, § 1:3.

44. *See id.*; *see also* Maritza I. Reyes, *Constitutionalizing Immigration Law: The Vital Role of Judicial Discretion in the Removal of Lawful Permanent Residents*, 84 TEMP. L. REV. 637, 662 (2012).

45. Soares, *supra* note 41, at 929.

46. STEEL, *supra* note 2, § 13:16.

felonies.⁴⁷ Now, the list of aggravated felonies includes murder; rape; sexual abuse of a minor; illicit trafficking in a controlled substance, firearms, or explosives; crimes of violence; theft offenses; and more.⁴⁸ Any noncitizen that is convicted of such a felony at any time after her admission is removable.⁴⁹

C. *Waivers and Discretionary Relief*

As a result of the expansion of the grounds for removal, thousands of noncitizens now find themselves in removal proceedings each year, searching for forms of relief.⁵⁰ The Immigration Act of 1924 required the deportation of any noncitizen present in the United States in violation of immigration laws, without exception.⁵¹ Between 1940 and 1990, Congress added several discretionary waivers of removal, only to pass legislation in the 1990s and 2000s that significantly curtailed that relief.⁵² While the grounds for removal have expanded, the possibilities for discretionary relief continue to shrink.⁵³

Relief provisions entail a balancing of misconduct against other factors, such as the removable noncitizen's long-term residence in the United States, chance of persecution in a foreign country, or relationships with U.S. citizen or LPR family members.⁵⁴ A noncitizen must affirmatively apply for relief in removal proceedings.⁵⁵ Forms of relief include asylum, Convention Against Torture waivers,⁵⁶ and withholding of removal.⁵⁷ Cancellation of removal—one of the most common forms of relief sought in removal proceedings⁵⁸—is available to noncitizens who have been in the United States for a long time, have substantial ties to the country, and have

47. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469–70.

48. INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2012). The Supreme Court has called this section a “maze of statutory cross-references” because it defines “aggravated felony” by reference to several other federal statutes. See *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 567 (2010).

49. 8 U.S.C. § 1227(a)(2)(iii).

50. In fiscal year 2014, ICE completed a total of 315,943 removals. DEP'T OF HOMELAND SEC., ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 7 (2014), <https://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf> [<https://perma.cc/4QQG-WNGK>].

51. Immigration Act of 1924, Pub. L. No. 68-139, § 14, 43 Stat. 153, 162.

52. See Soares, *supra* note 41, at 927–29.

53. See, e.g., *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (“The ‘drastic measure’ of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes.” (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948))).

54. LEGOMSKY & RODRÍGUEZ, *supra* note 3, at 593.

55. *Id.*

56. CHARLES GORDON ET AL., *supra* note 40, § 33.10.

57. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2012).

58. See DEP'T OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2013 STATISTICAL YEARBOOK N1 (2014), <http://www.justice.gov/eoir/statspub/fy13syb.pdf> [<http://perma.cc/KZZ5-3VSR>].

not committed certain crimes.⁵⁹ A noncitizen who has been convicted of an aggravated felony at any time cannot receive cancellation of removal.⁶⁰

Where a single criminal act makes a noncitizen both inadmissible and ineligible for cancellation of removal, she may still qualify for a waiver on the ground of inadmissibility.⁶¹ A common type of inadmissibility waiver—a “hardship waiver”—applies when a noncitizen shows that her citizen or LPR relatives would face extreme hardship if she were denied a waiver.⁶² Hardship waivers are available for some criminal grounds,⁶³ immigration fraud or misrepresentation,⁶⁴ and unlawful presence bars.⁶⁵ When determining whether a person’s removal will cause extreme hardship to her qualifying relative, adjudicators weigh a list of factors compiled through case law.⁶⁶

There are several other waivers for specific grounds of inadmissibility.⁶⁷ An applicant for any kind of waiver must first show that she is statutorily eligible to apply for the waiver and then that she merits the favorable exercise of discretion.⁶⁸ The adjudicator weighs the negative factors in the case—including the nature of the immigration violation, the applicant’s criminal record, and any evidence of bad character—against the positive equities—such as family ties, long-term residence, evidence of hardship, history of employment, and good character.⁶⁹ While this discretionary process may forgive certain criminal grounds, many of the waivers are statutorily unavailable to noncitizens who have been convicted of aggravated felonies. Thus, one of the primary barriers to relief stems from the INA’s expanded definition of “aggravated felony.”⁷⁰

Nestled within this constellation of relief provisions lies the 212(h) waiver of inadmissibility. Section 212(h) waivers are available to noncitizens (1) whose offending activities (mostly prostitution related)

59. See INA § 240A, 8 U.S.C. § 1229b. Requirements differ for LPRs and non-LPRs. Compare 8 U.S.C. § 1229b(a), with 8 U.S.C. § 1229b(b).

60. See *id.* §§ 1229b(a)(3), 1229b(b).

61. See CHARLES GORDON ET AL., *supra* note 40, § 63.12.

62. Only certain types of relationships qualify. See, e.g., 8 U.S.C. § 1182(h) (defining a qualifying relative as a U.S.-citizen or LPR spouse, parent, son, or daughter of the applicant). The applicant cannot prove eligibility based on her own hardship, with the exception of self-petitioners covered by the Violence Against Women Act. CHARLES GORDON ET AL., *supra* note 40, § 63.12.

63. 8 U.S.C. § 1182(h).

64. *Id.* § 1182(i).

65. *Id.* § 1182(a)(9)(B)(v).

66. CHARLES GORDON ET AL., *supra* note 40, § 63.12. Factors include the extent of the qualifying relative’s family ties in the United States that might be broken if she relocated with the waiver applicant, the qualifying relative’s ties to her U.S. community, the qualifying relative’s lack of ties to the foreign country or inability to speak the language, the conditions in the foreign country to which the relative might relocate with the waiver applicant, and significant health or psychological factors. *Id.*

67. See, e.g., 8 U.S.C. § 1182(k) (documentary problems); *id.* § 1182(c) (LPRs guilty of certain offenses pre-IIRIRA); *id.* § 1182(d)(3)(B)(i) (terrorism).

68. CHARLES GORDON ET AL., *supra* note 40, § 63.12.

69. *Id.*

70. Soares, *supra* note 41, at 929.

occurred more than fifteen years earlier and who show that they are rehabilitated; (2) who have qualifying relatives who would suffer extreme hardship upon denial of the waiver; or (3) who were victims of domestic violence.⁷¹

The inadmissible noncitizen must show that she falls under one of the three enumerated categories and that she is not otherwise barred from applying for the waiver.⁷² Prior to IIRIRA, the only noncitizens statutorily barred from receiving 212(h) waivers were those who had “been convicted of (or who ha[d] admitted committing acts that constitute) murder or criminal acts involving torture.”⁷³ With IIRIRA however, Congress expanded the category of noncitizens ineligible for the waiver as follows:

No waiver shall be granted under this subsection in the case of an alien *who has previously been admitted to the United States as an alien lawfully admitted for permanent residence* if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.⁷⁴

The controversy discussed in this Note stems from differing interpretations of the italicized phrase above. The Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits (“the majority courts”) have ruled that an aggravated felony or lack of continuous residence bars relief under section 212(h) only for those noncitizens who are admitted to the country as LPRs following inspection at a port of entry.⁷⁵ In removal proceedings outside of those circuits, the BIA holds that relief is unavailable to all LPRs who were convicted of an aggravated felony or who failed to meet the residence requirements after acquiring LPR status, regardless of the manner in which they gained that status.⁷⁶ The Eighth Circuit alone has sided with the BIA.⁷⁷

71. Brief of the Am. Immigration Council and the Am. Immigration Lawyers Ass’n As Amici Curiae in Support of Petition for Rehearing En Banc at 3–4, *Roberts v. Holder*, 745 F.3d 928 (2014) (No. 12-3359), <http://legalactioncenter.org/sites/default/files/Roberts%20Amicus%20Brief.pdf> [<http://perma.cc/5TGK-U7ZN>]. All of the noncitizens in cases that make up the circuit split discussed in Part II fall under category (2). See *infra* Part II.

72. The Attorney General may then exercise discretion to waive the noncitizen’s inadmissibility. A person in removal proceedings may seek a 212(h) waiver concurrent to an AOS or re-AOS, not on a “standalone” basis. *Matter of Rivas*, 26 I. & N. Dec. 130, 133 (B.I.A. 2013).

73. Immigration Act of 1990, Pub. L. No. 101-649, § 601(d)(4), 104 Stat. 4978, 5077.

74. INA § 212(h), 8 U.S.C. § 1182(h) (2012) (emphasis added).

75. See *infra* Part II.A, II.B.

76. See *infra* Part II.C.

77. See *infra* Part II.C.

*D. Judicial Review of Removal Orders
and Applications for Relief*

In addition to the expansion of the grounds for removal and bars to relief, two other factors make it difficult to challenge a removal order. First, judges have historically been deferential to immigration agencies. Second, Congress has narrowed the scope of judicial review in the immigration context.

Congress has delegated immigration authority to several administrative agencies.⁷⁸ In particular, the Executive Office of Immigration Review (EOIR), under the Department of Justice (DOJ), administers the immigration court system.⁷⁹ EOIR consists of a national network of immigration judges (IJs) who preside over removal proceedings.⁸⁰ The Department of Homeland Security (DHS) summons a person to appear at a removal hearing by issuing a Notice to Appear (NTA); an IJ then determines whether the person fits within one or more of the alleged grounds for removal and whether she is eligible for, and deserving of, the relief for which she has applied.⁸¹ The IJ may find that (1) the person is not removable, (2) she is removable and ineligible for discretionary relief (resulting in a removal order), or (3) she is removable but qualifies for discretionary relief (resulting in the termination of proceedings).⁸² The DHS or the noncitizen may appeal the IJ's decision to the BIA.⁸³

The BIA is the "highest administrative body for interpreting and applying immigration laws."⁸⁴ The agency generally does not conduct courtroom hearings, but instead decides appeals by reviewing the record.⁸⁵ It defers to the IJ's findings of fact unless there is clear error.⁸⁶ Since 2000, the BIA's structure and procedures have changed significantly.⁸⁷ Responding to an enormous backlog of cases, the BIA implemented several streamlining regulations, which included replacing three-judge panels with single judges

78. The Departments of Homeland Security (DHS), State, Labor, Justice, and Health and Human Services share oversight of immigration procedures and policies. LEGOMSKY & RODRÍGUEZ, *supra* note 3, at 5. The Homeland Security Act of 2002 (HSA) reorganized the agency apparatus, replacing the Immigration and Naturalization Service with two separate entities within DHS: Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE). *Id.* at 2–3. CBP is responsible for enforcement at borders and ports of entry; ICE manages interior enforcement, including investigations, detention, and intelligence gathering. *Id.* at 3. Additionally, the HSA created the U.S. Citizenship and Immigration Service to handle immigration benefit applications. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 515.

82. *Id.*

83. *Id.*

84. *Board of Immigration Appeals*, U.S. DEP'T JUST. (Feb 6, 2015), <http://www.justice.gov/eoir/biainfo.htm> [<http://perma.cc/F4Y8-GXZ4>].

85. *Id.* (calling the process a "paper review"); *see also* LEGOMSKY & RODRÍGUEZ, *supra* note 3, at 4.

86. STEEL, *supra* note 2, § 2:7.

87. *See* Shruti Rana, *Chevron Without the Courts?: The Supreme Court's Recent Chevron Jurisprudence Through an Immigration Lens*, 26 GEO. IMMIGR. L.J. 313, 327 (2012).

and allowing the BIA to issue one-line summary affirmances of IJs' decisions without endorsing or suggesting alternatives to IJs' rationales.⁸⁸

Changes in the BIA's administrative procedures have resulted in a flood of immigration appeals to the federal courts.⁸⁹ A noncitizen may petition for review of a BIA decision in the applicable U.S. court of appeals.⁹⁰ The level of deference that federal courts should afford BIA decisions has been a longstanding source of debate⁹¹ and informs the current conflict in the courts of appeals over whether to agree with the BIA's construction of section 212(h).

The judicially created plenary power doctrine holds that Congress has broad power to regulate immigration; under this view, the executive branch, by extension, deserves substantial deference in setting and enforcing immigration policy.⁹² This broad deference comes from the notion that immigration is unique.⁹³ As a result, the Supreme Court has not applied due process or equal protection safeguards as stringently in the immigration context as in other areas.⁹⁴ Some scholars have termed this deviation from legal norms "immigration exceptionalism."⁹⁵ However, some scholars have suggested that the plenary power doctrine's grip on immigration

88. *Id.* at 318; *see also* 8 C.F.R. § 1003.1(e) (2011).

89. Rana, *supra* note 87, at 327.

90. The government may not make appeals higher than the BIA. BIA decisions are ultimately reviewable by the Supreme Court. *See* STEEL, *supra* note 2, § 14:38.

91. *See, e.g.*, Jeffrey D. Stein, *Delineating Discretion: How Judulang Limits Executive Immigration Policy-Making Authority and Opens Channels for Future Challenges*, 27 GEO. IMMIGR. L.J. 35, 55 (2012) (noting that debate over plenary power and the balance of power between the executive and legislative branches is "still very much alive in both classrooms and courtrooms").

92. *Id.* at 40–41, 55–56; Soares, *supra* note 41, at 926; *see also* Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) (holding that Congress's power to regulate immigration extends to the power to enforce immigration laws, which it may do by delegating to agency officials the power to set procedures).

93. The Court has offered several rationales for the plenary power doctrine; one such rationale is that immigration policy entails political questions because it implicates foreign affairs. *See* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 260–78.

94. *See, e.g.*, *Matthews v. Diaz*, 426 U.S. 67, 79–80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."); *see also* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984).

95. *See e.g.*, Kevin R. Johnson, *Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 59 (2015). But Gabriel Chin argues the plenary power doctrine is nothing more than dicta; historic immigration decisions holding discriminatory and racist congressional action immune from judicial review were simply products of their time:

At the time they were decided, many of the terrible immigration cases could have come out the same way even if they involved the rights of citizens under domestic constitutional law. . . . There is no need for a special plenary power doctrine or other constitutional rule to explain these cases

Gabriel J. Chin, *Is There a Plenary Power Doctrine?: A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 258 (2000).

jurisprudence—at least in the Supreme Court—may be loosening.⁹⁶ Some call the doctrine as good as dead,⁹⁷ while others believe unscrupulous judicial deference to the BIA continues.⁹⁸

The Court’s framework for reviewing agency statutory interpretation from *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁹⁹ has often worked to reinforce and bolster the plenary power doctrine in the immigration context, restraining a reviewing court’s analysis of BIA decisions centering on interpretations of the INA.¹⁰⁰ However, a *Chevron* analysis does not preclude a judge from overturning a BIA construction—especially if the judge finds that the statute clearly supports an interpretation contrary to the agency’s.¹⁰¹

In addition to doctrinal restrictions on judicial review, Congress has enacted INA provisions that restrict judges’ role in reviewing BIA decisions. IIRIRA drastically restructured the relationship between the courts and the BIA.¹⁰² For example, although noncitizens may appeal BIA decisions to the courts of appeals, federal judges generally do not have jurisdiction to review the BIA’s *discretionary* decisions.¹⁰³ Instead, the federal courts only review questions of law.¹⁰⁴ This practice seriously limits the amount of judicial review available to persons challenging orders of removal or denials of discretionary relief.¹⁰⁵

96. See generally Motomura, *supra* note 20.

97. See, e.g., Johnson, *supra* note 95, at 61; Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002).

98. See Rana, *supra* note 87, at 343; Soares, *supra* note 41.

99. 467 U.S. 837 (1984). *Chevron* holds that, at Step One, a court should employ traditional tools of statutory construction to determine Congress’s intent and to determine whether the statute speaks directly to the issue at hand. *Id.* at 843 n.9. If congressional intent is clear, the court must follow it. *Id.* at 842–43. If the statute is ambiguous, the reviewing court moves to Step Two, determining whether the agency’s interpretation of the statute is reasonable; if so, the court must defer to the agency. *Id.*

100. See, e.g., *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (noting that the BIA deserves special deference because immigration deals with sensitive political functions implicating questions of foreign relations).

101. For one of the first cases applying *Chevron* to the BIA’s interpretation of the INA and overturning the agency’s construction of an asylum statute because contrary congressional intent was clear, see *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

102. See Austen Ishii, *There and Back, Now and Then: IIRIRA’s Retroactivity and the Normalization of Judicial Review in Immigration Law*, 83 FORDHAM L. REV. 949, 955–56 (2014). IIRIRA, combined with the Antiterrorism and Effective Death Penalty Act of 1996 and the REAL ID Act, imposed many unprecedented restrictions on review by the courts of appeals over individual deportation and removal orders. See GORDON ET AL., *supra* note 40, § 104.13[2] (listing many of the new restrictions).

103. Decisions related to waivers, cancellation of removal, voluntary departure, and AOS are discretionary. STEEL, *supra* note 2, § 14:38; see, e.g., INA § 212(h), 8 U.S.C. § 1182(h) (2012) (stating that “[n]o court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection”).

104. See, e.g., *Hanif v. Att’y Gen.*, 694 F.3d 479, 483 (3d Cir. 2012); *Bracamontes v. Holder*, 675 F.3d 380, 384 (4th Cir. 2012); *Martinez v. Mukasey*, 519 F.3d 532, 538 (5th Cir. 2008).

105. STEEL, *supra* note 2, § 14:38.

It is against this backdrop of broadening grounds for removal, narrowing relief, and restricted judicial review that the conflict over section 212(h) has materialized.

II. THE 212(H) CONFLICT

The BIA follows a court of appeals's decision overruling its own determination within that circuit but is free to follow its own interpretation elsewhere, which can lead to inconsistent applications of immigration law in different parts of the country.¹⁰⁶ Nine courts of appeals have declined to defer to the BIA on its interpretation of section 212(h), while one court has sided with the agency—creating a framework in which the question of whether noncitizens can remain in the United States may turn on where they live.¹⁰⁷ Part II details the legal conflict over whether noncitizens that adjusted to LPR status within the United States are eligible to apply for 212(h) waivers for committing certain crimes or not meeting continuous residence requirements. Part II.A analyzes the Fifth Circuit's decision on the issue, which eight other circuits have followed. Part II.B describes the arguments that the majority of the courts of appeals have presented for why LPRs who have adjusted status post-admission should be eligible for 212(h) waivers. Part II.C presents the contrary arguments raised by the BIA, the Eighth Circuit, and the dissenting opinions in the courts of appeals. Lastly, Part II.D presents theories on the current state of Supreme Court deference to the BIA based on the 2009 to 2013 Terms.

A. *The Question's Debut in the Fifth Circuit*

The first federal appellate court to address the issue of LPRs' eligibility to apply for 212(h) waivers was the Fifth Circuit in *Martinez v. Mukasey*.¹⁰⁸ Jose Martinez lawfully entered the United States from Argentina on a nonimmigrant visitor visa in 1980 and adjusted his status in 1990.¹⁰⁹ Martinez later married a U.S. citizen and fathered two U.S.-citizen children.¹¹⁰ In 2001, he pled guilty to bank fraud and served prison time. Shortly after his release, ICE officials took Martinez into custody and initiated removal proceedings, alleging that he had committed an aggravated felony.¹¹¹ Martinez argued that his crime did not constitute an aggravated felony, but he also applied for a 212(h) waiver of inadmissibility

106. Soares, *supra* note 41, at 937–38.

107. The BIA currently follows its own more narrow interpretation of section 212(h)—that the aggravated felony and continuous presence bar applies to all LPRs regardless of how they gained that status—in the First, Eighth, and Twelfth Circuits. *See infra* note 176 and accompanying text.

108. 519 F.3d 532 (5th Cir. 2008).

109. *Id.* at 536.

110. *Id.*

111. ICE relied on INA section 101 (a)(43)(M)(i) (allowing removal for “fraud or deceit in which the loss to the victim or victims exceeds \$10,000”), which made Martinez removable under INA section 237(a)(2)(A)(iii). *Martinez*, 519 F.3d at 536.

on the basis of extreme hardship to his U.S.-citizen wife and children.¹¹² The IJ held (and the BIA affirmed) that Martinez was removable and statutorily ineligible to seek relief under section 212(h) as an LPR with an aggravated felony conviction.¹¹³ On appeal, the Fifth Circuit overruled the BIA's interpretation of the 212(h) felony bar, holding that Martinez was eligible for a 212(h) waiver despite agreeing that his conviction was an aggravated felony.¹¹⁴

The court noted that, while it could not review a discretionary decision to deny or grant a 212(h) waiver, it had jurisdiction to review questions of law involving the BIA's construction of section 212(h).¹¹⁵ The legal question at issue was whether the statute's language—"previously been *admitted* to the United States as an alien lawfully admitted for permanent residence [and] . . . since the date of such admission the alien has been convicted of an aggravated felony"—barred LPRs who had adjusted status inside the country from qualifying for a 212(h) waiver.¹¹⁶ Martinez contended that, even if his conviction was an aggravated felony, he was eligible for a 212(h) waiver because he was never admitted as an LPR; rather, he adjusted status ten years after his initial admission as a nonimmigrant.¹¹⁷ The BIA argued that any LPR convicted of an aggravated felony at any time after acquiring that status was barred from using section 212(h).¹¹⁸

The court cited *Chevron* as guiding its analysis of whether it should defer to the agency's interpretation, noting that, in general, the court was constrained by the need to afford substantial deference to the BIA's interpretation of the INA.¹¹⁹ Applying the statutory definitions of "admission" and "admitted" to the text of section 212(h), the court found that "admitted" as used in the aggravated felony bar provision referred to a noncitizen's lawful entry into the country while holding LPR status.¹²⁰ It concluded that the statute's plain language unambiguously demonstrated that Congress did not intend to bar those LPRs who adjusted status post-

112. *Martinez*, 519 F.3d at 537.

113. *Id.*

114. *Id.* at 541–46.

115. *Id.* at 541.

116. *Id.* at 542.

117. *Id.*

118. The BIA relied on *Matter of Rosas*, where it held that a noncitizen who, unlike Martinez, entered without inspection and later adjusted to LPR status could be subject to removal proceedings under INA section 237(a)(2)(A)(iii) based on having an aggravated felony conviction. *Matter of Rosas*, 22 I. & N. Dec. 616 (B.I.A. 1999) (en banc). It considered LPRs who obtained status through AOS to have an "admission" for that particular provision but declined to resolve the meaning of "admission" in other contexts. *Id.* In Martinez's case, the BIA extended that reasoning to section 212(h). *Martinez*, 519 F.3d at 542. The Fifth Circuit noted that the language of INA section 237(a)(2)(A)(iii) differs from section 212(h). *Id.* It says that "[a]ny alien who is convicted of an aggravated felony *at any time after admission* is deportable." *Id.*

119. *Martinez*, 519 F.3d at 542. It emphasized that "[r]ecitation of this substantial-deference standard, without more, is insufficient to require our deference in this instance." *Id.*

120. *Id.* at 544; *see also infra* Part II.B.1.

entry from seeking a waiver of inadmissibility.¹²¹ Furthermore, reading the statute to allow those who adjusted to LPR status subsequent to entry to apply for 212(h) waivers comported with the immigration rule of lenity.¹²²

B. Courts Following the Fifth Circuit

Since *Martinez*, nine other courts of appeals have considered the question of whether the aggravated felony and continuous presence bars to 212(h) eligibility apply to LPRs who adjusted status post-entry.¹²³ Besides the Eighth Circuit, which diverged from the majority in March 2014, each court has adopted the Fifth Circuit's reasoning, finding that the provision at issue in section 212(h) unambiguously bars only the applications of those LPRs who acquired status through consular processing.¹²⁴ Although *Martinez* considered the question in light of a petitioner who had entered the country lawfully in a different status than LPR, courts have applied the Fifth Circuit's interpretation to both LPRs who were inspected and admitted by an immigration officer in some other status¹²⁵ as well as those who entered the United States illegally and later adjusted status.¹²⁶ All of the majority courts applied *Chevron* and found the language of section 212(h) to be unambiguous.¹²⁷ This section presents their arguments.

1. The Definition Section of the INA

In considering whether adjustment to LPR status while already living in the United States qualifies as having previously been "admitted" to the

121. *Martinez*, 519 F.3d at 546. The court cited *Connecticut National Bank v. Germain*, 503 U.S. 249, 253–54 (1992), for the principle that a court must begin with the plain language of the text to get to congressional intent: "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says." *Id.* at 543.

122. *Id.* at 544; see also *infra* Part II.B.2.

123. In most cases, the BIA deemed respondents ineligible for 212(h) waivers on the basis of aggravated felonies, but one had been found ineligible for failure to meet the seven-year continuous presence requirement. See *Hanif v. Att'y Gen.*, 694 F.3d 479, 481 (3d Cir. 2012).

124. *Medina-Rosales v. Holder*, 778 F.3d 1140 (10th Cir. 2015); *Husic v. Holder*, 776 F.3d 59 (2d Cir. 2015); *Stanovsek v. Holder*, 768 F.3d 515 (6th Cir. 2014); *Negrete-Ramirez v. Holder*, 741 F.3d 1047 (9th Cir. 2014); *Papazoglou v. Holder*, 725 F.3d 790 (7th Cir. 2013); *Leiba v. Holder*, 699 F.3d 346 (4th Cir. 2012); *Hanif*, 694 F.3d 479; *Bracamontes v. Holder*, 675 F.3d 380 (4th Cir. 2012); *Lanier v. Att'y Gen.*, 631 F.3d 1363 (11th Cir. 2011).

125. See, e.g., *Husic*, 776 F.3d at 60 (petitioner entered on B-2 visa, later received asylum, and adjusted to LPR); *Stanovsek*, 768 F.3d at 516 (petitioner entered on nonimmigrant visa and adjusted by marriage); *Negrete-Ramirez*, 741 F.3d at 1049 (petitioner entered on B-2 visa and adjusted to LPR shortly after); *Papazoglou*, 725 F.3d at 791 (petitioner entered on B-2 visa and adjusted through marriage).

126. *Leiba*, 699 F.3d at 347 (petitioner crossed border illegally but adjusted status pursuant to an employment-based petition); *Hanif*, 694 F.3d at 481 (petitioner entered on fraudulent visa and obtained marriage-based adjustment); *Bracamontes*, 675 F.3d at 382 (petitioner entered without inspection and adjusted fourteen years later); *Lanier*, 631 F.3d at 1365 (petitioner entered without inspection and adjusted to LPR four years later).

127. See, e.g., *Husic*, 776 F.3d at 66 ("[T]he statutory text is unambiguous."); *Stanovsek*, 768 F.3d at 516 (noting "inescapably clear language"); *Hanif*, 694 F.3d at 481 (stating that the language was "clear and unambiguous on its face").

country “for permanent residence” under section 212(h), the Eleventh Circuit emphasized that, in writing the eligibility bar, Congress used two terms of art that it “expressly defined” in section 101 of the INA.¹²⁸ Interpreting the statute required the court to apply the given definitions and “to assess the effect of each term on the meaning of [section 212(h)] as a whole.”¹²⁹ The rest of the majority courts similarly felt constrained to apply the defined meanings of “admitted” and “lawfully admitted for permanent residence.”¹³⁰

Section 101(a)(13)(A) of the INA defines “admitted” and “admission” as “the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.”¹³¹ The courts read the word “admitted” to contemplate a “physical crossing of the border following the sanction and approval of United States authorities”¹³² and to exclude post-entry AOS.¹³³ The Fifth Circuit pointed to legislative history to support this reading.¹³⁴ The court noted that after IIRIRA’s passage, members of Congress attempted, through the Immigration Technical Corrections Act of 1997, to amend section 101(a)(13)(A)’s definition of “admission” and “admitted” to explicitly include AOS.¹³⁵ Thus, at least some members of Congress did not consider the enacted definition of “admitted” to include post-entry AOS; the fact that the proposed amendment was rejected showed that the omission was intentional.¹³⁶

In section 101(a)(20), Congress defined “lawfully admitted for permanent residence” as “the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws.”¹³⁷ *Lanier v. Attorney General*¹³⁸ took this definition to describe “a particular immigration status, without any regard for how or when that status is obtained.”¹³⁹ The court reasoned that

128. *Lanier*, 631 F.3d at 1366.

129. *Id.*

130. See *Negrete-Ramirez*, 741 F.3d at 1053 (noting that when a statute includes an explicit definition, the court must follow the definition “unless doing so is not possible in a particular context”); *Hanif*, 694 F.3d at 484 (“Absent any indication to the contrary, we must presume that Congress intended to give those terms the meaning ascribed to them elsewhere in the statute.”); see also *Husic*, 776 F.3d at 63–64; *Stanovsek*, 768 F.3d at 517; *Negrete-Ramirez*, 741 F.3d at 1052; *Papazoglou*, 725 F.3d at 793–94.

131. INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A) (2012).

132. *Bracamontes v. Holder*, 675 F.3d 380, 385 (4th Cir. 2012); see also *Negrete-Ramirez*, 741 F.3d at 1051 (deciding “admission” means “passage into the country from abroad at a port of entry”).

133. See, e.g., *Negrete-Ramirez*, 741 F.3d at 1051; *Papazoglou*, 725 F.3d at 793–94; *Leiba*, 699 F.3d at 350–51; *Hanif*, 694 F.3d at 484–85; *Bracamontes*, 675 F.3d at 385–86; *Lanier*, 631 F.3d at 1366–67; *Martinez*, 519 F.3d at 543–44.

134. *Martinez*, 519 F.3d at 545.

135. Immigration Technical Corrections Act of 1997, H.R. 2413, 105th Cong. § 4(a) (1997). The proposed amendment would have added, “(D) In the case of an alien adjusted to the status of an alien lawfully admitted for permanent residence, such alien shall be regarded as having been admitted on the date of such adjustment.”

136. *Martinez*, 519 F.3d at 545.

137. INA § 101(a)(20), 8 U.S.C. § 1101(a)(2) (2012).

138. 631 F.3d 1363 (11th Cir. 2011).

139. *Id.* at 1366.

the phrase encompassed all persons with LPR status. If section 212(h) used that term alone, it would mean that all LPRs were barred from relief.¹⁴⁰ However, using the statutorily defined terms “admission” and “lawfully admitted for permanent residence” in conjunction described a particular status and the process used to obtain that status, thus narrowing the class of LPRs barred from seeking the waiver.¹⁴¹ Using both terms together was a “very strong indication that [Congress] intended that each term would serve a distinct purpose.”¹⁴²

With the statutory definitions substituted into the provision in question, section 212(h) reads:

No waiver shall be granted under this subsection in the case of an alien who has previously lawfully entered into the United States after inspection and authorization by an immigration officer as an alien with the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant . . .¹⁴³

Those LPRs who entered the country in a different status (or without status) and did not become LPRs until after adjustment did not have an “admission” in LPR status within the plain meaning of section 212(h).¹⁴⁴ Therefore, they remained eligible to seek a waiver of inadmissibility even if they had been convicted of aggravated felonies or failed to meet the continuous residence requirement.¹⁴⁵ This reading, said the Fourth Circuit, “accords section 212(h) its plain meaning and properly utilizes the definitions of terms Congress provided in the INA.”¹⁴⁶

Furthermore, if Congress wanted to bar all LPRs from applying for a 212(h) waiver, it could have done so using much simpler language.¹⁴⁷ For example, Congress could have said: “No waiver shall be granted under this subsection in the case of a lawful permanent resident.”¹⁴⁸ If Congress meant to withhold 212(h) relief from all LPRs who failed to meet the statutory conditions, the phrase “previously . . . admitted to the United States” would be mere surplusage.¹⁴⁹ By employing both defined terms together, rather than using a simpler construction, Congress indicated its

140. *Id.*

141. *Id.*; *Stanovsek v. Holder*, 768 F.3d 515, 519 (6th Cir. 2014) (“Each defined term adds its own meaning to that phrase: the first refers to a type of entry into this country, while the second refers to a certain status . . .”); *see also* *Negrete-Ramirez v. Holder*, 741 F.3d 1047, 1051–54 (4th Cir. 2014).

142. *Leiba v. Holder*, 699 F.3d 346, 355 (4th Cir. 2012).

143. *Bracamontes v. Holder*, 675 F.3d 380, 385–86 (4th Cir. 2012); *see also* *Husic v. Holder*, 776 F.3d 59, 63 (2d Cir. 2015); *Stanovsek*, 768 F.3d at 517.

144. *Bracamontes*, 675 F.3d at 385.

145. *Id.*

146. *Id.*

147. *See, e.g., Stanovsek*, 768 F.3d at 517; *Negrete-Ramirez v. Holder*, 741 F.3d 1047, 1053 (4th Cir. 2014); *Lanier v. Att’y Gen.*, 631 F.3d 1363, 1366 (11th Cir. 2011).

148. *Stanovsek*, 768 F.3d at 517.

149. *Bracamontes*, 675 F.3d at 386. Interpretations that would render certain statutory language redundant or otherwise superfluous are disfavored. *See, e.g., Husic v. Holder*, 776 F.3d 59, 64 (2d Cir. 2015); *Negrete-Ramirez*, 741 F.3d at 1053.

intent to bar only those LPRs who initially entered the country as such.¹⁵⁰ The courts presumed that, when writing a statute, Congress acts intentionally.¹⁵¹ The Seventh Circuit concluded, “We will not interpret a statute in a manner that renders part of it irrelevant, particularly where, as here, the statute has an unambiguous meaning if we simply apply the definition provided in the statute itself.”¹⁵² Similarly, the Fourth Circuit expressed that “[i]n the face of a statute’s unambiguous language, the BIA may not make its own administrative amendments,” and the court must give effect to the statute as written, even if the court or the agency disagrees with what Congress expressed.¹⁵³ If Congress did not in fact intend what it said in plain words, it was up to Congress—and not the court or the BIA—to amend the statute.¹⁵⁴

2. The Immigration Rule of Lenity

As further support for a narrow reading of the statute, several courts invoked the immigration rule of lenity.¹⁵⁵ In criminal law, the rule of lenity requires courts to construe ambiguities in favor of the defendant because of the “overwhelming constitutional concerns associated with punishment and depriving an individual of life, liberty, or property.”¹⁵⁶ Although deportation and pre-removal detention are not considered criminal punishments,¹⁵⁷ the Supreme Court has said that, in the immigration context, ambiguities affecting deportation should be resolved in favor of the noncitizen because of the drastic consequences of removal.¹⁵⁸

Although the courts did not find any ambiguity around the term “admitted” in section 212(h), application of the rule of lenity—reading the phrase to exclude AOS subsequent to entry—provided an additional argument for narrowly construing the statute in favor of allowing the respondents to seek a waiver of inadmissibility.¹⁵⁹

150. *Hanif v. Att’y Gen.*, 694 F.3d 479, 484 (3d Cir. 2012).

151. *See, e.g., id.*

152. *Papazoglou v. Holder*, 725 F.3d 790, 794 (7th Cir. 2013).

153. *Bracamontes*, 675 F.3d at 387.

154. *Id.* at 389.

155. *See, e.g., Negrete-Ramirez v. Holder*, 741 F.3d 1047, 1054 (9th Cir. 2014); *Lanier v. Att’y Gen.*, 631 F.3d 1363, 1367 n.4 (11th Cir. 2011); *Martinez v. Mukasey*, 519 F.3d 532, 544 (5th Cir. 2008).

156. Soares, *supra* note 41, at 933; *see also* Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 *GEO. IMMIGR. L.J.* 515 (2003).

157. *See, e.g., INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). Many scholars have called for stronger procedural safeguards for detained immigrants, arguing that deportation is akin to criminal punishment. *See, e.g.,* Cesar Cuauhtemoc Garcia Hernandez, *Immigration Detention As Punishment*, 61 *UCLA L. REV.* 1346 (2014); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 28 *IMMIGR. & NAT’LITY L. REV.* 679 (2007).

158. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 320 (2001); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948); *see also* Slocum, *supra* note 156, at 521–23; Soares, *supra* note 41, at 933.

159. *See, e.g., Martinez*, 519 F.3d at 544.

C. The BIA and the Eighth Circuit

Just over two years after the *Martinez* decision, in *Matter of Koljenovic*,¹⁶⁰ the BIA came to the opposite conclusion on 212(h) eligibility bars. Unlike *Martinez*, who entered the United States with a valid nonimmigrant visa and later adjusted status, Koljenovic had entered without inspection.¹⁶¹ He later adjusted status and was convicted of second-degree organized fraud three years later.¹⁶² Koljenovic found himself in removal proceedings when he sought to reenter the country after a brief trip abroad.¹⁶³ The IJ found that Koljenovic was ineligible for a 212(h) waiver because he did not have the requisite seven years of lawful continuous presence from the date of his AOS.¹⁶⁴ On appeal, Koljenovic argued that the continuous presence bar should not apply to him because his AOS should not be considered an “admission” as an LPR.¹⁶⁵

The BIA agreed that Koljenovic’s adjustment was not an “admission” by the “limited definitions” in section 101(a)(13)(A).¹⁶⁶ Nonetheless, it argued that Koljenovic’s adjustment was an admission for purposes of section 212(h), reading that provision in the context of the INA as a whole and with legislative history in mind.¹⁶⁷ The BIA had held in prior cases that an AOS could be an “admission” in some contexts: in *Matter of Rosas*,¹⁶⁸ it found that a noncitizen who entered without inspection and later adjusted to LPR status had been “admitted” as an LPR for purposes of section 237(a)(2); in *Matter of Shanu*,¹⁶⁹ in the same context, it found a person admitted as a nonimmigrant visitor who subsequently adjusted status also had been “admitted” as an LPR upon his AOS.¹⁷⁰

The BIA distinguished *Martinez* because the respondent in that case had been lawfully admitted as a nonimmigrant visitor and later adjusted his status.¹⁷¹ The Fifth Circuit had not considered whether its holding would apply in a case like Koljenovic’s, where the noncitizen had never previously been admitted in any lawful status.¹⁷² Applying the *Martinez* rule in every case, the agency said, would create an absurd result: LPRs like Koljenovic

160. 25 I. & N. Dec. 219 (B.I.A. 2010).

161. *Id.* at 219.

162. *Id.*

163. *Id.*

164. *Id.* at 219–20.

165. *Id.* at 220.

166. *Id.*

167. *Id.* at 220–25.

168. 22 I. & N. Dec. 616 (B.I.A. 1999) (en banc).

169. 23 I. & N. Dec. 754 (B.I.A. 2005), *vacated*, *Aremu v. Dep’t of Homeland Sec.*, 450 F.3d 578 (4th Cir. 2006).

170. The BIA noted other sections of the INA that equate adjustment and admission: sections 245(a) and (i) authorize the Attorney General to adjust a person’s status to that of an “alien lawfully admitted for permanent residence,” and section 245(b) instructs the Attorney General to treat the date AOS was granted as the date of lawful admission for permanent residence for recording purposes. *Matter of Koljenovic*, 25 I. & N. Dec. 219, 221 (B.I.A. 2010).

171. *Id.* at 223.

172. *Id.*

would be left without any date of admission within the meaning of section 101(a)(13), which would make them subject to grounds of inadmissibility and ineligible for various forms of relief.¹⁷³ Such a result would be inconsistent with the overall structure of the INA and would create incongruities among its statutory provisions.¹⁷⁴ Instead, the BIA found that resolving the statutory provision to bar all LPRs who failed the aggravated felony and continuous residence requirements was “far more consistent with the overall structure of the Act regarding the eligibility of aliens for relief under the relevant provisions of section 212(h) and for other analogous relief.”¹⁷⁵ Applying *Matter of Rosas*, the BIA concluded that no LPR who lacked the requisite continuous presence or failed to meet other statutory conditions could be eligible for a 212(h) waiver, regardless of how the LPR was “admitted” to that status.¹⁷⁶ The agency has since reaffirmed that holding in jurisdictions where controlling circuit law does not hold otherwise.¹⁷⁷

Only one court of appeals has chosen to side with the BIA and to bar *all* LPRs from applying for 212(h) relief if they have an aggravated felony or lack continuous presence. In March 2014, the Eighth Circuit issued *Roberts v. Holder*.¹⁷⁸ Unlike the respondent in *Koljenovic*, Shaun Roberts had been inspected and admitted at a port of entry as a nonimmigrant visitor, later adjusting status and becoming an LPR.¹⁷⁹ The court declined to follow the Third, Fourth, Fifth, and Eleventh Circuits—which by that time followed *Martinez*—and instead became the first court of appeals to find section 212(h) ambiguous.¹⁸⁰ Despite the fact that it was departing from its sister circuits, the court wrote a brief opinion. It argued that, reading section 212(h) in isolation,

one might conclude, as our sister circuits have, that the meaning of “admitted” is clear . . . [and] apply the aggravated felony bar only to those who obtained LPR status at the port of entry to the United States. However, the immigration statutes as a whole . . . do not treat the words “admitted” and “admission” consistently.¹⁸¹

Section 212(h) was thus susceptible to multiple interpretations.¹⁸² Moving to *Chevron* Step Two, the court found the BIA’s construction of the provision reasonable because the INA as a whole might fairly be read to treat post-entry adjustment as a proxy for inspection at the border.¹⁸³ Therefore, it deferred to the agency.

173. *Id.* at 223–24.

174. *Id.* at 221.

175. *Id.* at 224.

176. *Id.* at 225.

177. *Matter of Rodriguez*, 25 I. & N. Dec. 784, 789 (B.I.A. 2012).

178. 745 F.3d 928 (8th Cir. 2014).

179. *See supra* notes 1–5 and accompanying text.

180. *Roberts*, 745 F.3d at 932.

181. *Id.* at 933.

182. *Id.*

183. *Id.* at 932–33.

The Government, the Eighth Circuit, and the dissenting judges in the majority courts all argued that section 212(h) was ambiguous as to which LPRs were barred from eligibility and that the BIA's interpretation should therefore get *Chevron* deference.¹⁸⁴ In arguing that the statute was ambiguous, they invoked the absurdity doctrine, referenced the meaning of "admission" in other INA provisions, and invoked legislative history and purpose. This section presents those arguments.

1. The Meaning of "Admission" in Other Provisions of the INA
Makes the Use of "Admitted" in 212(h) Ambiguous

The Eighth Circuit held that "previously been admitted . . . as an alien lawfully admitted for permanent residence" was ambiguous without explicitly explaining how.¹⁸⁵ In *Bracamontes v. Holder*,¹⁸⁶ the dissent offered an explanation: section 212(h) used the term "admitted" to refer to an "entry" but also used the phrase "lawfully admitted for permanent residence," which refers to AOS.¹⁸⁷ While the majority read those terms together to clearly refer to LPRs who had not entered the country in that status, the dissent argued that the parallel use of "admission" in one sense to refer to an "entry" and in another sense to refer to "status" created confusion and ambiguity as to the meaning of the word "admitted" in the provision.¹⁸⁸ The BIA resolved that ambiguity by reading section 212(h) consistently with other INA provisions that used AOS as a proxy for admission.¹⁸⁹

The Government frequently argued that the statutory provision in section 212(h) cannot be read in isolation but instead must be read in the context of the entire INA.¹⁹⁰ Several other provisions in the INA consider an AOS an "admission," and the 212(h) bar should be read that way as well.¹⁹¹

In *Hanif v. Attorney General*,¹⁹² the Government pointed out that section 245(b) of the INA directs the Attorney General to treat the date that a noncitizen adjusted status as the date of lawful admission for permanent residence for recording purposes.¹⁹³ Therefore, it argued, the petitioner's AOS could be read as an "admission" as an LPR for section 212(h) purposes.¹⁹⁴ Similarly, the Government in *Leiba v. Holder*¹⁹⁵ argued that

184. See, e.g., *Stanovsek v. Holder*, 768 F.3d 515, 521 (6th Cir. 2014) (Boggs, J., dissenting); *Bracamontes v. Holder*, 675 F.3d 380, 390 (4th Cir. 2012) (Niemeyer, J., concurring in part and dissenting in part).

185. See *Roberts*, 745 F.3d at 932.

186. 675 F.3d 380 (4th Cir. 2012).

187. *Id.* at 390, 392 (Niemeyer, J., concurring in part and dissenting in part).

188. *Id.*

189. *Id.* at 390.

190. See, e.g., *Hanif v. Att'y Gen.*, 694 F.3d 479, 484 (3d Cir. 2012).

191. See, e.g., *id.* at 485; *Martinez v. Mukasey*, 519 F.3d 532, 545 (5th Cir. 2008).

192. 694 F.3d 479 (3d Cir. 2012).

193. *Id.* at 485.

194. *Id.* The majority responded that the recording provision in section 245(b) was simply a "ministerial provision relating to the monitoring and control of the number of visas available in any given year, rather than an effort by Congress to amend the definitions of

the use of AOS as a proxy for admission in section 237(a)(2)(A)(iii) should inform the reading of 212(h).¹⁹⁶

The dissent in *Stanovsek v. Holder*¹⁹⁷ pointed to three provisions in the INA that use the same “alien . . . *admitted* . . . as an alien lawfully admitted for permanent residence” language as section 212(h) but interpret the noncitizen’s AOS as an admission: sections 201(c), 216, and 216A.¹⁹⁸ Section 201(c) involves computing the number of family-sponsored visas available in a given year and says that a noncitizen “*subsequently admitted as an alien lawfully admitted for permanent residence*” shall not again be counted as “admitted.”¹⁹⁹ Sections 216 and 216A say that LPRs who entered the country and later adjusted status based upon marriage to a U.S. citizen shall be considered to “have been admitted” as LPRs.²⁰⁰ The dissent argued that, in these provisions, the language mirrored section 212(h) but allowed for an AOS to equal an admission—the distinction between physical entry and status did not matter in those statutes, so it should not matter in 212(h).²⁰¹

The majority courts rejected arguments that the way “admission” was used in other parts of the INA had any impact on the reading of section 212(h). According to the majority courts, there are other sections of the INA where the absence of an “admission” as defined in section 101(a)(13)(A) might permit using the date of AOS as the date of admission for practical purposes, such as in removal provisions or cancellation of removal.²⁰² But in those provisions, the terms “admission” or “admitted” are followed by “in any status” or left unqualified.²⁰³ In section 212(h), the concurrent use of “admitted” and “lawfully admitted for permanent residence”—terms of art separately defined in the INA—works differently.²⁰⁴

‘admitted’ and ‘lawfully admitted for permanent residence’ set forth in § 1101(a).” *Id.*; *see also Stanovsek v. Holder*, 768 F.3d 515, 518–19 (6th Cir. 2014).

195. 699 F.3d 346 (4th Cir. 2012).

196. *Id.* at 354.

197. 768 F.3d 515 (6th Cir. 2014).

198. *Id.* at 521–22 (Boggs, J., dissenting).

199. *Id.* at 522.

200. *Id.* at 523.

201. *Id.* at 521–22. The majority in *Stanovsek* analyzed each section in turn, finding that because those statutes dealt with “admission” in very specific contexts—parole and naturalization—they did not shed light on the terms’ meanings in the context of section 212(h). *Id.* at 520.

202. *See, e.g., Negrete-Ramirez v. Holder*, 741 F.3d 1047, 1052 (9th Cir. 2014); *Leiba v. Holder*, 699 F.3d 346, 354 (4th Cir. 2012).

203. *Negrete-Ramirez*, 741 F.3d at 1053.

204. *Id.* at 1052–54; *see also Hanif v. Att’y Gen.*, 694 F.3d 479, 486 (3d Cir. 2012) (noting that the “omission of this additional modifier creates a significant distinction”); *Martinez v. Mukasey*, 519 F.3d 532, 546 (5th Cir. 2008).

2. Absurdity Arguments

In arguing against the majority construction of section 212(h), the Government frequently invoked the absurdity doctrine,²⁰⁵ arguing that a plain reading of the provision would lead to ridiculous results that Congress could not have intended. Their arguments pointed to two bizarre results in particular: impermissible incongruities with other INA provisions and irrational distinctions among different types of LPRs.

First, the Government argued that the meaning of “admission” in section 212(h) should be read the same way as in other sections of the INA that treat an AOS as an admission.²⁰⁶ Relatedly, the Government argued that failing to read section 212(h) that way would lead to absurd results and to incongruities with other provisions of the INA, because some noncitizens would be left without any official admission. In *Leiba*, where the petitioner had entered the United States illegally and adjusted status through an employment-based petition, the Government argued that applying Congress’s definition of “admission” literally would produce the absurd result that those who never lawfully entered the country would be ineligible to apply for cancellation of removal under INA section 240A (because they had no admission) but would be eligible for a 212(h) waiver.²⁰⁷ The Government presumed that Congress intended to create congruity between sections 212(h) and 240A.²⁰⁸ The Government reasoned that, as the requirements in section 240A applied to all LPRs regardless of their mode of attaining that status, the 212(h) continuous residence requirements should also apply to all LPRs.²⁰⁹ In considering this argument, the majority courts found that Congress clearly did not intend the word “admitted” to read the same way in both contexts. The sections differed in a significant way: in 240A the seven-year continuous-residence requirement applied to LPRs “*after having been admitted in any status.*”²¹⁰ In 240A, Congress did not use “admitted” in conjunction with “lawfully admitted for permanent residence.”²¹¹ The “omission of this additional modifier” created a distinction between the two sections.²¹² Additionally, although it might be

205. See *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486–87 (1868) (“General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character.”).

206. See *supra* notes 191–201 and accompanying text.

207. *Leiba*, 699 F.3d at 354.

208. The BIA pointed to a House Conference Report to support its presumption: “The managers intend that the provisions governing continuous residence set forth in INA section 240A as enacted by this legislation shall be applied as well for purposes of waivers under INA section 212(h).” *Matter of Koljenovic*, 25 I. & N. Dec. 219, 222 (B.I.A. 2010) (citing H.R. REP. NO. 104-828, at 228 (1996) (Conf. Rep.)).

209. *Leiba*, 699 F.3d at 354.

210. *Id.*; *Hanif v. Att’y Gen.*, 694 F.3d 479, 485 (3d Cir. 2012).

211. *Hanif*, 694 F.3d at 485.

212. *Id.* at 486. Because Congress amended INA sections 212(h), 240A, and 101(a)(13)(A) at the same time, these textual differences were likely intentional. *Id.* at 484. When Congress includes particular language in one section and omits it in another, it acts purposefully in its disparate exclusion or inclusion. See *Leiba*, 699 F.3d at 354.

strange that LPRs who entered illegally and later adjusted status were left with no technical admission, the court in *Hanif* stated that Congress had “long been aware of the fact that aliens may enter the country without inspection and later adjust.”²¹³ While the situation was “awkward,” it was not absurd; the courts would not substitute their judgment for that of Congress.²¹⁴

Second, the BIA and the Government pointed out that barring some LPRs from 212(h) eligibility but not others led to absurd distinctions—both (1) between those who entered illegally and those who entered lawfully, and (2) between LPRs who went through consular processing and those who adjusted status.

In *Koljenovic*, the BIA emphasized that Congress could not have intended for a noncitizen who entered the country illegally, and then received the privilege of adjusting status, to be immune from restrictions on seeking 212(h) protection, while leaving a person who had gone through consular processing to be admitted as an LPR to suffer those restrictions.²¹⁵ The Government and dissents found it unfair that the majority interpretation of section 212(h) would impose harsher terms on those who entered legally than on any other category of entrants, “including not only those who enter, for example, as tourists and later adjust their status, but even those who sneak across the border; those who overstay their visas; or those who violate any other type of entry requirement—by lying about qualifications, past history, or affiliations for example.”²¹⁶ Judge Niemeyer, dissenting in *Bracamontes*, expressed that “[i]t is difficult to fathom why Congress would have wished to bar aliens who *lawfully entered* the United States with [LPR] status from reaping the benefits of section 212(h)[,] while permitting aliens who *illegally entered* the country” to reap those benefits.²¹⁷ Such a reading of the statute would create perverse incentives.²¹⁸

The BIA also reasoned that Congress could not have intended to distinguish those who had acquired LPR status through consular processing from those “whose admission occurred through adjustment of status.”²¹⁹ The dissent in *Stanovsek* argued that there is no material difference between one who enters the country as an LPR and one who adjusts status following entry, so there is no sensible explanation for why the statute would treat

213. *Hanif*, 694 F.3d at 487.

214. *Id.*

215. Matter of *Koljenovic*, 25 I. & N. Dec. 219, 223 (B.I.A. 2010).

216. *Stanovsek v. Holder*, 768 F.3d 515, 523 (6th Cir. 2014) (Boggs, J., dissenting). The dissent framed this disparate treatment as an absurdity rather than an equal protection issue. Courts have consistently rejected equal protection challenges to section 212(h). *See, e.g.*, *Bracamontes v. Holder*, 675 F.3d 380, 388–89 n.5 (4th Cir. 2012); *Hanif*, 694 F.3d at 486 (finding section 212(h) constitutional under rational basis review because Congress could have had good reasons for the 212(h) distinction).

217. *Bracamontes*, 675 F.3d at 393 (Niemeyer, J., concurring in part and dissenting in part).

218. *Id.*

219. *Koljenovic*, 25 I. & N. Dec. at 224.

LPRs disparately based on the procedure used to acquire that status.²²⁰ In *Martinez*, the Government argued that IIRIRA reforms were meant to expedite removal of “criminal aliens”; it would therefore be unreasonable to suggest that Congress intended to distinguish between LPRs guilty of the same crimes based on whether they entered the country as LPRs or adjusted status post-entry.²²¹

The Fifth Circuit majority found that the distinctions above were not necessarily absurd.²²² There were rational reasons for Congress to distinguish between different types of LPRs based on how they acquired that status.²²³ First, it was possible that Congress intended to take an incremental approach to reaching its ultimate goals.²²⁴ Second, Congress may have felt that LPRs who adjusted status inside the country rather than entering as green-card holders were more deserving of eligibility for a waiver because they likely grew up in this country, developed strong ties here, and had more citizen relatives who would be adversely affected by their removal.²²⁵ Ultimately, all that mattered was “that there are countervailing explanations for the statutory distinction between ‘admitted’ and ‘adjustment,’ which are just as plausible, if not more so, than the Government’s contention that such a reading would lead to an absurd result.”²²⁶

The dissenters in both *Bracamontes* and *Stanovsek* argued that the BIA’s interpretation, which treats all LPRs alike for purposes of section 212(h), was a more rational reading of the statute.²²⁷ Ultimately, the majority courts felt that, while a distinction based on manner of admission “appears to make little sense” and may leave readers and judges alike asking why “Congress [would] distinguish between those who obtained [LPR] status at the time of lawful entry and those who adjusted status later, for purposes of barring permanent residents who have committed aggravated felonies from discretionary hardship relief,” the courts’ own inability to answer that question did not warrant expanding the scope of the provision beyond the clearly limited meaning expressed in the text.²²⁸

220. *Stanovsek*, 768 F.3d at 523 (Boggs, J., dissenting).

221. *Martinez v. Mukasey*, 519 F.3d 532, 544 (5th Cir. 2008).

222. *Id.*

223. *Id.* at 544–45.

224. *Id.* at 545. In equal protection cases, for example, the legislature was permitted to take reforms one step at a time; a statute need not fail for failing to address every problem at once. *Id.*; see, e.g., *Ry. Exp. Agency v. New York*, 336 U.S. 106, 110 (1949) (“It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.”).

225. *Martinez*, 519 F.3d. at 545 (noting that this was exactly the situation for *Martinez*).

226. *Id.*

227. *Stanovsek v. Holder*, 768 F.3d 515, 523 (6th Cir. 2014) (Boggs, J., dissenting); *Bracamontes v. Holder*, 675 F.3d 380, 393 (4th Cir. 2012) (Niemeyer, J., concurring in part and dissenting in part).

228. *Stanovsek*, 768 F.3d at 520.

3. Arguments for Deference to the BIA

Finally, the Government and the dissents placed greater emphasis on the need to defer to the BIA, implicitly invoking the plenary power doctrine. In his dissent in *Stanovsek*, Judge Boggs noted, “[J]udicial deference to the Executive Branch is especially appropriate in the immigration context.”²²⁹ Because the statute allowed for meanings other than that which the majority adopted, courts should defer to the BIA on its interpretation of section 212(h).²³⁰ Similarly, Judge Niemeyer of the Fourth Circuit argued, in *Bracamontes*, “When a statute yields two plausible constructions, we should defer to the agency, especially when the statute pertains to immigration matters.”²³¹

D. Supreme Court Deference to the BIA: Where Is the Court Headed?

While there is little scholarly discussion regarding the dispute over section 212(h) in particular,²³² theories about how the Supreme Court has handled questions of deference to the BIA over statutory interpretation help illuminate how it might address 212(h). As discussed in Part I, the Court has historically been reticent to second-guess the BIA in matters involving immigration policy and INA interpretation. However, recent Supreme Court jurisprudence paints a surprisingly more complicated picture. This section reviews decisions from the 2009 to 2013 Terms that addressed whether to defer to the BIA’s interpretation of various INA provisions.²³³

1. 2009–2013: Opinions Withholding Deference

In *Carachuri-Rosendo v. Holder*,²³⁴ the Supreme Court granted certiorari to resolve a circuit split over whether subsequent simple possession offenses are aggravated felonies.²³⁵ ICE placed an LPR previously convicted of two misdemeanor drug offenses in removal proceedings.²³⁶

229. *Id.* at 523–24 (Boggs, J., dissenting).

230. *Id.*

231. *Bracamontes*, 675 F.3d at 390 (Niemeyer, J., concurring in part and dissenting in part).

232. In the world of scholarship, discussion of conflicting interpretations of section 212(h) take place almost exclusively in practitioners’ guides or immigration news releases. *See, e.g.*, DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW & CRIMES § 10:21 (2015); *BIA Reaffirms Matter of Koljenovic Outside of the 4th, 5th, and 11th Circuits but Follows Contrary Circuit Precedents in Those Circuits*, 89 INTERPRETER RELEASES 926 (2012). One journal article describes the dispute over the meaning of “admission” in section 212(h) alongside disputes about the meaning of “admission” in other sections of the INA. *See* Griffith, *supra* note 33. Only one student note addresses the topic. *See* Viridiana G. Carreon, Note, *Section 212(H) of the Immigration and Nationality Act After Matter of Rodriguez*, 6 J. MARSHALL L.J. 145 (2012).

233. This Note omits immigration cases on constitutional questions and federal preemption.

234. 560 U.S. 563 (2010).

235. *Id.* at 573.

236. *Id.* at 566.

Although Carachuri-Rosendo had only received a ten-day sentence for his second offense, an IJ found that he had been “convicted” of an “aggravated felony” within the meaning of the INA because his conduct could have been prosecuted as simple possession with a recidivist enhancement under state law and could have been punishable as a felony under federal law.²³⁷ The BIA affirmed, following circuit precedent,²³⁸ and the Fifth Circuit also adopted the IJ’s “hypothetical approach.”²³⁹ The Supreme Court reversed, holding that a second or subsequent simple possession offense does not qualify as an aggravated felony when the state conviction was not based in fact on a prior conviction.²⁴⁰ The Court found that the hypothetical approach did not comport with a plain reading of the statute or the term “conviction.”²⁴¹

In *Kucana v. Holder*,²⁴² the Court overruled the BIA on an issue that went to the very heart of judicial review of BIA decisions: whether the INA’s preclusion of judicial review of specific discretionary determinations²⁴³ also extends to determinations made discretionary by regulation.²⁴⁴ The BIA had denied the petitioner’s motion to reopen his removal proceedings.²⁴⁵ On appeal, the Seventh Circuit declined jurisdiction because a regulation prohibited review of denials of motions to reopen, even though the INA did not.²⁴⁶ The Supreme Court reversed, holding that the words “specified under this subchapter” precluded judicial review only of determinations made discretionary by the statute.²⁴⁷ While Congress had restricted judicial review in many provisions of IIRIRA, it had not delegated authority to executive agencies to further restrict judicial review by regulation.²⁴⁸ Therefore, the courts of appeals had jurisdiction to review denials of motions to reopen by the BIA.²⁴⁹

In 2011, the Supreme Court overturned another BIA interpretation in *Judulang v. Holder*.²⁵⁰ The Court reviewed the BIA’s “comparable

237. *Id.* at 570.

238. The BIA actually disagreed with the IJ’s reasoning and said that, in other circuits, it would not treat a subsequent misdemeanor conviction as an aggravated felony unless the conviction contained an express finding that the offender was a recidivist. *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382, 393 (B.I.A. 2007). It emphasized that it was interpreting a criminal statute for which it was not entitled deference. *Id.* at 385.

239. *Carachuri-Rosendo*, 560 U.S. at 572.

240. *Id.* at 582.

241. *Id.* at 576.

242. 558 U.S. 233 (2010).

243. INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii) (2012) precludes review of denials of discretionary relief or any other decision, or action of the Attorney General, “the authority for which is specified under [the] subchapter to be in the discretion of the Attorney General” and enumerates specific administrative judgments that are insulated from judicial review.

244. *Kucana*, 558 U.S. at 237.

245. *Id.* at 236–37.

246. *Id.* at 237.

247. *Id.*

248. *Id.* at 252.

249. *Id.* at 237.

250. 132 S. Ct. 476 (2011).

grounds” approach to applying 212(c)²⁵¹ relief in deportation cases.²⁵² Enacted prior to IIRIRA’s elimination of the distinction between exclusion and deportation,²⁵³ 212(c) only waived grounds for exclusion on its face. To determine whether section 212(c) could relieve a particular deportation ground, the BIA’s practice was to ask whether that ground consisted of a set of crimes substantially equivalent to those included in the exclusion grounds. If so, it could be waived under section 212(c); if not, the offense was not waiveable.²⁵⁴

In a unanimous decision by Justice Kagan, the Court emphatically overruled the comparable-grounds approach as arbitrary and capricious.²⁵⁵ In doing so, it stated, “When an administrative agency sets policy, it must provide a reasoned explanation for its action. That is not a high bar, but it is an unwavering one.”²⁵⁶ The Court conducted its analysis under the Administrative Procedure Act²⁵⁷ (APA) rather than using *Chevron* because it said that it was not dealing with an agency interpretation of statutory text, but rather with an agency policy alleged to be unfair.²⁵⁸ It noted, however, that its analysis would be similar under *Chevron*.²⁵⁹ The Court emphasized, “The BIA’s approach must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system.”²⁶⁰ The policy here was “unmoored from the purposes and concerns of the immigration laws.”²⁶¹ The Court emphasized that the agency must have an especially tight rationale when removal—a matter of “utmost importance”²⁶²—was involved.

In two more cases, the Court declined to defer to the BIA’s interpretations of the INA. In *Vartelas v. Holder*,²⁶³ the Court overturned the BIA’s retroactive application of an IIRIRA amendment that affected the ability of LPRs to travel without consequences after a conviction.²⁶⁴ Vartelas, a long-term LPR, had pled guilty to a felony in 1994; in 2003, he

251. Section 212(c) was repealed in 1996 and replaced by the cancellation of removal provision, but it applies retroactively to those whose removal is based on a guilty plea entered before the statute’s repeal. *Id.* at 481.

252. *Id.* at 483.

253. See *supra* note 41 and accompanying text.

254. See Stein, *supra* note 91, at 47.

255. *Judulang*, 132 S. Ct. at 479.

256. *Id.*

257. 5 U.S.C. § 706 (2012) (stating that a reviewing court must set aside agency actions that it finds to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law”).

258. *Judulang*, 132 S. Ct. at 483 n.7. In contrast, the 212(h) controversy entails a question of statutory interpretation that calls for a *Chevron* analysis—not a question of BIA policy that would fall under the APA.

259. *Id.*

260. *Id.* at 485. To appropriately further the immigration scheme, a removal policy must focus on a noncitizen’s fitness to remain in the country—the comparable-grounds approach did not. *Id.*

261. *Id.* at 490.

262. *Id.*

263. 132 S. Ct. 1479 (2012).

264. *Id.* at 1483–84.

was placed in removal proceedings upon his return from a weeklong trip abroad.²⁶⁵ The question at issue was whether the BIA was correct in retroactively applying the 1996 amendment to Vartelas and other LPRs whose convictions occurred prior to 1996.²⁶⁶ Writing for the majority, Justice Ginsburg relied on the presumption against retroactive legislation and overturned the BIA's holding.²⁶⁷

In *Moncrieffe v. Holder*,²⁶⁸ the issue was whether a conviction under a state criminal law constituted a "felony punishable under the Controlled Substance Act" thus making it an aggravated felony.²⁶⁹ The Court overruled the BIA's interpretation, holding that a conviction under state law criminalizing possession of small amounts of drugs did not constitute an aggravated felony requiring removal.²⁷⁰ Like *Carachuri-Rosendo*, *Moncrieffe* dealt largely with the interpretation of criminal statutes cross-referenced in the INA's definition of "aggravated felony," rather than with a specific provision of the INA.

2. 2009–2013: Opinions Granting Deference

During the 2009 to 2013 Terms, the Court deferred to the BIA on issues of statutory interpretation in at least three cases. In *Kawashima v. Holder*,²⁷¹ the Court agreed with the BIA's interpretation and application of section 237(a)(2)(A)(iii) of the INA, which says that anyone who is convicted of an offense involving fraud or deceit in which the loss to the victim exceeds a certain amount of money has committed an aggravated felony.²⁷² The Court found that the statutory text unambiguously made the petitioners' crimes—related to falsifying tax returns—aggravated felonies, as they necessarily entailed deceit.²⁷³ While the Court acknowledged that it had on some occasions construed ambiguities in deportation statutes in noncitizens' favor, it refused to apply the rule of lenity in this case because

265. *Id.* at 1483.

266. *Id.*

267. *Id.* at 1484. The issue turned on the interpretative question of what conduct the INA regulated. Justice Ginsburg understood the statute to regulate past misconduct. *Id.* Justice Scalia viewed the regulated activity to be Vartelas's readmission after travel outside the country post-1996, not his pre-1996 commission of a crime. *Id.* at 1493 (Scalia, J., dissenting). From that perspective, the application of the statute had no retroactive effect; Vartelas could have avoided the consequences of the amendment simply by not traveling or not returning from Greece. *Id.*

268. 133 S. Ct. 1678 (2013).

269. *Id.* at 1683.

270. *Id.* at 1682. The Court reemphasized the "categorical approach," which determines whether an offense is an aggravated felony based solely on the minimum conduct necessarily established by a conviction under the applicable criminal statute. *Id.* at 1684.

271. 132 S. Ct. 1166 (2012).

272. *Id.* at 1171–73.

273. *Id.* at 1173.

“the application of the present statute [was] clear enough that resort to the rule of lenity [was] not warranted.”²⁷⁴

In *Holder v. Martinez Gutierrez*,²⁷⁵ Justice Kagan wrote for a unanimous Court, deferring to the BIA’s construction of section 240A.²⁷⁶ The noncitizens in *Martinez Gutierrez* asked that their parents’ continuous presence in LPR status be imputed to them to satisfy the statute’s requirements for cancellation of removal.²⁷⁷ The BIA ruled that each noncitizen seeking cancellation of removal must satisfy the statute’s requirements on her own.²⁷⁸ The Supreme Court found that, because there was no mention in the text of whether imputation should be allowed, the statute was ambiguous.²⁷⁹ Under *Chevron*, it found the BIA’s interpretation reasonable and deferred to the agency.²⁸⁰

Most recently, the Court deferred to the BIA’s statutory interpretation of the Child Status Protection Act (CSPA) in *Scialabba v. Cuellar de Osorio*.²⁸¹ The CSPA was enacted to remedy the problem of “aging out”—when a child reached the age of twenty-one before her parent’s visa application was processed, and thus no longer qualified as a derivative “child” under INA section 101(b)(1), she fell to the back of the visa line or lost eligibility completely.²⁸² The CSPA provision at issue provided a formula for calculating the “age” of an aged-out noncitizen to permit them to still qualify for a visa. The question presented was whether that provision granted a remedy to *all* noncitizens who had been derivatives on family-based petitions but no longer qualified by the time a visa became available.²⁸³ The BIA interpreted the CSPA as providing relief only to those who could have qualified as principal beneficiaries of their own visa petitions, as opposed to those who only initially qualified for a visa as derivative beneficiaries.²⁸⁴

Justice Kagan’s plurality opinion determined that the statute at issue was ambiguous and had more than one possible reasonable construction.²⁸⁵ The Court consulted dictionaries, referred to congressional usage of the terms at issue in other statutes, and compared other parts of the CSPA.²⁸⁶

274. *Id.* at 1176. Justice Ginsburg, joined by Justices Breyer and Kagan, dissented, finding the statute ambiguous and interpreting it in favor of the noncitizens. *Id.* at 1176–81 (Ginsburg, J., dissenting).

275. 132 S. Ct. 2011 (2012).

276. *Id.* at 2014–15.

277. *Id.* at 2017.

278. *Id.* at 2018.

279. *Id.* at 2016–18.

280. *Id.* at 2021.

281. 134 S. Ct. 2191 (2014).

282. *Id.* at 2196.

283. *Id.* at 2196–97.

284. *Id.* at 2197. The BIA found that the text at issue did not expressly state which petitions qualified for automatic conversion and priority date retention. Given that alleged ambiguity, it interpreted the statute to protect beneficiaries who could move seamlessly from one family preference category to another and not those for whom a new sponsor was necessary to move the beneficiary into another category. *Id.* at 2201–02.

285. *Id.* at 2203.

286. *Id.* at 2204–05.

Ultimately, it decided the provision was internally contradictory, which “ma[de] possible alternative reasonable constructions.”²⁸⁷ The ambiguity in the statute permitted the BIA to distinguish among aged-out beneficiaries in the manner it had chosen.²⁸⁸ Kagan concluded,

This is the kind of case *Chevron* was built for. Whatever Congress might have meant in enacting § 1153(h)(3), it failed to speak clearly. Confronted with a self-contradictory, ambiguous provision in a complex statutory scheme, the Board chose a textually reasonable construction consonant with its view of the purpose and policies underlying immigration law. Were we to overturn the Board in that circumstance, we would assume as our own the responsible and expert agency’s role.²⁸⁹

The concurring and dissenting opinions reflected great disagreement among the Justices over statutory interpretation and agency deference. Justice Roberts (joined by Justice Scalia) concurred in the judgment but found ambiguity for different reasons.²⁹⁰ Justice Alito, dissenting, acknowledged that the provision at issue was “brief and cryptic” and “may well contain a great deal of ambiguity, which the [BIA] in its expertise is free to resolve,” but felt the BIA ignored certain statutory commands in resolving the issue.²⁹¹

Justice Sotomayor, dissenting, criticized the plurality’s application of *Chevron*, saying that

unlike in the usual *Chevron* case, where ambiguity derives from the fact that the text does not speak with sufficient specificity to the question at issue, the plurality argues that this is a case in which ambiguity can only arise—if it is to arise at all—if Congress has spoken clearly on the issue in diametrically opposing ways.²⁹²

She argued that, when confronted with a statute that seems internally contradictory, the Court should find ways to read it coherently rather than assuming that Congress messed up.²⁹³ “As judicious as it can be to defer to administrative agencies, our foremost duty is, and always has been, to give effect to the law as drafted by Congress.”²⁹⁴ Sotomayor offered several interpretations showing that Congress had spoken clearly to the issue of conversion and thus ended the analysis at *Chevron* Step One.²⁹⁵

3. Theory About Deference in the Immigration Context

What do these recent cases mean for the Supreme Court’s current approach to deference in the immigration context? In the late twentieth century, some scholars suggested that the plenary power doctrine was dying

287. *Id.* at 2203.

288. *Id.* at 2207.

289. *Id.* at 2213.

290. *Id.* at 2214 (Roberts, J., concurring).

291. *Id.* at 2216 (Alito, J., dissenting).

292. *Id.* at 2219 (Sotomayor, J., dissenting).

293. *Id.* at 2220.

294. *Id.*

295. *Id.* at 2221.

out²⁹⁶ but made a brief comeback post-9/11.²⁹⁷ Kevin Johnson hypothesizes that recent Supreme Court immigration decisions suggest that the plenary power doctrine is again headed toward its ultimate demise, noting that during the 2009 to 2013 Terms, a “conservative Supreme Court characterized by some observers as ideologically extreme, has consistently followed generally applicable legal principles in its immigration decisions.”²⁹⁸ Instead of applying extreme deference in the immigration context, Johnson argues, the Roberts Court “consistently has applied ordinary, standard, and unremarkable legal doctrines in ordinary, standard, and unremarkable ways.”²⁹⁹ This trend, he argues, may point to a realigning of immigration law with “conventional norms of judicial review.”³⁰⁰ In fact, Johnson says that “[i]t is difficult to discern significantly different treatment of immigration matters by the Court and any deviation from conventional legal doctrines” in the past few Terms.³⁰¹ Rather, the Court has rejected the BIA’s interpretations when it concludes that they are based on erroneous readings of the INA, and it is willing to defer to the BIA’s reasonable interpretations of ambiguous statutes.³⁰²

Other scholars, like Shruti Rana, do not agree that the Supreme Court is backing away from extreme deference in the immigration context.³⁰³ Rana argues that recent jurisprudence in fact expands agency authority and gives the judiciary a back seat in deciding immigration matters.³⁰⁴ Rana’s main thesis is that, in the immigration context, the Supreme Court is transforming *Chevron*’s division of interpretive decision-making authority (between the federal courts and agencies) in ways that “may threaten to reshape deference jurisprudence by handing more power to the immigration agency just when the agency may be least able to handle that power effectively.”³⁰⁵

Rana believes increased deference to the BIA is especially disturbing given the current state of the agency.³⁰⁶ Due in part to being underresourced and overburdened, as well as to procedural changes internally,³⁰⁷ many judges and scholars have noted a decline in the quality

296. See Johnson, *supra* note 95, at 60 n.9.

297. See *id.* at 60–61.

298. *Id.* at 62.

299. *Id.*

300. *Id.* at 65.

301. *Id.* at 113.

302. See *id.* at 114.

303. See Rana, *supra* note 87, at 345–46, 358.

304. *Id.* at 358.

305. *Id.* at 313.

306. See *id.* at 331. The deference doctrine assumes that agencies are specialists in their respective fields and are more politically accountable than judges. Rana argues that the BIA is currently “unable to meet even the basic requirements of legitimate decision making” and cannot fulfill any of the responsibilities that deference doctrine assumes. *Id.* at 324–25. She says, “Under almost any measure, indicators of quality decision making are lacking at the immigration agency, and the agency appears unable to meet the minimum threshold requirements for deference.” *Id.* at 331.

307. See *supra* notes 88–90 and accompanying text.

of BIA review and have increasingly called for reform.³⁰⁸ Federal judges across the country have acknowledged the inadequate performance of the BIA.³⁰⁹ Critics say the agency is plagued with significant problems including a backlog of cases, potential bias, widely inconsistent decision making, and endemic mistakes.³¹⁰ Rana criticizes the agency as one “whose decision-making processes are rapidly decaying, one that is increasingly unable to produce coherent decisions, much less high-quality ones,” and one that should receive little deference from the courts for its statutory construction.³¹¹ Instead, she laments, the Court has “increasingly tilted the balance of power toward[] the agency by limiting judicial interpretive authority in favor of agency deference.”³¹²

The lively debate over the current state of judicial deference to the BIA has played out in analyses of cases from the Court’s 2009–2013 Terms. Kevin Johnson focuses on the Court’s use of traditional rules of statutory interpretation in recent immigration cases as a signal of normalized review. In *Carachuri-Rosendo*, he says, the Court followed a traditional approach to statutory interpretation and administrative deference in analyzing the statute at issue.³¹³ It examined the ordinary meanings of statutory terms, consulted dictionary definitions,³¹⁴ invoked the immigration rule of lenity,³¹⁵ and found that the Government’s position ignored the plain language of the INA.³¹⁶ Johnson thinks the use of traditional tools of statutory interpretation suggests the Court’s willingness to withhold deference from the BIA when the plain meaning of the statute requires it.³¹⁷ He points out that the Court’s decision in *Kucana* supports a theory of normalization in immigration jurisprudence because the Court chose to protect the right to judicial review, in tension with the plenary power doctrine’s immunity from judicial scrutiny.³¹⁸

In contrast to Johnson’s depiction of normalized immigration jurisprudence, Matthew Soares views *Martinez Gutierrez* and *Kawashima* as “highly illustrative of a dangerous trend in the field of immigration law,” in which the Court has engaged in less judicial scrutiny and less lenity.³¹⁹ Both cases involved the meaning of statutes used to remove long-term

308. See Stacy Caplow, *After the Flood: The Legacy of the “Surge” of Federal Immigration Appeals*, 7 NW. J.L. & SOC. POL’Y 1, 26 (2012).

309. See, e.g., *Benslimane v. Gonzales*, 430 F.3d 828, 829–30 (7th Cir. 2005) (Posner, J.) (citing the Seventh Circuit and other appellate judges); see also Rana, *supra* note 87, at 330.

310. Rana, *supra* note 87, at 319.

311. *Id.* at 318. Rana presents a scathing review of the BIA, calling it “an agency run amok” and the “disaster agency of our time.” *Id.* at 333.

312. *Id.* at 318–19.

313. Johnson, *supra* note 95, at 74.

314. *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 574 (2010).

315. *Id.* at 581.

316. *Id.* at 576.

317. See Johnson, *supra* note 95, at 114.

318. *Id.* at 77. He concedes that a contrary holding would have raised serious constitutional questions. *Id.*

319. Soares, *supra* note 41, at 926 (calling these cases illustrative of a near total lack of judicial review or oversight in immigration law).

permanent residents that were open to multiple interpretations.³²⁰ The result of the Court's holdings in both cases was to restrict available relief and to render more noncitizens removable.³²¹ Johnson, on the other hand, depicts the dispute between the majority and the dissent in *Kawashima* as nothing more than differences of opinion over the proper way to interpret a statute.³²² He emphasizes the normality of *Kawashima* in administrative law decisions³²³ and calls *Martinez Gutierrez* a “run-of-the-mill *Chevron* deference case.”³²⁴

Judulang and *Scialabba* have perhaps invoked the most differing opinions on the issue of judicial deference. The decision in *Judulang* surprised those following the immigration field.³²⁵ The Court unanimously overturned a nearly uniform bloc of circuit courts that all had sanctioned a BIA policy, “striking down an executive agency’s rule in a domain in which executive agency action has been viewed traditionally as deserving of special deference.”³²⁶ Jeffrey Stein finds in *Judulang* a hopeful expression of the idea that the Court is moving away from affording the BIA special deference.³²⁷ The Court’s use of the APA (and, alternatively, *Chevron*) to expose the BIA’s policy as arbitrary and capricious signaled that the Court viewed its role in immigration as no different than from that in other areas of ordinary jurisprudence.³²⁸ *Judulang*, he writes, shifted the immigration system, “if subtly,” toward “a more reasoned jurisprudence,” opening the door for future meaningful challenges to the BIA’s actions.³²⁹

In support of his view, Stein notes that the Court did not cite a single plenary power case in its decision, but rather cited to quintessential and universally applicable administrative law cases.³³⁰ The absence of any discussion of plenary power, the executive’s role in immigration, or the unique nature of immigration, Stein argues, serves as evidence of the Court’s “current discomfort with—and, perhaps more precisely, disavowal of—allocating more deference to the executive in immigration matters than that branch receives in ordinary contexts.”³³¹ Stein also argues that *Judulang* introduced a “purpose inquiry” into the Court’s deference analysis—by which the Court analyzes Congress’s objectives in passing the statute at issue, as well as the purposes and principles of the immigration system at large—thus deepening the substantive standard that immigration agencies must meet.³³² Ultimately, he argues, *Judulang* contributes to the

320. *Id.* at 944.

321. *Id.*

322. Johnson, *supra* note 95, at 94–95.

323. *See id.*

324. *Id.* at 98.

325. Stein, *supra* note 91, at 37 (noting “a flurry of commentary and confusion over *Judulang*’s significance” in the aftermath of the opinion).

326. *Id.* at 35.

327. *Id.*

328. *Id.*

329. *Id.* at 35–36.

330. *Id.* at 56.

331. *Id.* at 56–57.

332. *Id.* at 38.

“reigning-in” of traditional deference to executive immigration decisions.³³³ Johnson, who calls *Judulang* “a stinging rebuke of the BIA’s reasoning and the U.S. government’s defense of it,” seemingly agrees.³³⁴

Shruti Rana, on the other hand, reads *Judulang* much more cautiously.³³⁵ Although the Court overturned the BIA’s decision, she worries that, by relying on the single-inquiry, arbitrary-and-capricious standard rather than *Chevron*’s two steps, the Court limited its potential role in reviewing agency decisions.³³⁶ She views *Judulang* as further collapsing the *Chevron* test into one step: error checking, rather than first construing the statute itself.³³⁷ Still, she acknowledges a small “glimmer of hope” that the Court will be more open to addressing the agency’s endemic shortcomings if presented with similarly poorly reasoned decisions.³³⁸

Lastly, despite its invocation of the plenary power doctrine, Kevin Johnson found *Scialabba* to be “the most recent example” of a trend away from special deference and toward an unexceptional analysis of administrative action in immigration law.³³⁹ Johnson argues that *Scialabba* was unexceptional in its application of routine administrative law principles, with the Justices applying similar interpretative analyses but reaching different conclusions.³⁴⁰ Other scholars, in contrast, have criticized the Court’s deference to the BIA in *Scialabba*³⁴¹ and questioned its application of *Chevron*.³⁴²

III. RESOLVING THE CONFLICT

Part III conducts a statutory interpretation analysis and resolves the arguments regarding LPR eligibility for section 212(h) presented in Part II. It points to the complexity of the INA as a reason for why strict interpretations at *Chevron* Step One make sense in the immigration context. Additionally, it addresses whether the BIA’s construction would be permissible if the text were actually ambiguous—making an argument for invoking the immigration rule of lenity. Acknowledging that the distinction between LPRs who entered as such and those who adjusted to that status makes little practical sense, this part argues for construing the INA to afford immigrants more opportunities for relief. Lastly, this part considers what

333. *Id.* at 52.

334. Johnson, *supra* note 95, at 93.

335. *See* Rana, *supra* note 87, at 353.

336. *Id.* at 353–54.

337. *Id.* at 353–55.

338. *Id.* at 355.

339. Johnson, *supra* note 95, at 108–09 (calling it an example of a “bread and butter” immigration case).

340. *Id.* at 111.

341. *See, e.g.*, Jihan M. Hassan et al., *Finding Hope for “Aged Out” Derivative Beneficiaries: Re-Examining the Child Status Protection Act in the Wake of Scialabba v. Cuellar de Osorio*, 47 J. MARSHALL L. REV. 1319, 1340–42 (2014).

342. *See, e.g.*, Leading Case, *Scialabba v. Cuellar De Osorio*, 128 HARV. L. REV. 341 (2014).

the current state of Supreme Court deference to the BIA means for section 212(h).

A. *The Meaning of Section 212(h) Is Clear*

The majority of the courts of appeals are correct: the plain meaning of section 212(h) shows that the aggravated felony and continuous residence bars apply to only LPRs who entered the country in that status. The outcome of a challenge to the BIA's interpretation of section 212(h) in the Supreme Court would likely turn on whether the Court finds the provision at issue to be ambiguous at *Chevron* Step One. The nine courts of appeals that held, contrary to the BIA, that LPRs who adjusted status in the United States could apply for a 212(h) waiver even if they failed to meet the conditions specified did so after finding the statute unambiguous and clear on its face.³⁴³ On the contrary, the BIA, the Eighth Circuit, and the dissenting judges found the statute's language to be ambiguous, moved to *Chevron* Step Two, and found that deference to the agency's construction of section 212(h) was reasonable.³⁴⁴

Not only have the courts of appeals's decisions followed this pattern, but in its recent immigration cases involving statutory interpretation, the Supreme Court has also followed a similar path. The Court has ruled against the BIA when it found a statute unambiguously clear, in spite of agency arguments to the contrary that the statute was ambiguous.³⁴⁵ It deferred to the BIA, on the other hand, when it found a statutory provision ambiguous.³⁴⁶

In reviewing the BIA's interpretation of section 212(h), a reviewing court must first determine whether Congress has spoken directly to the question of whether all LPRs fall under the eligibility bars.³⁴⁷ In writing section 212(h), Congress used two terms of art, each separately defined in the definitions section of the INA: "admitted" and "lawfully admitted as a permanent resident."³⁴⁸ With the aid of these definitions, the statute is clear on its face: no waiver shall be granted under section 212(h) to noncitizens who have "previously been admitted to the United States" (meaning inspected and admitted at the border) as noncitizens "lawfully admitted for permanent residence" (meaning in the status of an LPR). The phrasing in section 212(h) reads awkwardly because Congress intentionally combined two statutorily defined phrases.

If Congress had meant for the bar to apply to all LPRs, it could have made that clear simply by omitting the extra (and therefore unnecessary)

343. *See supra* Part II.B.

344. *See supra* Part II.C.

345. *See, e.g.*, *Vartelas v. Holder*, 132 S. Ct. 1479 (2012); *Judulang v. Holder*, 132 S. Ct. 476 (2011); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Kucana v. Holder*, 558 U.S. 233 (2010).

346. *See, e.g.*, *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014); *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011, 2016 (2012).

347. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

348. *See supra* Part II.B.1.

phrase “has previously been admitted to.”³⁴⁹ In fact, in section 212(h)(1)(B), which comes shortly before the phrase at issue, Congress did use simpler phrasing to refer to U.S.-citizen or LPR relatives of the potential waiver applicant: “the spouse, parent, son, or daughter of a citizen of the United States or an alien *lawfully admitted for permanent residence . . .*”³⁵⁰ That provision clearly refers to all LPR relatives regardless of their manner of acquiring that status.

When one starts and ends with the text of section 212(h), the interpretative exercise is fairly straightforward. When the text itself clearly identifies Congress’s intent, there is no reason for an agency or judge to depart from that text unless it is clear that Congress could not have meant what it said, as demonstrated by absurd results.³⁵¹ The BIA argued for departure from the plain meaning because Congress could not have meant to create such strange distinctions between LPRs.³⁵² However, the BIA, the Eighth Circuit, and the dissenting opinions all have failed to show satisfactorily that anything truly absurd would result from applying the statutory bar to LPRs who were admitted at the border in that status and not barring LPRs who adjusted status inside the country. For something to be absurd, it should be “so gross as to shock the general moral or common sense.”³⁵³ The results suggested by the BIA, Eighth Circuit, and dissents are admittedly strange, but while the disparate treatment of LPRs based on technical procedural differences may seem to make little sense, such treatment does not make the results shocking or absurd. There are reasons that Congress may have made the choices it did.³⁵⁴ Furthermore, the BIA and the government make technical distinctions among immigrants all the time, such as through deferred action programs and policy memoranda stating priorities for removal.³⁵⁵ By taking its current position, the BIA threatens to blur the line between legislative and executive authority. When Congress has spoken to an issue, it is not for the BIA (or any court) to question its clearly manifested intent or to rewrite the statute to avoid results with which it disagrees.³⁵⁶

The Eighth Circuit explicitly found the statutory phrase to be ambiguous but did not offer a clear explanation for that ambiguity.³⁵⁷ The court’s finding rested not on the wording of the provision in section 212(h), but instead on an attempt to establish a coherent meaning of “admission”

349. *See supra* notes 151–52 and accompanying text.

350. INA § 212(h)(1)(B), 8 U.S.C. § 1182(h)(1)(B) (2012) (emphasis added).

351. *See supra* Part I.B.1, I.C.2.

352. *See supra* notes 218–24 and accompanying text.

353. *Leiba v. Holder*, 699 F.3d 346, 351 (4th Cir. 2012) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)).

354. *See supra* notes 222–26 and accompanying text.

355. *See, e.g.*, U.S. Dep’t of Homeland Sec., Memorandum on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [<http://perma.cc/3C82-YD4N>].

356. *See supra* notes 155–56 and accompanying text.

357. *See supra* note 185 and accompanying text.

throughout the entire INA. The court argued that, when read with other immigration provisions, section 212(h) might fairly be interpreted as treating post-entry adjustment as a substitution for inspection at the port of entry and therefore as an “admission.”³⁵⁸

While it is important to consider a provision in the context of the full statute, the overall complexity of the INA and the fact that the same words may have different meanings when used in different ways throughout the statute cautions against trying to make the word “admission” read the same way in every provision. The INA has been amended several times over several decades.³⁵⁹ To suggest that the words “admission” and “lawfully admitted for permanent residence” should mean exactly the same thing in every context ignores the piecemeal way the INA has developed. If those terms should be read consistently with any other provisions of the INA, it is with the definition sections.³⁶⁰

In fact, in most of the INA sections to which the Eighth Circuit, the dissenting opinions, and the BIA refer as examples of where an AOS was an “admission,” Congress explicitly stated that a noncitizen’s AOS should count as such only in very specific contexts. For example, INA section 245(a) says that the Attorney General *may, in his discretion*, adjust the status of a person lawfully admitted to the United States to that of an LPR³⁶¹ and then record the date of AOS as the date of admission. The Attorney General should then reduce the number of preference visas available for the year accordingly.³⁶² This procedure applies in only very specific contexts and involves the Attorney General’s use of discretion to depart from the normal manner of recording admissions and adjustments. It should not, as the dissenting opinions suggest, be read as the general mode of recording admissions and adjustments of status, but rather as an exception.

In her concurrence in *Negrete-Ramirez*, Judge Berzon appreciated the difficulty in deciding whether to force the word “admission” in section 212(h) to mirror other parts of the INA or to apply a plain reading of the statute that reflects the section 101 definitions.³⁶³ She presented a persuasive and concise explanation for why section 212(h) should be read the way the majority courts have interpreted it. Judge Berzon admitted that she was first inclined to defer to the BIA’s understanding of section 212(h), thinking it to be informed by an acceptable interpretation of the INA as a

358. *Roberts v. Holder*, 745 F.3d 928, 933 (8th Cir. 2014).

359. *See supra* notes 21–23; *see also* Rana, *supra* note 87, at 320.

360. The phrase at issue in this Note, which added the aggravated felony and continuous residence bars, was added to the INA at the same time that IIRIRA also provided statutory definitions for “admitted” and “admission.” Pub.L. No. 104-208, Div. C, §§ 301(a), 348, 110 Stat. 3009 (1996). The concurrent amendment of both sections suggests that Congress was especially cognizant of how it was using the word “admitted” in section 212(h).

361. INA § 245(a), 8 U.S.C. § 1255 (2012).

362. *Id.*

363. *See Negrete-Ramirez v. Holder*, 741 F.3d 1047, 1054 (9th Cir. 2014) (Berzon, J., concurring).

whole.³⁶⁴ Berzon ultimately concluded, however, that the court must apply a plain meaning interpretation to the statutory definitions of “admission” and “admitted” in the INA when it can sensibly do so. In this case, she found that the juxtaposition of the statutorily defined term “admitted” with a second statutorily defined term (“lawfully admitted for permanent residence”) warranted a plain meaning approach:

[O]therwise, the term “admitted” would be redundant of the second phrase. In some instances, however, such as where there has been *no* admission of the sort contemplated by the statute, . . . [AOS] must be treated as admission.

This nuanced approach now seems to me more faithful to the appropriate division of responsibility between Congress and administrative agencies, and between such agencies and the courts, embodied in *Chevron* . . . than the BIA’s insistence on abandoning the plain language *throughout* the INA with regard to the terms “admitted” and “admission,” so as to avoid a context-specific approach in those circumstances in which the statutory definition simply will not work.³⁶⁵

Berzon concluded that, while the BIA’s insistence on uniformity might be the more orderly answer to the section 212(h) interpretive problem, it was not the right one.³⁶⁶

If the Supreme Court takes on the 212(h) issue, it should follow Judge Berzon and the majority courts to find the eligibility bar unambiguous: the aggravated felony and continuous residence bars apply only to those LPRs who gained their status through consular processing and were admitted at the border as LPRs. Ultimately, the BIA, the Eighth Circuit, and the dissenting writers did not provide satisfactory explanations for why the statutory phrase was ambiguous or why the results of the majority’s reading would be absurd. Instead, they simply disagreed with Congress’s decision to bar only those LPRs who had entered the country in that status. Despite the fact that the distinctions embodied in the statute may seem irrational and strange, the Court should stay true to the plain meaning of the text and invite Congress to amend the INA if it meant something different.

*B. The BIA’s Interpretation Is Not Permissible:
A Call for Lenity*

As argued above, the Court should find that the language of section 212(h) is not ambiguous. This section argues that, even if the Court did decide the text was ambiguous, it should not accept the BIA’s interpretation

364. *Id.* The BIA’s premise was that the plain language approach to incorporating the definitions of “admission” and “admitted” did not suffice in the context of section 212(h) because elsewhere the INA provides for the assimilation of AOS to admission; failure to read 212(h) as providing for a similar assimilation would lead to unintended and potentially absurd results. *Id.*

365. *Id.* at 1055.

366. *Id.*

of section 212(h) because it is not a permissible construction of the statute.³⁶⁷

As discussed in Part II, there are several arguments the Government and the BIA put forth as to why their interpretation is reasonable. But reading section 212(h) to deny *all* LPRs who have committed an aggravated felony or do not meet the continuous residence requirement the chance to apply for a waiver is not in fact permissible when one considers the purpose of 212(h).³⁶⁸

In considering the spirit of section 212(h) and what it is meant to accomplish, it becomes clear that at least one of its goals is leniency toward noncitizens that would otherwise be removable. Section 212(h) provides discretionary waivers for certain grounds of inadmissibility to those who meet certain conditions. It forgives the criminal transgressions of those who are inadmissible solely for having committed a prostitution offense more than fifteen years ago, those who have suffered domestic violence, and those whose U.S.-citizen or LPR relatives would experience hardship if they were deported.³⁶⁹ By its very nature, section 212(h) thus “contains a purpose of leniency and forgiveness.”³⁷⁰

Furthermore, immigration laws in general have as at least *a* purpose the goal of ensuring family unity.³⁷¹ Congress recognized family unity as a significant consideration in distributing 212(h) waivers, as seen in section 212(h)(B), which applies to those whose qualifying relatives would suffer extreme hardship upon their deportation. By reading the provision in section 212(h) to exclude all LPRs from applying for a waiver even when their removal would cause extreme hardship to a qualifying spouse or child, more noncitizens would potentially be split from their families, in conflict with an overall goal of hardship waivers.³⁷² The spirit of the statute thus

367. *See generally* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

368. *See* Judulang v. Holder, 132 S. Ct. 476, 485 (2011) (“[T]he BIA’s approach must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system.”).

369. *See supra* Part II.C.

370. Soares, *supra* note 41, at 945. One counterargument to this reading of the purpose of section 212(h) focuses on the House Report for the IIRIRA amendment that added the provision to 212(h), which says: “This section amends INA section 212(h) to *limit* waivers granted under that provision in the case of an immigrant previously admitted to the United States.” H.R. REP. NO. 104-828, at 228 (1996) (Conf. Rep.) (emphasis added). Some might argue that this language supports a reading of section 212(h) that would bar more noncitizens from applying for waivers. However, prior to 1996, the only immigrants categorically barred from seeking a 212(h) waiver were those who had been convicted of murder or criminal acts involving torture (or attempt or conspiracy to commit such crimes). *See supra* note 74 and accompanying text. So, IIRIRA *did* limit the number of LPRs that would be eligible for 212(h) waivers by adding the conditions related to aggravated felonies and continuous presence. Reading section 212(h) to bar only LPRs who were admitted to the country in that status and later committed aggravated felonies or failed to satisfy the residence requirement therefore still drastically limits the waivers available.

371. *See, e.g.,* Fiallo v. Bell, 430 U.S. 787, 797 (1977). *But see* Holder v. Martinez Gutierrez, 132 S. Ct. 2011, 2019 (2012) (upholding the BIA’s decision even though it conflicted with the goal of family unity).

372. *See supra* Part II.C.

supports a narrow reading of the bar to eligibility—one that would allow at least certain LPRs to apply—especially those who adjusted status here and are more likely to have strong family ties to the United States.³⁷³

With its dual purposes of promoting family unity and forgiveness, section 212(h) provides the perfect context for applying the immigration rule of lenity. Especially today, when grounds for removal have expanded just as avenues for relief have shrunk,³⁷⁴ it is important for the Court to affirm the majority courts. As amendments to the INA have made the removal process increasingly mechanical and inhumane,³⁷⁵ a just application of section 212(h) supports a more narrow reading of the 212(h) bars to eligibility. The fact that the ability to apply for a 212(h) waiver can have an enormous impact on an LPR's life and family supports a more lenient approach.³⁷⁶

C. *Where Is the Court Going?*

Given the Court's inconsistent approach to deference to the BIA on issues of statutory interpretation, it is hard to say whether the Court will embrace this reading of section 212(h). Johnson believes that, by faithfully following *Chevron*, the Court is moving away from historically unquestioning deference to the BIA and instead mainstreaming immigration analyses.³⁷⁷ While some of the outcomes of the cases from 2009 to 2013 suggest as much, it is also possible that most of the issues of statutory interpretation that the Court considered in its past few terms were simply not very difficult or controversial. In *Martinez Gutierrez*, the statute simply did not contain an imputation component at all; pursuant to traditional administrative law norms, the agency could fill the gap as long as it did so reasonably.³⁷⁸ Johnson cites *Carachuri-Rosendo* and *Moncrieffe* as symbolic of the Court's sympathy for long-term LPRs and as a movement away from deference to the BIA.³⁷⁹ But in *Carachuri-Rosendo*, the BIA in fact agreed with the Court's final outcome and only ruled differently because it felt constrained by federal precedent.³⁸⁰ The Court's opinion in substance therefore did not actually depart from the stance the BIA said it would have chosen in cases where it was not so constrained. Even in overturning the BIA, the Court took pains to emphasize that its rejection of the government's broad understanding of the meaning of "aggravated felony" would have a very limited impact on "policing our Nation's borders" and that the Attorney General still had discretion in issuing

373. See *supra* note 225 and accompanying text.

374. See *supra* Part I.B–C.

375. See, e.g., Reyes, *supra* note 44, at 663–65.

376. See *supra* notes 156–58 and accompanying text. The myriad moral, economic, and social arguments for decreasing removals are unfortunately beyond the scope of this Note.

377. See *supra* Part II.D.3.

378. See *supra* notes 275–80 and accompanying text.

379. Johnson, *supra* note 95, at 101.

380. See *supra* note 238.

relief.³⁸¹ So, while Johnson is correct that the Court used unremarkable tools of statutory interpretation, *Carachuri-Rosendo* is not a strong indication that the Court is becoming more willing to overturn BIA decisions. It was easy for the Court to overrule the BIA in that case, especially because the BIA was interpreting a criminal statute for which the BIA itself said it did not deserve deference.³⁸² Similarly, in *Moncrieffe*, the BIA's holding turned on the interpretation of a criminal statute rather than an interpretation of the INA.³⁸³ It was fairly uncontroversial for the Court to overturn the BIA in both cases.³⁸⁴

Judulang presents a much stronger case for the argument that the Court may be interested in holding the BIA to a higher standard. Although there the Court chose to use the APA to strike down a BIA policy, its decision also has implications for a *Chevron* analysis (indeed, Justice Kagan said the analysis would be the same under *Chevron* as under the APA).³⁸⁵ *Judulang* signaled that the Court might be more searching in reviewing agency statutory construction in three ways: (1) it focused on examining the underlying purpose of the laws at issue, (2) it made no reference to the plenary power doctrine, and (3) the Court was deeply critical of the BIA. *Scialabba*, however, frustrates each of those “glimmer[s] of hope.”³⁸⁶

First, in *Judulang*, the Court emphasized that, when reviewing an agency interpretation of its statute, it is important to consider the purpose of the laws at issue.³⁸⁷ If the Court considered the fact that section 212(h) is meant to generally give relief, such an inquiry could support the majority interpretation.³⁸⁸ However, it is not clear that *Judulang* has ushered in what Stein saw as a new hopeful era.³⁸⁹ In *Scialabba*, the Court did conduct a purpose inquiry, finding that the legislative purpose behind the family preference system was “that each immigrant must have a qualified and willing sponsor” and that the BIA's interpretation of the specific statute fit that purpose.³⁹⁰ In framing the statute's purpose that way, the Court ignored a competing legislative purpose: the reason behind having derivative applications in the first place is to avoid separating families despite the fact that not all family members always have a sponsor.³⁹¹

381. *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 581 (2010).

382. *See supra* note 238.

383. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1678 (2013).

384. *Carachuri-Rosendo* was a unanimous decision (Justices Thomas and Scalia both wrote separately, but concurred in the judgment); *Moncrieffe* was a 7-2 decision, with Justices Thomas and Alito dissenting.

385. *See supra* note 259 and accompanying text.

386. *See supra* note 338 and accompanying text.

387. *See supra* note 332 and accompanying text.

388. *See supra* Part III.B.

389. *See supra* notes 327–29 and accompanying text.

390. *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2194 (2014).

391. *See, e.g., Asian Americans Advancing Justice on Scialabba v. Cuellar de Osorio: Supreme Court Ruling Will Break Up Immigrant Families*, ASIAN AMS. ADVANCING JUST. L.A. (June 9, 2014), http://www.advancingjustice-la.org/media-and-publications/press-releases/asian-americans-advancing-justice-scialabba-v-cuellar-de#.ViwyoVPF__8 [<http://perma.cc/Z7AW-NQZA>].

Similarly, if the Court framed the purpose of section 212(h) as limiting available waivers rather than providing relief, the purpose-driven inquiry could actually hurt LPRs.³⁹²

Second, *Judulang* suggested indeed that the Court might be more willing to reject a strong adherence to historical BIA deference as encompassed in the plenary power doctrine.³⁹³ However, the Court made a complete reversal in *Scialabba*, reverting back to using plenary power doctrine language.³⁹⁴ Lastly, while Justice Kagan was extremely critical of the BIA in *Judulang*,³⁹⁵ her tone changed significantly in *Scialabba*.³⁹⁶ *Scialabba*'s reversion to plenary power and agency deference is troubling at a time when its record in the past decade suggests the BIA is anything but "responsible and expert."³⁹⁷

CONCLUSION

The Justices' discord in *Scialabba* and varying theories on the current state of agency deference show that the verdict is still out on whether the Court has closed the door on the plenary power doctrine. Still, it is true that the Court has been using traditional tools of interpretation in its review of BIA interpretation cases over the past few years. What does this all mean for section 212(h)?

The dissent in *Stanovsek* cited *Scialabba* for the proposition that deference is particularly important in the immigration context, which suggests that the dissent saw hope in *Scialabba* for its position on section 212(h).³⁹⁸ However, if the Court applies traditional tools of statutory interpretation as it has been and applies the definitions from INA sections 101(a)(13) and 101(a)(20) to the phrase at issue, it will likely conclude that the meaning of section 212(h) is clear: only those LPRs who were admitted at a port of entry in LPR status are subject to the bar in 212(h). While it may be unsettling that Congress would distinguish between LPRs based on the procedure by which they obtained that status, it is not for any court or agency to abandon the plain meaning of the statute. Congress chose that "tortured language" for a reason, and it is up to Congress to change the statute if it feels so compelled.

In the meantime, in an era where immigrants are finding themselves increasingly exposed to deportation with fewer avenues for relief, a more

392. *See supra* Part III.B.

393. *Judulang v. Holder*, 132 S. Ct. 476, 483–84 (2011) ("Agencies, the BIA among them, have expertise and experience in administering their statutes that no court can properly ignore. But courts retain a role, and an important one.").

394. *See supra* note 289. Judge Niemeyer's dissent from the majority's 212(h) interpretation also emphasized that *Chevron* deference should have special force in relation to the INA because immigration law involves sensitive political and foreign policy questions. *Bracamontes v. Holder*, 675 F.3d 380, 393 (4th Cir. 2012) (Niemeyer, J., concurring in part and dissenting in part).

395. *See supra* notes 255–62 and accompanying text.

396. *See supra* note 289.

397. *See supra* notes 306–12 and accompanying text.

398. *See supra* note 229 and accompanying text.

lenient reading of section 212(h) is all the more important. As the courts of appeals determine this issue one by one, it remains to be seen whether the Court will finally settle the question of which LPRs are barred from seeking 212(h) waivers.