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Inside

Certain Detained Aliens Do Not Have a Statutory Right to a Bond Hearing Pending Completion of their Removal Proceedings

In a 5-3 decision, the Supreme Court held in ***Jennings v. Rodriguez***, 138 S.Ct. 830 (2018) that the INA's detention provision in §§ 235(b), 236 (a), and 236(c), authorizing DHS to detain certain aliens pending the completion of their removal proceedings, do not give these detained aliens the right to periodic bond hearings during the course of their detention. Writing for the plutality, Justice Alito found "implausible" the Ninth Circuit's interpretation of the three statutory provisions. Because the statute was clear, the Ninth Circuit had misapplied the doctrine of constitutional avoidance. Justice Alito emphasized that "a court relying on that canon ... must interpret the statute, not rewrite it."

The Ninth Circuit had held, relying on the constitutional-avoidance canon of statutory interpretation, that detained aliens have a statutory right to periodic bond hearings under these provisions. *Rodriguez v. Robbins* 804 F.3d 1060 (9th Cir. 2015). Consequently, it upheld a lower court injunction which required the government to give a bond hearing to a detained alien every six months and that detention beyond the initial 6–month period would be permitted only if the government proved by clear and convincing evidence that further detention were justified.

Background

This decade-long litigation commenced on May 16, 2007, when petitioner, an LPR, sought writ of habeas corpus on behalf of himself and class of aliens detained during immigration proceedings for more than six months without bond hearing. Petitioner asserted that the detention of the members of the proposed class was not authorized by statute, and, in the alter-

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Supreme Court Grants Certiorari to Review Challenge to the BIA's Interpretation of the "Stop-Time" Rule

The Supreme Court will hear argument April 23, 2018, on alien's petition for a writ of certiorari challenging the First Circuit's decision in *Fonseca-Pereira v. Sessions*, 866 F.3d 1 (1st Cir. 2017), giving *Chevron* deference to the BIA's interpretation of the "stop-time" rule under 8 U.S.C. § 1229b(d)(1). ***Fonseca-Pereira v. Sessions***, 138 S.Ct. 735(January 12, 2018).

The Supreme Court granted the petition, presumably to resolve a conflict among the circuits on whether a notice to appear that does not specify a date and time for the alien's initial hearing ends the alien's continuous physical presence for purposes of his eligibility for cancellation of removal.

In *Matter of Camarillo*, 25 I&N Dec. 644 (BIA 2011), the BIA held that under the INA, service on an alien of a notice to appear containing a notation that the initial hearing will be at a time and place "to be set" is effective to stop accrual of the alien's continuous physical presence. The

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Detention Pending Completion of Immigration Proceedings

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native, that if their detention is authorized it violates the Fifth Amendment's guarantee of due process. Petitioner sought injunctive and declaratory relief providing individualized bond hearings with the burden on government, certification of class, and appointment of class counsel.

The district court initially denied class certification, but the Ninth Circuit reversed and granted class certification. *Rodriguez v. Hayes*, 591 F.3d 1105 (9th Cir. 2010). Following remand, the district court entered a preliminary injunction requiring the holding of bond hearings for individual class members. 2012 WL 7653016 (C.D. Cal. Sept. 13, 2012). The government appealed the injunctive order but the Ninth Circuit affirmed in *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013). The district court subsequently ruled on the merits and ordered the government to provide each class member, by the class member's 181st day of detention, with a bond hearing before an Immigration Judge consistent with the substantive and procedural requirements set forth by the court. The government appealed the decision.

The Ninth Circuit, relying principally on the Supreme Court decisions in *Zadvydas v. Davis*, 533 U.S. 678 (2001) and *Demore v. Kim*, 538 U.S. 510 (2003), applied the constitutional avoidance doctrine and concluded that the class members' detention beyond six-months would raise constitutional concerns and therefore the government would have to provide periodic bond hearings every six months "so that the noncitizens may challenge their continued detention." *Rodriguez v. Robbins* 804 F.3d 1060 (9th Cir. 2015).

The Supreme Court's Decision

The Court initially determined that it had jurisdiction to consider the class members' challenges to their continued detention pending the outcome of their removal proceedings. The Court determined that INA 242(b)(9) did not present a jurisdictional bar because the plaintiffs were not seeking review of a deportation order, nor challenging the decision to detain or to seek removal, nor challenging the removal process. Similarly, INA 236(e) did not bar review because plaintiffs were not challenging a discretionary judgment or decision of the Attorney General but were challenging the extent of DHS's detention authority under the statutory framework.

Justices Thomas and Gorsuch did not join on the majority's jurisdictional analysis because they would have found that the statute precluded review of aliens' claims except in a petition for review from a final removal order or in other circumstances not present in plaintiffs' case.

On the merits, the Court held that the Ninth Circuit had misapplied the canon of constitutional avoidance because its interpretation of the three INA detention provisions were "implausible." In particular, the Court found that the language in §§ 235(b)(1) and 235 (b)(2) was clear on its face and "read most naturally ... mandate detention of applicants for admission until certain proceedings have concluded." The Court rejected the Ninth Circuit's interpretation that these provisions contained an implicit six-months limitation on detention, and once that time period elapsed, detained aliens were entitled to a bond hearing. "Spotting a constitutional issue does not give a court the authority to rewrite the statute as it pleases," explained the Court. The Court specifically disagreed with the Ninth's Circuit's reading of *Zadvydas v. Davis*, 533 U.S. 678 (2001) as granting a license to graft a time limit on INA 235(b). "*Zadvydas* represents a notably generous application of the constitutional-avoidance canon, but the Court of Appeals in this case went much further," said the Court.

The Court found the language in INA § 236(c) "even clearer," noting that it creates a default rule aliens already present in the U.S. by permitting the Attorney General detain them pending detention or to release certain aliens on bond. This statutory provision also does not limit the length of detention. Therefore, the Court said that the Ninth's Circuit interpretation that the statute includes an implicit 6-month detention time limit, "falls far short of a 'plausible statutory construction.'"

Finally, the Court concluded that because the lower court had erroneously interpreted the statute, "it had no occasion to consider respondents' constitutional arguments on their merits." However, the Court instructed the Ninth Circuit to first consider whether it continues to have jurisdiction under INA § 242(f) in light of the resolution of the statutory claims. Specifically, whether the court "may issue class wide injunctive relief based on respondents' constitutional claims." And, if the court can only issue declaratory relief, "whether that remedy can sustain the class on its own." The Court also instructed the Ninth Circuit to also consider "whether a Rule 23(b)(2) class action continues to be the appropriate vehicle for respondents' claims in light of *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

Dissenting Opinion

In a dissenting opinion, Justice Breyer, who was joined by Justices Ginsburg and Sotomayer, would have found that the plurality's interpretation of the INA as forbidding bail, would likely render the statute unconstitutional, and therefore to avoid the constitutional question, would have agreed with the lower court that the INA required bail hearings, presumptively after six months of confinement.

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FURTHER REVIEW PENDING: Update on Cases & Issues

Crime of Violence — Vagueness

[THERE WILL BE AN ARTICLE ON THE SUPREME COURT'S APRIL 17, 2018 DECISION IN THE NEXT BULLETIN]

The Supreme Court heard reargument in ***Sessions v. Dimaya***, No. 15-1498, on October 2, 2017. On January 17, 2017, the Court heard original argument on the government's petition for a writ of certiorari challenging the judgment of a divided Ninth Circuit panel (803 F.3d 1110) that the "crime of violence" definition in 18 U.S.C. § 16(b), as incorporated into the aggravated-felony provision of the immigration laws, is unconstitutional in view of *Johnson v. United States*, 135 S. Ct. 2521 (2015) (striking down the "residual clause" of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii)). The government contends that review is warranted because that ruling is incorrect, strikes down a federal statute, conflicts with a decision of another court of appeals, and is already causing substantial disruption to the enforcement of the immigration laws and several criminal laws. There are numerous related petitions for certiorari, and other cases at various stages in the courts of appeals.

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Cancellation - Stop-Time Rule

On April 23, 2018, in ***Pereira v. Sessions***, No. 17-459, the Supreme Court will hear argument on the alien's petition, granted over government opposition, challenging the First Circuit's published opinion, 866 F.3d 1, on the question of whether to trigger the stop-time rule by serving a notice to appear, the government must specify the items listed in the definition of a notice to appear, including the time and place at which the proceedings will be held. Six circuits agree with the First Circuit and the Board (*Matter of Camarillo*, 25 I. & N. Dec. 644 (BIA 2011)); the Third Circuit held the statute is clear to the contrary. The National Immigrant Justice Center, AILA, and former BIA Chairman Schmidt have filed amicus briefs in support of petitioner.

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Mandatory Detention – "when ... released"

On March 19, 2018, the Supreme Court granted the government's petition for certiorari review in ***Neilsen v. Preap*** (together with a related case, *Khoury*), No. 16-1363, challenging the Ninth Circuit's class action decision, 831 F.3d 1193, on the question of whether a criminal alien becomes exempt from mandatory detention under 8 U.S.C. 1226(c) if, after the alien is released from criminal custody, the Department of Homeland Security does not take him into immigration custody immediately. The Ninth Circuit decision conflicts with four circuits that have held that a gap in custody is irrelevant to the mandatory detention regime, agreeing with the Board in *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001). The First Circuit, *en banc*, split evenly on the facts of a case with a multi-year gap. The government's merits brief is due May 3, 2018.

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Cancellation – Ambiguous Conviction Record

The Ninth Circuit granted to the alien's petition for en banc rehearing, over government opposition, vacating its published opinion in ***Marinelarena v. Sessions***, 869 F.3d 780, which held that the alien has not satisfied his burden of proof for cancellation of removal based on an inconclusive record of conviction. The rehearing petition sought *en banc* review on the question of whether *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc), which held that if there is uncertainty over whether the alien was convicted of disqualifying offense the alien has not satisfied his burden of proof for cancellation of removal, remains good law in light of the Supreme Court's decision in *Moncrieffe v. Holder*, 569 U.S. 184 (2013). Argument before an *en banc* panel is calendared for the week of June 18, 2018.

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USCIS Finalizes Guidance on Signature Requirements

USCIS recently announced that petitioners and applicants who seek immigration benefits must provide a valid signature on forms submitted to the agency. In an effort to protect and safeguard the nation's immigration system and those who benefit from it, power of attorney signatures will no longer be accepted. If forms are filed by a corporation or other legal entity, they must be signed by an authorized person. The new policy became effective March 18, 2018.

The prohibition on power of attorney signatures does not affect signatures on behalf of individuals younger than age 14 or those with disabilities. The final memorandum makes additional changes such as providing that an authorized signatory must be employed by the petitioner and that USCIS may reject a form submitted with a faulty signature instead of offering the opportunity to fix the deficiency.

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ First Circuit Holds Substantial Evidence Supports Denial of Request for Waiver of the Joint Filing Requirement for an Application to Remove Conditions on Permanent Residence

In ***Gitau v. Sessions***, 878 F.3d 429 (1st Cir. 2017) (Torruella, *Kayatta*, Barron), the First Circuit upheld the denial of a petition to waive the joint filing requirements where the IJ determined that petitioner could not show that she had entered the marriage in good faith and that her removal would result in extreme hardship.

The petitioner, a citizen of Kenya, became a conditional permanent resident when she married a U.S. citizen. However, she divorced and was unable to satisfy the statutory joint filing requirement to remove the condition on her residence. She then filed a petition to waive that requirement. The USCIS denied and she was place in removal proceedings when she renewed her request for a waiver. Following a hearing, the IJ ruled found petitioner not credible and finding the evidence other than her own testimony to be insufficient to support her claim that she entered into her marriage in good faith. The IJ also found that she had not demonstrated extreme hardship. On appeal, the BIA adopted and affirmed the IJ's decision, determining that the IJ did not clearly err in finding petitioner testimony not credible, and that the IJ adequately considered her documentary evidence.

The court held that that although "a reasonable factfinder could have gone either way on the question of whether [petitioner] was credible," the court concluded that it could not substitute its assessment for that of the IJ, and therefore there was no error in denying petitioner a waiver based on a good faith marriage.

The court then rejected the government's contention that it lacked jurisdiction to review petitioner's alternative basis for the waiver, that she would suffer "extreme hardship" if removed to Kenya. The court held that "threshold determinations of eligibility for a waiver are reviewable, while the ultimate grant or denial of a waiver is not." Nonetheless, the court upheld the finding of no extreme hardship. The court found that the BIA and IJ had considered the evidence of hardship "both individually and in the aggregate, and had determined that much of the evidence concerning conditions in Kenya did not relate to conditions arising during the petitioner's time as a conditional permanent resident, "but instead described general conditions in the country before and after the period." Accordingly, the court determined that the record did not compel a conclusion contrary to that of the agency.

Although "a reasonable factfinder could have gone either way on the question of whether [petitioner] was credible," the court concluded that it could not substitute its assessment for that of the IJ.

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■ First Circuit Holds That Proposed Particular Social Group of "Guatemalan Women Who Try to Escape Systemic and Severe Violence but Who Are Unable to Receive Official Protection" Is Neither Particular nor Socially Distinct

In ***Perez-Rabanales v. Sessions***, 881 F.3d 61(1st Cir. 2018) (Thompson, *Selya*, Kayatta), the First Circuit, held that the petitioner's proffered social group composed of "Guatemalan women who try to escape systemic and severe violence but who are unable to receive official protection," was not sufficiently particular nor socially distinct because it potentially encompassed all women in Guatemala and also was impermissibly defined by the persecution of its members.

The court rejected petitioner's contention that *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), buttressed her proposition that a particular social group may consist of women subject to violence. "Comparing the petitioner's proffered social group to the social group found cognizable in *Matter of A-R-C-G-* is like comparing carrots to cucumbers," said the court. In that case, explained the court, the petitioner "was able to show that the group in which she claimed membership—'married women in Guatemala who are unable to leave their relationship'—was viewed by her society as a discrete class of persons. The members' status as women forced to remain in their marriages left them uniquely vulnerable to persecution—a fact that was easily recognizable by Guatemalan society." Here, however, "petitioner's proffered social group is defined by the persecution of its members. This distinction has decretory significance. A sufficiently distinct social group must exist independent of the persecution claimed to have been suffered by the alien and must have existed before the alleged persecution began," explained the court.

Accordingly, the court concluded that "petitioner's failure to satisfy both the particularity and the social distinctiveness requirements defeats her attempt to qualify as a refugee through membership in a particular social group."

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■ Asylum Applicant's Speculative Claim Did Not Establish a Nexus between Harm She Experienced and Her Family Membership

In ***Sosa-Perez v. Sessions***, 884 F.3d 74 (1st Cir. 2018) (*Baron*, Selya, Stahl), the First Circuit held that the record did not compel the conclusion that the petitioner established persecution on account of her family membership. The court noted that petitioner provided no direct evidence that her assailants knew of, or targeted her on account of, her family membership, and determined that the fact that various family members had been subjected to violence in the past did not compel the conclusion that the harm was on account of family membership. The court also rejected the petitioner's due process claim because she did not show that any evidence was excluded or argument overlooked.

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■ First Circuit Holds Alien Did Not Show Nexus Between Harm to Family and Protected Ground

In ***Ruiz-Escobar v. Sessions***, 881 F.3d 252 (1st Cir. 2018) (*Lynch*, Selya, Souter (by designation)), the First Circuit upheld the denial of petitioner's application for withholding of removal when the alien failed to show that the deaths of several relatives in Honduras were on account of a protected ground.

Petitioner claimed that that a narcotrafficking gang called Los Cachiros had killed a number of his family members in Honduras. The IJ denied Ruiz-Escobar's request for relief, finding that he failed to establish that he had suffered—or was likely to suffer in the future—harm that was both sufficient to constitute persecution and related to his family membership. The BIA affirmed in a decision finding *inter alia* that petitioner had failed to show that the alleged persecution was on account of his family membership.

The court also rejected the petitioner's due process claim, holding that the IJ's use of the courtroom interpreter to translate a Spanish document did not prejudice petitioner when the petitioner did not contend the translation was inaccurate and the IJ did not base his decision on adverse credibility.

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■ IJ and BIA Correctly Analyzed Aggravated Identity Theft Crime (Not an Aggravated Felony) under the Frentescu Factors

In ***Valerio-Ramirez v. Sessions***, 882 F.3d 289 (1st Cir. 2018) (*Lynch*, Souter (by designation), Selya), the First Circuit held that the Immigration Judge and the BIA correctly analyzed the alien's aggravated identity theft conviction (not an aggravated felony under the INA) under the multi-factor test set forth in *Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982), notwithstanding that the case temporally arose under a provision of the Antiterrorism and Effective Death Penalty Act making an express reference to the United Nations Protocol. The court concluded that the IJ and the BIA properly relied on: (1) the nature and circumstances of the alien's crime, including a prior mail fraud crime as an element of the aggravated identity theft crime; (2) the reason for her sentence; and (3) the alien's danger to the community, despite the non-violent nature of the crime.

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> **The court held that the "privilege" of voluntary departure involves no cognizable liberty or property interest, and consequently petitioner failed to raise a colorable constitutional claim.**

■ First Circuit Holds It Lacks Jurisdiction to Review Discretionary Denial of Voluntary Departure

In ***Cruz-Orellana v. Sessions***, 878 F.3d (1st Cir. 2017) (Barron, Selya, *Lipez*), the First Circuit held that it lacks jurisdiction to review the discretionary denial of voluntary departure. The court noted that when an IJ denies voluntary departure as a matter of discretion, "the recantation doctrine does not prevent him from using an immigrant's timely recanted false testimony as a basis for denying relief."

The court also reiterated that the "privilege" of voluntary departure involves no cognizable liberty or property interest, and consequently petitioner failed to raise a colorable constitutional claim.

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■ Asylum Applicant Failed to Establish She Was Persecuted On Account of Her Familial Relationship

In ***Villalta-Martinez v. Sessions***, 882 F.3d 20 (1st Cir. 2018) (Lynch, *Stahl*, Barron), the First Circuit held that substantial evidence supported the BIA's conclusion that the alien failed to present evidence that her gang member persecutors were motivated by her relationship to a store owner who was also the father of her child. The court agreed that there was insufficient evidence to show her persecutors were motivated to harm her for any other reason than to extort money.

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■ First Circuit Holds That BIA Provided Inadequate Reasoning to Support Conclusion That Massachusetts Arson Is a Crime Involving Moral Turpitude

In ***Rosa Pena v. Sessions***, 882 F.3d 284(1st Cir. 2018) (Howard, *Lynch*, Thompson), the First Circuit held that the BIA failed to explain why the "least culpable conduct" under the Massachusetts arson statute is morally reprehensible, and why the statute's requirement of "malice," as defined by Massachusetts case law, qualifies the crime as one involving moral turpitude. Judge Droney, concurring, questioned whether Congress's omission of a duress exception violated the United States' international law obligations.

The First Circuit held that the BIA failed to explain why the "least culpable conduct" under the Massachusetts arson statute is morally reprehensible.

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SECOND CIRCUIT

■ Second Circuit Concludes No Implied Duress Exception to the Terrorist Activity Bar

In ***Hernandez v. Sessions,*** 884 F.3d 109 (2d. Cir. 2018) (*Jacobs*, Raggi, Droney), the Second Circuit deferred to the BIA's ruling in *Matter of M-H-Z-*, 26 I&N Dec. 757 (BIA 2016), that the relief bar for providing material support to a terrorist organization does not include a duress exception. The court previously upheld the BIA's unpublished determination that the alien was statutorily ineligible for asylum and withholding of removal because she provided material support to the Revolutionary Armed Forces of Colombia ("FARC"), but remanded for the BIA to address the duress issue.

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Second Circuit Holds that Board Erred by Retroactively Applying *Matter of Diaz-Lizarraga* to Alien's Petit Larceny Conviction

In ***Obeya v. Sessions***, 884 F.3d 442 (2d Cir. 2018), (*Lynch*, Carney, Hellerstein (by designation)) the Second Circuit held that the BIA erred by retroactively applying *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016) to conclude that the alien's theft offense was a CIMT, where the statute of conviction required a "virtually permanent" deprivation of property.

The court held that *Diaz-Lizarraga* was an "abrupt departure" from BIA precedent and it was reasonable for the alien to have relied on the previous rule (requiring a literally permanent deprivation) when pleading guilty. Applying the categorical approach and the BIA's pre-*Diaz-Lizarraga* standard, the court ruled that the alien's petit larceny conviction was not a CIMT.

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■ Second Circuit Holds *Chevron* Deference Applies to Agency Interpretation of Corroboration Methodology in Matter of *L-A-C-*

In ***Wei Sun v. Sessions***, 883 F.3d 23 (2d Cir. February 23, 2018) (Leval, Livingston, *Chin*), the Second Circuit held that the BIA's interpretation of 8 U.S.C. § 1158(b)(1)(B)(ii)'s requirement for corroboration is reasonable and entitled to *Chevron* deference. In its interpretation, the BIA relied on *Matter of L-A-C-*, 26 I&N Dec. (BIA 2015). The court declined to adopt the Ninth Circuit's interpretation (*Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011)) that an Immigration Judge is required to provide an applicant with notice and opportunity to either produce corroborating evidence or explain why it is unavailable.

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THIRD CIRCUIT

■ Third Circuit Holds Forgery under Georgia's Forgery Statute Categorically Is an Aggravated Felony Relating to Forgery

In ***Williams v. Att'y Gen.***, 880 F.3d 100(*Smith*, Hardiman, Brann (by designation)) (3d Cir. 2018), the Third Circuit held that a conviction for forgery under former Georgia Revised Statutes § 16-9-1(a) (2006) was an offense "relating to . . . forgery" and thus an aggravated felony. The court concluded that, although the Georgia definition of forgery was broader than common law forgery because it covered false agency endorsements, it related to forgery under the court's "logical connection" test. In doing so, the court disagreed with the Ninth Circuit's decision in *Vizcarra-Ayala v. Mukasey*, 514 F.3d 870 (9th Cir. 2008).

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FOURTH CIRCUIT

■ Proof of Admission under the Visa Waiver Program May Establish that Alien indeed Waived His Right to a Hearing

In ***Nardea v. Sessions***, 876 F.3d 675 (Traxler, *Diaz*, Floyd) (4th Cir.

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2017), the Fourth Circuit held that admission stamps and a portion of an arrival form established that the petitioner was admitted under the Visa Waiver Program when he entered the United States on September 30, 2001. The court rejected petitioner's contention that absent production of his signed I–94W Form, the government could not carry its burden of establishing by clear and convincing evidence he was admitted under the VWP.

The court also held that even absent direct proof that the alien executed the required waiver to contest his removal, the presumption of regularity applied to the actions of admitting officials who would have necessarily obtained it from him. "To hold otherwise would flip the 'presumption of regularity' on its head and have us presume that every entry is irregular," explained the court.

Finally the court rejected petitioner's contention that that even if he executed a waiver, it was invalid because it was neither knowing nor voluntary. Without deciding whether "the knowing and voluntary standard applies," the court held that petitioner could not show prejudice. "Had [petitioner] been informed fully about the consequences of signing the I–94W waiver, he would be faced with two options, either of which would lead to his removal from the United States. If [petitioner] had signed the waiver and entered the country, he would be subject to removal without a hearing if (as happened here) he overstayed his visa. Alternatively, if he refused to sign the waiver, he would have been removed summarily at the border," noted the court.

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■ Fourth Circuit Holds Additional Support for a Pre-Existing Asylum Claim Can Constitute a Changed Circumstance to Excuse One-Year Filing Deadline

In ***Romero Zambrano v. Sessions***, 878 F.3d 84 (4th Cir. 2017) (Keenan, Wynn, *Gibney* (by designation)) , the Fourth Circuit held, in an issue of first impression, that new facts which provide additional support for a pre-existing asylum claim can constitute a changed circumstance to excuse the asylum one-year filing deadline. "These facts may include circumstances that show an intensification of a preexisting threat of persecution or new instances of persecution of the same kind suffered in the past," said the court.

The court found "jurisdiction to decide questions of law concerning the legal definition of a changed circumstance."

The petitioner, a citizen of Honduras, entered the United States unlawfully in August 2011, but did not seek asylum until after he was apprehended by immigration authorities in 2014. He said he had fled to the United States because in 2012 because, as a former military he had helped local police arrest gang members, and now the gang members tried to track him down to get revenge. Because he had missed the one-year filing deadline for asylum, he claimed that in 2014 attacks on his family represented changed circumstances from the 2012 incidents due to the increased violence against his family members and the new scope of the search by the gang members for him spanning various cities.

The IJ rejected the petitioner's argument, finding that more severe attacks cannot amount to changed circumstances, and denied his application as untimely. On appeal, the BIA agreed with the IJ finding that "the 2014 incidents were an escalation of the 2012 incidents."

The court initially determined that it had jurisdiction because although "the factual question of what happened is unreviewable," it had "jurisdiction to decide questions of law concerning the legal definition of a changed circumstance." The court then joined the Second, Sixth, and Ninth Circuits in concluding that the BIA improperly interpreted INA § 208(a)(2)(D) to require that an asylum applicant, in order to excuse delay in filing beyond the one-year deadline, must demonstrate that he would not have been eligible for asylum had he applied before the change in country conditions. The court concluded that "[n]ew facts that provide additional support for a pre-existing asylum claim can constitute a changed circumstance. These facts may include circumstances that show an intensification of a preexisting threat of persecution or new instances of persecution of the same kind suffered in the past."

The court remanded the case to the BIA to allow it to decide whether the facts presented constitute changed circumstances that materially affect petitioner's asylum eligibility.

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■ Fourth Circuit Rules BIA Erred in Denying Withholding of Removal Because at Least One Central Reason for Alien's Feared Persecution Is His Family Membership

In ***Salgado-Sosa v. Sessions***, 882 F.3d 451 (Gregory, Floyd, *Harris*) (4th Cir. 2018), the Fourth Cir-

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cuit held that the record compelled the conclusion that a withholding of removal applicant's membership in the particular social group of his family was at least one central reason why gang members targeted him. The court focused on the alien and whether he was targeted because of his family relationship.

The court also remanded for the BIA to consider whether the alien qualifies for a changed circumstances exception to the one-year asylum filing deadline, based on "intensification" of preexisting threat, under *Zambrano v. Sessions*, 878 F.3d 84 (4th Cir. 2017).

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FIFTH CIRCUIT

■ Fifth Circuit Holds Notice of Hearing Date Not Required Where Alien Fails to Provide Current Address, Court Has Jurisdiction to Review Denials of Administrative Closure

In ***Hernandez-Castillo v. Sessions***, 875 F.3d 199 (5th Cir. 2017) (Reavley, Southwick, *Elrod*), the Fifth Circuit, upheld the denial of a motion to reopen holding that rescission of the alien's *in absentia* removal order was not warranted given that notice of the hearing date was not required where the alien was personally served with the notice to appear and he failed to provide a valid mailing address at any time. "When an alien fails to provide a viable mailing address to DHS, the government need not provide notice of the alien's hearing," said the court. The court also determined that petitioner's due process rights were not violated because there was no liberty interest at stake due to the discretionary nature of the relief sought.

The court then joined the Third, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits in concluding that it had jurisdiction to review denials of administrative closure for abuse of discretion. "Unlike a refusal to *sua sponte* reopen proceedings, the denial of a motion for administrative closure does not lack meaningful standards against which to judge the determination," explained the court. The court noted that in *Matter of Avetisyan*, 25 I&N Dec. 688, 692 (BIA 2012), the BIA set forth a list of factors that an IJ can consider when deciding whether to administratively close a case. Here, the BIA found that petitioner had not established prima facie eligibility for any form of relief, one of the factors in *Avetisyan*, and therefore there was no abuse of discretion.

> **"Unlike a refusal to sua sponte reopen proceedings, the denial of a motion for administrative closure does not lack meaningful standards against which to judge the determination."**

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■ Fifth Circuit Holds Substantial Evidence Supports Adverse Credibility Determination (Despite PTSD Consideration)

In ***Singh v. Sessions***, 880 F.3d 220 (5th Cir. 2018) (Smith, Barksdale, *Higginson*), the Fifth Circuit held that *Matter of J-R-R-A-*, 26 I&N Dec. 609 (BIA 2015), which provides that an Immigration Judge should accept testimony as credible where an alien is deemed incompetent or where a mental health concern impacts the alien's ability to provide coherent testimony, was not implicated where alien was "found to be competent" and "there was no indication that [aliens]'s PTSD affected his testimony or his ability to speak in a coherent and linear manner."

The court further held that substantial evidence supported the agency's adverse credibility determination based on unexplained inconsistencies between the alien's statements during a credible fear interview and his statements before an immigration judge.

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■ Fifth Circuit Holds It Lacks Jurisdiction Over Motion to Reopen Reinstated Removal Order

In ***Santos Mejia v. Sessions***, 881 F.3d 421 (King, *Dennis*, Costa) (5th Cir. 2018), the Fifth Circuit held that it lacked jurisdiction over a motion to reopen a reinstated in absentia removal order. It deemed an alien's lack of notice claim a collateral attack of a reinstated order and determined that he did not establish a gross miscarriage of justice in his underlying proceedings for the court to review the matter.

The court also concluded that 8 U.S.C. § 1231(a)(5) barred review of the alien's changed circumstances claim because it is a factual question not exempted by 8 U.S.C. § 1252(a)(2)(D). The court rejected the alien's due process challenge to the denial of sua sponte reopening because there is no liberty interest in a motion to reopen.

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■ Fifth Circuit Affirms District Court Summary Judgment That Alien Did Not Establish His Legitimation "Under the Age of Twenty-One" Pursuant to Former INA § 309(a) Based on Amended Documents

In ***Gonzalez-Segura v. Sessions***, 882 F.3d 127 (5th Cir. 2018) (Jones,

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Smith, *Prado*), the Fifth Circuit affirmed the summary judgment of the district court finding that neither the alien's rectified birth certificate nor the judicial decree of a Mexican court rectifying his birth certificate after the alien turned twenty-one could be given retroactive effect to establish his legitimation "under the age of twenty-one" pursuant to the plain language of former INA § 309(a). The court also concluded that a land conveyance document was not a valid, holographic will under Mexican law establishing his legitimation under former INA § 309(a).

Contact: S. Nicole Nardone, OIL
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■ Fifth Circuit Upholds BIA's Denial of Untimely Motion to Reopen

In ***Mendias-Mendoza v. Sessions***, 877 F.3d 223 (5th Cir. 2017) (*Smith*, Barksdale, Higginson), the Fifth Circuit concluded that the BIA had properly exercised its discretion in denying a motion to reopen filed twenty-three years after the alien's 1991 deportation proceedings. At that hearing petitioner conceded deportability and waived his appeal to the BIA. In 2014, petitioner with new counsel, moved to reopen his proceedings claiming that he had lied in 1991 and that he had obtained LPR status in October 1989. The IJ denied the motion finding that petitioner had not presented prima facie evidence of eligibility for adjustment of status and had not introduced previously unavailable, material evidence. The BIA dismissed the appeal agreeing that there was insufficient evidence that he was an LPR at the time of his 1991 deportation proceedings.

The court also held that it lacked jurisdiction to consider the petitioner's untimely challenges to his 1991 proceeding and declined to review the BIA's decision not to exercise its *sua sponte* reopening authority. The court additionally denied the alien's due process claim because it determined that the alien had no protected liberty interest in his motion to reopen.

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■ Fifth Circuit Holds that the Criminal Alien Review Bar Prevents It from Reviewing a Determination that an Alien Failed to Exercise Due Diligence in Pursuing an Ineffective Assistance of Counsel Claim

> **The court concluded that the question of whether an alien has exercised due diligence in pursuing a claim for ineffective of assistance of counsel was a factual question.**

In ***Penalva v. Sessions***, 884 F.3d 521 (5th Cir. 2018) (Wiener, *Elrod*, Southwick), the Fifth Circuit held that because the alien was previously found removed based on multiple CIMTs, it lacked jurisdiction to review the BIA's factual determination that the alien was not entitled to equitable tolling of the deadline for filing her motion to reopen. The Fifth Circuit concluded that the question of whether an alien has exercised due diligence in pursuing a claim for ineffective of assistance of counsel was a factual question, and that the criminal alien jurisdictional bar at 8 U.S.C. § 1252(a)(2)(C) therefore deprived the court of jurisdiction over the petition for review.

Contact: Dana Camilleri, OIL
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■ Fifth Circuit Holds Denial of Untimely Motion to Reopen Based on Lack of Notice and Change in Country Conditions Not an Abuse of Discretion

In ***Garcia-Nunez v. Sessions***, 882 F.3d 499 (5th Cir. 2018) (Wiener, Elrod, Southwick) (*per curiam*), the Fifth Circuit held that the agency did not err in denying an alien's untimely motion to reopen upon a finding that "failed internal workings of a household" did not constitute a lack of proper notice of the hearing where she was found removable *in absentia*. The court also affirmed the agency's conclusion that the alien failed to show a change in country conditions for purposes of reopening. Further, the court held that it was not an abuse of discretion for the Immigration Judge to find no significant increase in violence against women in Honduras since the petitioner's hearing.

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SIXTH CIRCUIT

■ Sixth Circuit Holds BIA Abused Its Discretion in Denying Reopening as Asylum Applicant May Be Targeted Based on Her Familial Membership

In ***Trujillo-Diaz v. Sessions***, 880 F.3d 244 (6th Cir. 2018) (Merritt, Moore, *Bush*), the Sixth Circuit held that the BIA abused its discretion in denying petitioner's motion to reopen on the basis that she had failed to show a likelihood that she would specifically be targeted on account of her familial membership. The BIA had determined that the declaration of petitioner's father was "unclear" on whether the harm he suffered was linked to familial ties.

Petitioner claimed that she feared returning to Mexico because she believes that the Knights Templar, a prominent cartel, is targeting her (along with the rest of her family) to get revenge for her brother's fleeing the country in 2010 after refusing to join La Familia, a cartel that was prominent at that time. Petitioner presented a sworn declaration

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from her father in which he stated that in 2014 he was kidnapped by members of the Knights Templar, who threatened to hurt the rest of his family if they could not get their hands on his sons, including the one who had gone to the U.S.

The court held that to deem the connection between the petitioner's father kidnapping and her brother's refusal to join La Famila "unclear," the BIA was required to have discredited the father's declaration by finding it to be "inherently unbelievable." Because the BIA did not explicitly hold the declaration to be "inherently unbelievable" or that the declaration was incompatible with some other incontrovertible piece of evidence, the matter was remanded back for the BIA to consider the remaining aspects of the alien's prima facie case for relief.

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■ Sixth Circuit Grants Petition for Review from Alien Fearing "Honor Killing" in Jordan

*In **Kamar v. Sessions***, 875 F.3d 811 (6th Cir. 2017) (*Merritt*, Moore, Rogers), the Sixth Circuit granted a petition for review to a native of Lebanon and a citizen of Jordan seeking withholding of removal and CAT protection based on her cousin's threat to kill her due to her becoming pregnant before she married her child's father and Jordan's practice of providing "involuntary protective custody" to women fearing "honor killings."

The IJ initially found petitioner not credible and denied her request for withholding and CAT protection on that basis. However, the BIA reversed the adverse credibility finding and remanded the case to the IJ. On remand the IJ found that petitioner had failed to establish a viable social group for relief under her withholding of removal application. Even if she had shown this, the IJ reasoned that there was no evidence that a Catholic had been subject to an honor killing based on an illegitimate birth and therefore was unable to show that it was more likely than not that she would be persecuted based on her membership in a group. The IJ also found that she could not show that it was more likely than not that she would be tortured by anyone. The BIA dismissed the appeal. Petitioner subsequently filed a motion to reopen due to changed country conditions. The BIA vacated its earlier opinion, denied the motion to reopen, and reinstated the original appeal.

> **Because the BIA did not explicitly hold the declaration to be "inherently unbelievable" or that the declaration was incompatible with some other incontrovertible piece of evidence, the matter was remanded back for the BIA**

The court remanded to the BIA for further proceedings consistent with its opinion, including for the BIA to determine whether the alien is a member of a particular social group and whether she could safely relocate in Jordan.

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SEVENTH CIRCUIT

■ Seventh Circuit Denies Alien's Motion to Stay Removal and Grants Motion to Proceed in Forma Pauperis

In ***Fuller v. Sessions***, 879 F.3d 265 (7th Cir. 2018) (*Wood*, *Manion* (concurring), Rovner), the Seventh Circuit denied petitioner's motion for a stay of removal and granted his motion to proceed *in forma pauperis*. The court had previously upheld the BIA's denial of withholding and CAT protection. *Fuller v. Lynch*, 833 F.3d 866 (7th Cir. 2016).

Without explicitly discussing the *Nken* factors, the court held that while "[w]e are loathe to think that United States immigration law is so draconian that it compels a court to send a man to certain death, just because he violated the time and number requirements for motions to reopen . . . we must also take the Government's second argument into account: that the Board of Immigration Appeals did consider Fuller's new evidence and was not persuaded that it would have made a difference in the Immigration Judge's credibility determination."

Contact: Joanna Watson, OIL
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■ Seventh Circuit Rules that BIA Can Remand for Reconsideration of Dispositive Issue; DHS Not Required to File Cross-Appeal when Prevailing Party

In ***Shojaeddini v. Sessions***, 880 F.3d 325 (7th Cir. 2018) (*Bauer*, Kanne, Rovner), the Seventh Circuit held that the BIA did not abuse its discretion when it granted the DHS's motion to remand proceedings for reconsideration of a dispositive eligibility finding that the Immigration Judge previously declined to address. The court agreed with the BIA that DHS did not need to file a cross-appeal of the issue, as DHS was the "prevailing party." The aliens challenged only the procedural posture of the case, and not the decision regarding eligibility for relief.

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Seventh Circuit Denies Attempt to Circumvent the Doctrine of Consular Non-Reviewability

In ***Matushkina v. Nielsen***, 877 F.3d 289 (Manion, Kanne, *Hamilton*) (7th Cir. 2017), the Seventh Circuit affirmed on the merits the jurisdictional dismissal of an APA challenge to an inadmissibility determination made by Customs and Border Protection ("CBP") during an inspection at a port of entry. The court held that the plaintiffs' attack on the inadmissibility determination was actually an impermissible attempt to circumvent the doctrine of consular non-reviewability because the plaintiffs really sought to challenge the denial of an immigrant visa based on the CBP inadmissibility finding.

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Asylum Applicant Failed to Demonstrate Well-Founded Fear of Future Persecution on Account of a Particular Social Group or Political Opinion

In ***Zhakypbaev v. Sessions***, 880 F.3d 881 (7th Cir. 2018) (Wood, Easterbrook, *Rovner*), the Seventh Circuit upheld the BIA denial of asylum, withholding, and CAT protection to a citizen of Kyrgyzstan. Petitioner claimed that he had been persecuted and feared persecution due to his association with family of ousted Kyrgyz president.

The court found that even if petitioner were part of a cognizable social group and persecuted, he also needed to demonstrate a nexus between the mistreatment and his membership in the particular social group.

The court further held that the alien's participation in political activities occurred months after he was interrogated and beaten and, therefore, his support for the political party could not have been a basis for his past persecution.

Contact: Rosanne Perry, OIL
☎ [redacted]

Even if petitioner were part of a cognizable social group and persecuted, he also needed to demonstrate a nexus between the mistreatment and his membership in the particular social group.

Seventh Circuit Affirms Denial of Speculative Convention Against Torture Application

In ***Bernard v. Sessions***, 881 F.3d 1042 (Bauer, Kanne, Barrett (*per curiam*)) (7th Cir. 2018), the Seventh Circuit denied petitioner's application for deferral of removal under the Convention Against Torture. The court held that it lacked jurisdiction over the petitioner's factual challenge to his particularly serious crime finding. The court then held that substantial evidence supported the agency's findings that the petitioner's fears of torture if returned to Jamaica on account of his bisexuality and political affiliation required stringing together a series of suppositions, and thus lacked merit.

Contact: Michael C. Heyse, OIL
☎ [redacted]

Seventh Circuit Holds Indiana Conviction for Attempted Statutory Rape Is Aggravated Felony Sexual Abuse of a Minor

In ***Correa-Diaz v. Sessions***, 881 F.3d 523 (7th Cir. 2018) (*Flaum*, Easterbrook, Barrett), the Seventh Circuit concluded that an Indiana conviction for attempted sexual misconduct with a minor qualified as sexual abuse of minor under INA § 101 (a)(43)(A). The Indiana statute required the defendant to be at least 18 years old, and the victim to be 14 or 15 years old. The Seventh Circuit rejected the alien's contention that the Supreme Court's decision in *Esquivel Quintana v. Sessions*, 137 S. Ct. 1562 (2017), overruled the court's deference to the Board of Immigration Appeals' interpretation of sexual abuse of a minor.

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Seventh Circuit Holds that Whether a Waiver of Appeal was Done Knowingly and Intelligently is a Factual Question, and Thus Not Reviewable Under the Criminal Alien Review Bar

In ***Melesio-Rodriguez v. Sessions***, 884 F.3d 675 (7th Cir. 2018) (Bauer, Flaum, Manion), the Seventh Circuit held that the court did not have jurisdiction to consider the BIA's finding that the alien knowingly and intelligently waived her appeal rights because it is a factual question barred by the criminal alien jurisdictional bar at 8 U.S.C. § 1252(a)(2)(C). Notably, in a footnote, the court rejected petitioner's argument that the appeal waiver regulation is *ultra vires*, finding it unexhausted but also unavailing.

Contact: Sarah K. Pergolizzi, OIL
☎ [redacted]

Seventh Circuit Clarifies Standard for Protection under the Convention Against Torture

In ***Perez-Montes v. Sessions***, 880 F.3d 849(*Easterbrook*, Sykes, Reagan (by designation)) (7th Cir. 2018), the Seventh Circuit held that, in denying deferral of removal under CAT, the agency did not apply an incorrect burden of proof by considering whether the alien faced a "substantial risk" of torture in Mexi-

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co. The court explained that the "substantial risk" formulation was announced in *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1136 (7th Cir. 2015), and was designed to be a non-quantitative restatement of the regulatory "more likely than not" standard. The court clarified that no decision of the Seventh Circuit holds the regulation invalid or creates a standard incompatible with it.

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■ Seventh Circuit Upholds Denial of Cancellation of Removal for Violation of Restraining Order

In ***Rodriguez v. Sessions***, 876 F.3d 280 (Bauer, Hamilton, *Darrow* (by designation)) (7th Cir. 2017), the Seventh Circuit applied the circumstance-specific approach to determine that the alien had been convicted of the avoidance-of-residence provision of a Temporary Restraining Order, and was therefore ineligible for cancellation of removal. In so doing, the court concluded that because the federal provision was not contingent on a conviction, the categorical approach was unnecessary.

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■ BIA Did Not Err in Declining to Consider Challenges to Reinstatement of Removal Order or to Asylum Ineligibility

In ***Cruz-Martinez v. Sessions***, 885 F.3d 460 (7th Cir. 2018) (Flaum, Easterbrook, *Manion*), the Seventh Circuit reaffirmed that illegal reentrants with reinstated removal orders are ineligible for asylum and precluded from challenging the underlying removal order more than 30 days after its entry. The court also: (1) identified no due process violation where the record contained an unsigned copy of the reinstatement order, given that the record also contained a signed copy, so remand would be futile; (2) held that the alien waived challenge to his Convention Against Torture claim and failed to show a clear probability of future persecution; and (3) ruled that the BIA did not err by declining to remand to consider new evidence, none which showed that the alien would be singled out for harm.

Substantial evidence supported the agency's findings that the alien's fears of torture on account of his bisexuality and political affiliation required stringing together a series of suppositions, and thus lacked merit.

Contact: Benjamin Mark Moss, OIL
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■ Seventh Circuit Holds Alien Has No Standing to Compel Issuance of 80,000 U Visas

In ***Taylor v. McCament***, 875 F.3d 849 (7th Cir. 2017) (*Flaum*, Manion, Ripple), the Seventh Circuit affirmed the district court's ruling that an alien on the U visa waiting list lacked standing to compel the issuance of 80,000 U visas. The alien sued under the Mandamus Act and the Administrative Procedure Act, claiming that USCIS's delay in promulgating regulations for the U visa caused a backlog in applications, and asking the court to compel USCIS to issue 80,000 visas to aliens on the waiting list.

The Seventh Circuit ruled that the alien's injury was not redressable because the statute provides that the number of aliens who may be issued U visas "shall not" exceed 10,000 per year.

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EIGHTH CIRCUIT

■ Eighth Circuit Holds Alien Failed to Prove Worship Constituted "One Central Reason" for Persecution

In ***Garcia-Moctezuma v. Sessions***, 879 F.3d 863 (8th Cir. 2018) (Wollman, Shepherd, *Goldberg* (by designation)), the Eighth Circuit held that substantial evidence supported the IJ's determination that the alien's Santa Muerte tattoos were a tangential and superficial reason for his mistreatment, and he did not show the persecutors were aware of his religious tattoos or that his mistreatment was because the tattoos were of a religious nature.

Contact: Julia Tyler, OIL
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■ Eighth Circuit Holds That It Lacks Jurisdiction to Consider a More Narrow Social Group Than the One Presented to the Agency

In ***Baltti v. Sessions***, 878 F.3d 240(8th Cir. 2017) (Riley, Beam, Rossiter (by designation) (per curiam)), the Eighth Circuit on panel rehearing, held that it lacked jurisdiction to review the more narrow particular social group the alien put forth in his petition for review because he failed to raise it in his appeal to the BIA. Because the alien did not address the social group that he raised before the agency in his petition for review, the court declined to review that aspect of the BIA's decision.

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■ Both Subsections of Minnesota Domestic Assault Statute Categorically Constitute a Crime of Violence under 18 U.S.C. § 16(a)

In ***Onduso v. Sessions***, 877 F.3d 1073 (Smith, *Gruender*, Ben-

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ton) (8th Cir. 2017), the Eighth Circuit held that both subsections of Minn. Stat. § 609.2242.1 are categorically crimes of violence under 18 U.S.C. § 16(a). The court observed that subsection 1 categorically constitutes a section 16(a) crime of violence under the express holding of *Ramirez-Barajas v. Sessions*, 877 F.3d 808 (8th Cir. 2017). It further held that, because subsection 2 requires the "intentional or attempted infliction of bodily harm," it necessarily requires "force 'capable of' producing that result" and therefore also falls within section 16(a).

Contact: Corey Farrell, OIL
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■ **Eighth Circuit Holds Minnesota Domestic Assault Categorically Constitutes a Crime of Violence under 18 U.S.C. § 16(a)**

In ***Ramirez-Barajas v. Session,*** 877 F.3d 808 (8th Cir. 2017), (Loken, Gruender, *Benton*) the Eighth Circuit held that a conviction of Minnesota domestic assault under Minn. Stat. § 609.2242.1(1) categorically constitutes a crime of violence under 18 U.S.C. § 16(a).

The court followed its prior decision in *United States v. Schaffer*, 818 F.3d 796, 798 (8th Cir. 2016), that "commit[ting] an act with intent to cause fear in another of immediate bodily harm or death" "has as an element the 'threatened use of physical force against the person of another.'"

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NINTH CIRCUIT

■ **Ninth Circuit Holds Immigration Judges Need Not Make a "Running Commentary" on Demeanor Problems during Alien's Testimony**

In ***Manes v. Sessions***, 875 F.3d 1261 (Wallace, Tashima, Watford (*per curiam*)) (9th Cir. 2017), the Ninth Circuit determined that an Immigration Judge may rely on demeanor to make an adverse credibility finding without making a "running commentary" during the alien's testimony. The court also rejected the alien's attempts to dispel inconsistencies between his testimony and documents he submitted by "discredit [ing] the reliability of his own evidence."

An Immigration Judge may rely on demeanor to make an adverse credibility finding without making a "running commentary" during the alien's testimony.

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■ **Ninth Circuit Holds Department of Homeland Security Must Provide Most Recent Medical Records for Detained Alien with Indicia of Incompetence**

In ***Calderon-Rodriguez v. Sessions***, 878 F.3d 1179(9th Cir. 2018) (Tashima, *Berzon*, Kennelly (by designation)), the Ninth Circuit held that if there are indicia of incompetence, the Immigration Judge must "adequately ensure" that the Department of Homeland Security ("DHS") complies with its obligation under *Matter of M-A-M-*, 25 I. & N. Dec. 474 (BIA 2011), by providing a detained alien's "most recent medical records, diagnoses, and prescriptions."

The court concluded that neither the Immigration Judge nor the Board of Immigration Appeals recognized that the medical record provided by the DHS was nearly a year old and may have no longer reflected the alien's mental state.

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■ **Ninth Circuit Dismisses Adam Walsh Act Appeal for Lack of Subject Matter Jurisdiction**

In ***Gebhardt v. Nielsen***, 879 F.3d 980 (*Graber*, N.R. Smith, Rosenthal (by designation)) (9th Cir. 2018), the Ninth Circuit affirmed the district court's dismissal for lack of jurisdiction an action challenging the DHS's denial of a U.S. citizen's I-130 visa petitions filed on behalf of his wife and her children. DHS denied the petitions under the Adam Walsh Act ("AWA"), finding that the petitioner, who had previously been convicted of a sex crime against a child, had failed to show that he posed "no risk" to his proposed beneficiaries.

The panel found that while courts have jurisdiction to review "predicate legal issues," such as whether an offense was covered under the AWA, it lacked jurisdiction to review how the Secretary exercises her discretion. Finally, the panel assumed without deciding that it could address the citizen's constitutional claims, but found that they were not colorable.

Contact: Joshua S. Press, OIL-DCS
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■ **Ninth Circuit Holds California Hit and Run Statute Is Divisible**

In ***Conejo-Bravo v. Sessions***, 875 F.3d 890), (Pregerson, Nguyen, *Owens*) (9th Cir. 2017), the Ninth Circuit reaffirmed that California Vehicle Code § 20001(a) is divisible and, applying the modified categorical approach, held that the alien's conviction for leaving the scene of a car accident that resulted in injury

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constitutes a crime involving moral turpitude.

Contact: Tim Ramnitz, OIL
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■ Ninth Circuit Holds California Carjacking Is Not a Crime of Violence Aggravated Felony

In ***Solorio-Ruiz v. Sessions***, 881 F.3d 733 (9th Cir. January 29, 2018) (*Graber*, Smith, Zipps (by designation)), the Ninth Circuit ruled that *Johnson v United States*, 559 U.S. 133 (2010), had "fatally undermined" the court's prior holding in *Nieves-Medrano v. Holder*, 590 F.3d 1057 (9th Cir. 2010), that a conviction for carjacking under California Penal Code § 215(a) is a crime of violence under INA § 101(a)(43)(F). The court held that California Penal Code § 215(a) is not a crime of violence because it does not require violent force, but remanded for the BIA to decide whether it is a theft offense under INA § 101(a)(43)(G).

> **The court held that California Penal Code § 215(a) is not a crime of violence because it does not require violent force, but remanded for the BIA to decide whether it is a theft offense under INA § 101(a)(43)(G).**

Contact: Melissa Lott, OIL
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■ Ninth Circuit Holds That Alien Was Persecuted on Account of an Imputed Political Opinion

In ***Song v. Sessions***, 882 F.3d 837 (9th Cir. 2018) (Thomas, *Nguyen*, Amon (by designation)), the Ninth Circuit held that the evidence compelled the conclusion that the Chinese government imputed a political opinion to the alien, who organized a demonstration after officials announced they would confiscate his commercial property and provided the alien less compensation than he deemed fair.

The court further concluded that, based on the statements made to the alien by government officials and police, the imputed political opinion was one central reason for the persecution.

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■ Ninth Circuit Affirms Preliminary Injunction Requiring Tucson Sector Border Patrol to Provide Sleeping Mats, Showers, and Medical Screening to All Individuals Held at Stations

In ***Doe v. Kelly***, 878 F.3d 710(9th Cir. 2017) (*Callahan*, Tallman, Ezra (by designation)), the Ninth Circuit held that the district court properly applied the standard governing challenges to civil confinement conditions as set forth in *Bell v. Wolfish*, 441 U.S. 520 (1979), and did not abuse its discretion in requiring that Tucson Sector Border Patrol provide sleeping mats to all individuals in its custody longer than twelve hours. The court found unpersuasive plaintiffs' arguments that the district court should have required beds instead of sleeping mats, hot showers instead of body wipes, and medical treatment of all apprehended individuals by a medical professional.

Contact: Sarah Fabian, OIL-DCS
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■ Ninth Circuit Holds That Alien Who Claims Deprivation of Right to Counsel in 238(b) Administrative Removal Proceedings Must Show Prejudice

In ***Gomez-Velazco v. Sessions***, 879 F.3d 989 (9th Cir. January 10, 2018) (*Watford*, Owens, Navarro (by designation; dissenting)), the Ninth Circuit assumed, without deciding, that the alien's due process rights were violated because counsel was not present during administrative removal proceedings. The court held that prejudice is not presumed where an alien is able to consult with counsel before a removal order is executed.

Contact: Juria Jones, OIL
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■ Ninth Circuit Holds That CSPA Age Calculation Unambiguously Applies to Beneficiaries of Family Preference Visa Petitions Whose Parent Naturalizes

In ***Rodriguez-Tovar v. Sessions,***, 882 F.3d 895 (Nelson, *Reinhardt*, Steeh, D.J., by designation) (9th Cir. 2018), the Ninth Circuit held that the statutory provisions enacted pursuant to the Child Status Protection Act ("CSPA"), when read together, dictate that a visa petition for an individual who is considered a minor under the CSPA automatically converts to an immediate relative petition when the sponsoring parent naturalizes, even if the beneficiary turned 21 prior to the parent's naturalization.

In finding these statutory provisions unambiguous, the court declined to defer to *Matter of Zamora-Molina*, 25 I&N Dec. 606 (BIA 2011).

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■ Ninth Circuit Concludes That Conviction for Nonconsensual Sodomy Under Section 286(i) of the California Penal Code is an Aggravated Felony Rape Offense and Bar for Naturalization

In ***Elmakhzoumi v. Sessions***, 883 F.3d 1170 (9th Cir. 2018) (Graber, N.R. Smith, *Simon* (D. Or. by designation)), the Ninth Circuit affirmed the Northern District of California's decision dismissing plain-

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tiff's petition for naturalization because he was convicted of an aggravated felony "rape" offense under 8 U.S.C. § 1101(a)(43)(A). Specifically, plaintiff was convicted of non-consensual sodomy of an intoxicated person in violation of section 286(i) of the California Penal Code. Relying on *United States v. Castro-Baez*, 217 F.3d 1057 (9th Cir. 2000), the court held that that the plaintiff's crime fell within the "ordinary usage" of the crime of rape because it involved non-consensual sexual intercourse with an individual incapable of resisting.

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The court held that the Immigration Judge was not required to inform petitioner that he might be eligible for Special Immigrant Juvenile classification where his eligibility was not apparent.

■ Ninth Circuit Holds It Has Jurisdiction to Review the Agency's Administrative Closure Decisions

In ***Gonzalez-Caraveo v. Sessions***, 882 F.3d 885 (9th Cir. 2018) (Gould, *Murguia*, Freudenthal (by designation)), the Ninth Circuit held that it had jurisdiction to review the alien's administrative closure claim, because the factors set forth in *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), rooted in the regulatory grant of authority to immigration judges and the BIA, provided a sufficiently meaningful standard against which to review administrative closure decisions.

The court also held that the agency erred by not reviewing the alien's administrative closure request, but the error was harmless, and thus, the court denied the petition for review.

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■ Ninth Circuit Holds That Neither the Due Process Clause Nor the INA Create a Categorical Right to Taxpayer-Funded Counsel for Alien Minors

In ***C.J.L.G., A Juvenile Male v. Sessions***, 880 F.3d 1122 (9th Cir. 2018) (*Callahan*, Owens, Faber (by designation)), the Ninth Circuit, in a published decision held that neither the Due Process Clause nor the Immigration and Nationality Act create a categorical right to court-appointed counsel at the Government's expense for alien minors. The court held that C.J., a minor from Honduras, had not shown a necessity for appointed counsel to safeguard his due process right to a full and fair hearing.

The court further held that the Immigration Judge was not required to inform C.J. that he might be eligible for Special Immigrant Juvenile classification where his eligibility was not apparent, and that substantial evidence supported the denial of his asylum application. In a concurrence, Judge Owens expressed his view that the majority opinion did not discuss whether the Due Process Clause mandates counsel for unaccompanied minors.

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■ Ninth Circuit Holds Nevada Drug and Conspiracy Statutes Are Overbroad and Indivisible

In ***Villavicencio v. Sessions***, 879 F.3d 941 (Schroeder, *Rawlinson*, Stafford (by designation)) (9th Cir. January 5, 2018), the Ninth Circuit concluded that an alien was not removable for his conviction under Nevada Revised Statutes §§ 199.480 and 454.351. The court held that Nevada's conspiracy statute, § 199.480, was indivisible and overbroad because it lacks the "overt act" requirement. The court determined that § 454.351, which applies to any drug which may not be lawfully introduced into interstate commerce under the Federal Food, Drug and Cosmetic Act, is categorically overbroad and is indivisible because jurors need not agree on the means of the violation.

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TENTH CIRCUIT

Tenth Circuit Affirms District Court Decision Finding that Visa Denial Did Not Substantially Burden Church-Applicant's Religious Exercise under RFRA

In ***Iglesia Pentecostal Casa De Deios Para Las Naciones v. Duke***, __ Fed.Appx. __, 2017 WL 6033034 (*Matheson*, Phillips, Briscoe) (10th Cir. December 6, 2017), the Tenth Circuit, in an unpublished decision held that Iglesia, a Pentecostal church, failed to present a prima facie RFRA claim against USCIS's application of 8 C.F.R. § 214.2(r)(11), which requires a religious organization seeking to sponsor an R-1 visa applicant to demonstrate its ability to compensate the applicant.

Specifically, the court determined that the compensation regulation did not impose a substantial burden on the church's ability to pay its employee through a system of "love offerings" from its parishioners; rather, it was the church's deficient bookkeeping that precluded it from meeting the regulatory requirements.

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Tenth Circuit Joins the Ninth Circuit in Holding that *Moncrieffe* Did Not Alter the Rule That an Inconclusive Record of Conviction Renders an Alien Ineligible for Relief

In ***Lucio-Rayos v. Sessions***, 875 F.3d 573 (10th Cir. 2017) (Hartz, *Ebel*), the Tenth Circuit reaffirmed that an alien cannot satisfy his burden of proving eligibility for relief from removal with an inconclusive record of conviction. "The fact that [the alien] is not to blame for the ambiguity surrounding his criminal conviction does not relieve him of his obligation to prove eligibility for discretionary relief," said the court quoting its prior ruling in *Garcia v. Holder*, 584 F.3d 1288, 1289-90 (10th Cir. 2009). The court rejected the arguments of the alien and amici that *Moncrieffe v. Holder*, 569 U.S. 184 (2013), overruled prior circuit precedent on that issue. Following *Matter of Cortez-Canales*, 25 I&N Dec. 301 (BIA 2010), the court further held that the alien's conviction for a CIMT foreclosed him from cancellation of removal, notwithstanding the petty offense exception in 8 U.S.C. § 1182(a)(2)(A)(i)(I).

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Making a False Statement When Applying for an American Passport is Categorically a CIMT

In ***Afamasaga v. Sessions***, 884 F.3d 1286 (10th Cir. 2018)(Briscoe, *Hartz*, McHugh), the Tenth Circuit held that making a false statement in an application for an American passport, in violation of 18 U.S.C. § 1542, is categorically a CIMT.

The court agreed with the analyses of the BIA and the Second Circuit that fraud is an "ingredient" of the crime and rejected the alien's assertion that the statute could apply to conduct falling outside the established CIMT definition, explaining that a conviction required the "intent to induce or secure the issuance of a passport."

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ELEVENTH CIRCUIT

Eleventh Circuit Upholds Dismissal of Bivens Challenge to Hearing Closure and Plaintiff's Removal from Court Building

In ***Stevens v. U.S. Attorney General***, 877 F.3d 1293(11th Cir. 2017) (Carnes, *Edmondson*, Williams), the Eleventh Circuit affirmed the district court's order dismissing a *Bivens* action against an immigration judge ("IJ").

Judicial immunity to Bivens damages applies to IJs, and that the IJ performed a judicial function in his jurisdiction in ordering hearing closure, courtroom exclusion, and removal from the building.

The court held, *inter alia*, that judicial immunity to *Bivens* damages applies to IJs, and that the IJ performed a judicial function in his jurisdiction in ordering hearing closure, courtroom exclusion, and removal from the building. The court also held that judicial immunity applies to injunctive relief claims, and it affirmed the dismissal of *Bivens* claims against the remaining defendants.

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A Conviction under Florida Statute Criminalizing Projecting Bodily Fluids at a Child Is a Categorical Crime of Child Abuse and a CIMT

In ***Pierre v. Sessions***, 879 F.3d 1241 (11th Cir. 2018) (Black, *Hull*, Restani), the Eleventh Circuit held that Fla. Stat. § 784.085, which criminalizes battery on a child by projecting bodily fluids at that child, is a categorical crime of child abuse, neglect, or abandonment, and a crime involving moral turpitude. The court deferred to the BIA's interpretation of a crime of child abuse as being "any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being." *Matter of Velazquez–Herrera*, 24 I&N Dec. 503 (2008).

Thus, the court held that the alien was properly found removable and ineligible for cancellation of removal based on his conviction.

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Eleventh Circuit Dismisses Constitutional Claims as Unexhausted; Holds BIA Did Not Abuse Discretion in Denying Motion to Reopen

In ***Lin v. U.S. Attorney General***, 881 F.3d 860 (11th Cir. 2018) (*Marcus*, Newsom, Moore (by designation)), the Eleventh Circuit dismissed in part and denied in part petitioner's PFR, holding that the court lacked jurisdiction to consider his constitutional claims, where such claims "were subject to an exhaustion requirement and undeniably were not exhausted."

The court also concluded that it lacked jurisdiction to consider the petitioner's unexhausted claim that the IJ's handwritten motion to reopen denial did not constitute "reasoned consideration" of his claim; as well the alien's challenges to the denials of two prior motions to reopen, which he never appealed to the BIA. Finally, the court held that the agency did not abuse its discretion in denying the alien's third mo-

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tion to reopen as time and number-barred, and as lacking any new and previously unavailable evidence.

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■ **Eleventh Circuit Holds Former 8 U.S.C. § 1432(a) Derivative U.S. Citizenship Statute Does Not Unconstitutionally Discriminate On the Basis of Gender or Legitimacy**

In ***Levy v. U.S. Attorney General***, 882 F.3d 1364 (11th Cir. 2018) (Carnes, Tjoflat, Pryor) (*per curiam*), the Eleventh Circuit held that former 8 U.S.C. § 1432(a), a derivative United States citizenship statute, does not unconstitutionally discriminate on the basis of gender or legitimacy.

Alternatively, the court held that, even if the statute discriminates on the basis of legitimacy, the statute passes intermediate scrutiny (without holding that such standard applies), determining that the classification was based on an important government interest of protecting parental rights.

Alternatively, the court held that, even if the statute discriminates on the basis of legitimacy, the statute passes intermediate scrutiny (without holding that such standard applies).

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■ **Eleventh Circuit Holds Florida Trafficking in Cocaine Overbroad and Indivisible**

In ***Francisco v. U.S. Attorney General***, 884 F.3d 1120 (11th Cir. 2018) (*Tjoflat*, Wilson, and Robreno (by designation)), the Eleventh Circuit held that a conviction for trafficking in cocaine under section 893.135(1)(b) of the Florida Statutes is categorically not a drug trafficking aggravated felony offense.

The court explained that in its recent decision in *Cintron v. U.S. Attorney General*, it had recently held that Fla. Stat. § 893.135(1)(c) is neither divisible nor a categorical match to a federal crime in the CSA. Because this latter provision has substantively identical language has § 893.135(1)(b). Therefore, the conviction could not be for an aggravated felony. Consequently, the conviction did not render the alien ineligible for cancellation of removal.

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Supreme Court to Review BIA's Interpretation of the "Stop-Time" Rule

(Continued from page 1)

First Circuit found that the statutory language of the stop-rule to be ambiguous. It then determined that "in light of the relevant text, statutory structure, administrative context, and legislative history, the BIA's construction of the stop-time rule [in *Matter of Camarillo*] is neither arbitrary and capricious nor contrary to the statute." "Given Congress's intent in enacting IIRIRA to prevent notice problems from dragging out the deportation process, it would make little sense for Congress to have created the potential for further delays by conditioning the activation of the stop-time rule on the receipt of a hearing notice that may come months, or even years, after the initiation of deportation proceedings by DHS," observed the court.

Of the seven courts of appeals to have addressed that question in precedential opinions, six have found the BIA's construction of the statute to be reasonable and entitled to deference. See *Moscoso-Castellanos v. Lynch*, 803 F.3d 1079, 1083 (9th Cir. 2015); *Guaman-Yuqui v. Lynch*, 786 F.3d 235, 240 (2d Cir. 2015) (*per curiam*); *Gonzalez-Garcia v. Holder*, 770 F.3d 431, 434-435 (6th Cir. 2014); *Wang v. Holder*, 759 F.3d 670, 675 (7th Cir. 2014); *Urbina v. Holder*, 745 F.3d 736, 740 (4th Cir. 2014); *see also O'Garro v. United States Att'y Gen.*, 605 Fed. Appx. 951, 953 (11th Cir. 2015) (*per curiam*). The Third Circuit alone has concluded that the BIA's construction of the stop-time rule is impermissible. *See Orozco-Velasquez v. Attorney Gen. U.S.*, 817 F.3d 78, 81-82 (2016) (holding that the statutory provision unambiguous, and a notice to appear is not effective to stop the clock unless it includes the time, date, and place of the initial hearing).

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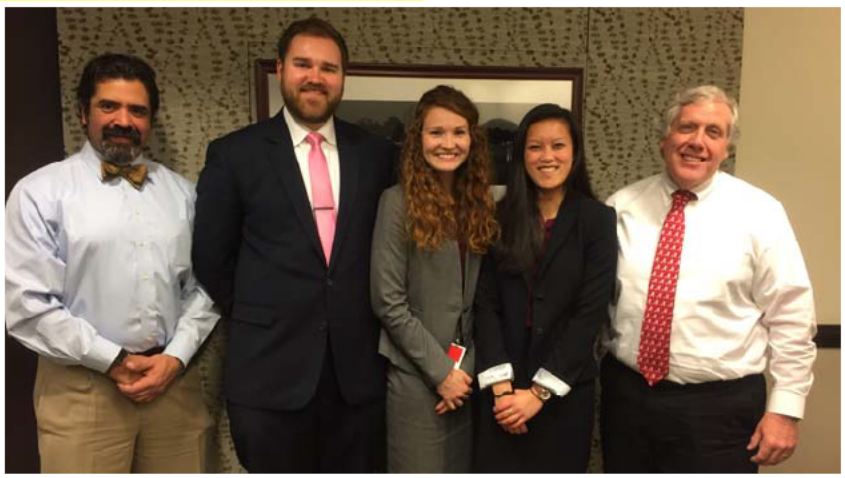

Ernie Molina, OIL's Spring Interns, Eric Falland, Sarah George, Samantha Poon, with OIL Director David McConnell

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