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## Immigrant

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# IMMIGRAFT

JAYESH RATHOD\* & ANNE SCHAUFLE\*\*

Pursuing the American dream is a costly endeavor. From the initial journey to the United States, to navigating the complicated immigration system, to labor exploitation, to scams targeting recent arrivals, immigrants pay heavily into the formal and informal sectors. As explored in this Essay, however, their pay-out does not stop there: the U.S. Department of Homeland Security (DHS) also charges and retains funds in unjustified ways, resulting in tens of millions of dollars transferred from the pockets of vulnerable immigrants and their families to the sprawling immigration bureaucracy. This Essay introduces the term *immigraft* to capture this phenomenon, defined as the unjust transfer of funds from individuals to the state in the context of efforts to obtain immigration benefits or relief from the state.

This Essay highlights four examples of immigraft in the U.S. immigration system, describing how sub-agencies of DHS have illegally and/or unjustly retained funds in the context of biometric services fees, humanitarian parole applications filed by Afghan nationals, immigration bond for noncitizens in removal proceedings, and administrative appeals filed due to obvious agency mistakes. This Essay concludes by exploring theoretical implications of immigraft, including the normalization of extraction of value from noncitizens and its corrosive effect on the relationship among citizens, noncitizens, and the state. By way of a path forward, this Essay also offers practical recommendations to address immigraft through executive action and congressional oversight.

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#### INTRODUCTION

It started with a knock on the door. Standing in front of Karla<sup>1</sup> was a young teenager, hardly older than a child, there to warn her that she was next if she didn't pay "rent" to the gang.<sup>2</sup> Just days earlier, the same gang had bludgeoned her father to death when he refused to accede to their extortion. Karla herself simply could not pay. Lacking both family and police protection, she fled Central America to reunite with her mother in the United States. It was a costly trip, one that almost cost Karla her life when she was abandoned by her guide and stranded in the desert. With the last bar of power on her cell phone, she sent her coordinates to her mom, who called U.S. Customs and Border Protection (CBP). CBP found Karla in the desert, blistered, tired, and hungry. Although she was still a teenager, Karla was over eighteen, so CBP transferred her to an adult detention center. While detained, an immigration judge determined that she was neither a flight nor security

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1. Pseudonym used to protect the client's privacy. The authors have drawn from additional cases and edited the facts to further anonymize Karla's story.

2. See generally Efrén Lemus, *From Extortion to Investment: The Making of Barrio 18, Inc.*, IN SIGHT CRIME (Oct. 2, 2015), <https://insightcrime.org/news/analysis/barrio-18-investments-increasing-sophistication/> [<https://perma.cc/R328-KUWQ>] (describing gang members collecting "rent" money from individuals or businesses under threat of harm).

risk and granted her a \$10,000 bond. If she couldn't pay, she would stay locked up for the duration of her proceedings.<sup>3</sup>

Karla's mother scraped the money together, but she could not post bond for her daughter. At the time, an immigration bond had to be posted by a U.S. citizen or a lawful permanent resident.<sup>4</sup> Karla's mom identified someone she believed she could trust, a paralegal at a law firm. The paralegal, using funds provided by Karla's mom, posted the \$10,000 bond and agreed to represent Karla in removal proceedings for an additional cost.<sup>5</sup> After her release, Karla was scheduled for an immigration hearing at the courthouse near where she had first been detained. The paralegal, who could not appear in immigration court because she was not licensed to practice law, told Karla that because a hurricane was passing through the area, her hearing had been canceled. The hurricane was real, but the cancellation was a lie. Karla's court date proceeded without her, and the immigration judge overseeing her case ordered Karla removed in absentia. Further, because Karla had failed to appear in court—even though she had been misled by an unauthorized practitioner—Immigration and Customs Enforcement (ICE) determined that Karla had forfeited the bond, and that the \$10,000 could never be recovered.

The financial impact of the lost bond would haunt Karla and her mom for years, but the government fees continued. Karla eventually succeeded in reopening her immigration court case, secured asylum, and later filed for permanent residence with U.S. Citizenship and Immigration Services (USCIS). For asylees like Karla, USCIS charged \$1,140 plus an \$85 biometrics services (digital fingerprinting and

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3. See generally ADVOC. FOR HUM. RTS., UNDERSTANDING IMMIGRATION BONDS (2021), <https://www.theadvocatesforhumanrights.org/Res/Understanding%20Immigration%20Bonds-English.pdf>.

4. Notably, ICE Enforcement and Removal Operations requires the obligor on the bond to be a U.S. citizen or lawful permanent resident, pursuant to their Bond Worksheet. U.S. IMMIGR. & CUSTOMS ENF'T, ERO 11301.1, ENFORCEMENT AND REMOVAL OPERATIONS BOND MANAGEMENT HANDBOOK 36 (2014), <https://www.aila.org/files/o-files/view-file/B3785D77-ADE3-481C-8296-B26223B9566E> [<https://perma.cc/EW5E-2BNY>] [hereinafter BOND MANAGEMENT HANDBOOK]. However, the Department of Homeland Security Bond Management Handbook also permits "Lawfully admitted nonimmigrants (visa holders); Aliens released on an OSUP; Aliens placed in removal proceedings; deferred action, stays of removal, etc.]; Authorized surety companies and their agents; and Foreign nationals" to post bond. *Id.* at 22.

5. The paralegal was engaged in the unauthorized practice of law and was practicing law without attorney supervision.

photograph) fee for the application.<sup>6</sup> Not long after her filing, however, USCIS notified Karla that she did not need to appear for a biometrics appointment because her fingerprints were already in the Department of Homeland Security (DHS) database.<sup>7</sup> As with countless similarly situated applicants,<sup>8</sup> USCIS did not refund the \$85 fee. This pattern repeated itself after Karla received her green card, and she applied for a refugee travel document to visit a family member overseas. She submitted the \$135 filing fee plus an unneeded (and ultimately unrefunded) \$85 biometrics fee.<sup>9</sup> After nearly eighteen months, USCIS granted Karla a refugee travel document valid for one year. Any additional travel before she becomes a U.S. citizen could again cost hundreds of dollars in fees.<sup>10</sup>

ICE retained Karla's \$10,000 immigrant bond, and applied it, as it does with all bonds it retains, to fund immigration detention beds.<sup>11</sup> USCIS retained the \$170 Karla paid in biometrics fees, using those funds to sustain their largely fee-driven operations. On top of these financial harms, USCIS took over eighteen months to adjudicate each of Karla's applications, and of course retained the entirety of Karla's \$1,445 in filing fees. In total, Karla, an asylee, and her mom have paid the Department of Homeland Security nearly \$12,000. Of these funds, the vast majority were unjustly retained by DHS.

Karla and her family were subjected to what this Essay terms *immigrant*. Building upon Professor Bernadette Atuahene's theory of

6. See *Form I-485, Application to Register Permanent Residence or Adjust Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/i-485> [<https://perma.cc/SS5Q-FSU2>]. As of April 1, 2024, USCIS increased the I-485 application fee to \$1,440 and incorporated the biometric services fee into the application fee. U.S. CITIZENSHIP & IMMIGR. SERVS., DEP'T OF HOMELAND SEC., FORM G-1055, FEE SCHEDULE (2024), <https://www.uscis.gov/sites/default/files/document/forms/g-1055-fr.pdf> [<https://perma.cc/A8QL-UQRQ>] [hereinafter FEE SCHEDULE].

7. USCIS sends applicants a notice when they can "reuse [their] previously captured fingerprints and other biometrics." U.S. CITIZENSHIP & IMMIGR. SERVS., FORM I-797C, NOTICE OF ACTION (2021) (on file with authors) [hereinafter FORM I-797C]. The notice states that "[t]he biometrics fee will not be refunded." *Id.* See also Alyssa Aquino, *Duo Says USCIS Keeps 'Unnecessary' \$85 Biometric Fees*, LAW360 (May 18, 2023, 3:17 PM), <https://www.law360.com/articles/1678954/duo-says-uscis-keeps-unnecessary-85-biometric-fees>.

8. See Aquino, *supra* note 7.

9. See *Form I-131, Application for Travel Document*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/i-131> [<https://perma.cc/G8ZE-ESW4>]. In early 2024, USCIS issued a final rule increasing the I-131 refugee travel fee from \$135 to \$165 but will no longer require a separate biometrics fee. U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 89 Fed. Reg. 6194, 6199 tbl.1 (Jan. 31, 2024) (to be codified at 8 C.F.R. pts. 103, 106, 204, 212, 214, 240, 244, 245, 245a, 264, 274a).

10. See FEE SCHEDULE, *supra* note 6, at 8.

11. See BOND MANAGEMENT HANDBOOK, *supra* note 4, at 2.

*stategraft*, immigrant is defined as the unjust transfer of property from individuals to the state in the context of efforts to obtain immigration benefits or relief from the state, resulting in the enrichment of state coffers. Immigrant has two additional core features. First, the often acute need for the immigration benefit of relief renders individuals—both noncitizens and their family members—particularly susceptible to immigrant and underscores the predatory nature of the state action. Second, while clearly unjust in moral or even basic contractual terms, immigrant is often enabled by ambiguous laws and regulations that provide a veneer of legality for the state action. Underlying this latter feature is the culture of immigration exceptionalism in the U.S. legal system, which gives immigration authorities an unusually wide decisionmaking berth, unencumbered by normal judicial and constitutional constraints.<sup>12</sup>

Immigrant is a particularly loathsome phenomenon because pursuit of the American dream is already costly. From the initial journey to the United States, to navigating the complicated immigration system, to labor exploitation, to scams targeting recent arrivals, immigrants pay heavily into the formal and informal sectors.<sup>13</sup> But as explored in this Essay, their pay-out to smugglers, unscrupulous employers, scammers, and others does not stop there. DHS also charges and retains funds in unjustified ways, resulting in tens of millions of dollars transferred from the pockets of vulnerable immigrants and their families to the sprawling immigration bureaucracy.

Part I of this Essay provides background about Professor Atuahene's theory of stategraft and the derivative theory of immigrant, as articulated herein. This first Part also provides an overview of the DHS and the functions of its sub-agencies and describes other agencies that operate within the broader immigration system. Part II offers specific examples of immigrant, as practiced by both U.S. Citizenship and Immigration Services and U.S. Immigration and Customs Enforcement. Following these detailed examples, Part III articulates broader implications of these

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12. David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 585 n.2 (2017) (providing a holistic review of immigration exceptionalism, including tradeoffs and impacts when federal, state, and local laws differ and constitutional norms are ignored).

13. See, e.g., Anna Ochoa O'Leary, *The ABCs of Migration Costs: Assembling, Bajadores, and Coyotes*, 6 MIGRATION LETTERS 27 (2009) (detailing the different costs incurred by migrants from Latin America who seek to enter the United States without authorization); Jennifer J. Lee & Annie Smith, *Regulating Wage Theft*, 94 WASH. L. REV. 759, 768–69 (documenting high rates of wage theft among foreign-born workers); Juan Manuel Pedroza, *Making Noncitizens' Rights Real: Evidence from Immigration Scam Complaints*, 44 LAW & POL'Y 44 (2022) (studying scams targeting noncitizens).

examples for current scholarly conversations. Part III also includes some preliminary recommendations for how DHS might reform its operations to cease the practice of immigraft.

## I. THEORETICAL AND TOPICAL BACKGROUND

### A. *Distinguishing Stategraft and Immigraft*

In her seminal work, “A Theory of Stategraft,” Professor Bernadette Atuahene provides a lexicon and framework for the unjust extraction of resources by public officials, with the end result being the enrichment of public coffers, whether intentional or not.<sup>14</sup> Breaking down its constitutive elements, stategraft first assumes actions by a state agent, including employees embedded within bureaucracies, higher-level officials, and even law enforcement officers and judges.<sup>15</sup> Private actors may also play a complementary role, contributing to conditions that allow stategraft to occur.<sup>16</sup> Second, the theory of stategraft involves the transfer of property from individuals to the state. The property can take many different forms, and the transfer may manifest as dispossession, displacement, or some combination thereof, whether permanent or temporary.<sup>17</sup> Notably, stategraft does not require a nefarious motive for the transfer of property, but instead acknowledges that such transfers can be attributed to predatory systems instead of ill-meaning individuals.<sup>18</sup> Third, stategraft theory contemplates property transfers that directly augment state coffers, or where governments at least “substantially benefit” from transfers when other intermediaries may be involved.<sup>19</sup> Indeed, in many instances, stategraft occurs so that governments can maintain financial solvency.<sup>20</sup> Finally, stategraft requires that the transfer has occurred in violation of law or basic human rights.<sup>21</sup> Atuahene acknowledges that there may not be a formal finding of illegality from an adjudicative body, and that determining illegality can be challenging in some instances.<sup>22</sup>

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14. Bernadette Atuahene, *A Theory of Stategraft*, 98 N.Y.U. L. REV. 1, 2–3, 7 (2023).

15. *Id.* at 11.

16. *Id.* at 12.

17. *Id.* at 13–14.

18. *Id.* at 14.

19. *Id.* at 15–16.

20. *Id.* at 7.

21. *Id.* at 2–3.

22. *Id.* at 19–20.

Although Atuahene focuses her analysis on illegally inflated property taxes and the accompanying foreclosures in Detroit, she underscores that stategraft can occur via municipal fines, civil forfeiture laws, and debt collection practices.<sup>23</sup> This Essay explores behaviors by U.S. immigration agencies that closely resemble stategraft, but because of an important definitional distinction, this Essay uses the term “immigrant” instead. Like stategraft, immigrant involves the transfer of property by state actors from individuals to the state, with the result being the fattening of the public purse. Unlike stategraft, however, immigrant does not always implicate demonstrable violations of law. Rather, some instances of immigrant are the result of statutory and regulatory frameworks that create unjust and absurd results, often because of ambiguity, lack of nuance, or because their exceeding complexity makes them difficult to navigate. In short, stategraft and immigrant are closely related phenomena, both involving the extraction of resources from vulnerable individuals, and thus falling under the broader umbrella of state predation.<sup>24</sup> Table 1 summarizes key dimensions of immigrant, as explored in this Essay.

<b>Aspect of Stategraft</b>	<b>Required for Immigrant?</b>
State actors	YES. Immigrant occurs via the policies and practices of immigration authorities.
Transfer of property from individuals to the state	YES. Immigrant often takes the form of the charging and retention of fees and other payments by immigration authorities.
Augment state coffers	YES. Immigrant contemplates scenarios where the property in question is used by the state, often to fund the operations of the immigration agencies.
In violation of law	NO. While some instances of immigrant constitute actionable legal violations, others simply reflect legal regimes and administrative processes that produce unjust outcomes.

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23. *Id.* at 5–6.

24. *See id.* at 40–46.

	Ambiguous legal standards and regulations lacking nuance can provide a veneer of legality for the state action.
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*Table 1. Stategraft and Immigraft in Comparison.*

As outlined above, immigraft, like stategraft, contemplates that predatory practices of the state can be attributed to institutions, as opposed to the ill intent of individuals. In this regard, immigraft is adjacent to theories of administrative law that examine how structural forces and conditions within agencies can engender problematic results. For example, Professor Bijal Shah has articulated a theory of administrative subordination, noting that the harms that administrative agencies inflict upon vulnerable communities can be attributed to “institutional systems,” and not just to the acts of individual bureaucrats.<sup>25</sup> According to Shah, the pursuit of ostensibly laudable agency values—such as efficiency and the conservation of resources—often occurs on the backs of marginalized individuals.<sup>26</sup> Shah catalogs many adverse effects of administrative subordination, including unnecessary law enforcement incursions, compromised adjudicative processes, and even physical harms.<sup>27</sup>

Immigraft complements this theory, illustrating that the effects of administrative subordination extend beyond a range of intangible and tangible harms and include the actual transfer of property from individuals to the state. Whether the harms occasioned by immigraft are more or less severe depends on individual perspectives and circumstances. But the addition of property extraction to this mix of harms reveals that administrative subordination can have predatory dimensions and can result in demonstrable pecuniary loss, potentially exacerbating other injuries occasioned by state agencies.

### *B. Federal Immigration-Related Agencies*

In the United States, immigration-related functions are spread across multiple agencies. The agency that oversees the widest swath of these functions is the U.S. Department of Homeland Security, established in 2002 by the Homeland Security Act.<sup>28</sup> Despite its relatively young age, DHS is the third largest federal agency, with approximately 260,000

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25. Bijal Shah, *Administrative Subordination*, U. CHI. L. REV. (forthcoming) (manuscript at 4–5), <https://ssrn.com/abstract=4392123>.

26. *Id.* (manuscript at 14–15 tbl.I, 16–17).

27. *Id.* (manuscript at 14–15 tbl.I).

28. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

employees under its aegis.<sup>29</sup> For fiscal year 2023, the total budget authority for the agency was \$101.6 billion.<sup>30</sup>

Within DHS, three sub-agencies perform most of the public-facing immigration functions. USCIS “oversees lawful immigration to the United States.”<sup>31</sup> Specifically, USCIS receives and adjudicates applications for a large number of temporary visas, permanent residence, citizenship, employment authorization, and more.<sup>32</sup> USCIS also oversees specific humanitarian benefits, including requests for asylum, humanitarian parole, and temporary protected status.<sup>33</sup> Typical public interactions with USCIS include the submission of application forms, accompanying evidence, and fees, either in hard copy or online, followed by an adjudication period of varying length, and in some cases, an interview.<sup>34</sup>

Relevant to the analysis provided herein is the fact that USCIS is essentially a self-funded agency, relying on application fees for about ninety-six percent of its overall spending authority.<sup>35</sup> The fees that USCIS collects for applications and other benefits are deposited into the Immigration Examinations Fee Account,<sup>36</sup> created by Congress in 1988 to encourage the agency to recover its processing costs via application fees.<sup>37</sup> The legal basis for charging fees to agency customers rests in Title V of the Independent Offices Appropriations Act of 1952.<sup>38</sup> Every two years, the agency reviews the status of its fee intake and makes

29. *Priorities*, DEP’T HOMELAND SEC., <https://www.dhs.gov/priorities> [<https://perma.cc/V9VM-LKDH>] (Jan. 30, 2024).

30. DEP’T OF HOMELAND SEC., FY 2024 BUDGET IN BRIEF 1, [https://www.dhs.gov/sites/default/files/2023-03/DHS%20FY%202024%20BUDGET%20IN%20BRIEF%20%28BIB%29\\_Remediated.pdf](https://www.dhs.gov/sites/default/files/2023-03/DHS%20FY%202024%20BUDGET%20IN%20BRIEF%20%28BIB%29_Remediated.pdf) [<https://perma.cc/37VK-9J98>].

31. *What We Do*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/about-us/mission-and-core-values/what-we-do> [<https://perma.cc/5U6L-J7B3>] (Feb. 27, 2020).

32. *Id.*

33. *Id.*

34. *See generally A Day in the Life of USCIS*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/about-us/a-day-in-the-life-of-uscis> [<https://perma.cc/9HQ8-5ASP>] (Dec. 11, 2022).

35. *Proposed Fee Rule Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/proposed-fee-rule-frequently-asked-questions> [<https://perma.cc/WPU7-RQZS>] (Feb. 23, 2023). *See also Budget, Planning and Performance*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/about-us/budget-planning-and-performance> [<https://perma.cc/ZND9-EYCJ>] (Jan. 11, 2024).

36. 8 U.S.C. § 1356(m).

37. *Budget, Planning and Performance*, *supra* note 35.

38. Independent Offices Appropriations Act, 31 U.S.C. § 9701. *See also* Daimeon Shanks, *Entrance Fees: Self-Funded Agencies and the Economization of Immigration*, 93 U. COLO. L. REV. 405, 411 (2022).

recommendations regarding possible fee increases.<sup>39</sup> In 2023, USCIS proposed a substantial increase in application fees to raise revenue and address its backlog in case adjudications.<sup>40</sup> Underlying this entire legal architecture—requiring USCIS to fund itself and charge hefty fees—are neoliberal principles emphasizing cost savings and efficiency in government operations.<sup>41</sup> Notably, the federal government as a whole has grown more reliant on user fees over the last several decades, now collecting more than \$500 billion in such fees per year.<sup>42</sup> As some scholars have observed, the heavy reliance on user fees can skew agency behavior in undesirable ways.<sup>43</sup>

Two other agencies round out the trio of key DHS sub-agencies. U.S. Immigration and Customs Enforcement, through its Enforcement and Removal Operations (ERO) division, is responsible for enforcement of immigration laws in the interior of the country. ICE-ERO effectuates the apprehension and removal of noncitizens from the United States and oversees a network of immigration detention centers around the country.<sup>44</sup> As part of its administration of immigration detention, ICE manages the immigration bond system, whereby some detained noncitizens are able to post a bond to secure their liberty during the pendency of immigration removal proceedings.<sup>45</sup> A third agency, U.S. Customs and Border Protection, plays a lead role along U.S. borders and at ports of entry, monitoring the flow of individuals and goods that are entering and departing the United States.<sup>46</sup> The U.S. Border Patrol,

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39. 31 U.S.C. § 902(a)(8); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR NO. A-25, MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS (1993).

40. See U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 88 Fed. Reg. 402 (proposed Jan. 4, 2023) (to be codified at 8 C.F.R. pts. 103, 106, 204, 212, 214, 240, 244, 245, 245a, 264, 274a).

41. Shanks, *supra* note 38, at 424–25; ERIKA LIETZAN, USER FEE PROGRAMS: DESIGN CHOICES AND PROCESSES 7 (2023) (“[H]istorically program designers and scholars justified transactional user fees on economic efficiency grounds . . .”).

42. LIETZAN, *supra* note 41, at 3–4.

43. See *id.* at 57.

44. *Enforcement and Removal Operations*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/about-ice/ero> [<https://perma.cc/BKB8-MGSK>] (June 27, 2023).

45. *Post a Bond*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/detain/detention-management/bonds> [<https://perma.cc/4VXL-HS8K>] (Nov. 16, 2023).

46. *About CBP*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/about> [<https://perma.cc/C5C6-W2XG>] (Jan. 23, 2024).

which conducts surveillance and enforcement along the nation's physical borders, is housed within CBP.<sup>47</sup>

Although DHS undertakes most federal immigration-related functions, other agencies play important roles. Notably, the U.S. Department of Justice houses the Executive Office for Immigration Review (EOIR), which oversees the network of U.S. immigration courts, and the Board of Immigration Appeals, which reviews immigration court decisions.<sup>48</sup> Immigration judges, who are appointed by the Attorney General, preside over removal hearings, making decisions about removability and eligibility for relief from removal.<sup>49</sup> In most cases, these judges are also authorized to review custody determinations made by ICE-ERO, to conduct bond hearings, and to set bond amounts from \$1,500 upwards.<sup>50</sup> Other federal agencies that undertake important functions in the U.S. immigration system are the U.S. Department of State, U.S. Department of Labor, and the U.S. Department of Health and Human Services.<sup>51</sup>

## II. EXAMPLES OF IMMIGRAFT

### A. Biometric Services Fees: Unjustified and Unrefunded

As noted above, USCIS oversees many different immigration pathways, and collects application forms and fees from individuals seeking approval of a particular immigration status or benefit. USCIS fees range anywhere from under \$100 to tens of thousands of dollars for

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47. *Along U.S. Borders*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/border-security/along-us-borders> [https://perma.cc/Y4T7-2LSL] (Aug. 23, 2023).

48. *About the Office*, EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T JUST., <https://www.justice.gov/eoir/about-office> [https://perma.cc/2BMZ-W256] (Apr. 25, 2023).

49. EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., IMMIGRATION COURT PRACTICE MANUAL § 4.1 (2023), <https://www.justice.gov/eoir/book/file/1528921/dl?inline> [https://perma.cc/3AC5-WLWV] [hereinafter IMMIGRATION COURT PRACTICE MANUAL]; *Make a Difference: Apply for an Immigration Judge Position*, EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T JUST., <https://www.justice.gov/eoir/Adjudicators#> [https://perma.cc/BTS5-EL4S] (Dec. 1, 2023).

50. IMMIGRATION COURT PRACTICE MANUAL §§ 9.1(a), 9.3(a); 8 C.F.R. § 1003.19 (2024); 8 U.S.C. § 1226(a)(2)(a).

51. Megan Davy, Deborah W. Meyers & Jeanne Batalova, *Who Does What in U.S. Immigration*, MIGRATION POL'Y INST. (Dec. 1, 2005), <https://www.migrationpolicy.org/article/who-does-what-us-immigration> [https://perma.cc/P9MB-PBK5].

certain employment- and investment-related green cards.<sup>52</sup> Currently, the fee for an application for lawful permanent residence (green card) is \$1,440, and the fee to apply for U.S. citizenship by naturalization is \$710 (online filing) to \$760 (paper filing).<sup>53</sup> Before April 1, 2024, a seemingly innocuous and separate “biometrics services fee” of \$85 was tacked onto many application fees. As described below, in many cases, the charging and retention of this biometrics fee constitutes an act of immigrant.

This separate biometrics services fee was required for eighteen different benefits conferred by USCIS, including lawful permanent residence, green card renewals, travel documents, citizenship, and temporary protected status.<sup>54</sup> As reflected in Karla’s story, noncitizens routinely apply in succession for different immigration benefits, and each required the same \$85 biometrics fee prior to April 2024. To capture biometrics, USCIS schedules applicants to appear for a short appointment at an application support center, where they attest to the veracity of their application, and provide their fingerprints, photograph, and signature.<sup>55</sup> These biometrics permit USCIS to run criminal background and national security checks on applicants before their applications are approved.

Given this digital capture, USCIS has easy access to biometrics taken as part of a previous application. Indeed, USCIS now routinely notifies applicants that they are not required to appear for a biometrics appointment, because the previously captured biometrics are already on file with the agency. In these circumstances, USCIS does not refund the \$85 fee they collected prior to April 1, 2024. While this might seem like a relatively small amount, when one considers the volume of applications that USCIS adjudicates, the biometrics fee can bring in substantial revenue. In Fiscal Year 2022, for example, USCIS received 781,000 applications for naturalization (N-400), generating up to \$66,385,000 just from biometrics fees.<sup>56</sup> In that same period, the agency received 619,000

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52. See FEE SCHEDULE, *supra* note 6.

53. Both fees now incorporate the cost of biometric services. See FEE SCHEDULE, *supra* note 6, at 16, 34.

54. The following USCIS forms required a separate biometrics fee for some or all applicants: I-90, I-129CW, I-131, I-485, I-600, I-600A, I-687, I-698, I-751, I-765, I-800A, I-817, I-821, I-829, I-881, I-941, I-956H, and N-400. See U.S. CITIZENSHIP & IMMIGR. SERVS., DEP’T OF HOMELAND SEC., FORM G-1055, FEE SCHEDULE (2023), <https://www.uscis.gov/sites/default/files/document/forms/g-1055.pdf> [<https://perma.cc/7P7C-EMNY>].

55. U.S. CITIZENSHIP & IMMIGR. SERVS., *Part C – Biometrics Collection and Security Checks*, POL’Y MANUAL, <https://www.uscis.gov/policy-manual/volume-1-part-c> [<https://perma.cc/6GTy-2MFG>] (Jan. 24, 2024).

56. See U.S. CITIZENSHIP & IMMIGR. SERVS., ANNUAL STATISTICAL REPORT FY 2022, at 6 (2023), [https://www.uscis.gov/sites/default/files/document/reports/FY2022\\_Annual\\_Statistical\\_Report.pdf](https://www.uscis.gov/sites/default/files/document/reports/FY2022_Annual_Statistical_Report.pdf) [<https://perma.cc/6DF8-4PJR>].

applications for lawful permanent residence (green cards), generating up to \$52,615,000 in revenue from the biometrics fees alone.<sup>57</sup> Applications for temporary protected status, of which there were 182,300 in fiscal year 2022, may have brought in nearly \$15.5 million in biometrics fees.<sup>58</sup> To be clear, applicants for all three of these application types (naturalization, lawful permanent residence, and temporary protected status) may seek a fee waiver, and data from USCIS shows that approximately one-seventh of persons naturalized in fiscal year 2023 received a fee waiver.<sup>59</sup> Even accounting for this difference, the actual amount generated from the biometrics fees is substantial and is well into the tens of millions of dollars.

USCIS never articulated a clear justification for continuing to charge the \$85 biometrics fees on successive applications—especially in cases where the agency had previously captured biometrics—and notified applicants that they need not appear for another biometrics appointment.<sup>60</sup> A possible rationale could be gleaned from the regulation governing the biometric services fee, which articulates an extremely broad purpose for the charge: “DHS may charge a fee to collect biometric information, to provide biometric collection services, to conduct required national security and criminal history background checks, to verify an individual’s identity, and to store and maintain this biometric information for reuse to support other benefit requests.”<sup>61</sup>

This language suggests that fees are used not only for the actual collection of biometrics, which requires physical space and employee time, but also to run background checks and to “store and maintain” the biometric data. While USCIS likely incurs some marginal, per-user cost for these kinds of routinized activities, the costs simply cannot be equivalent for first-time versus subsequent applications. All of the tasks described in the regulation apply to applicants whose biometrics are being taken for the first time. When one considers that subsequent applications necessarily require fewer of these tasks, the improper and unjust nature

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57. *See id.* at 7.

58. *See id.* at 19.

59. In fiscal year 2023, USCIS granted fee waivers (waiving the filing fee for Form N-400) to 14.6% of those naturalized during that fiscal year. *Naturalization Statistics*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/citizenship-resource-center/naturalization-statistics> [<https://perma.cc/Q9WK-8CKD>].

60. FORM I-797C, *supra* note 7.

61. 8 C.F.R. § 103.17 (2024). Even though USCIS has reduced the biometric services fee, even that reduced fee includes duplicative and unjustified collection costs. *See* U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 89 Fed. Reg. 6194, 6199 tbl.1 (Jan. 31, 2024) (to be codified at 8 C.F.R. pts. 103, 106, 204, 212, 214, 240, 244–45, 245a, 264, 274a).

of the charge comes into fuller view. Indeed, USCIS itself undercuts any defense for the charge in the notice sent to applicants informing them that they need not appear for a biometrics appointment despite paying a fee. Specifically, the notice states that “USCIS is able to reuse your previously captured fingerprints and other biometrics. USCIS will run the same security checks and use your biometric data as in the past . . . . The biometrics fee will not be refunded.”<sup>62</sup>

This practice recently led one Missouri-based attorney to file a class action lawsuit against DHS in order to “recover . . . unused biometrics fees and to halt the USCIS’s policy of keeping those fees when they are not needed.”<sup>63</sup> The complaint further alleges that “USCIS knows perfectly well how to return an unnecessary fee . . . but has chosen not to do so.”<sup>64</sup> Indeed, in other contexts, the agency has devised a mechanism for refunding some user fees. The complaint also argues that “USCIS knows perfectly well how to remove the biometrics requirement for a specific class of applicants/petitioners from whom biometrics are not needed, and to return those fees improperly charged.”<sup>65</sup> As of early 2024, the lawsuit remains active before the Eastern District of Texas, and the federal government has filed a motion to dismiss the suit.<sup>66</sup> In its motion to dismiss, the federal government cites provisions akin to the above-mentioned regulation that articulate a broad agency authority for biometric fee capture.<sup>67</sup>

This unjust biometric fee capture perfectly encapsulates the practice of immigraft, as it involves the transfer and retention of property—in this case, monetary payments ostensibly for biometrics services fees—from individuals to the state. The result is the contribution of millions of dollars to the USCIS operating budget. All of this occurs via policies crafted and implemented by DHS. As evidenced by the pending lawsuit, the practice is arguably illegal, placing it at the intersection of both immigraft and stategraft. Even if it is ultimately found to be lawful, given the broad wording of the regulations, it generates an unjust outcome, particularly for noncitizen applicants who are already economically vulnerable, and often acutely need the benefit they are seeking from USCIS.

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62. FORM I-797C, *supra* note 7.

63. Complaint at 1, *Paz v. Mayorkas*, No. 23-CV-92 (E.D. Tex. filed May 17, 2023).

64. *Id.* at 6.

65. *Id.*

66. See Defendant’s Motion to Dismiss, *Paz v. Mayorkas*, No. 23-CV-92 (E.D. Tex. Aug. 23, 2023).

67. *Id.* at 17–19.

*B. Humanitarian Parole: Profiting off False Hope  
and Changing Rules Midstream*

Under Section 212(d)(5)(A) of the Immigration and Nationality Act, the U.S. government may temporarily admit a noncitizen into the United States on parole, where they otherwise do not have a legal pathway to enter, because of “urgent humanitarian reasons or significant public benefit.”<sup>68</sup> If approved for admission, the humanitarian parolee may request work authorization for the duration of their parole, typically one to two years.<sup>69</sup> Upon arrival to the United States, they may also apply for other humanitarian protections or proceed with already-filed immigrant petitions (*e.g.*, family petitions). Although there are several types of parole in the U.S. immigration system, this Section addresses the aforementioned type of humanitarian parole sought by a noncitizen who is outside of the United States. In particular, it examines how the U.S. government’s handling of humanitarian parole applications filed by Afghans—including its collection of millions of dollars and fees, and its subsequent midstream change to its assessment criteria—constitute immigrant.

An applicant can apply for humanitarian parole by submitting Form I-131 to USCIS with a payment of \$580 (online filing) to \$630 (paper filing) and a declaration from someone in the United States who agrees to be financially responsible for the applicant.<sup>70</sup> While applicants who meet certain criteria can request a fee waiver, many are reluctant to do so; since the application requires a declaration of financial support from someone in the United States, simultaneously requesting a waiver of fees can potentially send a conflicting message.<sup>71</sup> USCIS retains the filing fee

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68. 8 U.S.C. § 1182(d)(5)(A).

69. *Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS., [https://www.uscis.gov/humanitarian/humanitarian\\_parole](https://www.uscis.gov/humanitarian/humanitarian_parole) [https://perma.cc/4MUY-XVP8] (Oct. 23, 2023).

70. See FEE SCHEDULE, *supra* note 6, at 8; U.S. CITIZENSHIP & IMMIGR. SERVS., FORM I-134, DECLARATION OF FINANCIAL SUPPORT 10 (2023), <https://www.uscis.gov/sites/default/files/document/forms/i-134.pdf> [https://perma.cc/5XAT-V9U9] (“That I am willing and able to receive, maintain, and support the person named in Part 2. to better ensure that such persons will have sufficient financial resources or financial support to pay for necessary expenses for the period of his or her temporary stay in the United States. . . . I am aware of my responsibilities as an individual agreeing to financially support the beneficiary.” (emphasis omitted)).

71. Gabrielle Hays, *How Humanitarian Parole Works, and Why So Many Afghan Families Are Waiting To Be Reunited*, PBS NEWSHOUR (May 5, 2022, 11:25 AM), <https://www.pbs.org/newshour/nation/how-humanitarian-parole-works-and-why-so-many-afghan-families-are-waiting-to-be-reunited>.

regardless of whether the application for humanitarian parole is approved or denied.<sup>72</sup>

In August 2021, the United States withdrew from Afghanistan and the Taliban took over the Afghan government.<sup>73</sup> In advance, and in the immediate aftermath, of the withdrawal, the U.S. government evacuated approximately 79,000 Afghans and offered the vast majority (approximately 72,500) “port parole” upon their entrance to the United States.<sup>74</sup> But thousands more were left behind, and many families were separated. After the initial evacuations, U.S. efforts to protect Afghans at risk slowed significantly. Afghans and their allies were desperate to protect family, friends, colleagues, and others who did not exit via the initial evacuations.

In these circumstances, parole for “humanitarian reasons or significant public benefit” seemed like the most rational vehicle to secure the lawful entry into the U.S. of Afghans at risk. Afghan families began to apply for humanitarian parole in droves, encouraged by USCIS statements identifying humanitarian parole for Afghans, as well as organized campaigns by several non-profit groups.<sup>75</sup> Families in Afghanistan—where the average *yearly* salary in 2020 was over \$100 less than the then-\$575 filing fee for humanitarian parole—sold property, borrowed money, and crowdsourced to come up with the filing fee to apply.<sup>76</sup>

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72. *Id.* See 8 C.F.R. § 103.2(a)(1) (2024).

73. Katherine Schaeffer, *A Year Later, a Look Back at Public Opinion About the U.S. Military Exit from Afghanistan*, PEW RSCH. CTR. (Aug. 17, 2022), <https://www.pewresearch.org/short-reads/2022/08/17/a-year-later-a-look-back-at-public-opinion-about-the-u-s-military-exit-from-afghanistan/> [https://perma.cc/7ASC-T3CJ].

74. Muzaffar Chishti & Jessica Bolter, *Welcoming Afghans and Ukrainians to the United States: A Case in Similarities and Contrasts*, MIGRATION POL’Y INST. (July 13, 2022), <https://www.migrationpolicy.org/article/afghan-ukrainian-us-arrivals-parole> [https://perma.cc/M9RC-GMKU].

75. Press Release, Project ANAR, Project ANAR Launches To Support Thousands of Afghan Refugees (Oct. 12, 2021), <https://www.projectanar.org/project-anar-launches-to-support-thousands-of-afghan-refugees> [https://perma.cc/4B4X-ZTRE] (referencing the ten legal and community partners assisting Afghans with humanitarian parole); *Information for Afghan Nationals on Requests to USCIS for Parole*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/humanitarian-parole/information-for-afghan-nationals-on-requests-to-uscis-for-parole> [https://perma.cc/6GCQ-H68E] (Oct. 23, 2023). See also Complaint at 2, *Roe v. Mayorkas*, No. 22-cv-10808 (D. Mass. May 25, 2022).

76. Lindsay M. Harris & Yalda Royan, *Afghan Allies in Limbo: The U.S. Immigration Response*, SAN DIEGO L. REV. (forthcoming Dec. 2024) (manuscript at 25) (citing *Adjusted Net National Income Per Capita – Afghanistan*, WORLD BANK, <https://data.worldbank.org/indicator/NY.ADJ.NNTY.PC.CD?locations=AF> [https://perma.cc/7FST-Z9BE]).

Afghans filed an estimated 52,870 applications for humanitarian parole after August 1, 2021.<sup>77</sup> USCIS collected an estimated \$25 million in humanitarian parole fees from the Afghan community.<sup>78</sup> Despite the influx of funds, the subsequent processing of these Afghan humanitarian parole applications reveals that this was an empty remedy that resulted in little meaningful protection for Afghans, while contributing substantially to the agency's bottom line. In particular, the glacial pace of adjudications, disproportionately high denial rates, and midstream decision to change the assessment criteria generated costly and deeply unjust outcomes for Afghan applicants.

As a threshold matter, the office processing humanitarian parole applications was significantly understaffed to meet the need. Previously, the office adjudicating humanitarian parole requests had processed fewer than 2,000 applications per year and approved between 25% and 35% of those applications.<sup>79</sup> The vast majority of Afghan applications for humanitarian parole have not been decided, and most that have been decided were denied.<sup>80</sup> As of October 12, 2023, over two years after the fall of Kabul, DHS reported that it had adjudicated less than a third of the applications for humanitarian parole, of which approximately 80% were denied, 11% were conditionally approved, and 9% were found to be eligible for parole.<sup>81</sup>

The approval rate of around 11% for Afghan humanitarian parole applicants is well below the office's past approval rate of 25% to 35%. In addition, the adjudication timeframe is considerably longer than the

77. Letter from Edward J. Markey, U.S. Sen., to Alejandro Mayorkas, Sec'y, U.S. Dep't of Homeland Sec., and Ur Jaddou, Dir., U.S. Citizenship & Immigr. Servs. (Jan. 4, 2024), [https://www.markey.senate.gov/imo/media/doc/humanitarian\\_parole\\_for\\_afghans\\_letter\\_1424.pdf](https://www.markey.senate.gov/imo/media/doc/humanitarian_parole_for_afghans_letter_1424.pdf) [<https://perma.cc/7YA8-M5AQ>].

78. Abigail Hauslohner, *Biden Welcomes Ukrainian Refugees, Neglects Afghans, Critics Say*, WASH. POST (Apr. 28, 2022, 6:00 AM), <https://www.washingtonpost.com/national-security/2022/04/28/biden-refugees-ukraine-afghanistan/> [<https://perma.cc/A5V4-F6H9>] (reporting that the U.S. government may have collected as much as \$25 million in fees from Afghan parole applicants).

79. As per the complaint in *Roe v. Mayorkas*:

At USCIS, humanitarian parole applications are adjudicated by the agency's Humanitarian Affairs Branch. Before August 2021, the office had a small number of adjudicators, who processed fewer than 2,000 applications per year on behalf of noncitizens from all over the world. The office typically processed those applications within 90 days of receipt. It approved approximately 500 to 700 applications each year—an approval rate of 25-35%.

Complaint, *supra* note 75, at 8.

80. Miriam Jordan, *Afghans Who Bet on Fast Path to the U.S. Are Facing a Closed Door*, N.Y. TIMES, <https://www.nytimes.com/2022/02/16/us/afghan-refugees-humanitarian-parole.html> (Feb. 28, 2022).

81. Letter from Edward J. Markey to Alejandro Mayorkas and Ur Jaddou, *supra* note 77, at 5.

processing time for other parole applicants, such as Ukrainians.<sup>82</sup> If USCIS denied humanitarian parole, the applicant would have had to submit a costly appeal on Form I-290B for a fee of \$675.<sup>83</sup> As of October 16, 2023, DHS reported that 416 Afghans filed parole-related Form I-290B appeals, of which eighty-three percent were still pending adjudication and just twenty-seven were granted.<sup>84</sup>

Perhaps the most concerning aspect of USCIS's handling of Afghan humanitarian parole cases was its decision to switch its evaluation criteria *after* thousands of Afghans had submitted applications. At the time of the Taliban's takeover in August 2021, the standard for adjudicating humanitarian parole claims was simply to review for "urgent humanitarian reasons or significant public benefit."<sup>85</sup> Just three months later, in November 2021, the standard for adjudicating humanitarian parole claims from Afghanistan changed in two important and life-altering ways. First, USCIS announced that it would no longer consider claims filed from applicants within Afghanistan, thus excluding the most vulnerable populations.<sup>86</sup> Those applications already pending would be denied or administratively closed until the applicant found refuge outside of Afghanistan in a country with an active U.S. embassy.<sup>87</sup> Second, even if the applicant managed to leave Afghanistan, USCIS announced that it would only approve "extreme cases in which beneficiaries faced either imminent harm in the country in which they were present or an imminent risk of being returned to Afghanistan."<sup>88</sup>

In *Roe v. Mayorkas*,<sup>89</sup> the ACLU of Massachusetts and the Mintz law firm sued USCIS for changing its standards in this way.<sup>90</sup> The U.S. District Court for the District of Massachusetts held, however, that the new "extreme cases" standard was consistent with 8 U.S.C.

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82. In just three weeks after implementing the humanitarian parole program for Ukrainians, USCIS had already adjudicated over 6,000 applicants. *Roe v. Mayorkas*, No. 22-cv-10808, 2023 WL 3466327, at \*4 (D. Mass. May 12, 2023) (citing Complaint, *supra* note 75, at 15).

83. *I-290B, Notice of Appeal or Motion*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/i-290b> [<https://perma.cc/P939-SJYT>] (Jan. 30, 2024). As of April 1, 2024, USCIS will not charge an appeal fee for a "parole request (Form I-131) filed on behalf of a national of Afghanistan outside the U.S., and that parole request was denied between August 1, 2021, and September 30, 2023." See FEE SCHEDULE, *supra* note 6, at 13.

84. Letter from Edward J. Markey to Alejandro Mayorkas and Ur Jaddou, *supra* note 77, at 5–6. The authors filed a FOIA request to USCIS requesting data on the number of I-290B appeals filed with the agency (including as a result of I-131 denials), the fees collected, and the number of fee waivers granted.

85. Complaint, *supra* note 75, at 10–11.

86. *Id.* at 11.

87. *Id.*

88. Complaint, *supra* note 75, at 11.

89. No. 22-cv-10808, 2023 WL 3466327 (D. Mass. May 12, 2023).

90. *Id.* at \*3.

§ 1182(d)(5)(A) and did not conflict with statutory or policy mandates requiring consideration of applications on an individual basis.<sup>91</sup> The court reasoned that Section 1182(d)(5)(A) leaves discretion to the agency regarding the precise meaning of “urgent humanitarian reasons or significant public benefit.”<sup>92</sup> The court partially granted USCIS’s motion to dismiss, upholding its policy to grant applications from Afghan beneficiaries located outside of Afghanistan only in “extreme cases.”<sup>93</sup> The court did, however, question whether USCIS had complied with its own policy requiring case-by-case review and allowed that claim to proceed.<sup>94</sup> Despite the ongoing review, the wide agency discretion to approve or deny these applications may be sanctioned by the courts.

Overall, the handling of Afghan humanitarian parole by USCIS amounts to *immigrant*. In this instance, USCIS affirmatively encouraged vulnerable Afghans to apply for humanitarian parole, and gladly accepted millions of dollars in application fees. Yet even in basic contractual terms, one could argue that USCIS failed to deliver on the implied and wholly reasonable expectations of the applicants: that they would fairly adjudicate the applications in a relatively timely manner, given the statute itself refers to “urgent humanitarian” circumstances.<sup>95</sup> Instead, USCIS has held onto these fees, failing to adjudicate most applications despite their lengthy pendency, and unreasonably tightening their assessment criteria in a post hoc manner. Although a federal court has suggested that the “discretionary” nature of humanitarian parole offers a fig leaf of legality for the agency, the bigger picture remains the same: USCIS is profiting from Afghan humanitarian parole applicants who have been left in limbo and denied the opportunity to be considered for protection. At a minimum, the agency should have offered refunds to those applicants whose claims were disqualified by the midstream change in evaluation criteria. Its failure to do so, whether illegal or merely unjust, constitutes an act of *immigrant*.

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91. *Id.* at \*15.

92. *Id.* (quoting 8 U.S.C. § 1182(d)(5)(A)).

93. *Id.* at \*18.

94. *Id.* at \*13–14.

95. 8 U.S.C. § 1182(d)(5)(A).

*C. Immigration Bond: Funding ICE Detention Beds through Increasingly Expensive Immigration Bonds that Are Difficult to Recover*

The U.S. immigration system uses three types of bonds: delivery bonds,<sup>96</sup> voluntary departure bonds,<sup>97</sup> and order of supervision bonds.<sup>98</sup> Delivery bonds, which secure the release of a detained noncitizen in removal proceedings, comprise the majority of bonds (ninety-three percent of the total number in 2020).<sup>99</sup> The following analysis focuses on delivery bonds, given their high value relative to the other two bond types and their significant financial impact on immigrant families. As described below, complex recovery processes and a lack of nuance in regulations have created conditions where many noncitizens and their families are unjustly denied recovery of the bonds they have paid.

After ICE apprehends a noncitizen, ICE decides whether to detain them, release them on bond, release them on their own recognizance, or offer parole.<sup>100</sup> In fiscal year 2023, ICE Enforcement and Removal Operations apprehended 273,220 noncitizens across the United States.<sup>101</sup> Once ICE apprehends a noncitizen, the agency bases its custody decision

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96. 8 C.F.R. § 236.1(c)(10) (2024).

97. In 2020, voluntary departure bonds, which are used to ensure a noncitizen granted voluntary departure leaves the U.S., accounted for six percent of the total number of bonds. Immigration Bond Notifications, 88 Fed. Reg. 53358, 53360 (Aug. 8, 2023) (to be codified at 8 C.F.R. pt. 103). *See also* 8 C.F.R. §§ 240.25(b), 1240.26(b)(3)(i), (c)(3)(i).

98. In 2020, order of supervision bonds, issued by ICE to a detained noncitizen in removal proceedings, accounted for less than one percent of the total number of bonds. Immigration Bond Notifications, 88 Fed. Reg. at 53360. *See also* 8 C.F.R. § 241.5(b).

99. Immigration Bond Notifications, 88 Fed. Reg. at 53360.

100. *See* 8 U.S.C. §§ 1226(a)(2)(A), 1182(d)(5)(A); 8 C.F.R. §§ 212.5, 235.3(b)(2)(iii), 236.1(c). *See also* Denise Gilman & Luis A. Romero, *Immigration Detention, Inc.*, 6 J. ON MIGRATION & HUM. SEC. 145, 153 (2018).

101. *Detention Management: FY 2023 Detention Statistics*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/detain/detention-management> [https://perma.cc/6C29-9BNJ] (Mar. 14, 2024). From the total number of immigrants detained, 188,421 were initially apprehended by CBP and 84,799 by ICE. *Id.*

on its Risk Classification Assessment tool.<sup>102</sup> According to ICE statistics, in 2023, the agency itself granted bond to 8,528 noncitizens.<sup>103</sup>

If ICE elects to detain a bond-eligible noncitizen, the noncitizen has another opportunity to request bond via a custody redetermination hearing before an immigration judge.<sup>104</sup> In practical terms, an immigration bond is a written agreement between an obligor (generally an individual or surety company) and the U.S. government to secure the noncitizen's release from detention and to ensure they attend and comply with future immigration proceedings. To secure bond, the noncitizen must prove that they are not a flight risk or a danger to the community.<sup>105</sup> The statutory minimum bond amount is \$1,500,<sup>106</sup> yet the median bond amount set by immigration judges in Fiscal Year 2022 was over three times that minimum at \$5,000; the median bond amount in Fiscal Year 2023 increased to over four times the minimum to a median of \$7,000.<sup>107</sup> Bond grant rates and bond amounts vary significantly by the location of

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102. An ICE officer asks each noncitizen up to 178 questions at intake and a computerized algorithm then determines whether to detain the noncitizen, though ICE can override the algorithm's determination. See Jayashri Srikantiah, *Reconsidering Money Bail in Immigration Detention*, 52 U.C. DAVIS L. REV. 521, 539–40 (2018). For 18.4 percent of the Risk Classification Assessment (RCA) decisions, the RCA made no recommendation. For 21.9 percent of the RCA decisions, ERO officers overrode the RCA recommendations. OFF. OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., OIG-15-22, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT'S ALTERNATIVES TO DETENTION (REVISED) 11–12 (2015), [https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/2015/OIG\\_15-22\\_Feb15.pdf](https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/2015/OIG_15-22_Feb15.pdf) [<https://perma.cc/Z9ZP-CA9N>]. The Office of the Inspector General (OIG) assessed the RCA tool as “time consuming, resource intensive, and not effective in determining which aliens to release or under what conditions.” *Id.* at 2. According to the OIG's 2015 report, the RCA is not capable of making decisions or recommendations on complex cases; does not take into account the different alternatives to detention for release and custody under Integrated Safety Assessment Program II; and does not require medical training or privacy for questions on special vulnerabilities, in conflict with ICE's Performance Based National Detention Standards. *Id.* at 11–13.

103. See *Detention Management: FY 2023 Detention Statistics*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/detain/detention-management> [<https://perma.cc/6C29-9BNJ>] (Mar. 14, 2024).

104. According to ICE statistics, in fiscal year 2023, immigration judges granted bond to 9,038 noncitizens. *Detention Management: FY 2023 Detention Statistics*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/detain/detention-management> [<https://perma.cc/6C29-9BNJ>] (Mar. 14, 2024).

105. 8 C.F.R. § 1236.1(c)(8) (2024).

106. See Immigration and Nationality Act (INA) § 236(a)(2), 8 U.S.C. § 1226(a)(2).

107. See *Immigration Court Bond Hearings and Related Case Decisions*, TRAC IMMIGR., <https://trac.syr.edu/phptools/immigration/bond/> [<https://perma.cc/4VV9-9YE7>].

the immigration court,<sup>108</sup> and by the nationality<sup>109</sup> and the race of the respondent.<sup>110</sup>

From October 2016 to December 2023, those supporting detained non-citizens contributed more than \$2 billion in immigration bond fees.<sup>111</sup> ICE retains the immigration bond fee if the bond is breached, or if the bond is never successfully returned to the obligor. A breach occurs if the noncitizen in removal proceedings fails to comply with the conditions of the bond (*e.g.*, they fail to appear at an immigration court hearing or fail to comply with other terms set by ICE, and the obligor fails to surrender the noncitizen to ICE).<sup>112</sup>

### 1. BOND BREACH

In order to be eligible for a bond refund, the noncitizen released from detention must attend all of their court hearings and follow all the orders set by the immigration judge or ICE.<sup>113</sup> Bond obligors have the right to appeal a bond breach by completing Form I-290B, Notice of Appeal or Motion, within thirty calendar days after service of the decision, and with the required filing fee.<sup>114</sup> Many obligors do not even have an opportunity to appeal a bond breach because they never receive notice of the breach. By the government's own limited estimate, twenty-

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108. See *Three-Fold Difference in Immigration Bond Amounts by Court Location*, TRAC IMMIGR. (July 2, 2018), <https://trac.syr.edu/immigration/reports/519/> [<https://perma.cc/J654-XMUL>]; *Detained Immigrants Seeking Release on Bond Have Widely Different Outcomes – Overall Bond Grant Rates Have Dropped*, TRAC IMMIGR. (July 19, 2023), <https://trac.syr.edu/reports/722/> [<https://perma.cc/FA2E-HUHN>]. In fiscal year 2023, immigration judges granted bond to around thirty-two percent of respondents in removal proceedings nationwide. See *Immigration Court Bond Hearings and Related Case Decisions*, *supra* note 107.

109. *Importance of Nationality in Immigration Court Bond Decisions*, TRAC IMMIGR. (Feb. 12, 2019), <https://trac.syr.edu/immigration/reports/545/> [<https://perma.cc/BTH9-VV9G>].

110. *Black Immigrant Lives Are Under Attack*, RAICES [<https://perma.cc/C4D8-7K VX>].

111. See *Immigrants Pay \$2 Billion in ICE Bonds Since FY 2017*, TRAC IMMIGR. (Feb. 8, 2024), <https://trac.syr.edu/reports/738/#f2> [<https://perma.cc/6LF5-EMCE>].

112. 8 C.F.R. § 103.6(e) (2024).

113. 8 C.F.R. § 103.6(c)(3). See generally U.S. IMMIGR. & CUSTOMS ENF'T, FORM I-352, IMMIGRATION BOND (2023), <https://www.ice.gov/doclib/forms/i352.pdf> [<https://perma.cc/GX6B-SER5>].

114. 8 C.F.R. § 1003.38(b). The filing fee for Form I-290B is \$800. See FEE SCHEDULE, *supra* note 6, at 13.

eight percent of its demand notices after a bond breach never made it to the obligor.<sup>115</sup>

For Karla, profiled in the Introduction, the obligor never advised her of the bond breach. Moreover, by the time the court reopened the case because of the errors committed by the unauthorized practitioner, the thirty-day deadline to appeal the bond breach had long passed. Before her removal order was rescinded and her case was reopened, Karla had no legal basis to appeal the breach, unless she were somehow re-detained. The statute relating to the return of bond funds provides, “except to the extent forfeited for violation of the terms thereof, [bond] shall be returned to the person by whom furnished, or to his legal representatives.”<sup>116</sup> Even though Karla (and others like her) re-opened her case due to ineffective assistance of counsel and eventually won asylee status, she was punished for an unintentional breach of the terms of her bond. Even when the failure to appear was the result of ineffective assistance of counsel, ICE treats the circumstances as a “forfeit” under the statute. Thus, lack of nuance in the law governing bond forfeiture generates a truly unjust outcome and enables ICE to hold onto the funds.

From 2018 to 2020, an average of over 7,000 cash bonds and over 1,400 surety bonds, or an average total of about seventeen percent of the total number of immigration bonds, were breached each year.<sup>117</sup> The bonds posted in cash were already in the government’s possession; the government had to collect on the bonds posted by sureties.<sup>118</sup> During that same time period of 2018 to 2020, DHS estimated it would collect \$55 million annually in breached bonds.<sup>119</sup> The funds from breached bonds are deposited into a Breached Bond Detention Fund to fund detention

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115. Immigration Bond Notifications, 88 Fed. Reg. 53358, 53368 (Aug. 8, 2023) (to be codified at 8 C.F.R. pt. 103) (“A random sample of 100 delivery cash bonds that were declared as being breached during calendar years 2017–2019 indicates that approximately 28 percent of demand notices sent by certified mail to the obligor’s address of record were returned as undeliverable or unclaimed.”).

116. 8 U.S.C. § 1183.

117. The average annual number of cash and surety bonds from 2018 to 2020 was 50,010. Immigration Bond Notifications, 88 Fed. Reg. 53358, 53365 (Aug. 8, 2023) (to be codified at 8 C.F.R. pt. 103).

118. In fiscal year 2016, out of a total of 816 invoices issued for surety bonds, just 420, or fifty-one percent, were actually paid by surety companies. *Bond and Surety Statistics FY2006–FY2016*, U.S. IMMIGR. & CUSTOMS ENF’T, ice.gov/foia/bond-and-surety-statistics-fy2006-fy2016 [https://perma.cc/2AUB-M2RW].

119. DEP’T OF HOMELAND SECURITY, FY 2020 BUDGET IN BRIEF 27 (2020), [https://www.dhs.gov/sites/default/files/publications/fy\\_2020\\_dhs\\_bib.pdf](https://www.dhs.gov/sites/default/files/publications/fy_2020_dhs_bib.pdf) [https://perma.cc/7PS7-LS4B].

beds.<sup>120</sup> In the past, DHS was overspending its allocations for detention beds,<sup>121</sup> and thereby had an incentive to collect on bond breaches. Although data is not available regarding how many of the breaches were unintentional, at least some of the bond fees the government retains are as the result of ineffective assistance of counsel, a failure by the court to advise the noncitizen of a future hearing date, or other circumstances that lead to unintentional breaches.

## 2. BOND RETURN

Even when the bond has not been forfeited, the process of recovering one's bond requires physical paperwork that may have been lost in the intervening years.<sup>122</sup> The lengthiness of immigration proceedings makes it more likely that paperwork is misplaced or that the obligor moves without updating their address. As of January 2022, the average completion time for a case in immigration court was 1,206 days,

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120. BOND MANAGEMENT HANDBOOK, *supra* note 4, at 2.

121. During the Obama Administration, Congress set the ICE detention bed quota at no less than 34,000 detention beds. Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5, 251. However, DHS reallocated funds to cover ICE's expenses beyond this quota. See Erica Werner, Damian Paletta & Seung Min Kim, *Shutdown Looms as Border Talks Break Down over Immigration Enforcement*, WASH. POST (Feb. 10, 2019, 5:51 PM), [https://www.washingtonpost.com/business/economy/border-talks-at-impasse-as-shutdown-looms-friday-officials-say/2019/02/10/aa8ef08c-2d36-11e9-813a-0ab2f17e305b\\_story.html](https://www.washingtonpost.com/business/economy/border-talks-at-impasse-as-shutdown-looms-friday-officials-say/2019/02/10/aa8ef08c-2d36-11e9-813a-0ab2f17e305b_story.html) [https://perma.cc/7ABF-P8GE]. By March 2018, Congress gave ICE enough funding to detain an average of 40,520 people a day. *Id.*; Dara Lind, *Congress's Deal on Immigration Detention, Explained*, VOX (Feb. 12, 2019, 11:00 AM), <https://www.vox.com/2019/2/12/18220323/immigration-detention-beds-congress-cap> [https://perma.cc/4VS6-5BHM]. Although the detention bed quota was set at 40,520, ICE continued to detain people far above the mandate. Werner, Paletta & Kim, *supra*. During the fiscal year 2019 shutdown, Congress negotiated a deal that ultimately provided ICE with enough funding to maintain an average of 45,000 people in detention per day, which ICE outspent. See Jack Herrera, *ICE Is Hugely Overspending Its Detention Budget—Again*, PAC. STANDARD (May 21, 2019), <https://psmag.com/news/ice-is-hugely-overspending-its-detention-budget-again>; Nick Miroff, *Why Immigration Detention Beds Became a New Issue in Trump Border Wall Fight*, WASH. POST (Feb. 12, 2019, 8:00 AM), [https://www.washingtonpost.com/national/why-immigration-detention-beds-are-the-new-front-in-trump-border-wall-fight/2019/02/11/9c8e6d2a-2e15-11e9-813a-0ab2f17e305b\\_story.html](https://www.washingtonpost.com/national/why-immigration-detention-beds-are-the-new-front-in-trump-border-wall-fight/2019/02/11/9c8e6d2a-2e15-11e9-813a-0ab2f17e305b_story.html) [https://perma.cc/4LJU-SRAP].

122. IMMIGRS. RTS. CLINIC AT STAN. L. SCH. & IMMIGR. L. CLINIC AT THE U.C. DAVIS SCH. OF L., FOLLOWING THE MONEY: NEW INFORMATION ABOUT THE FEDERAL GOVERNMENT'S BILLION DOLLAR IMMIGRATION DETENTION AND BOND OPERATIONS 5 (2019) [hereinafter FOLLOWING THE MONEY REPORT], [https://law.stanford.edu/wp-content/uploads/2019/05/19-02-25-Bond-FOIA-Report\\_Final.pdf](https://law.stanford.edu/wp-content/uploads/2019/05/19-02-25-Bond-FOIA-Report_Final.pdf) [https://perma.cc/43CR-RP5W].

or over three years.<sup>123</sup> Additionally, the obligor is the only person who can get back the bond, even if the released noncitizen has already paid the obligor for the full bond amount, and even if the obligor moved outside of the country, or was involved in fraud or other nefarious activities.

DHS currently has over \$200 million in unclaimed bond funds.<sup>124</sup> These funds sit with the Department of the Treasury presumably until they are returned. According to Professors Jayashri Srikantiah and Holly S. Cooper, “the amassing of bond money indicates a serious problem and could amount to a massive theft from people who can least afford it.”<sup>125</sup> The difficulty of recovering immigration bond, and of even being eligible for its return, enrich the government’s coffers and fund its ability to detain future immigrants in a never-ending cycle.<sup>126</sup>

#### *D. Exorbitant Appeals Fees for Obvious Agency Mistakes*

USCIS adjudicators are notorious for making obviously wrong decisions. This includes predicating denials on a lack of evidence that was, in fact, submitted; and arguing that filings were untimely when they were, in fact, received on time by USCIS. In these cases, noncitizens and their advocates have few options to remedy this error and often must file an administrative appeal with USCIS via Form I-290B, which costs

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123. *The Continuing Impact of the Pandemic on Immigration Court Case Completions*, TRAC IMMIGR. (Feb. 11, 2022), <https://trac.syr.edu/immigration/reports/677/> [<https://perma.cc/X8DV-D5K2>].

124. FOLLOWING THE MONEY REPORT, *supra* note 122, at 5, 7.

125. Meagan Flynn, *ICE Is Holding \$204 Million in Bond Money, and Some Might Never Get It Back*, WASH. POST (Apr. 26, 2019, 3:11 PM), [https://www.washingtonpost.com/immigration/ice-is-holding-204-million-in-bond-money-and-some-immigrants-might-never-get-it-back/2019/04/26/dcaa69a0-5709-11e9-9136-f8e636f1f6df\\_story.html](https://www.washingtonpost.com/immigration/ice-is-holding-204-million-in-bond-money-and-some-immigrants-might-never-get-it-back/2019/04/26/dcaa69a0-5709-11e9-9136-f8e636f1f6df_story.html) [<https://perma.cc/F5WX-59FF>].

126. This core component of both stategraft and immigrant is encapsulated in a critique of ICE offered by attorney Becca Heller. She notes,

Is a government agency evil? No. Is every single person inside ICE evil? No. The brilliance of the system is that their job has been siphoned off in such a way that maybe what they see day to day seems justified, but when you add it up, all of the people just doing their job, it becomes this crazy terrorizing system.

*Netflix Documentary Filmmakers Summarize Takeaway from Their Six-Part Series with Becca Heller’s Description of the US Immigration System*, SKADDEN FOUND. (Sept. 22, 2020), <https://www.skaddenfellowships.org/news-and-stories/2020/09/becca-heller-describes-immigration-for-netflix> [<https://perma.cc/4VYW-EPAT>].

\$800.<sup>127</sup> The appeal must be filed within thirty days after the adverse decision.<sup>128</sup> Although, as of April 1, 2024, humanitarian applicants are exempt from the \$800 fee, and some other applicants can seek a waiver, they run the risk of having the fee waiver denied (and thus the application rejected) after the time for an appeal has run.<sup>129</sup> Further, while the USCIS ombudsman might also be positioned to remedy obvious adjudication errors, they are typically unable to act before the thirty-day period lapses. Therefore, sloppy agency practices create an unjust scenario, whereby noncitizens are required to remit substantial fees to keep their cases afloat and to get the agency to correct its own mistakes. In some instances, noncitizens have multiple applications that are simultaneously denied due to agency error, requiring multiples of the \$800 fee.

Practicing attorneys have reported numerous examples of clear agency errors that have resulted in denials of applications, and consequently, costly appeals fees.<sup>130</sup> USCIS often bases its denial on the grounds that the applicant failed to timely respond to a Request for Evidence (RFE), a common USCIS notice requesting additional information or documentation relating to a pending application. Yet USCIS has issued denials even when the applicant submitted a timely response to the RFE; in other cases, attorneys have argued that USCIS never actually sent out the RFE that later formed the basis for the denial. The frequency of such reports suggests clear lapses in how the agency processes and tracks RFE responses—lapses that applicants bear the burden of fixing. In other cases, the USCIS error is even more blatant: one attorney reported receiving a denial based on the applicant's failure to attend an interview. In fact, the applicant had attended the interview as scheduled. A costly appeal was needed for the application to be reopened and approved.

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127. *I-290B, Notice of Appeal or Motion*, *supra* note 83 (providing instructions and the appropriate forms to file a Notice of Appeal or Motion form with USCIS). *See also* FEE SCHEDULE, *supra* note 6, at 13.

128. *See I-290B, Notice of Appeal or Motion*, *supra* note 83 (requiring the form be filed within thirty days); INSTRUCTIONS FOR NOTICE OF APPEAL OR MOTION, FORM I-290B, U.S. CITIZENSHIP & IMMIGR. SERVS. (2019), <https://www.uscis.gov/sites/default/files/document/forms/i-290binstr.pdf> [<https://perma.cc/UP63-PUQH>] (listing the same time requirements for filing the form).

129. U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SEC., USE OF FEE WAIVERS: POLICIES AND DATA 13 (2023), [https://www.dhs.gov/sites/default/files/2023-10/23\\_0828\\_uscis\\_use-of-fee-waivers-q2\\_fy23.pdf](https://www.dhs.gov/sites/default/files/2023-10/23_0828_uscis_use-of-fee-waivers-q2_fy23.pdf) [<https://perma.cc/56HC-4SCU>].

130. The examples cited in this paragraph are drawn from correspondence between the authors and practicing immigration attorneys. Documentation of this correspondence is on file with the authors.

Currently, USCIS does not have a clear policy of refunding the \$800 fee, even when the decision that prompted the denial is clearly the result of agency error.<sup>131</sup> The instructions for Form I-290B state unequivocally that “[t]he filing fee is not refundable, regardless of any action USCIS takes on this form.”<sup>132</sup> In the past, the agency has suggested that fees accompanying an appeal or motion to reopen might be refunded if USCIS error is determined to be the underlying cause.<sup>133</sup> Yet the current instructions for the relevant form state otherwise, and USCIS has failed to articulate clear guidelines for when and how it will refund appeal fees.

As such, the practice constitutes a clear instance of immigrant: by levying a costly fee for an appeal, the agency and its personnel are effectuating the transfer of property from individuals to the state, resulting in the enhancement of USCIS’s coffers. While the practice is not demonstrably illegal, as it reflects standard operating procedures, the outcome is clearly unjust. But for the agency’s own mistake, the applicant would not have been compelled to pay for the appeal. And while some small percentage of errors are to be expected in any process, both the frequency of these adjudicative errors—and the lack of a transparent policy or mechanism for refunding appeals fees in the case of underlying agency errors—places this squarely within the realm of immigrant.

This example also illustrates how structural features of an agency’s operations can enable predatory practices. In the case of USCIS, the self-funded nature of the agency creates an emphasis on efficiency and incentivizes lean agency staffing. A foreseeable result of these conditions is hasty and error-ridden decisionmaking (or conversely, delayed adjudicative processes) that can leave applicants without protection and result in squandered and thus unjustified fees. Agencies may implicitly understand that additional funding is needed to complete their work, but to preserve their image as resource conservers, costly appeals fees are levied, and are conveniently not refunded, even when the agency is clearly to blame. In other cases, as described before, unjustified fees may be tacked on, or payments may be subjected to complex and confusing fee recovery processes.

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131. Per reports from practicing immigration attorneys, in some instances, when the applicant or their representative has specifically requested a refund given the underlying USCIS error, USCIS has issued that refund.

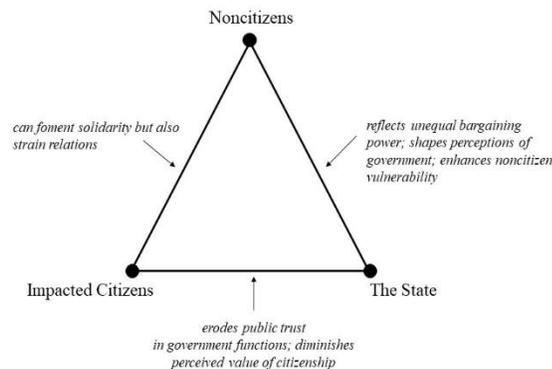
132. INSTRUCTIONS FOR NOTICE OF APPEAL OR MOTION, *supra* note 128.

133. *USCIS Holds National Stakeholder Meeting*, 88 INTERPRETER RELEASES 685, 686 (2011) (“[A] motion to reopen because of USCIS error must be filed with the fee . . . , which will be reimbursed if it is found that there was a USCIS error.”).

## III. IMPLICATIONS AND RECOMMENDATIONS

*A. Theoretical Implications*

In “A Theory of Stategraft,” Atuahene cautions that stategraft “distinctly unsettles the democratic agreement between citizen and state,” diminishing citizens’ level of confidence in the state, and even encouraging them to challenge the state via activism, social movements, and political processes.<sup>134</sup> While similar dynamics are present in immigraft, the involvement of noncitizens transforms the citizen-state dyad into a complex tripartite relationship. As reflected in the image below, immigraft complicates each of these relationships. Building upon existing scholarly conversations, the Sections that follow detail two main implications. First, immigraft epitomizes the lopsided bargaining power between noncitizens and the state and reflects the tendency to extract maximum value from immigrants. Second, immigraft can impact noncitizen-citizen relationships in distinct ways, potentially leading to an erosion of citizens’ trust in the state and a diminished valuation of their own citizenship.



*Figure 1. Implications of Immigraft.*

## 1. UNEQUAL BARGAINING STRENGTH AND THE EXTRACTION OF VALUE

The differential in power between federal immigration authorities and noncitizens is substantial, with agencies like USCIS, ICE, and EOIR

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134. Atuahene, *supra* note 14, at 30.

wielding enormous influence over noncitizens' futures in the United States. Given the carceral dimensions of immigration control, some of these agencies are also empowered to deprive noncitizens of their liberty and property via immigration detention. For those noncitizens who fear persecution or torture in their countries of origin or who have substantial connections to the United States that they risk losing, the impulse to do whatever is needed to secure a favorable immigration outcome is powerful. This includes, as described before, the payment of costly, unjustified, and often unrecoverable fees to advance one's immigration case or to secure one's liberty.

Scholars including Hiroshi Motomura have framed the relationship between noncitizens and the state in contractual terms, noting the deeply unequal relationship between the parties.<sup>135</sup> On the one hand, noncitizens are expected to contribute economically, stay out of the criminal legal system, and to endure various hardships and indignities that accompany their "outsider" status—challenges that are magnified for migrants who are less affluent and/or racial minorities.<sup>136</sup> Yet there are few formal expectations regarding what the state will provide in return, except for a modicum of stability by sanctioning the noncitizens' presence and perhaps allowing them to seek employment. But even these gestures are often "revocable at any time" as the U.S. Supreme Court once expressed,<sup>137</sup> with some exceptions for permanent residents and others. Immigrant encapsulates this long-standing and lopsided dynamic, whereby noncitizens are expected to keep paying into a system that may produce little in return and where their status remains uncertain. Indeed, the implied social contract between noncitizens and the state now arguably assumes that payments, penalties, and unpleasant enforcement are the price to be paid for even a mere *chance* at a more secure status, notwithstanding the particulars of one's case.<sup>138</sup>

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135. HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 30 (2006) (noting that foundational immigration cases, which articulated a plenary immigration power for the federal government, telegraphed that "immigrants are guests to be let in, but only on the condition that they are easily evicted").

136. See Muneer I. Ahmad, *Beyond Earned Citizenship*, 52 HARV. C.R.-C.L. L. REV. 257, 261 (2017) ("[W]orthiness [of noncitizens] is measured by economic productivity and moral rectitude.").

137. *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889). See also MOTOMURA, *supra* note 135, at 36 ("Lawful immigrants were treated as mere holders of revocable licenses who agreed to abide by the terms of admission.").

138. Cf. Frank D. Bean, Robert G. Cushing, Charles W. Haynes & Jennifer V. W. Van Hook, *Immigration and the Social Contract*, 78 SOC. SCI. Q. 249, 265 (1997).

More broadly, *immigraft* reflects a societal environment in which the extraction of value from noncitizens, often at great cost, has been normalized.<sup>139</sup> In addition to the considerable fees paid to U.S. immigration agencies, noncitizens—particularly those with tenuous legal status—are expected to provide economic value through difficult labor, often without proper compensation and in hazardous environments.<sup>140</sup> Restrictions on public benefits and their positioning in the informal economy mean that many immigrants receive few government or employee benefits, requiring them to pay out of pocket for medical coverage and other essential expenses.<sup>141</sup> The very logic of “earned legalization” proposals presupposes that undocumented noncitizens must add measurable value to society, often over many years, before they are given an opportunity to remain in the United States permanently.<sup>142</sup>

Unsurprisingly, the extraction of value and accompanying burdens are borne most heavily by noncitizens of color. In the immigration bond context, for example, data reveals that detained Haitian men (ninety-five percent of Haitians are Black) are routinely charged higher bond amounts.<sup>143</sup> Even more concerning are disparities in the humanitarian parole context. Whereas Afghan applicants were charged \$575 for each application, Ukrainian applicants for humanitarian parole were allowed to apply for free.<sup>144</sup> Similarly, Ukrainians were afforded certain conveniences in the interview and application process that were not

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139. See, e.g., Jon Burnett & Fidelis Chebe, *Towards a Political Economy of Charging Regimes: Fines, Fees and Force in UK Immigration Control*, 60 BRIT. J. CRIMINOLOGY 579, 586 (2020).

140. See, e.g., Lee & Smith, *supra* note 13, at 768; Maria Eugenia Fernández-Esquer, Cecilia F. Aguerre, Martha Ojeda, Louis D. Brown, John S. Atkinson et al., *Documenting and Understanding Workplace Injuries Among Latino Day Laborers*, 31 J. HEALTH CARE POOR & UNDERSERVED 791, 792 (2020) (“Latino day laborers experience the highest occupational mortality rate in the United States . . .”).

141. See, e.g., TANYA BRODER & GABRIELLE LESSARD, NAT’L IMMIGR. L. CTR., OVERVIEW OF IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS (2023), <https://www.nilc.org/wp-content/uploads/2023/10/overview-immeligfedprograms-2023-10-01.pdf> [<https://perma.cc/5EAM-4LY8>] (summarizing noncitizens’ limited eligibility for major public benefits programs); *Key Facts on Health Coverage of Immigrants*, KFF (Sept. 17, 2023), <https://www.kff.org/racial-equity-and-health-policy/fact-sheet/key-facts-on-health-coverage-of-immigrants/> [<https://perma.cc/ZWN2-MPBH>] (noting that immigrants, because of higher uninsured rates, tend to pay more out of pocket than U.S.-born individuals).

142. See, e.g., Ahmad, *supra* note 136, at 272–77.

143. *Black Immigrant Lives Are Under Attack*, *supra* note 110. *Haiti at a Glance*, EMBASSY REPUBLIC HAITI, <https://www.haiti.org/haiti-at-a-glance> [<https://perma.cc/M3YF-KEKN>].

144. Chishti & Bolter, *supra* note 74.

extended to Afghans.<sup>145</sup> These financial burdens mirror other hardships that immigrants of color disproportionately shoulder, including wage theft, workplace injuries and fatalities, and foreclosed access to government benefits.<sup>146</sup>

## 2. DYNAMICS AMONG CITIZENS, NONCITIZENS, AND THE STATE

Although it is noncitizens who are most directly affected by immigrant, the practice can also impact citizens. The examples of immigrant described above reveal that U.S. citizens are often standing alongside the noncitizens who are navigating these processes, whether as family members or friends, and often as providers of the funds that are transmitted to DHS. As witnesses to, and perhaps even victims of, immigrant, citizens may lose trust in government institutions and processes, and begin to question the value of their own citizenship. Immigrant can also shape citizen-noncitizen relations in distinct ways: on the one hand, it can foment feelings and expressions of solidarity and support, yet it might also strain relationships within families and between naturalized citizens and more recent arrivals.

Recent estimates suggest that nearly 11 million U.S. citizens reside in households with undocumented persons,<sup>147</sup> and millions more undoubtedly reside with permanent residents, temporary visa holders, and others navigating the U.S. immigration system. Research also reveals that about half of the noncitizens in immigration detention have a U.S. citizen child and thus belong to mixed-status families.<sup>148</sup> Accordingly, as noncitizens experience instances of immigrant, literally millions of U.S. citizens may also be affected, whether directly or

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145. Professor Lindsay Harris has created a visual representation of these disparities, and other researchers have noted them as well. *See, e.g.*, Harris & Royan, *supra* note 76, at 27–28; Chishti & Bolter, *supra* note 74.

146. *See, e.g.*, Maria Eugenia Fernández-Esquer, Lynn N. Ibekwe, Rosalia Guerrero-Luera, Yesmel A. King, Casey P. Durand & John S. Atkinson, *Structural Racism and Immigrant Health: Exploring the Association Between Wage Theft, Mental Health, and Injury Among Latino Day Laborers*, 31 *ETHNICITY & DISEASE* 345, 346 (2021) (“Latinos remain some of the least protected workers in the United States.”); Cori Alonso-Yoder, *Publicly Charged: A Critical Examination of Immigrant Public Benefit Restrictions*, 97 *DENV. L. REV.* 1 (2019) (describing the racial underpinnings of benefits restrictions targeting both noncitizens and others).

147. *Immigration Reform Can Keep Millions of Mixed-Status Families Together*, *FWD.US* (Jan. 18, 2024), <https://www.fwd.us/news/mixed-status-families/> [<https://perma.cc/66YD-89VC>].

148. *See* Blanca A. Ramirez, *Anchoring Work: How Latinx Mixed-Status Families Respond to Interior Immigration Enforcement*, *J. ETHNIC & MIGRATION STUD.* 2 (2023).

indirectly. First and most obviously, the U.S. citizen may be the source of funds used to pay the various fees imposed by an agency and thus may experience pecuniary loss. Along these lines, U.S. citizens may be called upon to bring in income and hold the family unit together while their noncitizen relatives navigate the immigration process.<sup>149</sup>

More broadly, however, immigration policies, including the manifestations of immigraft, can affect the overall well-being of these U.S. citizen family members.<sup>150</sup> Sociologist Laura Enriquez uses the term “multigenerational punishment” to describe how “legal sanctions intended for undocumented immigrants extend into the lives of U.S. citizens.”<sup>151</sup> For example, challenges and uncertainties with immigration processes may restrict noncitizens’ ability to travel, which may also inhibit the mobility of U.S. citizen family members.<sup>152</sup> Likewise, the economic insecurity that noncitizens experience invariably affects U.S. citizens in their immediate family, imposing additional burdens and limiting opportunities for advancement.<sup>153</sup> Accompanying a noncitizen through the immigration process can also impact one’s mental and physical health.<sup>154</sup> And while the work of Enriquez and other scholars focuses on immigration enforcement, the principles apply more broadly: the financial hardship, delays, and stress occasioned by immigraft affect U.S. citizen family members in myriad ways<sup>155</sup> and undoubtedly place some strain on citizen-noncitizen relationships.

Additionally, in accompanying noncitizen family members through taxing and uncertain immigration processes, U.S. citizens may themselves feel targeted, and perhaps less than full citizens, because the

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149. *Id.* at 4.

150. See Laura E. Enriquez, *Multigenerational Punishment: Shared Experiences of Undocumented Immigration Status Within Mixed-Status Families*, 77 J. MARRIAGE & FAM. 939, 940 (2015).

151. *Id.* at 940 (emphasis omitted).

152. *Id.* at 947.

153. *Id.* at 949. See also Leisy J. Abrego, *Relational Legal Consciousness of U.S. Citizenship: Privilege, Responsibility, Guilt, and Love in Latino Mixed-Status Families*, 53 LAW & SOC’Y REV. 641, 647 (2019) (citing studies that link having undocumented parents with a greater likelihood of living in poverty and experiencing food insecurity).

154. Melanie Griffiths, *‘My Passport Is Just My Way Out of Here’*. *Mixed-Immigration Status Families, Immigration Enforcement and the Citizenship Implications*, 28 IDENTITIES 18, 23 (2021).

155. See, e.g., *id.* at 23. Women partnered with noncitizen males with precarious immigration status “were made poorer, as they lost savings and became indebted by legal and application fees.” *Id.* Cf. Abrego, *supra* note 153, at 657 (describing the “pain” felt by U.S. citizens upon “witnessing their [mixed-status] families’ struggles”).

integrity of their family unit is at stake.<sup>156</sup> And as family members struggle with unjust immigration systems, U.S. citizens may feel reluctant to fully embrace the privileges that accompany their status<sup>157</sup> or may question the value of citizenship.<sup>158</sup> Along these lines, citizens may feel a sense of disappointment and even betrayal at the government's treatment of their loved ones and the seemingly little weight given to the experiences of their families.<sup>159</sup> This experience, as Atuahene suggests, can corrode the relationship between citizens and the state, weakening their trust in government institutions and processes.<sup>160</sup> This may be particularly likely to occur when those processes involve components that seem unfair or unjustified.<sup>161</sup>

At the same time, having U.S. citizens bear witness to these difficulties may engender even deeper empathy for the noncitizen experience and foment collaborations among citizens and noncitizens to address the various pathologies in the existing immigration system, including the practice of immigrant.<sup>162</sup> Indeed, the advocacy and litigation that has emerged in response to immigrant demonstrates how unjust practices can have a mobilizing effect. In particular, those U.S. citizens whose family members are directly affected by a dysfunctional immigration system are positioned to be powerful allies in struggles for reform.<sup>163</sup>

What about naturalized U.S. citizens who traversed the same flawed system and managed to secure their status in the United States? Wouldn't they be natural allies? On the one hand, they may empathize with the noncitizens following in their footsteps and may endeavor to ameliorate some of the harms, whether through individualized support or systemic advocacy. Yet others may be embittered by their past experience, harboring frustration towards government authorities and even insisting

156. Abrego, *supra* note 153, at 660.

157. *Id.* at 664 (“Witnessing their loved ones’ suffering is difficult and informs their legal consciousness in ways that make them feel alienated from their own citizenship, filling them with a desire to resist its associated privileges.”).

158. Griffiths, *supra* note 154, at 28.

159. *See id.* at 25–26 (describing how female partners of noncitizens “felt betrayed at what was experienced as high levels of state-sponsored emotional and financial harm caused to themselves and their families” and also “felt let down and dismissed” by their own government).

160. Atuahene, *supra* note 14, at 31. *See also* Griffiths, *supra* note 154, at 26.

161. *See* Griffiths, *supra* note 154, at 26.

162. *See, e.g.,* Inger Lassen, *Resisting Dehumanization: Citizen Voices and Acts of Solidarity*, 15 CRITICAL DISCOURSE STUD. 427 (2018) (providing a nuanced case study of the contours of citizen solidarity with refugee communities).

163. *See* Abrego, *supra* note 153, at 666.

that others undergo the same hardship. Indeed, one hears echoes of this sentiment among those who navigated legal immigration pathways—who “did it the hard way”—and now insist that persons without authorization experience a similar, drawn-out, and costly process.<sup>164</sup>

### *B. Recommendations for Immigration Agencies*

#### 1. EXECUTIVE BRANCH SOLUTIONS

On its own, the state is incentivized to continue to collect funds and offset costs, and is disincentivized from critiquing its own collection practices. While the executive branch has proposed some solutions to address immigrant, consumer lawsuits and congressional oversight are often the best avenues to hold the state accountable for immigrant. ICE and USCIS have considered or should consider the preliminary solutions suggested below to address unnecessary biometrics fees, humanitarian parole fee waivers, withholding bond after an accidental bond breach, and refunds for appeals based on agency error.

One recent agency proposal relates to biometrics fees. In 2024, USCIS issued a final rule to incorporate biometrics fees into the main application fee for most application types and to reduce the fee from \$85 to \$30 for certain categories of applications.<sup>165</sup> USCIS has also started exempting biometrics service fees from certain applications, such as the I-539 Application to Extend/Change Nonimmigrant Status.<sup>166</sup> Whether as a response to the consumer class action challenging unrefunded

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164. Craig Palosky, *Many Immigrants, Including Naturalized Citizens, Don't Feel Well-Represented by Either Political Party, Though More Align with Democrats than Republicans*, KFF (Nov. 30, 2023), <https://www.kff.org/racial-equity-and-health-policy/press-release/many-immigrants-including-naturalized-citizens-dont-feel-well-represented-by-either-political-party-though-more-align-with-democrats-than-republicans/> [https://perma.cc/QX5E-J5DZ] (conducting a survey of more than 3,000 immigrants and reporting that naturalized citizens are more likely to think immigration enforcement is not enough). Cf. Joseph H. Carens, *Who Gets the Right To Stay?*, BOS. REV. (Jan. 23, 2018), <https://www.bostonreview.net/articles/joseph-h-carens-who-gets-right-stay/> [https://perma.cc/PL7Q-5ZFH] (considering “the argument that amnesty is unfair to those waiting patiently in line for admission”).

165. U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 89 Fed. Reg. 20101 (Mar. 21, 2024).

166. *USCIS Exempts the Form I-539 Biometrics Services Fee for All Applicants*, AILA (Sept. 26, 2023), <https://www.aila.org/library/uscis-exempts-the-form-i-539-biometrics-services> [https://perma.cc/Z85B-K766].

biometrics fees or on its own initiative, this is a welcome shift to begin to address this form of immigrant.<sup>167</sup>

On the issue of humanitarian parole, USCIS seemingly acknowledged its shortcomings in charging Afghans to apply for humanitarian parole when it waived fees for its subsequent program for Ukrainians.<sup>168</sup> It has since implemented a humanitarian parole program for Cubans, Haitians, Nicaraguans, and Venezuelans, again without an application fee for applicants.<sup>169</sup> This confirms that the cost of adjudicating requests for this type of humanitarian benefit can be absorbed by the agency without a direct charge to the applicant. At a minimum, USCIS should issue refunds to Afghans whose cases were denied due to the midstream policy change and adjudicate the remaining cases by applying the rule in effect when the parole seekers filed their applications.

As for immigration bonds, ICE has announced that its new eBONDS and CeBONDS systems will provide electronic notice to better reach obligors.<sup>170</sup> This electronic system should provide improved notice but does not address the underlying issues that create a bond breach or issue with the bond return. USCIS, in adjudicating bond breach appeals, should permit an exception to the thirty-day filing deadline where there was an accidental bond breach. In the case of Karla, profiled in the Introduction, who breached her bond only because she was misadvised by a rogue paralegal, USCIS should adjudicate her claim, and others like it, as not a “substantial violation” of the conditions of bond because it was unintentional, in good faith, and remedied with a motion to reopen in immigration court.<sup>171</sup>

Lastly, on appeals, USCIS should create a basis for filing a fee waiver where the petitioner can allege agency error. The agency should adjudicate the fee waiver first on that basis, and if it determines there

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167. See Complaint, *supra* note 75.

168. See Chishti & Bolter, *supra* note 74.

169. *Frequently Asked Questions About the Processes for Cubans, Haitians, Nicaraguans, and Venezuelans*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/frequently-asked-questions-about-the-processes-for-cubans-haitians-nicaraguans-and-venezuelans> [https://perma.cc/PY88-2YUH] (Oct. 11, 2023).

170. Immigration Bond Notifications, 88 Fed. Reg. 53358, 53360, 53368 (Aug. 8, 2023) (to be codified at 8 C.F.R. pt. 103).

171. In evaluating whether a bond violation is “substantial,” four factors are considered: “(1) the extent of the breach; (2) whether it was intentional or accidental on the part of the alien; (3) whether it was in good faith; and (4) whether the alien took steps to make amends or place himself in compliance.” *Ruiz-Rivera v. Moyer*, 70 F.3d 498, 501 (7th Cir. 1995) (citing *Bahramizadeh v. INS*, 717 F.2d 1170, 1173 (7th Cir. 1983)).

was agency error, waive the fee; if not, it should issue an invoice for the appeal amount. In the alternative, USCIS should institute and implement a refund policy if agency error led to the need for an appeal. The refund policy may already be implemented ad hoc in some circumstances but should be clearly articulated in the I-290B instructions and followed as a matter of policy.

## 2. CONGRESSIONAL OVERSIGHT

Ideally, Congress should fund USCIS's humanitarian adjudications and hold it accountable to justify fee increases. Yet, given that Congress itself created the conditions that made USCIS a self-funding agency, it may have little incentive to scrutinize practices that generate revenue and keep costs down.

As a remedy for the mistreatment and mishandling of Afghan parole applications, Congress should pass the Afghan Adjustment Act.<sup>172</sup> Congress should require USCIS to train and reallocate its workforce where the need, and the application fees, demand it. For example, in times of humanitarian emergencies, additional staff should be assigned to adjudicate humanitarian parole applications.

Congress should also investigate the potential conflict of interest of ICE bond breaches funding ICE detention beds.<sup>173</sup> In addition, Congress should demand ICE address the issue of unreturned bonds by engaging in a public education campaign to return \$200 million in unclaimed bond funds to their rightful owners, address the byzantine rules to return bond funds, and amend the rule on bond breaches. Where a bond breach occurs, Congress should revise 8 CFR § 103.6(e) to provide an exception for returning the bond where ineffective assistance of counsel or lack of notice by the immigration court impede an otherwise meritorious basis for returning the bond.<sup>174</sup>

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172. See Dan Kosten, *Bill Summary: The Afghan Adjustment Act of 2023*, NAT'L IMMIGR. F. (July 28, 2023), <https://immigrationforum.org/article/bill-summary-the-afghan-adjustment-act-of-2023/> [<https://perma.cc/CG5G-Z8GC>].

173. See FOLLOWING THE MONEY REPORT, *supra* note 122, at 7.

174. Current bond breach regulations provide that:

A bond is breached when there has been a substantial violation of the stipulated conditions. A final determination that a bond has been breached creates a claim in favor of the United States which may not be released or discharged by a Service officer. The district director having custody of the file containing the immigration bond executed on Form I-352 shall determine whether the bond shall be declared breached or cancelled, and shall notify the obligor on Form I-323 or Form I-391 of the decision, and, if declared

## CONCLUSION

Scholars have identified statecraft in fields as diverse as child welfare to property tax.<sup>175</sup> Noncitizens in immigration proceedings or seeking immigration benefits also are subject to the state's enrichment practices, described herein as immigrant. As detailed in this Essay, noncitizens and their families pay into a government system for unjustified biometrics fees, unfairly adjudicated humanitarian parole applications, unjustly retained immigration bond funds, and costly appeals fees. Often, these are desperate moments responding to an international humanitarian crisis, like the Taliban takeover of Afghanistan, or a personal crisis, like the detention of a family's breadwinner. The state capitalizes on these moments of desperation at a high cost, taking money for services they fail to provide, and extracting valuable resources from vulnerable noncitizens and their families.

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breached, of the reasons therefor, and of the right to appeal in accordance with the provisions of this part.

8 C.F.R. § 103.6(e) (2024).

175. Atuahene, *supra* note 14, at 8–10; Daniel L. Hatcher, *The Commodification of Children and the Poor, and the Theory of Statecraft*, 2024 Wis. L. REV. 559.

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