REVIEW OF IMMIGRATION-RELATED U.S. SUPREME COURT CASES: CHALLENGES, RAMIFICATIONS, & WHAT TO EXPECT

ENGY ABDELKADER, STEPHEN VLADECK, LUCAS GUTTENTAG, AND PHIL TORREY∞

From November 2019 to April 2020, the ABA Section of Civil Rights and Social Justice's Rights of Immigrants Committee hosted a six-part webinar series exploring immigration at the intersection of national security law, public international law, and U.S. Constitutional law. What follows is a transcript from the third panel of the series, which took place on January 15, 2020. The transcript has been edited for clarity.

Engy Abdelkader: Welcome to the ABA webinar, "Review of Immigration Related US Supreme Court Cases: Challenges, Ramifications, and What to Expect." My name is Engy Abdelkader and I'm going to be your program moderator today.

This program is sponsored by the Rights of the Immigrants Committee with the Section of Civil Rights and Social Justice. It is also co-sponsored by a number of valuable partners including the ABA Commission on Immigration, the ABA Criminal Justice Section, ABA Center for Public Interest Law, the ABA Section of International Law as well as the ABA Government and Public Sector Lawyers Division. We are grateful for all their support. It's also important to take a moment to acknowledge the full-time ABA staff that help bring these webinars to you, including Paula Shapiro and Alli Kielsgard. Without their technical and logistical support these programs would not be possible. So, thank you, Paula and Alli.

As you know, this is the third installment in a series of immigration webinars exploring the subject at the intersection of public international law, U.S. constitutional law, national security law among other subjects. Within the past year

∞ A fellow with the Public Religion Research Institute and German Marshall Fund of the United States, Engy Abdelkader teaches at Rutgers University. She chairs the Rights of Immigrants Committee with the American Bar Association Section of Civil Rights and Social Justice. In that capacity, she designed, organized and moderated this panel series.

Stephen Vladeck is the A. Dalton Cross Professor in Law at the University of Texas School of Law. He has written for the *Harvard Law Review*, the *Yale Law Journal*, the *New York Times*, *BuzzFeed*, *CNN*, and the *LawFare* blog. He earned a B.A. from Amherst College and a J.D. from Yale Law School.

Lucas Guttentag Professor of the Practice of Law at Stanford Law School and Martin R. Flug Lecturer in Law and Senior Research Scholar at Yale Law School. He is the founder and former national director of the ACLU's Immigrants' Rights Project, and served as a senior immigration policy official in the Obama administration. Guttentag is a graduate of the University of California at Berkeley and Harvard Law School.

Phil Torrey is the Director of the Harvard Law School Crimmigration Clinic and the Managing Attorney of the Harvard Immigration and Refugee Clinical Program (HIRC), as well as a Lecturer on Law at Harvard Law School. His scholarship has been with the *Harvard Law Review*, *Michigan Journal of Law Reform*, the *Harvard Latinx Law Review*, the *Immigration and Nationality Law Review*, *Harvard Law Review for Civil Rights-Civil Liberties*, and the *Harvard Law and Policy Review*. Previously, Torrey was an attorney in the Immigration Unit of Greater Boston Legal Services and a litigation associate at Skadden, Arps, Slate, Meagher & Flom LLP.

or so, immigration has proven to be a hot-button issue. Just this week, on Monday, for instance, the U.S. Supreme Court asked the government to chime in on a particular case involving special immigrant juvenile visas. Specifically, a case out of Kansas presents the question about whether or not state courts should be required to make specific findings that support applications for legal permanent residence on behalf of abused or neglected immigrant children. Also, yesterday, we saw that the Trump administration asked the U.S. Supreme Court to strike down an injunction against its "public charge" rule.

Even before that, over the past several years, we've seen a consistent assault on asylum seekers and legal protections for refugees enshrined in international law. One of the most anticipated cases this term involves this Administration's rescission of DACA and how the U.S. Supreme Court will rule on that particular case. In addition, a number of cases on the U.S. Supreme Court docket involved the immigration consequences of criminal convictions. And, we have one of the country's foremost experts from Harvard Law School with us today to provide his insights and observations regarding those related matters. So, without further delay, let us hear from the experts.

We've assembled nationally renowned experts from around the country to help us digest and better understand these cases. First is Stephen Vladeck who is the A. Dalton Cross Professor in Law at the University of Texas School of Law. His teaching and research focus on federal jurisdiction, constitutional law, national security law, and military justice. A nationally recognized expert on the role of the federal courts in the war on terrorism, Vladeck's prolific and widely cited scholarship has appeared in an array of legal publications including the *Harvard Law Review* and the *Yale Law Journal*. His popular writing has also been published in forums ranging from the *New York Times* to *BuzzFeed.* Vladeck, who is CNN's Supreme Court analyst and a co-author of Aspen Publishers' leading national security law and counterterrorism law case books, has argued multiple cases before the U.S. Supreme Court and the U.S. Court of Appeals for the Armed Forces. He frequently represents parties or *amici* across a range of other litigation matters and has often reported on related topics for a wide range of organizations including the First Amendment Center of the Constitution Project, as well as the ABA Standing Committee on Law and National Security.

Together with Professor Bobby Chesney, Vladeck co-hosts a popular national security law podcast. Professor Vladeck spent the first eleven years of his career teaching at the University of Miami and American University Washington College of Law, has won numerous awards for his teaching, his scholarship, and his service to the legal profession. He is an elected member of the American Law Institute, a senior editor of the Journal of National Security Law and Policy, co-editor-in-chief of *Just Security* blog, a senior contributor to the *LawFare* blog, a distinguished scholar at the Robert S. Strauss Center for International Security and Law, a Supreme Court Fellow at the Constitution Project, a member of the Advisory Committee to the ABA Standing Committee on Law and National Security, and a fellow at the Center on National Security at Fordham University School of Law.

He is also a member the Board of Academic Advisors of the American Constitution Society and the advisory boards of the Electronic Privacy Information

Center, the National Institute of Military Justice, and the RAND history of U.S. military policy. A 2004 graduate of Yale Law School, Vladeck clerked for the Honorable Marsha S. Berzon on the U.S. Court of Appeals for the Ninth Circuit and the Honorable Rosemary Barkett on the U.S. Court of Appeals for the Eleventh Circuit. While a law student, he was executive editor of the Yale Law Journal and the student director of Balancing Civil Liberties and National Security Post 9/11 Litigation Project. He was awarded the Potter Stewart Prize for best team performance in the court and Harlan Fiske Stone Prize for outstanding moot court oralist. He earned a BA *summa cum laude* with highest distinction in history and mathematics from Amherst College in 2001 where he wrote the senior thesis on "Leipzig's Shadow: The War Crimes Trials of the First World War and Their Implications from Nuremberg to the Present." Vladeck lives in Pemberton Heights with his wife Karen, their daughters Madeleine and Sydney and their pug Roxanna. Welcome, Steve.

Stephen Vladeck: Thanks Engy, it's a pleasure to be here. It's a pleasure to be on this forum. I really am embarrassed that my bio is that long. So, the task ahead of me today is to sort of set the stage for the conversation

I'm going get the ball rolling by covering three distinct developments when it comes to immigration law and policy in the Supreme Court. The first is the uptick in immigration related stays at the Supreme Court, including some pretty significant decisions even where the court hasn't rendered a real decision. The second is to talk a bit about the cross-border shooting case *Hernandez v. Mesa*, which I actually argued on November 12th. The third is to talk about an interesting case the court is set to hear next month, *United States v. Sineneng-Smith*, which is a fascinating case about the intersection of criminal immigration law and the First Amendment. I'll then yield the floor to Lucas and Phil who know a heck of a lot more than I do: it's the privilege of going first.

With regard to immigration stays, there's been a broader pattern across the Trump administration over the last three years. There have been a series of district court rulings that have either frozen government policies or ordered government action that the government has objected to, where the government has been unable to get any kind of interim relief from the court of appeals. Instead, the government has been forced to go to the Supreme Court to ask for a stay of a district court decision, whether an injunction or a subpoena or anything of the like. In fact, over the last three years there have been 23 total requests for stays from the Trump administration. That's in contrast to the previous 16 years across the George W. Bush and Obama administrations, during which the government sought such relief a total of eight times. So, there's been a real uptick in these requests. I think there's a longer conversation to be had about the sources of that uptick.

The track record so far has been fairly mixed. The court has granted the government's requests in nine of these 23 cases. It's granted them at least in part but also denied in part in three. The government has withdrawn three, and the court has denied the government's request in seven cases. As Engy mentioned there's actually a brand-new one that was filed on Monday. There's been in an especial focus in this group on immigration cases. Not all of these 23 cases have been immigration cases,

but a majority have been. The result of the stays has been to have policies that are deeply controversial, policies that are dramatically changing the status quo go into effect even as litigation challenging them proceeds.

In the immigration context especially we've seen four big stay requests in the last year. The first of those was in the first so-called "asylum ban" case, *East Bay Sanctuary Covenant v. Trump*, that involved the government's proposed rule to ban eligibility for asylum to anyone who applied outside of a port of entry. So basically to say: immigrants, non-citizens, who enter the country surreptitiously or who overstay a visa cannot apply for asylum, you actually have to present yourself at a port of entry in order to apply. The district court had enjoined this rule from going into effect, and the Ninth Circuit refused to stay it. The Supreme Court in December 2018 refused the government's application for a stay and basically left the lower court ruling intact by a five-to-four vote, with Chief Justice Roberts, to some folks' surprise, joining the four more progressive justices to deny relief to the government to leave the lower position intact. This was the same case where President Trump had publicly complained about so-called "Obama judges," and the Chief Justice in a very rare public rebuke had pushed back and said, "no there's no such thing as Trump judges and Obama judges." I think this case was always a big, visible potential message for the Chief Justice.

There's also a second case with almost the same caption, *East Bay Sanctuary Covenant v. Barr*. This was a separate proposed rule from the government to ban asylum to anyone who had failed to apply for asylum in each third country through which they had transited while en-route to the United States. Again, the lower court had enjoined this policy from going into effect. The Ninth Circuit had narrowed the injunction: instead of a nationwide injunction the Ninth Circuit had tailored it to a circuit-wide injunction. The Supreme Court still stayed even that decision over a pointed dissent from Justice Sonia Sotomayor who is joined by Justice Ginsburg but that allowed that policy to go into effect.

The third example, also from this summer, is the border wall litigation *Sierra Club v. Trump*, where again you had a district court decision blocking the president's transfer of military construction funds to help construct a wall along the U.S.-Mexico border. The Ninth Circuit had refused to stay the decision, and then the Supreme Court granted a stay at the government's request. This was five-to-four again, although Justice Breyer dissented only in part. For Justice Breyer, he would have allowed the government to at least enter into contracts for building the wall, but he would have frozen the actual construction.

And then as Engy mentioned just this Monday, we had the fourth big one where the Supreme Court received a request for a stay from the Solicitor General in the public charge rule case. So, in this case, the public charge rule had been enjoined by the district court in New York, the Second Circuit had refused to stay that decision, and the Supreme Court is now considering whether it should stay that rule while that litigation goes forward.

I could go into more detail about these individual cases. I think the larger point is that although we're going spend the rest of this webinar talking about you know what we might call "merits cases," cases where the Supreme Court grants review, receives briefings, hears argument, and issues formal decisions, the Supreme

Court is actually making a whole lot of immigration law on what we might call its "shadow docket." It is making decisions through stay applications, through applications from the government for extraordinary relief, through deciding which cases to take or not to take in the first place. So when we think about the relationship between the Supreme Court and immigration law, the one point I hope we can all agree upon is that these cases are often no less important, and in some respects more important, than some of the merits cases that the Court puts much more time and effort into and that produce decisions by the end of the term.

Pivoting to those merits cases, so the two that I've been asked to talk about. The first is a case called *Hernandez v. Mesa*, which is near and dear to my heart because I'm one of the lawyers for Mr. Hernandez and his family. Sergio Hernandez was a 15-year old Mexican national who was shot and killed by a Customs and Border Patrol (CBP) agent back in 2010. Sergio was playing with friends in the aqueduct along the Rio Grande on the border between El Paso and Juarez. The U.S. CBP agent, Agent Jesus Mesa, was standing on U.S. soil. The allegations in the complaint are that Mesa basically committed a cold-blooded murder, that he was not provoked, that he was not acting in self-defense. He was just frustrated with Sergio and his friends who had been harassing him and that he basically took out his gun and shot and killed Sergio in the back. This was a suit for damages brought by Sergio's parents both on his and their behalf. The questions in these cases have really gone up and down in the court system for the better part of the last five years. In what we call "Hernandez 1," the Fifth Circuit, the federal appeals court for Texas, Louisiana and Mississippi, had held that Sergio could not proceed this lawsuit could not proceed because of qualified immunity. Essentially, even if the facts were all as Sergio's parents alleged them, there was no clearly established law that Sergio Hernandez, as a Mexican national standing on the Mexican side of the border, had any constitutional rights that Agent Mesa could have violated.

In 2017, the Supreme Court reversed that decision and sent it back to the Fifth Circuit. What the Supreme Court said was usually the qualified immunity question asked is what the officer reasonably could have known at the time of the incident, and at the time that Mesa fired his gun he could not have known that Hernandez was in fact a Mexican national. He couldn't have known that the person he was shooting at didn't have constitutional rights. So whether or not the parent should be able to proceed, the Fifth Circuit was wrong to throw the case out on qualified immunity grounds. Instead, the Supreme Court said the real question is whether the parents have a cause of action in the first place, and this gets into a whole complicated body of law under the so-called "*Bivens* doctrine."

Bivens is a 1971 Supreme Court case, where the Supreme Court said there are circumstances in which the federal courts can directly read into the Constitution a cause of action for damages against a federal officer who violates an individual's constitutional rights. *Bivens* has been quite controversial in recent years, and the Supreme Court has repeatedly narrowed it, including in a 2017 case called *Ziglar v. Abbasi*. This arose out of the post 9-11 immigration roundup of men of Arab and/or Muslim descent in and around New York. In 2017, the Supreme Court said "Hey Fifth Circuit, why don't you reconsider whether there's even a *Bivens* remedy in this case given what we've just said in the *Abbasi* case."

The case went back to the Fifth Circuit, and in "Hernandez 2" in 2018, the Fifth Circuit ruled 13-to-2, sitting *en-banc*, again in favor of Agent Mesa and against Hernandez. This time, they ruled on the *Bivens* ground, holding that the court should not recognize a remedy for the parents for the alleged violation of Sergio's Fourth and Fifth Amendment rights. Basically, they held that there were various special factors counseling hesitation against recognizing such a remedy, that there were powerful reasons for the courts to stay out of these disputes and leave them to the political process, and just wasn't the kind of thing the courts should do anymore. Dissenting Judge Prado argued that this was actually the exact kind of case for which *Bivens* has always been the most important: individual uses of excessive force by individual law enforcement officers.

We petitioned for cert in June 2018, and while the cert petition was pending the Ninth Circuit in a case called *Swartz v. Rodriguez*, an eerily similar case arising out of an eerily similar cross-border shooting, in Arizona came out in the exact opposite direction. The court there held that not only was there a *Bivens* remedy for the parents of Mr. Rodriguez, but that agent Swartz was not entitled to qualified immunity and that on the merits he had in fact violated Rodriguez's Fourth Amendment rights. The Supreme Court was now faced with a circuit split and granted cert again in Hernandez to resolve the split. We had argument in November and of course we are just waiting for a decision from the court. I'll leave it to other people to tell you how the argument went. I survived, but I'm not sure *Bivens* will though, and I think that's the larger takeaway from *Hernandez*.

By the time we had argued *Hernandez* in November, the Fourth Circuit had held in a case called *Tun-Cos v. Perrotte* that *Bivens* in general will not be available against ICE officers and ICE agents. The 5th Circuit's analysis in our case, *Hernandez* 2, suggest that Bivens remedies will almost never be available against Border Patrol or other CBP officers. I think there's a real concern that if this is the pattern that unfolds in these cases, it will be very, very difficult, even in cases of egregious violations of constitutional rights by immigration officers, for the victims of those violations to recover damages. This of course brings with it the concomitant concerns about what it would mean if there was no deterrent in these cases, nothing to prevent these officers from pushing their authority up to and perhaps well past the constitutional line. So, on Hernandez 2, I think that the moral is "stay tuned," although I think it's going to be very close.

Finally, the other merits case that I was asked to talk about is a case the court has not heard yet, but it's set to be heard on February 25th. It's a case called *United States v. Sineneng-Smith*. This is a criminal appeal. The long and short of this is that federal law makes it a crime for any individual to "encourage or induce" – those are the verbs – illegal immigration for commercial advantage or private financial gain. In this case Sineneng-Smith operated an immigration consultant firm in San Jose, California. She helped people apply for a labor certification as a prerequisite for applying for a green card, but that program had actually expired in April 2001, and the government proved at trial that she knew that. So, in effect she was basically inducing non-citizens to pay her money in exchange for applying for an immigration status that no longer exists.

On December 18, 2018, a three-judge panel of the Ninth Circuit struck down this provision under the First Amendment, holding that it criminalizes a substantial amount of protected expression, in contrast and in relation to the narrow band of legitimately prohibited conduct and unprotected expression. In other words, basically applying First Amendment overbreadth doctrine, the Ninth Circuit concluded that the statute punishes way too much speech that is protected even though there's at least some speech – perhaps including Sineneng-Smith's – that might not be protected by the First Amendment. One example that the court used I think rather powerfully to illustrate the overbreadth problems with the statute is that on a plain and ordinary reading of the text, it would probably be a violation of the statute for a grandmother to encourage her grandson to overstay his visa by telling him she wants him to stay and by reaping any financial benefit from that arrangement. For example, if the grandson is going to find employment in the United States and then share some of his earnings with the grandmother, that would be a violation. Obviously, I think that's not the same facts as the case the court actually decided, but from the court's perspective I think that proved just how overbroad the statute is from a First Amendment context.

The Solicitor General petitioned for certiorari, and the Supreme Court granted cert. The government has already filed its merits brief, and Sineneng-Smith's brief is due today. The case is going to be argued on February 25th. I this is a pretty significant case with regard to this statute, and I think it probably also has broad implications for First Amendment doctrine going forward because of the Ninth Circuit's fairly conventional overbreadth analysis, and the current Supreme Court's lack of sympathy for that kind of analysis. This court might be more skeptical of that kind of overbreadth reasoning than its predecessors. I think though of all the cases we're discussing it might be the one with the least specific immigration consequences because nothing about immigration policy itself will rise or fall. Nothing that would directly affect the conduct of the government in the enforcement of immigration laws will be directly affected by a ruling. So, this is a really important First Amendment case, one with obvious immigration ramifications, but I think Lucas and Phil – to whom I now yield the floor – have some probably even bigger cases to talk about and ramifications to walk through.

Engy Abdelkader: Wonderful, thank you so much, Steve. Let's turn now to Lucas Guttentag who has been one of the country's leading figures in immigration law and immigrant rights for more than 30 years. He is now Professor of the Practice of Law at Stanford Law School and Martin R. Flug Lecturer in Law and Senior Research Scholar at Yale Law School. He is the founder and former national director of the American Civil Liberties Union's Immigrants' Rights Project which he led from 1985 to 2010. From 2014 to 2016, he served in the Obama administration as a senior advisor on immigration policy, including as senior counselor to the Secretary of Homeland Security. He served as law clerk to Federal Judge William Wayne Justice in Texas and is a graduate of the University of California at Berkeley and Harvard Law School. Guttentag has litigated many major cases throughout the United States on behalf of non-citizens. He's argued in district and appellate courts around the country and in California Supreme Court, and successfully argued *INS v. St. Cyr* in

the United States Supreme Court. He has testified before Congress, writes on the intersection of immigration and civil rights issues and is frequently cited in the national media.

He's listed among the Lawdragon 500 Leading Lawyers in America, is a member of the American Law Institute, the recipient of an honorary degree from CUNY Law School, a fellow of the American Bar Foundation, and was named a human rights hero by the American Bar Association Human Rights Journal. He has been recognized for his litigation advocacy by many national and community-based organizations including receiving the American Immigration Lawyers Association top litigation award four times, the National Lawyers Guild Immigration Litigation Award, and the California Lawyers Appellate Lawyer of the Year Award. He's been listed among the top 100 lawyers in Northern California, and designated one of the country's top 25 immigrant advocates of the last 25 years. Guttentag has served as a board member of numerous nonprofit entities and advises not-for-profit and philanthropic business and government entities on legal and policy issues. Welcome, Lucas.

Lucas Guttentag: Hi, thank you very much it's a pleasure to join you and to be a part of this. Let me follow up on what Steve started out with and first, maybe before getting into a couple of particulars, I'm going to focus on the DACA litigation, and then on in a number of cases that the courts granted cert in that have not gotten the attention that they deserve in my view which has to do with the scope of federal court jurisdiction over federal INS removal orders.

But just before I get to that, let me just say something about the term as a whole which is I think it's really a remarkable term that we're facing this year. There are by my count no fewer than ten immigration-related cases that the Supreme Court's hearing this term and that's not taking into account the so-called "shadow docket" that Steve was talking about—the state cases where the court's already grappling, as a preliminary matter, with a number of these cases. But the cases that the court's taking is, first, the DACA rescission case which I'm going to talk about in just a moment.

Secondly, three cases dealing with federal court jurisdiction: the scope of judicial review over immigration removal orders. The *Bivens* case, the cross-border shooting case, the Mesa case, as well as the First Amendment case that Steve just talked about. There's a case that's a very technical immigration case, *Barton v. Barr*, having to do with the application of the stop-time rule and what constitutes when that applies in terms of when a person is deemed inadmissible, or permanent residence deemed inadmissible and how the stop-time rule applies there. There's an important preemption case out of Kansas and the extent to which Kansas can criminalize misrepresentations of information that also appear on an I-9 form employment verification form, and whether the state can impose a penalty there. And then there's the two categorical rule cases that I think Phil is going to talk about, having to do with ACCA serious drug offense and then also the applicability of the categorical rule in the discretionary relief context.

So, we have an incredible array of issues that are confronting the Court this term, and it's really, I think in many respects, going to be a very, very significant

term. I have some materials on this that I'll post for the participants after the session is over and to summarize those for people who want to look at them more closely and keep track of what's happening and also the docket numbers and so on. So let me turn then to the DACA case first; and this is obviously a case that's gotten an enormous amount of attention and has just huge consequences both for the 700,000-plus individuals who currently have DACA and who were at risk of having it terminated. For the additional 100,000 or so people who previously had DACA and have not renewed, the total number of DACA recipients went as high as nearly 800,000. And of course it's got incredible political salience: the decision is expected to come down in June. Just as the political…you know, right on the cusp of the election. And I don't need to or want to review the entire history of this, but let me give a little bit of the background of the litigation. The case was argued in November so it's now under submission before the court and notwithstanding its incredible importance and the significance of just so many people in terms of the legal issues it's really more an administrative law case than it is an immigration case.

So, as we all know, what happened was in 2012 the Obama administration in a memo issued by then Secretary of Homeland Security Janet Napolitano created the deferred action program known as DACA and it provides that qualifying individuals can apply for the DACA relief and if it's granted based on an individual case-by-case review of each application, then the individual gets two years of deferred action and work authorization. That program remained, and still is, in effect. And then a relevant and gentle issue occurred which is that in 2014 the Obama administration created the DAPA program: the deferred action for parents of American citizens and permanent residents. This was a separate and distinct program that was going to allow individuals also who met certain qualifying criteria did not pose a national security and public safety threat who had resided in the country a minimum number of years and who had US citizen children in the United States and it was going to allow them to apply for a similar form of deferred action that would then allow them to have, in that case, three years of deferred action and employment authorization for that period of time, subject to renewal, subject to review and so on. That was announced in November of 2014, and then was subject to litigation by the state of Texas and a number of other states, supported by a number of states on the other side, and the DAPA program ended up being preliminarily enjoined by a district court in Texas and a nationwide injunction that other issue that Steve referenced that, you know, increasingly controversial the use of nationwide injunctions by district courts. But it was the DAPA program was enjoined and that was appealed to the Fifth Circuit, the Circuit upheld that injunction and then the Supreme Court agreed to review the case and in the interim Justice Scalia died. And so when the Supreme Court ultimately heard the case, it issued a 4-4 decision which is to say in affirmed but without decision, without opinion, without any analysis, and left the Fifth Circuit's opinion intact.

So why is that relevant? Well, what happened in 2017 after President Trump came into office, at first, as you may recall he announced you know his support and sympathy for the DACA program and praised the DACA recipients. But then soon thereafter the secretary–and at that point, there was a lot of discussion a debate about what would happen with the DACA program, would it be renewed or not, would

there be legislation for DACA recipients and so on. And then, the state of Texas that had brought the DAPA suit and others complained to the Trump administration and said that the DACA program was illegal for the same reason that the Fifth Circuit had struck down the DAPA program, even though they were very different programs. And Texas threatened to sue the administration if it didn't end the DACA program. And what that led to, then, was an opinion by the Attorney General—Jeff Sessions at the time—expressing the view that the DACA program was illegal, even though the Justice Department has defended it, as well.

At that point, then, the Secretary Nielsen who was then-Secretary of Homeland Security—excuse me, Secretary Duke who was the acting Secretary of Homeland Security—the Secretary issued a memorandum ending the DACA program. And that's the so-called rescission of DACA that then was challenged. And so the cases challenging the rescission of DACA essentially made two points, because the government argued that this was a discretionary program, that it could be ended, that there have been no promise that would ever be continued indefinitely, and that the Secretary or the President could end the program. The plaintiffs argued that that's, in this case, the program been ended, not because the President or the Secretary was exercising their judgment that this program should as a matter of discretion be ended, but rather that it was being ended because the Attorney General had said it was illegal. And that was the basis for the decision by the Secretary of Homeland Security. So the administrative law, the litigation that ensued, and the basic question in the case is twofold.

One is whether the decision to end DACA by the Trump administration is reviewable at all and the government has argued that this is a discretionary decision and that therefore an exercise of prosecutorial discretion and that that decision is unreviewable. To which the plaintiffs that responded, well, that might be the case if this were an exercise of prosecutorial discretion, but that's not what's happened here. What's happened here is that the administration has said we're ending the program because we believe it's illegal and how that makes it a reviewable decision, because now an agency has said it lacks the power to continue DACA. It's a legal decision by the administration to end it, not a discretionary decision. And that's the threshold question in the case is whether or not this decision to end DACA is or is not reviewable by the courts, and obviously now by the Supreme Court. If it's not—if it's not reviewable, then the rescission stands and the plaintiffs argument is again, as I said, because they've given cause the administration's relying on a legal justification, that makes it a reviewable decision, because any time an agency says that it lacks the authority or has the legal authority and rests on a legal decision that has to be reviewable by the courts.

Now there's one other little interesting wrinkle here which is that there were lawsuits filed in California, in New York, and in the District of Columbia challenging the DACA rescission. The—in the District of Columbia, the court that was hearing the case there agreed with the plaintiffs, as did the other courts. But in that case the district court said, I agree with the plaintiffs, but I'm going to give the administration a second chance to end the program with a new justification, expressing their view that they are exercising their discretion not resting solely on these legal grounds—do it again. And he gave the government 90 days to issue a

new decision. And they did issue a new decision, but the court found that that new decision was nothing other than a repeat of the first decision that it was resting on the same ground, was not an exercise of discretion by the administration, but rather continues to continue to rest on the legal justification that the program was illegal. And so notwithstanding the fact that the Trump administration had a second chance, they doubled down on their initial decision rather than essentially taking responsibility for ending the program as a matter of policy rather than under legal compulsion. So in the Supreme Court, the argument was essentially that, by the plaintiffs, that the government was not taking responsibility for exercising the judgment and the discretion and choosing to end DACA but rather doing it based under legal compulsion and that made the decision reviewable.

The second argument is that the DACA program, if it's being judged based on its legality, is entirely legal, and that the reliance on the Fifth Circuit's decision related to DAPA is, that's entirely different; that in any case the Fifth Circuit's decision is wrong; that these exercises of prosecutorial discretion are lawful exercises by the executive, and therefore it's the case that the rescission is reviewable and the justification given for the decision is incorrect. So that case is now ending, before, as I said, under submission before the Court, and we can have a discussion about what the prospects are from reading the transcript. I think that it's difficult to know exactly where the court's going to come out on this, as is always the case. You know that there seem to be divided views on it, but we'll soon know. Let me turn to the other issue—the other category of cases, and these are the judicial review cases that I mentioned, and there are three of them.

The most significant is one called *Department of Homeland Security v. Thuraissigiam*, and I may be mispronouncing that name. *Thuraissigiam* is a case concerning review of a negative credible fear decision by a person put into expedited removal. Mr. Thuraissigiam is a Sri Lankan national who arrived at the southern border of the United States, crossed the border, immediately sought protection—not asylum—and was subjected to a credible fear interview. He was denied credible fear in the summary proceeding that's available in those circumstances, an interview by an asylum officer, and then a very brief review by an immigration judge. His claim is that he wasn't given the process to which he's entitled under the statute, as well as that the process violates due process, that it was too truncated. But a central claim is that the asylum officer and then the immigration judge didn't do what they have to do when they're conducting a credible fear interview. They have to inquire into the facts, they have to know country conditions, they have to understand the nature of his claim, and they have to apply it properly to the country condition in Sri Lanka, where he's a member of the Tamil minority who are, they're subject to notorious persecution. And he personally has been arrested, beaten under circumstances that matched the classic persecution of Tamil in Sri Lanka.

Well, the question in the case is whether the court can review the denial of his credible fear. And he filed a habeas corpus action in the Southern District of California, raising these legal and constitutional claims, that the process by which his decision was made violated the statute and violated his due process right. The government's making two or three really stunning arguments as to why he's not entitled to challenge his negative credible fear finding. And this goes back to the *INS*

v. St. Cyr case that you mentioned briefly in introducing me. This was the case the Court decided back in 2001 where it concluded, although it's a long, complicated decision and I won't go into all the details, but where the court concluded that the central means by which a non-citizen is entitled to challenge their forcible expulsion, their removal, their deportation from the United States, is through a process that the Suspension Clause of the Constitution guarantees every person who's detained a right to challenge the legality of that detention. And that immigration, since the beginning of federal regulation of immigration going back to the 1800s, immigration expulsion has been recognized as a seizure and a forcible removal of a person from the country against their will. That's the nature of deportation. That's the nature of expulsion. And since the beginning, the Supreme Court and the courts have recognized that habeas corpus—the Suspension Clause of the Constitution—guarantees an individual a right to challenge the legality of that government action before they're forcibly removed.

The government's questioning all of that precedent and all of that history. What they're saying, essentially, in this case, is, one: that a person being removed, forcibly expelled from the United States, is not subject to detention within the meaning of the Suspension Clause. They're saying that deportation is not protected against or by judicial oversight of the legality of the government's action. The core protection of the Suspension Clause of the Constitution doesn't apply to immigration deportation at all. That's one argument. That would have consequence—sweeping consequences. It's hard to even fathom. Because the argument is that, if there's no judicial check on when a person could be ordered removed, Congress could provide for expulsion of persons without any judicial review of that decision at all. That's never been the case in our history. It's inconsistent with the common law of habeas corpus. When you look at what the Suspension Clause means, what the Court has always done, is that we have to look at what the writ of habeas corpus meant in England at the time of the framing, because what the Founders were doing was preserving and protecting the writ of habeas corpus as it existed under the common law, as it is expanded subsequently, and so on. But that, at a minimum, we have to see what the case was, and there's ample common law history in Britain of habeas corpus being used to protect against the forcible expulsion or removal of a person, including a non-citizen from Britain. And so to suggest that the government has this unilateral authority, without any judicial check, would have enormous ramifications.

The second thing that the government argued is that Thuraissigiam, because he had just crossed the border—and he was arrested shortly after crossing the southwest border, within about 25 yards of the border—that because he was arrested so close and so soon after entering the United States, that he has no due process rights at all. That he's not protected by the Due Process Clause of the Constitution. And then the government argues that because he has no due process rights, he has no habeas corpus rights. And the rights to habeas corpus, which looks not just to whether a person's process was sufficient under the Due Process Clause, but whether it complies with the law and regulations governing the detention and the government's action, but that the government's argument is that because he lacks due process, he has no right to habeas corpus at all. Well, that's wrong for two reasons

in my view, and I'll say I'm involved in this case, so needless to say I'm expressing my views on those legal arguments, but it's hard for two reasons.

One is that it's long been recognized by the Supreme Court that once the person crosses into the territory of the United States, they're protected by the Due Process Clause. A person who stopped at the port at a port of entry who never enters the country at all? The court has said in very controversial decisions from the 1950s that a person seeking initial entry or entry into the United States stopped at the border is not entitled to that process; what they're entitled to is what Congress provides and that the Due Process Clause doesn't provide a separate check. That's never been applied to someone who's actually entered the country, as he did in this case. So the government's argument is trying to undo the principle of to whom due process applies to; it applies to everybody in the territory of the United States. The second reason that argument should be rejected by the Court is because of the Guantanamo habeas corpus case that the Court decided with regard to the so-called enemy combatants who are held and still being held at Guantanamo. In that case, the *Boumediene* case, the Court held as a constitutional matter that the enemy combatants at Guantanamo are entitled to habeas corpus guaranteed by the Suspension Clause. The fact that they're non-citizens doesn't matter, the fact that they were detained by the United States outside the territorial jurisdiction of the United States; at a place under US control, that it doesn't matter that that's outside the United States; that the Suspension Clause of the Constitution applies, and that it guarantees and entitles them to judicial review of the legality of their detention. It did not find—the Court in that case did not find that the enemy combatants are entitled to due process. The court left that aside. And so it's very clear from that, from the Court's analysis, from its endorsement of the earlier *St. Cyr* case, that due process and habeas corpus are two entirely separate and distinct protections.

One is to limit the government's unlawful detention of someone, regardless of whether they're raising a constitutional claim or a statutory claim or other claims. If the detention isn't authorized by law it's impermissible. And secondly, that if a person is entitled to due process, then the procedure has to meet those standards. But the Suspension Clause and habeas corpus apply to enforce statutory rights, not only those rights that are guaranteed by the Constitution. So the reason I spend so much time on this is because the significance of the case is profound. It hasn't been as reported because it's obviously very technical, but the implications of the government's position are really—the positions are really unprecedented and radical, would be to provide us, to ask the Court to approve of a scheme where deportation could be summary, could be dictated solely by Congress and the Executive branch, and would deprive non-citizens of protections against unlawful deportation altogether. So this case will be argued on now on March 2nd.

The briefing the government filed its opening brief, the responsive brief just went in and the reply brief will be shortly, so I urge everyone to pay attention very closely to this case. And given the short time, let me just say very briefly that, the two other related cases one's already been argued. And that's the *Guerrero-Lasprilla v. Barr* case, and that too raises a question related to the jurisdiction of the federal courts over removal orders, and this is where a legal permanent resident applies for—was subject to removal, and thought to raise in a motion to reopen, that the time

for filing a motion to reopen was untimely, and he sought to challenge that on the ground that the time should be tolled based on equitable tolling. And the question is whether there's a claim that equitable tolling is reviewable by a court. And the underlying question basically is what constitutes a question of law, that a person, or this persons who are, whose judicial review is restricted, because they have criminal convictions, whether the question of law has to be reviewable by a court. So it's related to the Thuraissigiam in the sense that it too goes to what's the scope and what's the role of the federal courts. The case itself arises under a specific statutory provision that authorizes review of questions of law and the question is what constitutes a question of law.

And the last case in this group that I'll mention is *Nasrallah v. Barr*, which is a person who, again, a criminal conviction, so the scope of review is limited. He applied for CAT relief, and the question in that case is to what extent can the federal courts review denials of CAT relief, mandatory prohibition of removal based on a CAT claim in the context of a non-citizen who's been convicted of a criminal conviction. So all three of the cases together will have a significant effect on how the Court views the role of the courts in reviewing immigration removal orders. Let me stop with that so that Phil can turn to some of the other cases.

Engy Abdelkader: Thank you very much. Wonderful, thank you. So, as a reminder to our audience, you do have the ability to pose questions using your control panel. That should appear on the right-hand side of the screen. There is an ability to pose questions to our experts and there will be a Q&A session after Phil's presentation as well. So, please feel free to either pose questions now or you can do so after Phil concludes his presentation.

So, as noted, our next presenter is Phil Torrey. He is the managing attorney of Harvard Immigration and Refugee Clinical Program. He is a Lecturer on Law at Harvard Law School, he directs the Crimmigration Clinic, and he teaches a course concerning the intersection of criminal law and immigration law. The clinic engages in cutting-edge litigation and policy advocacy concerning issues ranging from criminal bars to immigration relief to sanctuary city policies. The clinic also provides advice to criminal defense attorneys around the country concerning the immigration consequences of criminal charges. Torrey's research focuses on crime-based grounds of removal and immigration detention including the private prison industry and the immigration system's mandatory detention regime. Prior to joining Harvard Law School, Torrey worked as an attorney in the immigration unit of the Greater Boston Legal Services and as a Litigation Associate at the law firm of Skadden Arps. He received his B.A. from Colgate University and a J.D. with honors from the University of Connecticut School of Law. Welcome, Phil.

Phil Torrey: Thanks so much Engy and thanks for the invitation from everybody at the ABA. I'm thrilled to be on this panel especially with Lucas and Steve who I consider to be the foremost experts on constitutional law and immigration law in the Supreme Court. So as Lucas referenced I'm going to talk a little bit about three cases that I'm paying particularly close attention to that all concern the intersection of criminal law and immigration law. Two of those cases relate to something called the

categorical analysis which is essentially the tool that's used by adjudicators to determine when either a federal or state conviction triggers an immigration consequence and then the third case that I'll talk about relates to the stop-time rule and whether somebody has accrued a sufficient amount of time to be eligible for cancellation of removal.

So the first case that I'll talk about is *Pereida v. Barr*. It's out of the 8th Circuit and it's a Circuit issue that was recently granted by the Court on December 18th of last year so there's no merits briefing yet on that case but it's an issue that's incredibly important and one in which there is a significant divide amongst the circuits. I'm most familiar with the First and Ninth Circuit cases. I worked on this issue in both the First and Ninth Circuits. The issue basically concerns whether an applicant who bears the burden of demonstrating eligibility for a discretionary form of relief can meet that burden if a record of conviction is inconclusive as to whether a particular criminal bar to that relief has been triggered. So I want to tell you a little bit about the case itself, Mr. Pereida and what the arguments being made by the petitioner as well as the government are and some of its implications. So Mr. Pereida conceded that he was removable after entering the country approximately 25 years ago. He applied for non-lawful permanent resident cancellation of removal and as part of that it's his burden to demonstrate that he's eligible for that form of relief by meeting all of the requirements. One of those requirements is demonstrating that he does not have a criminal bar and specifically in this case a crime involving moral turpitude.

This is where things get a bit tricky. Mr. Pereida was convicted of violating a Nebraska criminal statute for attempted criminal impersonation and both the government and the petitioner agree here that that particular statute is overbroad and so in other words there are parts of the statute that would satisfy the crime involving moral turpitude definition and parts that would not. And so based on Supreme Court precedent specifically cases like Descamps and Mathis and Moncrieffe, the immigration judge looked at Mr. Pereida's record of conviction to determine which part of the Nebraska statute it violated and whether it was the part that satisfied the CIMT definition or the part that did not. Mr. Pereida's record of conviction was inconclusive as to what part of the divisible statute he had violated and so the immigration judge determined that he was not able to satisfy his burden of demonstrating that the conviction did not satisfy the crime involving moral turpitude definition and therefore was not able to meet that requirement of non LPR cancellation of removal. The BIA affirmed and the Eighth Circuit also affirmed relying heavily on the INA and federal regulations demonstrating that it is an applicant's burden to demonstrate eligibility for a form of relief.

So, the arguments in this case really focus on the purpose of the categorical analysis and exactly what the ramifications are when the burden of proof is on a non-citizen applicant for discretionary form of relief. So the petitioner here relies heavily on recent Supreme Court precedent including Moncrieffe and Descamps and Mathis to demonstrate that the categorical analysis is strictly a legal analysis and is therefore not conducive to an evidentiary burden of proof as cited in the INA and federal regulations. What the Supreme Court said in Moncrieffe is that the categorical analysis when looking at a conviction requires an adjudicator to look at only what the conviction necessarily involved and that is the minimum culpable conduct under

that particular statute. As Justice Kagan has said, the underlying conduct is certainly completely irrelevant so instead the court has to presume that the conviction rested on nothing more than the least culpable conduct. That determination is strictly a legal analysis and so in other words if the record doesn't demonstrate that the part of the visible statute that would trigger the mandatory denial has been violated then the court has to presume that the conviction rested on nothing more than the least culpable conduct and the inquiry ends there. That legal analysis is conducive to a binary yes or no so if the inconclusive record doesn't point to a section of the statute that demonstrates either that is a CIMT or it is not then it can't necessarily be a CIMT that would trigger the bar to cancellation of removal.

The government on the other hand says that when you have an inconclusive record there is first a factual analysis that has to be determined by the court when applying the categorical approach. So first the court has to determine what crime the defendant has been convicted of and then the second step is strictly a legal analysis in determining whether that crime necessarily satisfies the criminal bar. Again in this case it would be the crime involving moral turpitude definition and so the government is arguing that that first step requires review of a factual record which is conducive to a burden of proof and therefore in this case Mr. Pereida was not able to meet that burden of proof and so he is ineligible for cancellation or removal. My analysis of this case is that it certainly has wide-ranging implications. I mean non-lawful permanent residents applying for cancellation or removal is a form of relief that is often sought and there are many individuals that have old convictions where documents are not available either from prior courts or other offices and therefore those folks are likely going to have inconclusive records and that could preclude them from being eligible for this form of relief. Again this cert. petition was just granted so we don't have the merits briefs yet. It's a little bit difficult to tell from the tea leaves where the court is going to land on this but I could see scenarios where it goes either way. Prior cases like the Nijhawan or Breyer's dissent in Mathis could indicate some avenues in which Alito and some of the conservative justices could pull this into the realm where they would agree with the government, which again would have significant implications for those applying for cancellation.

The second case that I'll talk about is called *Barton v. Barr*. That case has progressed a little bit further in that there was oral argument held in that case on November 4th. It's another cancellation of removal case. This case is the other version of cancellation of removal available to lawful permanent residents. So the issue here is whether a lawful permanent resident not seeking admission can still be considered inadmissible and therefore trigger the stop-time rule for qualifying residence.

The stop-time rule is something that we saw the court delve into *Pereira v. Sessions* in 2018 and it relates to the continuous residence requirement for cancellation of removal. An LPR seeking cancellation of removal must demonstrate that he or she has been continuously residing in the United States for at least seven years. The accrual of that time can be stopped when an applicant commits an offense that—according to the technical terms of the statute—would render the applicant inadmissible. Here, Mr. Barton was admitted and became a lawful permanent residence. He committed an offense in January 1996 and so the government is

arguing that the that particular 1996 offense has stopped his accrual of residence short of the seven-year requirement. The immigration judge agreed, the BIA also agreed and the Eleventh Circuit denied Barton's petition for review so essentially also agreed and held that the statutory language of the stop-time rule unambiguously precludes accrual of the requisite term of residence if an offense triggers a ground of inadmissibility even if the applicant, in this case a lawful permanent resident, is not seeking an admission. A lawful permanent resident in removal proceedings is generally not seeking admission yet that particular phrase is applicable here.

The Eleventh Circuit basically held using strict canons of statutory interpretation that the phrase "renders inadmissible" doesn't require a specific adjudication on admissibility which is a bit confusing. The Eleventh Circuit used a couple of different analogies that are somewhat colorful to illustrate the point that an individual can be inadmissible without seeking admission. This is an argument that the government has picked up on it is arguing that rendering somebody inadmissible is basically a status. So an individual can be inadmissible even if that person is not seeking an admission much like—and this is one of the analogies the Eleventh Circuit used and Alito referenced in the oral argument—"rot renders a fish inedible regardless of whether someone is trying to eat it." The petitioner on the other hand is arguing that inadmissibility is not a status but instead requires an individual seeking an admission and so the petitioner is arguing that the stop time rule should not apply to somebody who's not seeking an admission regardless of that phrase in the statute because a lawful permanent resident can't possibly seek admission and a court can adjudicate admissibility with somebody who has already made an admission like a lawful permanent resident.

The implications for this case I think are our wide-ranging. It's hyper-technical. It's a strict statutory interpretation case and the language of the immigration statute, which I'm sure many who are listening hear can appreciate, is incredibly confusing and the justices very much agree with that. So it'll be interesting to see which way they go with it. Both sides are pointing to other parts of the statute that that bolster their particular argument, but it largely seems like that's a wash for the justices so it remains to be seen exactly how strictly the court will read this particular provision and whether they agree with the government and the Eleventh Circuit's determination that inadmissibility is a status.

Finally, in just a few minutes so we have time to get to questions here I'll briefly touch on the *Shular v. United States* case. Cert in this case was granted last June and this is another case from the Eleventh Circuit. It's being argued next week I believe—next Tuesday. The issue here is whether the "serious drug offense" sentencing enhancement and the Armed Career Criminal Act require a strict categorical analysis like the violent felony provision of ACCA and also whether the generic offenses listed as serious drug offenses would require proof of a mens rea. Here is a short summary of the case. The petitioner, Eddie Lee Shular, had a number of prior convictions under Florida law one of which was a possession with intent to sell, which he pled guilty to and other different controlled substances. And then was found guilty of possessing a firearm. The default sentencing range for him was 0 to 120 months and based on state applicable state sentencing guidelines he was looking at somewhere between 36 and 57 months. His probation officer however

recommended that he be considered an armed career criminal under ACCA thus augmenting the sentence range of 280 to 235 months—so a significant enhancement. Shular objected to the probation officer's determination that his prior drug offenses constituted "serious drug offenses" under ACCA because the Florida statutes under which he was convicted are kind of an anomaly in that they omit the necessary mens rea element. Mens rea can be an affirmative defense to the charge but it's presumed in the statute. Nevertheless the district court, applying Eleventh Circuit's precedent, did find that the convictions qualified as serious drug offenses and sentenced Mr. Shular to 180 months.

So, the serious drug offense provision of ACCA states that "serious drug offenses" under state law are those "involving manufacturing, distributing, or possessing with intent to manufacture, or distribute a controlled substance". The government in this case is arguing that the word "involving" and all of the words that precede it are technically different types of activities or conduct in that if there's a conviction that involves any one of those kinds of activities then the sentencing enhancement would trigger. Mr. Shular on the other hand is arguing that the word involving and the terms afterwards indicate generic offenses and that the strict categorical approach would apply to those offenses and the generic definitions of those offenses necessarily require a mens rea. Therefore, his Florida convictions would not trigger the serious drug offenses enhancement. I won't get into the case more than that but I'm happy to answer questions about it.

The ACCA cases or the criminal sentencing cases are quite applicable in the immigration context when it comes to the categorical approach so it will be interesting to see what the justices do with this word "involving." There are other parts of the INA that in some cases use the word involving but it will be interesting to see what kind of meaning that justices give to this word and how it affects the INA. And then also if the court gets involved in in defining what a generic federal offense is that would obviously implicate things like aggravated felonies in the INA as well.

The last point that I'll just close on is that there's a couple of cases that I'm keeping an eye on that have not yet been granted cert. There's a case in the Ninth Circuit called Olivas-Motta which is arguing that the crime involving moral turpitude definition is void for vagueness and the cases also discusses administrative retroactivity. The CIMT void for vagueness argument has been brought to the court many times in the past and recently the Court did not grant cert in those kinds of cases but this one adds an interesting administrative retroactivity element so I'm curious to see what happens there. I'm also looking at the Karingithi Ninth Circuit case related to the Pereira v. Sessions case a couple of years ago about jurisdiction and notices to appear. Finally it'll be interesting to see if there's any cases that will come up in relation to the Jennings v. Rodriguez decision and if any of those cases make their way up to the Supreme Court that discuss some of the constitutional arguments that were not decided in the Jennings v. Rodriguez case. So I'll leave it there and looking forward to questions.

Engy Abdelkader: Wonderful, thank you so much Phil for that very comprehensive discussion. So, we will open up the session to Q&A from our audience. A reminder

that you are able to post questions using the control panel on the right-hand side of your screen. As an initial matter, I should let each of you know—Phil, Lucas, and Steve—that there has been a request for case citations for each of the matters that you discussed in your respective presentations. So, if you'd be so kind—perhaps forward a copy of those case citations and we can include them in the distribution of the video recording after today's webinar. That would be wonderful.

Lucas, I'd like to actually begin with you. As I mentioned, one of the greatly anticipated cases this term is what the US Supreme Court will decide in DACA. This case was argued late last year. At that time there were various pessimistic interpretations of the questions posed by the justices and how this case would fare. Obviously, you know the implications and ramifications of a negative decision from the court would affect, as you mentioned, hundreds of thousands of people who call the United States home and only know this country as home. They would effectively be deported. What is your sense as to what you think is going to happen? I know many experts are loathe to engage in forecasting at this scale. But, if you can provide us any insights into to what you think might happen as well as whether there may be a political response as well. In other words, in the event of a negative decision from the High Court, is it likely that the Trump Administration is going to respond politically and allow some of the dreamers to actually remain? What do you think is going to happen?

Lucas Guttentag: Well as you said, you know, I'm always hesitant to make too many predictions or any predictions based on the oral argument. And I don't, you know, Stephen, Phil may have views and they'll be just as insightful as mine. I would say, you know, that there was a lot of discussion about whether the decision to rescind is reviewable, that threshold question that I spent a lot of time on. There was a lot of discussion in that and the justices were trying to kind of draw a line as to, well if this decision's reviewable, what about other exercises of prosecutorial discretion? And if there were guidelines on the enforcement of the criminal law and a new administration comes in and changes that, does that mean that can be reviewable? So there was definitely, I would say, skepticism among a number of the members of the court that the decision to rescind was reviewable at all. So that was very just, you know…troubling. Not surprising, but troubling.

The second thing I think is there was a lot of understanding at the court—again, you know you have to look at it justice by justice, but I think there was a lot of understanding about the incredible consequences that this would have for individuals and the so-called reliance interest as a legal matter that recipients have, how much they relied on this. And one of the challenges to the rescission is that the government failed to take serious account, or any account, of the reliance interest that people have. And a change in existing guidance like this, under administrative law principles, the government is obliged to take into account the reliance interests of people who've been acting under the prior guidance, so there was definitely a lot of recognition of that.

And then there was also you know, I thought, a significant amount of traction for the argument that the government's trying to avoid—the Trump administration's trying to avoid taking responsibilities for the decision by hiding

behind this legal argument. I think the Solicitor General made a point at the end of his rebuttal of saying, "no, we own this decision." And that was clearly responding to the argument that we'll take the political heat—or so he said to the Court—we'll take the political heat further sending it, we're not trying to hide behind it. I think the Chief Justice, Chief Justice Roberts—I read one of his questions at least—as trying to kind of lower the temperature of the consequence. I think he understands that the Court will be seen as allowing the end of DACA, and that it is actually shifting responsibility to the Court. But he said at one point words to the effect of if it ends, essentially, it'll be a wind-down, not a termination of existing DACA recipients. Which is to say that he was implying, it seemed to me, that an end of the DACA program would leave people with the DACA they have, and it would expire at the end of their current work authorization or current period of deferred action rather than being abruptly terminated.

I think that was disheartening in the sense he was trying to make it seem less consequential. It was at least a recognition that people who currently have DACA would presumably not be terminated abruptly. But where the Court ultimately comes out on this, I think, it's very difficult to predict. I think they recognize the consequences in terms of—the last thing I'll say just in terms of the political response: I think there's a lot going on already. I think there's a recognition that there has to be some response, even those who until now have said that they support the termination of DACA have said—the Trump administration included—have said that it should be addressed through legislative means and by Congress. So I think there will be support for that. The question will be at what cost. And if the program has to be preserved legislatively, what will be the demand for the Trump administration in exchange for preserving DACA? And that, I think, is going to be a very fraught, political contested matter.

Engy Abdelkader: Thank you, Lucas. That was incredibly helpful. Steve, let me turn to you. Thank you so much for your presentation. You highlighted the uptick in stays and you made this larger point which I thought was interesting and potentially provocative. You stated that the Supreme Court is making immigration law on its shadow docket that may be even more important than its merit cases. And, I wanted to give you an opportunity to expand on that and provide us with some supporting evidence or analysis to help us understand why you're making that argument.

Stephen Vladeck: I think the key here is that when the Supreme Court is granting a stay in some of these cases, it's granting a stay where the only thing that's been decided by the district court is to enter a preliminary injunction barring a new policy from going into effect, sometimes on a nationwide basis and sometimes on a district-wide basis, pending the duration of litigation. And so the practical effect of a stay in one of these cases is that the Trump administration gets somewhere between two to three free years of allowing this policy or a policy that may have virtually no basis in law, or that may—as in the context of the first asylum ban—be directly counter to the plain text of the relevant statute. They nevertheless get two to three years of having these policies in effect before their merits can be conclusively resolved by the Supreme Court. The only thing the administration has to lose is the possibility

that maybe three years down the road, when no one's paying attention or perhaps even when there's a new administration, the case gets thrown out. This could happen either because the court of appeals sides with the challengers and the Supreme Court denies cert or because the Supreme Court actually takes the case on the merits and sides with the challengers.

I think it really messes up the balance of the equities which historically and traditionally is supposed to be what guides how federal courts approach these kinds of questions at the outset of litigation. The Supreme Court is in a lot of these cases defaulting to a stay on the grounds that any injunction against a government policy causes irreparable harm to the government, never mind the impact that allowing the change in policy to go into effect has on tens or hundreds or thousands of individuals. In these cases, the affected individuals are immigrants who have to bear the brunt of these policies that may very well be illegal but that go into effect pending the litigation.

We also saw that with regard to the travel ban, where the Supreme Court with regard to travel ban 2.0 allowed a pretty substantial chunk of it to go into effect. Even though the merits of travel ban 2.0 never produced a decision from the Supreme Court, the administration changed the policy on the eve of what was supposed to be the oral argument in October 2017. We've also seen this with the asylum cases. I think we may be about to see this with the public charge case where the government filed first day on Monday so you know Engy, I think the concern is not necessarily that these are cases where the government has no chance of winning. The concern is that what used to be an extraordinary measure, where it was an exceptional case—where the Supreme Court would go out of its way to allow a policy like this to go into effect if the lower courts had all said no we're freezing it—is now becoming the norm. I think you know if folks want to read one opinion about this, Justice Sotomayor's dissenting opinion in the second *East Bay Sanctuary Covenant* case from September goes through exactly why it's problematic for this to become the default and why it really sort of runs roughshod over an idea dating back really to the founding of this country. That when the government wants to dramatically change its policies, courts are going to be very careful about letting those changes go into effect when there are substantial reasons to doubt that the changes are legal.

Engy Abdelkader: I have a quick follow-up to that. Many of us have seen the polling data regarding immigration-related issues. There's deep partisan divides when it comes to immigration policy in the United States with conservative hostility towards permissive immigration policies or approaches. And, so, this trend that you are identifying—is it reflective of partisanship and political leanings in the court, or is it something else?

Stephen Vladeck: It’s a great question Engy and I think it’s probably a little bit of both. I think it's certainly true that part of why the Supreme Court has become more tolerant of these applications, part of why they've granted more of these requests and therefore why the government has felt encouraged to file them, is because of shifts in the composition of the court. If folks want the 41-page version of this, I have an

article that walks through the very subtle doctrinal shift that I think explains what the Supreme Court is doing. I also think there is to some degree a sense, at least in the government if not on the Supreme Court, that there's a bit of anti-Trump hostility behind some of these district court injunctions. Although, as the paper suggests, I think that's a bit of an oversimplification. There are folks who think that this is really a response to the uptick in nationwide injunctions. I think that too is too simple an explanation, given that of the 23 stays the government has applied for, only about half of them have been of district court injunctions that had nationwide applicability.

So, I think it's a combination of factors. But I think what's really going on is that we have a court system that increasingly sort of errs on the side of the government in immigration cases, at least in the appellate context, when it's often the district judges—the judges who are on the ground, who are in the best position to actually do fact finding—who may be in a better position to assess at least the initial impact of allowing these policies to go into effect. And so, you know whatever the cause of this uptick I think some of it has a partisan valence but I think there's also partly a disconnect between how appellate judges think about their jobs and how district judges think about theirs.

Engy Abdelkader: Good, so on that note of partisanship and politics we do have a question from one of our audience members. She asks whether or not immigration practitioners should be more hesitant about filing for certification before the Supreme Court given the current composition of the court. That's for everybody if anybody wants to respond.

Stephen Vladeck: I think the short answer is that when you're practicing you have you have an ethical obligation to your client. I think you know there always has to be a question about whether there's a reasonable chance that you're going to get a better result in the Supreme Court then you have in the in the lower courts. I mean this is we talked about this a bit in the context of the cross-border shooting case where we had lost in the Fifth Circuit on remand and where there was some concern that if we went back to the Supreme Court the court would take this rule and make it even broader. I think the reality is that if there really is a possibility that your case is going to be used by the Supreme Court to upset precedents that are actually in general beneficial for plaintiffs in this context, I think it's worth thinking about it carefully. But I still think that our ethical obligations to our clients have to come first in context where we think there's at least a plausible chance, a reasonable chance, that we might be able to get relief for them by taking it one step higher. That's my view, but I'm curious what Lucas and Phil think.

Engy Abdelkader: Lucas, did you have anything add?

Lucas Guttentag: I'm happy to weigh in on this, and it's a very challenging question, of course. But I guess I see a couple of things. One is in many of these cases, the government's the one that stops cert and I think that's a difference. You know, if we win below and we're defending a client and the government files for cert there's not a lot you can do. You can't give up on the based on the fear that down

the road the government is going to file for cert. So I think we have to distinguish cases between where we're filing—"we" being the immigrant the non-citizen—or filing seeking court review in cases where we're defending a favorable lower court decision. I think overall it states the obvious to say this is not a time when the Supreme Court is going to be making big positive advances in the law on behalf of non-citizens. So I think we have to be realistic about that and be very strategic about which cases go there, under what circumstances they go there, when we have the opportunity to make a choice, you know, to think very hard about whether it's a good time to present cases to the Court.

And related to that, I would say that sometimes, oftentimes the same issue arises in a number of different cases and can come up out of a number of different circuits. And I think one of the critical things is for advocates to coordinate and to think strategically about if an issue is going to go to the Supreme Court, what's the best posture in which it gets there? Which represents as facts, what are the circumstances, and if there are a number of circuit courts that have ruled favorably in a case and one circuit court has ruled unfavorably, can we wait before taking that case? Or if the prospects are not good, so that at least in the favorable circuits, people can continue to get benefit of a good rule of law, if there's not much optimism about preserving that rule once it actually gets to the court.

So I think there's a lot of different factors that go into making cases, different issues are going to go to how and when to actually present the issue. And on that I just want to add that the Solicitor General, the government does that very much. You know, in other words they don't take every case they lose up to the court. And they can be very strategic because they control which cases they file for cert in, so I think it's incumbent on us try to make, yeah, strategic—I recognize absolutely what Steve said, we have an ethical obligation to our clients. And I think we have to fully respect that. And at the same time, we need to be strategic and collaborative about how we decide to make the best arguments to the Court that is inevitably hostile, at least a majority of the Court, in the tops of the kinds of the cases we're bringing.

Engy Abdelkader: Phil, I know that you wanted to also share your observations and insights as well. I also wanted to pose a related question that is associated with granting cert. It is remarkable, as Lucas observed, how many immigration cases are on the US Supreme Court docket. And, it's notable that a number of those cases involve immigration consequences of criminal convictions. Is that just serendipity or is there something more going on there?

Phil Torrey: Yeah I mean just to follow up on the point that Steve and Lucas were making in terms of bringing cases to the Supreme Court, I can't emphasize enough specifically what Lucas was just saying in terms of coordinating with others in terms of looking for proper vehicles as well as making sure the best arguments are put forward in the court. I think that's important. In terms of the cases about the immigration consequences of criminal convictions, it's been a general uptick over the last several years in those types of cases and there's probably a couple of things going on. One is that this Administration and really the prior administration there's been a focus on folks with criminal convictions and processing them into the

removal pipeline. More and more of those arguments are being made at the IJ and BIA level and then percolating up to the appellate court and the Supreme Court. Another thing that I've been seeing recently and kind of loosely keeping an eye on is that there's been a state response to many of the federal policies that are coming down one of which is to provide lawyers and representation to folks who are detained which often include folks with criminal convictions. And so you have an attorney at that beginning stage who can start to formulate and make many of these arguments that then end up percolating up to the Court. I think that's critically important too so I think that may also be playing some role in this trend also.

Engy Abdelkader: Great. So, a question from one of our audience members—what role if any has international law played in the context of adjudicating and advocating on the various issues you discuss? And I guess this is particularly relevant in the context of asylum law. Any insight any of you want to provide on that note?

Phil Torrey: I could just say a couple of things just briefly about that. I mean I saw that question and one of the first things that came to mind is another proposed regulation that the administration is looking at to increase the number of criminal bars for asylum eligibility. Asylum, as you pointed out Engy, is based on our international treaty obligations and although we haven't specifically ratified or signed on to that treaty, the treaty as it relates to refugees we have in terms of the 1967 Protocol and our domestic asylum laws are essentially a mirror of many of the provisions in that treaty. And so one of the issues that I've been working on in different circuits in conjunction with Immigrant Defense Project out of New York is to combat a particular criminal bar to asylum called the particularly serious crime bar. And in doing so attempting to infuse some international law arguments there has been some mixed success with that I mean typically Article III courts are not relying heavily on international law arguments however there has been it seems like there has been some openness to accepting those arguments specifically when they relate to asylum or those kinds of humanitarian protections that are based on our international treaties.

Engy Abdelkader: Good, did anyone else want to comment on that question?

Lucas Guttentag: Yeah, I would just echo what Phil said. I mean, it depends on the context of the case, and in the asylum context, international law has traditionally played a significant role, because we are supposed to be fulfilling our international obligations and treaty obligations. Especially the cases, I think that Steve mentioned, that are still working their way up, international law is likely to play a much more prominent role in the border ban cases and the other Asylum related cases that Phil was talking about that you mentioned. But in the cases we have before the court right now, I don't think international law, and I may be mistaken, I don't think international law is playing a prominent role. I don't know about Steve's—not the *Bivens* part of it, but I don't know about the rights of non-nationals when they're murdered by somebody who sits on US soil. But the other cases, I think it's not playing a prominent role unless I'm missing something.

Stephen Vladeck: No, I mean I think at least in *Hernandez*, there's a lot of foreign relations baked into the case but not specific applicability of particular rules of either positive or customary international law, so I agree with both Lucas and Phil.

Engy Abdelkader: Great. So, we are over time. Before we end I do want to give each of you an opportunity to share any concluding thoughts you may have. So, Lucas, let's begin with you. Any concluding thoughts for our audience members?

Lucas Guttentag: No, we covered an enormous amount of ground, needless to say. And I think I would end just where I started, with the two cases that I at least talked about. You know, DACA has unbelievable human lenses and political impact and is so consequential for so many people. Doctrinally, I don't think it's a profoundly significant case. And the habeas corpus cases in the world of law, which are not as immediately understandable...[*audio disrupted*]…develops that the government position is in the case to allow unilateral Executive and legislation and it's out of a role in the immigration process context.

Engy Abdelkader: Wonderful, thank you. Phil, any concluding thoughts?

Phil Torrey: I'm not sure if I had I have much to add. I would say that you know there are a number—as Lucas has pointed out—there are a surprising number of immigration cases at the court right now some of which are getting a lot of headlines —and rightly so—but many of these other cases could have incredibly wide implications too so it's important to keep an eye on them. And the last thing I'll say is Steve you started out talking about your oral argument in the Hernandez case and I would encourage folks to check it out because you did a fantastic job I thought.

Stephen Vladeck: Thanks Phil. What's a better place to end than having Phil extol my virtues. I think that the biggest takeaways from all this are, as Lucas said when he when he began his presentation, this is an unusually heavy term for immigration for the court but that's only in comparison to the last few years. It's entirely possible that this is the harbinger of things to come, and that immigration will be the flashpoint of division between the lower courts and this now solidified Supreme Court majority. In that respect, the Federal Courts nerd in me thinks that it's the cases about the role of the courts in general—*Thuraissigiam*, *Hernandez* etc. —that are going to have the broadest longest-term structural ramifications even as, hopefully, the underlying policies change whether because of new statutes or new presidents.

Engy Abdelkader: Wonderful that's a powerful note to end on. Thank You Phil, Lucas, and Steve for joining us today and sharing your insights and expertise with all of us. Thank you to our audience members for your probing questions and your attention during the last hour and a half. You will be receiving the video recording shortly after this session. As I mentioned in the beginning, this is part of a larger national lecture series. Our next webinar will be on February 19th, when we will be

examining the emergency declarations on the southern border. We hope you'll be joining us then. Thank you all.

Stephen Vladeck: Thanks everybody.

Lucas Guttentag: Thank you.