

# PRECLUSION OF EXCLUSION: HOW MANY BITES DOES DHS GET AT THE DEPORTATION APPLE?

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## ABSTRACT

*The common law doctrine of res judicata prevents parties from relitigating claims that were, or could have been, litigated in a previous proceeding. In the background of all civil law, the doctrine has been regularly applied to executive agency adjudications. However, recent developments have highlighted a circuit split and tension between the branches of government, as different adjudicative bodies have come to differing conclusions on whether, and to what extent, res judicata applies in removal proceedings.*

*This Note argues that res judicata should apply broadly and uniformly in removal proceedings, limiting the Department of Homeland Security (“DHS”) to only one bite at the deportation apple. The text and structure of the Immigration and Nationality Act, as well as its judicial interpretations and the regulations created to enforce it, command this result. Furthermore, the principles of fairness, reliance, and efficiency that drive res judicata are especially salient as immigrant defendants face unique challenges while the U.S. immigration system becomes increasingly overburdened. This Note concludes with a survey of the available avenues to reach a uniform application of the doctrine and to provide much needed clarity for the adjudicators applying the law, the lawyers on both sides, and the noncitizens facing one of the most severe penalties—deportation.*

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## INTRODUCTION

When Adrian Moncrieffe was a toddler, he legally immigrated to the United States from Jamaica with his family.<sup>1</sup> Over the next twenty-three years, Adrian lived in the United States without incident.<sup>2</sup> He received an education and worked in multiple industries,<sup>3</sup> including home health care.<sup>4</sup> He became a legal permanent resident, married a U.S. citizen, and started a family of his own in Georgia.<sup>5</sup>

Adrian's life was derailed in 2007 when he was pulled over while driving with a friend.<sup>6</sup> During the stop, police found 1.3 grams of marijuana in his car, which "is the equivalent of about two or three marijuana cigarettes."<sup>7</sup> Adrian was charged with and pleaded guilty to a Georgia state offense: possession of marijuana with the intent to distribute.<sup>8</sup> While the relevant statute covers distribution of up to ten pounds of marijuana,<sup>9</sup> it also criminalizes "the social sharing of small amounts of the drug for no remuneration."<sup>10</sup> His attorney did not warn him of any potential immigration consequences of his guilty plea or subsequent conviction.<sup>11</sup> Because he was a first-time offender, he was not sentenced to prison time.<sup>12</sup> Instead, his record was eligible for expungement after successful completion of probation.<sup>13</sup>

But Adrian was not out of the woods. Two years later, he was arrested by federal immigration officials who claimed that his Georgia marijuana conviction qualified as an aggravated felony,<sup>14</sup> which is a

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1. *Moncrieffe v. Holder*, 569 U.S. 184, 188 (2013); Nina Totenberg, *Justices Say U.S. Improperly Deported Man over Marijuana*, NPR (Apr. 23, 2013, 5:25 PM), <https://www.npr.org/2013/04/23/178651009/justices-say-u-s-improperly-deported-man-over-marijuana> [<https://perma.cc/V2TR-J7BY>].

2. Totenberg, *supra* note 1.

3. Brief for the Petitioner at 4, *Moncrieffe*, 569 U.S. 184 (No. 11-702).

4. Totenberg, *supra* note 1.

5. *Id.*

6. Brief for the Petitioner, *supra* note 3, at 5.

7. *Moncrieffe*, 569 U.S. at 188.

8. *Id.*

9. GA. CODE ANN. § 16-13-30(j)(1) (2017); *see also id.* § 16-13-31(c) (listing heightened punishments for offenses involving more than ten pounds of marijuana).

10. Brief for the Petitioner, *supra* note 3, at 5.

11. Totenberg, *supra* note 1.

12. *Moncrieffe*, 569 U.S. at 188–89.

13. *Id.* at 189.

14. Immigration and Nationality Act ("INA") § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2018) (listing the various crimes that qualify as aggravated felonies).

deportable offense under federal law.<sup>15</sup> Despite having almost no meaningful connections left in Jamaica,<sup>16</sup> Adrian was deported.<sup>17</sup> The Board of Immigration Appeals (“BIA”) affirmed the removal,<sup>18</sup> and the Fifth Circuit denied Adrian’s petition for review.<sup>19</sup> The U.S. Supreme Court granted certiorari to resolve a circuit split regarding the scope of drug-related aggravated felonies.<sup>20</sup>

In 2013, the Court held that Adrian’s marijuana conviction was not an aggravated felony.<sup>21</sup> The relevant aggravated felony charge was a “drug trafficking crime,”<sup>22</sup> which includes “any felony punishable under the Controlled Substances Act.”<sup>23</sup> Controlled Substances Act (“CSA”) violations are not felonies if they involve “distributing a small amount of marihuana for no remuneration.”<sup>24</sup> Because a conviction under the Georgia statute “[did] not reveal whether either remuneration or more than a small amount of marijuana was involved,” the conviction did not necessarily amount to a felony under the CSA.<sup>25</sup> In other words, Adrian could have been convicted under the Georgia statute without meeting the aggravated felony requirements.<sup>26</sup>

Writing for the majority, Justice Sonia Sotomayor clarified that “[e]scaping aggravated felony treatment does not mean escaping deportation.”<sup>27</sup> Importantly, the Georgia marijuana conviction

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15. INA § 237(a)(2)(A)(iii), § 1227(a)(2)(A)(iii); Brief for the Petitioner, *supra* note 3, at 6; *see also infra* Part I.A.2 (detailing the relationship between the federal deportability scheme and state law).

16. Brief for the Petitioner, *supra* note 3, at 5.

17. Totenberg, *supra* note 1.

18. “Removal” is synonymous with “deportation.” *Deportation*, BLACK’S LAW DICTIONARY (11th ed. 2019).

19. *Moncrieffe v. Holder*, 569 U.S. 184, 189 (2013).

20. *Id.* at 189–90. Specifically, the circuit split concerned “whether a conviction under a statute that” covered *both* felony and misdemeanor drug offenses could be an aggravated felony. *Id.*

21. *Id.* at 195.

22. INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B) (2018).

23. 18 U.S.C. § 924(c)(2) (2018).

24. 21 U.S.C. § 841(b)(4) (2018); *see also* § 841(b)(1)(D) (making the exception applicable for offenses involving “less than 50 kilograms of marihuana”).

25. *Moncrieffe*, 569 U.S. at 194–95.

26. Adrian was found with a small amount of marijuana, and there was no evidence of payment apparent from the record. *Id.* at 194. However, under the categorical approach, the courts disregard the underlying facts of the conviction, and instead look to see if the fact of conviction alone proves that the noncitizen has committed a deportable offense. *See infra* notes 80–85 and accompanying text (explaining the categorical approach).

27. *Moncrieffe*, 569 U.S. at 204.

qualified as *another* deportable offense: a controlled substances offense.<sup>28</sup> Although not the subject of the appeal, the Department of Homeland Security (“DHS”) had also charged Adrian as deportable for this offense.<sup>29</sup>

Imagine that DHS had only brought the aggravated felony charge against Adrian. After the Supreme Court had vindicated Adrian on this charge, could DHS bring him back to square one and attempt to deport him for the controlled substances offense? Is it possible for an individual to be found deportable after the government has already once failed to show that a conviction constituted a deportable offense?

The answer depends on whether, and to what extent, the next court would apply *res judicata*, otherwise known as claim preclusion. Because Adrian was originally charged under both theories, Justice Sotomayor did not directly address the *res judicata* question. But she did assert that the Court generally favors a “degree of imperfection to the heavy burden of relitigating old prosecutions.”<sup>30</sup>

Multiple circuits and the BIA have weighed in on *res judicata* in removal cases.<sup>31</sup> Recently, in *Arangure v. Whitaker*,<sup>32</sup> the Sixth Circuit ruled that *res judicata* *does* apply in removal proceedings.<sup>33</sup> But shortly thereafter, the BIA declined to adopt the Sixth Circuit’s precedent—reflecting an underlying circuit split and disagreement among branches of the government.<sup>34</sup>

As a whole, applications of *res judicata* principles in the deportation context are varied and fraught with exceptions.<sup>35</sup> For example, circuit courts disagree about how *res judicata* should apply when the defendant has multiple underlying offenses or convictions.<sup>36</sup> Particularly, disagreement arises over whether DHS should have to bring all deportability charges—across all existing convictions—at

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28. *Id.*; INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (2018). Although not asserted here, this offense also includes a carve-out for “a single offense involving possession for one’s own use of 30 grams or less of marijuana.” *Id.*

29. Brief for Respondent in Opposition at 3, *Moncrieffe*, 569 U.S. 184 (No. 11-702).

30. *Moncrieffe*, 569 U.S. at 205 (defending the categorical approach discussed in Part I.A.2).

31. *See infra* Part II.

32. *Arangure v. Whitaker*, 911 F.3d 333 (6th Cir. 2018). This Note refers to the Sixth Circuit case as *Arangure v. Whitaker* or *Arangure* and to the BIA case below as *Matter of Jasso Arangure* or *In re Jasso Arangure*.

33. *Id.* at 345.

34. *In re Gavino Quito*, 2019 WL 2464431, at \*2 (B.I.A. Feb. 13, 2019); *see also infra* Part II.B.3. (describing the BIA’s decision to not align its precedent with the Sixth Circuit).

35. *See infra* Part II.

36. *See infra* note 116 and accompanying text.

once.<sup>37</sup> This produces a haphazard administration of justice as the BIA attempts—or declines—to follow conflicting precedent.

This disjointed application of the law is incompatible with the integrity and justice that the American legal system aims to uphold. It leaves everyone involved in a state of confusion: immigrants are unable to rely on favorable deportability rulings, lawyers are unable to properly advise their clients on potential consequences of their decisions, and judges are unable to cleanly navigate the confines of preclusion set out in this precedential maze. Defining a clear standard for all tribunals making deportation determinations would promote the uniformity, justice, and efficiency that our immigration system so desperately needs.

This Note argues that Adrian—and others like him—should not be subject to new theories of deportability based on convictions that were previously litigated. *Res judicata* should apply in removal proceedings and bar relitigation of convictions found not to warrant deportation. This Note contends that DHS should be required to bring all available charges of deportability at once, regardless of the number of underlying offenses or convictions. As one court aptly put it, DHS should not be able to take “an infinite number of trips around the carousel in repeated efforts to grab the brass ring missed on the first try.”<sup>38</sup>

This Note fills a gap in scholarly literature by focusing almost exclusively on how *res judicata* should apply in removal proceedings after *Arangure*.<sup>39</sup> Part I of this Note builds a foundational understanding of immigration law and *res judicata*. It draws comparisons between the constitutional protections afforded to immigration and criminal defendants, and it discusses the statutory

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37. *Id.*

38. *Medina v. INS*, 993 F.2d 499, 503 (5th Cir. 1993).

39. For an argument that federal common law defenses, including *res judicata*, should generally apply in immigration cases, see generally Fatma E. Marouf, *Invoking Federal Common Law Defenses in Immigration Cases*, 66 UCLA L. REV. 142 (2019). For a comprehensive, pre-*Arangure* discussion of *res judicata* in all immigration proceedings, see generally Karen Moulding, Annotation, *Application of Res Judicata Doctrine in Removal, Deportation, Exclusion, or Denaturalization Proceedings*, 74 A.L.R. Fed. 2d 341 (2013). For a brief evaluation of *Matter of Jasso Arangure* before it reached the Sixth Circuit, see Alicia Triche, *Matter of Jasso Arangure Blows a Huge Hole in Res Judicata*, FED. LAW., May 2018, at 12, 37 (admonishing the BIA’s decision not to apply *res judicata*). There is more scholarship pertaining to the related doctrine of collateral estoppel as it applies to immigration law as a whole. See generally, e.g., Greg Pennington, *A Preclusive Effect: Issue Preclusion in Immigration Practice*, IMMIGR. L. ADVISOR (U.S. Dep’t of Just., Exec. Off. for Immigr. Rev., D.C.), Jan. 2015 (guiding courts on how to apply collateral estoppel in immigration proceedings).

scheme for deportation established by the Immigration and Nationality Act (“INA”)<sup>40</sup> and relevant enforcement regulations. Part II surveys precedent and current implementation of *res judicata* in removal proceedings. It gives special attention to the most recent circuit case on point, *Arangure*, and dissects the BIA’s prior rejection of *res judicata*, the Sixth Circuit’s embrace of the doctrine, and the BIA’s subsequent rebuff of the Sixth Circuit’s decision. Part III analyzes the arguments made by courts, identifying textual and structural reasons *res judicata* should apply in removal proceedings. Part IV examines the underlying reasons for applying preclusion, including fairness, finality, and efficiency. It argues that in a complex and overburdened system, uniformity in applying *res judicata* will help alleviate uncertainty and reduce administrative waste. Part V promotes a uniform and comprehensive application of *res judicata* and explores the options for implementing such a solution.

## I. FOUNDATIONAL PRINCIPLES

This Part establishes the background necessary for understanding the ways in which *res judicata* does—and should—apply in removal proceedings. First, it provides a high-level overview of relevant concepts in U.S. immigration law and adjudication. Next, it outlines the basics of the *res judicata* doctrine and how it has been applied in administrative settings.

### A. *Relevant Concepts in Immigration Law*

Immigration law is a particularly “extensive and complex” branch of civil law.<sup>41</sup> In some respects, it “has long been a maverick, a wild card” in American law: “In a legal firmament transformed by revolutions in due process and equal protection doctrine and by a new conception of judicial role, immigration law remains the realm in which government authority is at the zenith, and individual entitlement is at the nadir.”<sup>42</sup> This Section aims to unravel some of these complexities as they may relate to removal proceedings and potential relitigation. First, it establishes the constitutional framework and provides an overview of the authority allocated to the branches of government.

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40. Immigration and Nationality Act (“INA”), Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537 (2018)).

41. *Arizona v. United States*, 567 U.S. 387, 395 (2012).

42. Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984).

Next, it describes the statutory framework that governs immigration law and explains the process of deportation. Lastly, it outlines enforcement regulations that inform the ways in which *res judicata* can apply in removal proceedings.

1. *Constitutional Framework and Distribution of Regulatory and Adjudicatory Authority.* Defendants facing civil immigration charges are not afforded “most of the constitutional procedures required for criminal prosecutions.”<sup>43</sup> They have no “Sixth Amendment right to counsel, and only a limited Fourth Amendment [protection] against unreasonable searches and seizures.”<sup>44</sup> There is also “no Fifth Amendment privilege against self-incrimination”<sup>45</sup> nor double jeopardy protections<sup>46</sup> because deportation is not considered punitive.<sup>47</sup> Immigration defendants are protected by some Fifth Amendment procedural safeguards as well as “[the Due Process] Clause’s deep commitment to personal liberty,” although these rights are “applied more loosely” in the immigration context than in the criminal context.<sup>48</sup>

The Constitution vests Congress with the power “[t]o establish an uniform Rule of Naturalization.”<sup>49</sup> Along with this vested authority, the federal government enjoys broad power over immigration policy and noncitizens because of its inherent sovereign power over foreign relations and national security.<sup>50</sup> Although the separation of powers contours of immigration authority have never been clearly established, twenty-first century immigration law is arguably dominated by the executive branch, with notions of both inherent executive power and

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43. CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *CRIMMIGRATION LAW* 5 (2015).

44. *Id.*

45. *Id.*

46. U.S. CONST. amend. V (“[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .”).

47. *Cf.* HERNÁNDEZ, *supra* note 43, at 94 (explaining that the clause does not apply for immigration detention because detention is civil and not punitive).

48. *Id.* at 6, 13, 105. For example, noncitizens are entitled to deportation hearings, but these hearings are in front of executive, not judicial, officers. *Id.* at 6. Immigration judges may also address multiple defendants at once. *Id.* at 13. *But see* AM. IMMIGR. COUNCIL, *A PRIMER ON EXPEDITED REMOVAL 2* (2019), [https://www.americanimmigrationcouncil.org/sites/default/files/research/primer\\_on\\_expedited\\_removal.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/primer_on_expedited_removal.pdf) [<https://perma.cc/8J7T-BEPR>] (describing expedited removal, in which immigration officials can circumvent due process protections and remove certain noncitizens at their discretion).

49. U.S. CONST. art. I, § 8, cl. 4.

50. *Arizona v. United States*, 567 U.S. 387, 394–95 (2012).

delegated congressional power over the subject.<sup>51</sup> At any rate, the plenary power doctrine, which “sharply limit[s] judicial scrutiny of the immigration rules,” leaves immigration law largely to the political branches.<sup>52</sup>

Immigration adjudications, including removal proceedings, are housed within the Department of Justice’s Executive Office for Immigration Review (“EOIR”).<sup>53</sup> The EOIR oversees hundreds of Immigration Judges (“IJs”) who manage trial-level adjudications in more than sixty immigration courts across the country.<sup>54</sup> The EOIR also oversees the BIA, which hears appeals from the immigration courts as “the highest administrative body for interpreting and applying immigration laws.”<sup>55</sup> BIA decisions can be “modified or overruled by the Attorney General” or by “judicial review in the federal courts”<sup>56</sup> as they are directly appealable to circuit courts.<sup>57</sup> Circuit court decisions are binding on the BIA when it is deciding cases within that circuit, and thus, the BIA applies different circuit precedent depending on which court would hear an appeal.<sup>58</sup>

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51. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 *YALE L.J.* 458, 465–66 (2009). Professors Cox and Rodríguez identify a “regulatory asymmetry” in which the president has policy-making authority over removing noncitizens while Congress retains the authority over admitting noncitizens. *Id.* at 485. However, in recent years, the president has been granted broad discretion over admission as well. *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018) (upholding President Trump’s executive order “travel ban” as a proper use of executive discretion).

52. Cox & Rodríguez, *supra* note 51, at 460.

53. *About the Office*, U.S. DEP’T OF JUST., EXEC. OFF. FOR IMMIGR. REV., <https://www.justice.gov/eoir/about-office> [https://perma.cc/P6SX-UUMP].

54. *Office of the Chief Immigration Judge*, U.S. DEP’T OF JUST., EXEC. OFF. FOR IMMIGR. REV., <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge> [https://perma.cc/A3LV-V8GE].

55. *Board of Immigration Appeals*, U.S. DEP’T OF JUST., EXEC. OFF. FOR IMMIGR. REV., <https://www.justice.gov/eoir/board-of-immigration-appeals> [https://perma.cc/2C9E-D7BS].

56. *Id.*; *see also In re E-L-H-*, 23 I. & N. Dec. 814, 815 (B.I.A. 2005) (“[A] Board precedent decision applies to all proceedings involving the same issue unless and until it is modified or overruled by the Attorney General, the Board, Congress, or a Federal court.”); 8 C.F.R. § 1003.1(d)(1), (h) (2020) (outlining the attorney general’s authority over the BIA and its decisions).

57. INA § 242(a)(1), (b)(2), 8 U.S.C. § 1252(a)(1), (b)(2) (2018); HERNÁNDEZ, *supra* note 43, at 18.

58. *Ballesteros v. Ashcroft*, 452 F.3d 1153, 1157 (10th Cir. 2006) (“[A]n immigration judge should analyze removability and relief issues using only the decisions of the circuit in which he or she sits . . . since it is to that circuit that any appeal from a final order of removal must be taken.” (quoting *In re Ballesteros*, 2004 WL 1167187, at \*4 (B.I.A. Feb. 18, 2004)); HERNÁNDEZ, *supra* note 43, at 18. *But see Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (“[P]rior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”).



In immigration matters, judicial deference is especially important because of the executive's "especially sensitive political functions that implicate questions of foreign relations."<sup>59</sup> Thus, the BIA is typically eligible for *Chevron* deference when interpreting the INA.<sup>60</sup> Under *Chevron*,<sup>61</sup> federal courts must defer to an administrative agency's interpretation of law if (1) the statute is ambiguous and (2) the agency interpretation is reasonable,<sup>62</sup> inquiries referred to as *Chevron* step one and step two, respectively. However, the *Chevron* framework is only applicable when an agency is exercising authority delegated to it by Congress.<sup>63</sup> Furthermore, only interpretations "carrying the force of law" are eligible for *Chevron* deference.<sup>64</sup> Circuit courts that have addressed the issue have held that unpublished, and therefore nonprecedential, BIA decisions do not carry the force of law.<sup>65</sup> This poses questions of if and when the judiciary should defer to the BIA's interpretation of whether the INA obliges application of *res judicata*.<sup>66</sup> This Note argues that the BIA is not eligible for deference because: (1) Congress has not delegated authority to the BIA to determine the question and (2) the INA is unambiguous regarding *res judicata*.<sup>67</sup>

2. *The INA and the Deportation Pipeline.* The INA, as amended over the past seven decades, is the basis for immigration law in the United States.<sup>68</sup> It establishes the bases for inadmissibility and deportability, which, although distinct from each other, both result in

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59. *Negusie v. Holder*, 555 U.S. 511, 517 (2009) (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)).

60. *Id.* at 516.

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

62. *Id.* at 842–43.

63. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

64. *Id.*

65. *See, e.g., Arobelidze v. Holder*, 653 F.3d 513, 519–20 (7th Cir. 2011) (discussing the decisions of other circuit courts in overruling a Seventh Circuit decision to the contrary).

66. *See infra* Part III.A. Although beyond the scope of this Note, there is some disagreement about whether *res judicata* is a purely procedural matter (where agencies have broad discretion) or an issue of statutory interpretation (where *Chevron* deference is applicable). *Compare* *Johnson v. Whitehead*, 647 F.3d 120, 128–29 (4th Cir. 2011) (*preclusion as a procedural matter*), *with* *Arangure v. Whitaker*, 911 F.3d 333, 345 n.7 (6th Cir. 2018) (*res judicata as a matter of statutory interpretation*). This Note assumes that it is an issue of statutory interpretation. *See* *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (assessing *res judicata* as a matter of statutory interpretation).

67. *See infra* Part III.A.

68. *Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/legal-resources/immigration-and-nationality-act> [<https://perma.cc/8MKH-QV7G>].

the removal of noncitizens unless they are entitled to some form of relief. Inadmissibility applies to those who are “ineligible” for admission to the United States.<sup>69</sup> Deportability, on the other hand, applies to those who were formally “admitted” to the United States but have since lost legal permission to remain in the country.<sup>70</sup> Although the INA prescribes criminal penalties for some violations, removal is a civil remedy.<sup>71</sup> INA § 237 lists the various deportability charges that immigration officials<sup>72</sup> may bring against noncitizens.<sup>73</sup> Among the offenses that can lead to deportation are immigration violations, such as overstaying a visa or simply being “[p]resent in violation of law.”<sup>74</sup> Criminal offenses, including crimes involving moral turpitude, aggravated felonies, certain drug offenses, firearm offenses, crimes of domestic violence, and trafficking, also render noncitizens deportable.<sup>75</sup> This includes a sweeping number of offenses; aggravated felonies alone include twenty-eight different categories of crime, ranging from murder to alteration of a passport.<sup>76</sup>

Charges under § 237(a)(2) are predicated on separate, underlying criminal convictions—whether federal, state, or local. In other words, immigration officials bring deportation charges based on convictions that noncitizens have already received.<sup>77</sup> Immigration officials can

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69. INA § 212, 8 U.S.C. § 1182 (2018).

70. INA § 237, 8 U.S.C. § 1227. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) established this distinction insofar as it relies on the “admission” of a noncitizen. Pub. L. No. 104-208, § 308(f), 110 Stat. 3621–22 (codified at 8 U.S.C. §§ 1182, 1227).

71. *E.g.*, *Arizona v. United States*, 567 U.S. 387, 396 (2012).

72. Immigration officials are housed under the Department of Homeland Security (“DHS”). *Immigration Enforcement Actions*, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/immigration-statistics/enforcement-actions> [<https://perma.cc/ZQU6-ZVTF>]. Relevant DHS agencies include Immigration and Customs Enforcement (“ICE”), Customs and Border Protection (“CBP”), and Citizen and Immigration Services (“USCIS”). *Id.* ICE works in the interior of the country, looking to identify and remove noncitizens without authorization to be in the country, including those who are removable due to criminal convictions. *Id.* CBP is stationed at entry points along the U.S. border and makes decisions about whether noncitizens are admissible. *Id.* USCIS handles the administration and processing of affirmative immigration applications, such as asylum and student visa applications. *Id.*

73. INA § 237, 8 U.S.C. § 1227.

74. INA § 237(a)(1), 8 U.S.C. § 1227(a)(1). A noncitizen may also be deportable if they are found to have been inadmissible at their time of entry or when attempting to adjust their immigration status. *Id.*

75. INA § 237(a)(2), 8 U.S.C. § 1227(a)(2).

76. INA § 101(a)(43), 8 U.S.C. § 1101(a)(43).

77. The definition of conviction is broader in the immigration law setting than in the criminal law setting. Therefore, a noncitizen may be found “convicted” of a crime for immigration

bring charges at any point after the conviction,<sup>78</sup> often resulting in a looming threat of deportation for years after a criminal proceeding has ended.<sup>79</sup>

To determine if an underlying conviction qualifies as a deportable offense, courts use the “categorical approach.”<sup>80</sup> This complex test<sup>81</sup> evaluates the necessary requirements for conviction of the underlying offense and compares it to the federal removability charge. If an underlying statute criminalizes behavior that is not necessarily covered by the deportability charge, then the statute is overbroad, and the noncitizen is not deportable for a conviction under that statute.<sup>82</sup> For example, Adrian Moncrieffe was not deportable for an illicit-trafficking aggravated felony because the Georgia statute of conviction penalizes misdemeanor and felony drug offenses, whereas the federal aggravated felony definition only covers felony drug offenses.<sup>83</sup> On the other hand, if the underlying offense fits squarely within the federal deportability charge, the noncitizen is deportable for that charge. Notably, the categorical approach looks only at the fact of conviction and disregards the particular facts of the defendant’s case.<sup>84</sup> Thus, someone who actually committed an offense that fits within the definition of a federal removability charge will not be deported if the statute of conviction also criminalizes behavior that does not fit within the deportability charge.<sup>85</sup>

Adding to the complexity, deportability charges are often predicated on *state* convictions. More often than not, state criminal laws do not track the exact language of federal deportability offenses. Nor do these offenses align among states. Therefore, a conviction

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purposes, even if they were not convicted in a criminal court or if their conviction was expunged by the state. INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A).

78. See INA § 237, 8 U.S.C. § 1227 (imposing no statute of limitations on deportability charges).

79. See, e.g., *Johnson v. Whitehead*, 647 F.3d 120, 124 (4th Cir. 2011) (deportability charges predicated on convictions from six and nineteen years prior); *Bravo-Pedroza v. Gonzales*, 475 F.3d 1358, 1358–59 (9th Cir. 2007) (deportability charges predicated on convictions from four and five years prior).

80. E.g., *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986 (2015).

81. For a more thorough discussion of the categorical approach, see HERNÁNDEZ, *supra* note 43, at 30–41.

82. *Id.* at 33.

83. *Moncrieffe v. Holder*, 569 U.S. 184, 195–96 (2013).

84. *Id.* at 190.

85. See *id.* at 205 (“[W]e err on the side of underinclusiveness because ambiguity in criminal statutes referenced by the INA must be construed in the noncitizen’s favor.”).

under one state law may lead to deportability while a conviction under another state’s law—prohibiting the same general activity—would not.<sup>86</sup> And because convictions are separate from deportability charges, DHS can—and often does—bring multiple deportability charges based on one conviction.<sup>87</sup> Under the categorical approach, one theory of deportability may fail whereas another may succeed. So, the question becomes whether DHS must bring all of its theories of deportability at once, or if it may bring a new theory after an original theory fails.

3. *Regulatory Guidelines for Enforcement.* The EOIR promulgates regulations for immigration officials and judges. One such regulation, 8 C.F.R. § 1003.30, dictates when new charges may be brought against a noncitizen: “At any time during deportation or removal proceedings, additional or substituted charges of deportability and/or factual allegations may be lodged by [DHS] in writing.”<sup>88</sup> To aid in applying *res judicata* principles, the regulations also specify that an immigration decision “becomes final upon waiver of appeal or upon expiration of the time to appeal.”<sup>89</sup> Removal proceedings are not final when the case is remanded,<sup>90</sup> when a case is administratively closed,<sup>91</sup> or when there is a temporary stay of the proceedings.<sup>92</sup> BIA decisions are final, however, even when they are appealed to the circuit courts.<sup>93</sup>

Debate persists about the scope of § 1003.30, particularly regarding the word “may.” The Ninth Circuit views the regulation as

86. See, e.g., *Islas-Veloz v. Whitaker*, 914 F.3d 1249, 1257 (9th Cir. 2019) (Fletcher, J., concurring) (“Some convictions under state hit-and-run statutes are crimes involving moral turpitude while other convictions are not.”).

87. See *Marouf*, *supra* note 39, at 179 (“A noncitizen placed in removal proceedings is normally charged with one or more inadmissibility or deportability grounds under the INA.”); see also *Yong Wong Park v. Att’y Gen.*, 472 F.3d 66, 73 (3d Cir. 2006) (“[I]t is not uncommon for the DHS to conceive of a single crime as qualifying both as a crime involving moral turpitude and as an aggravated felony.”).

88. 8 C.F.R. § 1003.30 (2020).

89. *Id.* § 1003.39.

90. *Id.* §§ 1003.1(d)(7), 1003.47(h).

91. E.g., *Karim v. Mukasey*, 269 F. App’x 5, 7 (1st Cir. 2008); see also *Romero v. Barr*, 937 F.3d 282, 287–88 (4th Cir. 2019) (“After the case is administratively closed, either party may reactivate the case by filing a motion to re-calendar.”). The attorney general limited the ability of IJs and the BIA to administratively close their cases. *In re Castro-Tum*, 27 I. & N. Dec. 271, 293 (Att’y Gen. 2018). However, this decision has been challenged in the circuit courts with some success. E.g., *Romero*, 937 F.3d at 297 (abrogating *Castro-Tum*, 27 I. & N. Dec. 271).

92. *Moulding*, *supra* note 39, § 2.

93. 8 C.F.R. § 1003.1(d)(7); INA § 242(b)(9), 8 U.S.C. § 1252(b)(9) (2018) (stating that circuit courts can only review final orders).

giving DHS the ability to assert new claims during the removal proceeding, but not after the proceeding has become final.<sup>94</sup> In contrast, at least one other circuit finds the word “may” to be more permissive.<sup>95</sup> Under this interpretation, the fact that DHS may bring new charges during the proceedings does not preclude DHS from bringing new charges after the proceeding has been terminated.<sup>96</sup>

*B. Res Judicata: From Common Law to Administrative Adjudication*

Res judicata, also known as claim preclusion, is derived from common law.<sup>97</sup> The doctrine “bar[s] the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been—but was not—raised in the first suit.”<sup>98</sup> It applies if the same issue was previously litigated, there was “a final judgment on the merits,” and the same parties were involved.<sup>99</sup> Res judicata encourages parties to bring any and all claims against each other in one proceeding, limiting them to only one bite at the apple.<sup>100</sup> This goal of efficiency is prevalent throughout civil law and is a driving force behind the related doctrine of collateral estoppel,<sup>101</sup> as well as procedural rules surrounding counterclaims,<sup>102</sup> joinder,<sup>103</sup> and supplemental jurisdiction.<sup>104</sup>

The Supreme Court has held that common law principles, such as res judicata, should be read into legislation as long as Congress has not

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94. See *Bravo-Pedroza v. Gonzales*, 475 F.3d 1358, 1360 (9th Cir. 2007) (“It says nothing about new charges after one proceeding is over.”).

95. See *Channer v. Dep’t of Homeland Sec.*, 527 F.3d 275, 282 (2d Cir. 2008) (“The regulation permits but does not affirmatively require DHS to supplement already existing charges.”); see also *Arangure v. Whitaker*, 911 F.3d 333, 346 (6th Cir. 2018) (citing § 1003.30 with emphasis on “may”).

96. *Channer*, 527 F.3d at 282 (“[W]e do not find that § 3.30 required DHS to lodge all deportation charges against [defendant] in a single proceeding.”).

97. *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 107 (1991).

98. *Res Judicata*, BLACK’S LAW DICTIONARY (11th ed. 2019).

99. *Id.*

100. *Pennington*, *supra* note 39, at 2.

101. *Id.* Collateral estoppel, also known as issue preclusion, is a “narrower . . . cousin” of res judicata. *Id.* This doctrine bars relitigation of discrete issues that were actually decided in prior litigation, even if the two suits are unrelated. *Id.*

102. See FED. R. CIV. P. 13(a)(1)(A) (requiring pleaders to bring counterclaims against a party if they “arise out of the [same] transaction or occurrence” as the other party’s claim).

103. See FED. R. CIV. P. 20(a) (allowing parties to join if their claims for relief arise out of the same transaction or occurrence).

104. See 28 U.S.C. § 1367(a) (2018) (granting a federal court supplemental jurisdiction over claims arising out of the same action as a claim where the federal court has original jurisdiction).

expressed a clear intent to exclude them.<sup>105</sup> Exclusionary intent can manifest “through explicit text or through an obvious inference from the statute’s structure.”<sup>106</sup>

Historically, preclusion has applied in all adjudications regardless of whether the relevant forum is a court or an agency.<sup>107</sup> As such, “a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of *res judicata*, subject to the same exceptions and qualifications, as a judgment of a court.”<sup>108</sup> Nonetheless, some circuit courts have found that *res judicata* is more “flexibl[e]” in administrative proceedings.<sup>109</sup> *Res judicata*’s “suitability may vary according to the specific context of the rights at stake, the power of the agency, and the relative adequacy of agency procedures.”<sup>110</sup> Regarding issues that are initially adjudicated in administrative fora, relitigation in federal courts may be “warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation.”<sup>111</sup>

## II. A PRECEDENTIAL MAZE

Over the last few decades, courts have come to varying conclusions about if, and how, *res judicata* should apply in removal proceedings. This Part explores the different approaches that have led to this divergence and the most recent developments in the precedential landscape.

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105. See *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991) (finding that common law “rules of preclusion” should be read into a statute unless Congress indicates otherwise).

106. *Arangure v. Whitaker*, 911 F.3d 333, 344 (6th Cir. 2018).

107. See *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966) (“When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.”). Cf. *Duvall v. Att’y Gen.*, 436 F.3d 382, 390 (3d Cir. 2006) (referencing the longstanding assumption that collateral estoppel applies in all “adjudicative” proceedings).

108. RESTATEMENT (SECOND) OF JUDGMENTS § 83(1) (AM. L. INST. 1982).

109. See, e.g., *Alvear-Velez v. Mukasey*, 540 F.3d 672, 677 (7th Cir. 2008) (“[W]e have applied *res judicata* much more flexibly in the administrative context.”).

110. *Astoria*, 501 U.S. at 109–10.

111. *B&B Hardware, Inc. v. Hargis Indus.*, 575 U.S. 138, 158 (2015) (quoting *Montana v. United States*, 440 U.S. 147, 164 n.11 (1979)).

### A. *Pre-Arangure State of Affairs*

Although *Arangure* is the most recent — and perhaps most direct — federal court ruling on the topic, the Sixth Circuit was hardly the first court to address the application of res judicata in removal proceedings. Before *Arangure*, circuits had reached different conclusions, resulting in obscurity and a haphazard application of the principle. Some circuits have applied res judicata in removal proceedings — or have insinuated that it may apply.<sup>112</sup> Others have limited the application of res judicata in removal proceedings or have insinuated that it should not apply at all.<sup>113</sup> Many of these latter circuits focused their reasoning on the clear congressional intent to deport noncitizens convicted of crimes.<sup>114</sup> Other circuits have yet to directly address the matter or have declined to come down one way or the other.<sup>115</sup>

There are a couple of wrinkles in the inquiry, especially regarding separate convictions. It is unclear whether res judicata should apply where there are two convictions and the first proceeding addressed only one of the convictions, but the other conviction was known — or should have been known — by the government at the time of the first

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112. See *Bravo-Pedroza v. Gonzales*, 475 F.3d 1358, 1360 (9th Cir. 2007) (holding that DHS could not bring new deportability charges based on a conviction when a prior removal proceeding regarding the same conviction had been terminated); *Duvall*, 436 F.3d at 387–88 (holding that the doctrine of collateral estoppel is incorporated into the INA as long as it “does not frustrate congressional intent or impede the effective functioning of the agency”); *Medina v. INS*, 993 F.2d 499, 504 (5th Cir. 1993) (holding that res judicata applied in a removal proceeding because the petitioner’s citizenship was conceded by the government during a prior exclusion proceeding).

113. See *Johnson v. Whitehead*, 647 F.3d 120, 129 (4th Cir. 2011) (“Courts must thus refrain from imposing judge-made preclusion principles on agencies unless such a course is dictated by statute.”); *Duhaney v. Att’y Gen.*, 621 F.3d 340, 354 (3d Cir. 2010) (finding that “the Government was permitted to lodge new charges of removability, even based on convictions that were disclosed” before prior proceedings were terminated); *Channer v. Dep’t of Homeland Sec.*, 527 F.3d 275, 282 (2d Cir. 2008) (holding that DHS is not required to “lodge all deportation charges . . . in a single proceeding”); *Yong Wong Park v. Att’y Gen.*, 472 F.3d 66, 73 (3d Cir. 2006) (holding that judicial estoppel did not prevent DHS from alleging a new ground of removability, in part because “there is no requirement that the [DHS] advance every conceivable basis for [removability] in the [Notice to Appear]” (alteration in original) (quoting *De Faria v. INS*, 13 F.3d 422, 424 (1st Cir. 1993))).

114. *Duhaney*, 621 F.3d at 351 (“The fact that Congress has specifically chosen to amend the immigration laws to facilitate the removal of aliens who have committed aggravated felonies counsels against an overly rigid application of the res judicata doctrine.”); *Channer*, 527 F.3d at 280 n.4 (“[A] doctrine of repose should not be applied so as to frustrate clearly expressed congressional intent.”).

115. See, e.g., *Cardona v. Holder*, 754 F.3d 528, 529–30 (8th Cir. 2014) (declining “to decide whether res judicata applies in immigration proceedings” because res judicata would be inapplicable either way).

proceeding.<sup>116</sup> There is agreement, however, that *res judicata* does not apply when a second conviction could not have been known or had not yet occurred at the time of the first proceeding.<sup>117</sup> Generally, courts have not applied *res judicata* “[w]here a prior conviction is combined with a new conviction for purposes of the subsequent proceeding . . . at least where the combination qualifies as a new or different ground for removal.”<sup>118</sup> An example of this would be a charge of removability for convictions of “two or more crimes involving moral turpitude.”<sup>119</sup> Suppose a noncitizen were convicted of a criminal offense that qualified as a crime involving moral turpitude and DHS charged them as removable. They were not found removable for this conviction but were subsequently convicted of another criminal offense that DHS alleges is a crime involving moral turpitude. DHS would be permitted to bring a new removability charge based on this new conviction.<sup>120</sup> Some courts, however, would apply *res judicata*, prohibiting DHS from combining the new conviction with the previously litigated conviction to charge the noncitizen as removable for committing two or more crimes involving moral turpitude.<sup>121</sup>

Moreover, Congress has the power to create new deportability charges, making it more difficult to assess a noncitizen’s risk of deportation. For example, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) amended the INA by expanding aggravated felony charges and retroactively applying them.<sup>122</sup> Thus, if a noncitizen were found not deportable during a

116. Compare *Channer*, 527 F.3d at 281 (“While the remedy for each claim is identical—deportation for committing an aggravated felony—the contrasting evidence required to prove each claim and the different elements of each crime demonstrate that they do not form a convenient trial unit.”), and *Yong Wong Park*, 472 F.3d at 73 (finding it “inappropriate to apply” judicial estoppel), with *Al Mutarreb v. Holder*, 561 F.3d 1023, 1031 (9th Cir. 2009) (“[R]es judicata bars [DHS] from ‘initiating a second deportation case on the basis of a charge that [it] could have brought in the first case,’ but did not.” (third and fourth alterations in original) (quoting *Bravo-Pedroza*, 475 F.3d at 1358)), and *Pennington*, *supra* note 39, at 2 n.2 (“[C]laim preclusion could bar the Government from initiating a second removal case on the basis of a charge that could have been brought in the first instance but was not.”).

117. See, e.g., *Whitehead*, 647 F.3d at 131 (holding that “repeat offenders” cannot be immunized from deportation based on “the termination of earlier removal proceedings”); *Duvall*, 436 F.3d at 391 (“Legislative policy dictates that the bar against relitigation must drop when the alien continues to commit criminal acts after initial immigration proceedings.”).

118. Moulding, *supra* note 39, § 2.

119. INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) (2018).

120. See *supra* note 117 and accompanying text.

121. E.g., *Bravo-Pedroza*, 475 F.3d at 1360.

122. IIRIRA, Pub. L. No. 104-208, § 321(b), 110 Stat. 3009–546, 3009–628 (codified at 8 U.S.C. § 1101(a)(43)).



removal proceeding prior to 1996, IIRIRA would give DHS the authority to assert deportability again based on the same conviction used in the previous proceeding, but under a newly established aggravated felony theory.<sup>123</sup>

Before *Arangure*, the BIA did not seem to have a clear position on res judicata in removal proceedings,<sup>124</sup> likely due to the fact that it adjudicates claims arising within different circuits.<sup>125</sup> Getting a full picture is also difficult because only published opinions have binding, precedential weight, and the “vast majority of [BIA] decisions are unpublished.”<sup>126</sup>

### B. *Arangure v. Whitaker: A Vehicle for Change?*

As the most recent circuit case to address res judicata in removal proceedings, *Arangure* may signal where the doctrine is heading. This Section traces the case from the immigration courts to the Sixth Circuit and introduces a subsequent case where the BIA declined to follow the decision.

1. *Rejection in Immigration Courts.* Ramon Jasso Arangure is a Mexican citizen who had legal permanent residency in the United States for almost twelve years before he was convicted of a home invasion under Michigan law.<sup>127</sup> A few months after his conviction, DHS charged Ramon as removable for having committed a crime-of-

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123. See *Ljutica v. Holder*, 588 F.3d 119, 127 (2d Cir. 2009) (“[A previous judgment] cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case.” (quoting *St. Pierre v. Dyer*, 208 F.3d 394, 400 (2d Cir. 2000))); *Alvear-Velez v. Mukasey*, 540 F.3d 672, 678 (7th Cir. 2008) (“[S]tatutory changes that occur after the previous litigation has concluded may justify a new action.”); see also *Duhaney v. Att’y Gen.*, 621 F.3d 340, 352 (3d Cir. 2010) (citing to *Ljutica* and *Alvear-Velez* but declining to decide the issue).

124. Compare *In re Kurremula*, 2017 WL 4736625, at \*2 (B.I.A. Aug. 10, 2017) (following the Fifth Circuit in finding that res judicata does apply to removal proceedings), with *In re Martins-Correia*, 2017 WL 1045576, at \*2 (B.I.A. Jan. 5, 2017) (allowing consideration of a previously litigated conviction in a new removal proceeding); see also *In re Fedorenko*, 19 I. & N. Dec. 57, 61–62 (B.I.A. 1984) (finding that collateral estoppel applies in removal proceedings for issues previously decided in denaturalization proceedings).

125. See *supra* note 58 and accompanying text.

126. BD. OF IMMIGR. APPEALS, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL 8–9 (2020), <https://www.justice.gov/eoir/page/file/1250701/download> [<https://perma.cc/2Z49-GPNX>]; see also 8 C.F.R. § 1003.1(g)(2) (2020) (establishing publication of precedential decisions).

127. *In re Jasso Arangure*, 27 I. & N. Dec. 178, 178–79 (B.I.A. 2017), *vacated*, *Arangure v. Whitaker*, 911 F.3d 333 (6th Cir. 2018).

violence aggravated felony.<sup>128</sup> Later that week, an IJ found him removable as charged.<sup>129</sup> Ramon promptly appealed to the BIA.<sup>130</sup>

While the appeal was pending, the Sixth Circuit decided *Shuti v. Lynch*,<sup>131</sup> which held that the applicable portion of the crime of violence definition was void for vagueness.<sup>132</sup> Because the statute underlying DHS's removability charge was no longer in effect, the BIA remanded Ramon's case and the IJ terminated the proceedings.<sup>133</sup> Two days later, DHS filed a new removal charge against Ramon: a burglary offense, which is an additional aggravated felony arising from the same home-invasion conviction.<sup>134</sup> Ramon moved to terminate this proceeding based on *res judicata*.<sup>135</sup> Denying his motion, the IJ found him removable under the new charge.<sup>136</sup> Ramon once again appealed to the BIA.<sup>137</sup>

In *Matter of Jasso Arangure*,<sup>138</sup> the BIA agreed that *res judicata* did not bar DHS's new claim.<sup>139</sup> Despite the two proceedings being brought "based on the same conviction and the same charge of removability,"<sup>140</sup> the court found that "the underlying basis for . . . each is different."<sup>141</sup> Under this interpretation, the crime of violence and burglary offenses relied on different "operative facts" because the proof required and elements of each offense were different.<sup>142</sup> The BIA asserted that the intervening Sixth Circuit case was unforeseeable and that, generally, it was unreasonable to expect DHS to bring all

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128. *Id.* at 179.

129. *Id.*

130. *Id.*

131. *Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016).

132. *Id.* at 451. The Supreme Court later held the same statute void for vagueness. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018). Derived from the Due Process Clause of the Fifth Amendment, the void for vagueness doctrine holds invalid "a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015).

133. *Jasso Arangure*, 27 I. & N. Dec. at 179.

134. *Id.*

135. *Id.*

136. *Id.* at 179–80.

137. *Id.* at 180.

138. *In re Jasso Arangure*, 27 I. & N. Dec. 178 (B.I.A. 2017), *vacated*, *Arangure v. Whitaker*, 911 F.3d 333 (6th Cir. 2018).

139. *Id.* at 181.

140. *Id.* Both charges are aggravated felonies under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2018).

141. *Jasso Arangure*, 27 I. & N. Dec. at 181.

142. *Id.* at 181–82.

potential charges at once.<sup>143</sup> In the BIA's view, enforcing *res judicata* in removal proceedings would do more harm than good.<sup>144</sup> Further, the BIA emphasized that Congress has made a clear commitment to removing noncitizens convicted of aggravated felonies, warranting a more "flexib[le] . . . application of the *res judicata* doctrine."<sup>145</sup>

This published, and therefore precedential, BIA decision had huge ramifications. First, it was unclear whether the ruling was limited to the facts at hand or whether it would be extended to cover all aggravated felonies, or even other deportability charges,<sup>146</sup> such as crimes involving moral turpitude. Second, the BIA's refusal to apply *res judicata* in this context gave DHS the power to "keep fishing for legal theories until they find one that a judge will accept."<sup>147</sup> As one practitioner put it, *Matter of Jasso Arangure* "turn[ed] *res judicata* on its head, allowing for the unstable and 'vexatious litigation' that doctrine was designed to prevent."<sup>148</sup>

2. *Revival in the Sixth Circuit.* Ramon appealed the BIA's decision to the Sixth Circuit, which vacated the BIA decision and held that the "[r]es judicata doctrine applies in removal proceedings."<sup>149</sup> The court reasoned that the BIA should not deviate from the common law *res judicata* principle absent specific direction from Congress.<sup>150</sup> The court relied on notions of "fairness and reliance" to support its adherence to the doctrine.<sup>151</sup> Further, the court looked to the INA itself for clues: "DHS's [clear and convincing] burden of proof in each removal proceeding . . . would be rendered 'largely meaningless' if DHS could repeatedly bring one proceeding after another until it got the result it wanted."<sup>152</sup>

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143. *Id.* at 182.

144. *See id.* (explaining that requiring "DHS to anticipate every possible turn of events and charge an alien with all conceivable grounds of removability would not provide the judicial economy that is a fundamental goal of *res judicata*," in part because "Immigration Judges would need to rule on multiple, redundant charges[,] . . . further burden[ing] the already backlogged immigration system").

145. *Id.* at 183.

146. Triche, *supra* note 39, at 37.

147. *Id.*

148. (quoting *Alvear-Velez v. Mukasey*, 540 F.3d 672, 677 (7th Cir. 2008)).

149. *Arangure v. Whitaker*, 911 F.3d 333, 345, 347–48 (6th Cir. 2018).

150. *See id.* at 343 ("Congress legislates against a common-law backdrop and presumably does not intend to reject that backdrop with general statutory language.").

151. *Id.*

152. *Id.* at 344 (quoting *Duvall v. Att'y Gen.*, 436 F.3d 382, 388 (3d Cir. 2006)); *see also infra* notes 197–201 and accompanying text.

The court did, however, make an important distinction: *res judicata* only prevents DHS from bringing new charges based on the same conviction.<sup>153</sup> Charges based on different convictions are not barred, “even if those convictions could have been raised in the first proceeding,” because they constitute “different factual occurrences.”<sup>154</sup> Although the court’s reasoning for this distinction is not quite clear, it drew an analogy by citing to § 1003.30.<sup>155</sup>

The court found Ramon’s case easily met two of the *res judicata* requirements: the two proceedings “involv[ed] the same parties,” and “the non-moving party could have raised the claim at issue” during the first proceeding.<sup>156</sup> It was undisputed that both proceedings involved DHS charges against Ramon and that the burglary aggravated felony charge could have been asserted at the same time as the crime-of-violence aggravated felony charge.<sup>157</sup> This left the court to determine whether the two proceedings were based on “the same factual occurrence” and whether the decision in the first proceeding was “final.”<sup>158</sup> The court quickly disposed of the BIA ruling that the underlying bases of the two charges were different because the elements and proof necessary for the two removability charges were different.<sup>159</sup> Instead, the court found that the two charges were simply “two different theories of the case”<sup>160</sup> that relied on “the same underlying fact: his Michigan home-invasion conviction.”<sup>161</sup>

The Sixth Circuit’s decision had another caveat: for the decision in the first proceeding to be final for *res judicata* purposes, the IJ must have dismissed the claim with prejudice.<sup>162</sup> The court found that it was unclear whether the proceeding was terminated with or without

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153. *Arangure*, 911 F.3d at 346.

154. *Id.*

155. *See id.* (“At any time during deportation or removal proceedings, additional or substituted charges . . . may be lodged by [DHS] in writing.” (alteration in original) (quoting 8 C.F.R. § 1003.30 (2020))).

156. *Id.* at 345.

157. *Id.*

158. *Id.*

159. *Id.* at 345–46.

160. *Id.* at 346 (quoting *Wilkins v. Jakeway*, 183 F.3d 528, 535 (6th Cir. 1999)).

161. *Id.* at 345; *see also id.* at 346 (“[A]ny two different legal theories will emphasize different aspects of the same facts or rely on some factual details rather than others. But a party’s ‘different shading[] of the facts’ does not create two separate factual occurrences for claim preclusion.” (alteration in original) (quoting *Talismanic Props., LLC v. City of Tipp City*, 742 F. App’x 129, 132 (6th Cir. 2018))).

162. *Id.* at 347.

prejudice.<sup>163</sup> Therefore, the court did not rule on the finality of the first proceeding and remanded the case for the BIA to determine whether the second claim was precluded by the first removal proceeding.<sup>164</sup>

3. *Resistance to Arangure*. A few months after the Sixth Circuit handed down *Arangure*, the BIA declined to adopt the ruling in a case arising out of the Eighth Circuit.<sup>165</sup> In *Matter of Gavino Quito*,<sup>166</sup> defendant Simon Gavino Quito was convicted of statutory rape under Minnesota law.<sup>167</sup> DHS charged Simon with the crime-of-violence aggravated felony, and the IJ and BIA agreed that Simon was removable on this ground.<sup>168</sup> While the case was on appeal at the Eighth Circuit, the Supreme Court handed down *Sessions v. Dimaya*,<sup>169</sup> finding the relevant definition of “crime of violence” void for vagueness.<sup>170</sup> Therefore, Simon was no longer removable under the crime-of-violence aggravated felony, and the Eighth Circuit remanded the case to the BIA.<sup>171</sup>

The issue in *Matter of Gavino Quito* was “whether proceedings should be terminated with prejudice . . . or instead be remanded to the Immigration Judge to allow the DHS to lodge an additional charge of removability.”<sup>172</sup> DHS wanted to charge Simon as removable for a different aggravated felony.<sup>173</sup> Because the court had not issued Simon a final removal order, the BIA decided to allow the new charge before the IJ.<sup>174</sup>

The BIA acknowledged the Sixth Circuit’s decision in *Arangure*, but declined to adopt the ruling because Simon’s case was within a different circuit.<sup>175</sup> According to the BIA, Simon’s case was also

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163. *Id.*

164. *Id.*

165. *In re Gavino Quito*, 2019 WL 2464431, at \*2 (B.I.A. Feb. 13, 2019).

166. *In re Gavino Quito*, 2019 WL 2464431 (B.I.A. Feb. 13, 2019).

167. *Id.* at \*1.

168. *Id.*

169. *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

170. *Gavino Quito*, 2019 WL 2464431, at \*1; *see also supra* note 132.

171. *Gavino Quito*, 2019 WL 2464431, at \*1.

172. *Id.*

173. *See id.* at \*2 (citing INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A) (2018), which makes “murder, rape, or sexual abuse of a minor” an aggravated felony). It is unclear which of these acts DHS was specifically referring to, but presumably, the claim came under either the “rape” or “sexual abuse of a minor” prong of the aggravated felony.

174. *Id.*

175. *Id.*

distinguishable from *Arangure* because there had been no final termination of Simon’s removal proceedings, whereas Ramon’s had been officially terminated.<sup>176</sup> Despite these differences, the BIA explicitly dismissed *Arangure*.<sup>177</sup> This is not surprising as the BIA’s decision in *Matter of Jasso Arangure* is precedential and still applies with full force outside of the Sixth Circuit.<sup>178</sup> But because the BIA did not elaborate on why it found *Arangure* unpersuasive,<sup>179</sup> it remains to be seen how the BIA would engage with *Arangure* in a case arising in the Sixth Circuit.<sup>180</sup>

### III. THE TEXTUAL AND STRUCTURAL CASE FOR RES JUDICATA IN REMOVAL PROCEEDINGS

Textual and structural guidance are pivotal in untangling this precedential maze. Common law principles establish a strong presumption that res judicata applies in removal proceedings. Furthermore, clues within the INA, its interpretation, and its enforcement favor a robust application of res judicata and counsel against disrupting the common law presumption.

#### A. *Res Judicata as a Default*

Although the BIA is typically given *Chevron* deference in interpreting the INA,<sup>181</sup> res judicata is a fundamental legal question, and there is no evidence that Congress delegated authority over it to the BIA.<sup>182</sup> In fact, the Supreme Court has regularly resolved questions

176. *Id.* at \*2 n.2.

177. *Id.* at \*2.

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

179. *Gavino Quito*, 2019 WL 2464431, at \*2 (stating only that “we do not find *Arangure* to be persuasive, and decline to follow it in the Eighth Circuit”).

180. Of course, the BIA would be legally bound by the Sixth Circuit. *See supra* note 58 and accompanying text. Facing another res judicata question within the Sixth Circuit, the BIA could choose to issue a new precedential decision, perhaps partially overruling its decision in *Matter of Jasso Arangure*. More likely, the BIA would attempt to distinguish the case at issue or apply *Arangure v. Whitaker* without disturbing the precedent in other circuits. *See infra* Part V.B.

181. *See supra* note 60 and accompanying text.

182. *See Reply Brief of Petitioner at 1–2, Arangure v. Whitaker*, 911 F.3d 333 (6th Cir. 2018) (No. 18-3076) (arguing that the *Chevron* framework is inapplicable to “the purely legal question of whether res judicata applies in removal proceedings,” in part because it “is not the kind of question Congress would plausibly assign to agency discretion”); *see also* *Da Silva v. Att’y Gen.*, 948 F.3d 629, 635 (3d Cir. 2020) (questioning *Chevron*’s applicability and the BIA’s expertise regarding an issue of statutory construction); Michael Kagan, *Chevron’s Liberty Exception*, 104 IOWA L. REV. 491, 495 (2019) (asserting that *Chevron* is not “meaningfully” applied in removal cases).

of whether preclusion applies to agency adjudications without any mention of *Chevron*.<sup>183</sup> Accordingly, this Note argues that the *Chevron* framework is inapplicable.

But even if the *Chevron* framework did apply, deference would not be afforded under step one because the INA is unambiguous regarding res judicata.<sup>184</sup> Although the INA lacks the explicit language that courts primarily turn to in evaluating whether a statute is ambiguous,<sup>185</sup> statutes without clear language, like the INA, can only be ambiguous if congressional intent is unclear.<sup>186</sup> Congress is assumed to legislate against a backdrop of common law principles, such as res judicata, unless it expresses clear intent to dispose of them.<sup>187</sup> Res judicata is in the background of all civil law and is often thought of as a default.<sup>188</sup> Congress did not disturb this default, which is evidence of its intent that “[t]he common-law presumption of res judicata makes the INA unambiguous” and leaves no room for deference to the BIA.<sup>189</sup> Further, res judicata “implicates similar fairness and reliance concerns to the presumption against retroactivity,”<sup>190</sup> which similarly makes a statute unambiguous for *Chevron* purposes.<sup>191</sup> Even assuming,

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183. See generally *B&B Hardware, Inc. v. Hargis Indus.*, 575 U.S. 138 (2015) (Trademark Trial and Appeal Board); *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104 (1991) (state administrative agencies resolving age discrimination claims); *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966) (Atomic Energy Commission’s Advisory Board of Contract Appeals). *Utah Construction* was decided before *Chevron*, further supporting the inquiry’s independence from the *Chevron* framework. Additionally, *Chevron* has not been mentioned in recent Supreme Court cases involving “the BIA’s interpretation of criminal grounds of removal.” Kagan, *supra* note 182, at 524.

184. See *supra* note 150 and accompanying text; see also *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, 843 n.9 (1984) (establishing the primacy of congressional intent).

185. See *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) (“[T]he starting point in every case involving construction of a statute is the language itself.” (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring))); Pennington, *supra* note 39, at 1 (“There is nothing in the language of the Immigration and Nationality Act regarding issue or claim preclusion.”).

186. *Chevron*, 467 U.S. at 842–43.

187. See *supra* notes 105, 150, and accompanying text.

188. See *supra* note 105 and accompanying text.

189. *Arangure v. Whitaker*, 911 F.3d 333, 345 (6th Cir. 2018).

190. *Id.* at 343. The presumption against retroactivity dictates that statutes are not understood to apply to events occurring before their enactment without explicit direction from Congress. *Id.* at 342. Similar to res judicata, “[s]ilence in this situation is a congressional choice, not a delegation to the agency.” *Id.*

191. *INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) (“Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously

*arguendo*, that the INA was entitled to deference under *Chevron* step one, there are persuasive textual and structural reasons why the BIA's interpretation in *Matter of Jasso Arangure* is unreasonable and would not pass *Chevron* step two.<sup>192</sup> Thus, this presumption of *res judicata* should not be disturbed.

*B. The INA: Textual, Interpretative, and Enforcement Clues*

The INA does not include a provision affirming or discounting the application of *res judicata* in immigration proceedings.<sup>193</sup> But an analysis of the statutory scheme, as well as the judicial approach and administrative regulations that flow from it, signal that Congress did not intend to disturb the presumption of *res judicata*. Most notably, INA § 238, which establishes special removal procedures for certain noncitizens convicted of aggravated felonies, creates an exception to preclusion.<sup>194</sup> Therefore, Congress's silence on preclusion elsewhere in the INA implies a normal application of the doctrine throughout the rest of the statute.<sup>195</sup> As the Third Circuit stated, “[t]here would be no reason for Congress to include this provision unless it anticipated that [preclusion] would otherwise apply in proceedings under the INA.”<sup>196</sup>

The clear and convincing burden of proof for deportation, as required by INA § 240, is further evidence that *res judicata* is meant to apply.<sup>197</sup> The heightened burden placed on DHS signals a congressional intent to encourage comprehensive deportation charges and is inconsistent with a rejection of *res judicata*. As the Sixth Circuit noted in *Arangure*, “DHS’s burden of proof in each removal proceeding . . . would be rendered ‘largely meaningless’ if DHS could repeatedly bring

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prospective, there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve.” (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 264 (1994))).

192. See *infra* Part III.B.

193. Pennington, *supra* note 39, at 1.

194. INA § 238(c)(4), 8 U.S.C. § 1228(c)(4) (2018) (“Denial of a request for a judicial order of removal shall not preclude the Attorney General from initiating removal proceedings . . . upon the same ground of deportability or upon any other ground of deportability . . .”).

195. See *Expressio Unius Est Exclusio Alterius*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“[T]o express or include one thing implies the exclusion of the other, or of the alternative.”).

196. *Duvall v. Att’y Gen.*, 436 F.3d 382, 388 (3d Cir. 2006).

197. INA § 240(c)(3)(A), 8 U.S.C. § 1229a(c)(3)(A) (“In the proceeding [DHS] has the burden of establishing by clear and convincing evidence that . . . the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.”).



one proceeding after another until it got the result it wanted.”<sup>198</sup> This burden must be met with the evidence presented at a hearing,<sup>199</sup> and the Third Circuit has interpreted this to mean that DHS “bears the burden of proving removability based on evidence offered during a *single* immigration hearing.”<sup>200</sup> If preclusion doctrines did not apply, DHS “would have no real incentive to marshal all of its evidence or present its best case” because it could simply try again.<sup>201</sup>

Additional clues are found in Supreme Court adjudication of deportability charges. The Court employs the categorical approach, which aims to avoid “*post hoc* investigation[s] into the facts of predicate offenses.”<sup>202</sup> In *Moncrieffe v. Holder*,<sup>203</sup> the Court espoused a goal to “promote[] judicial and administrative efficiency by precluding the relitigation of past convictions.”<sup>204</sup> The Court has also suggested that the high costs of relitigating a criminal conviction justify the categorical approach, which results in some noncitizens escaping removal despite having committed the removable activity.<sup>205</sup> These values are easily translatable to the *res judicata* debate and suggest that tribunals should prioritize efficiency and limit relitigation, even if it means some noncitizens would escape deportation simply because DHS did not bring all relevant charges.

The EOIR regulations designed to enforce the INA provide more guidance. The Second Circuit found that 8 C.F.R. § 1003.30 permits DHS to bring new claims after a proceeding becomes final.<sup>206</sup> This infers quite a bit from the regulation. The argument is that the word “may” is permissive in that while DHS has the option to bring its claims during the proceeding, it may also bring the claims at other times.<sup>207</sup> The more logical interpretation, and the one endorsed by this Note, would be that the regulation allows DHS to bring alternative claims during the proceeding, but it does not confer the right at any other

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198. *Arangure v. Whitaker*, 911 F.3d 333, 344 (6th Cir. 2018) (quoting *Duvall*, 436 F.3d at 388).

199. *See* INA § 240(c)(1)(A), 8 U.S.C. § 1229a(c)(1)(A) (“The determination of the immigration judge shall be based only on the evidence produced at the hearing.”).

200. *Duvall*, 436 F.3d at 388 (emphasis added).

201. *Id.*

202. *Moncrieffe v. Holder*, 569 U.S. 184, 200 (2013).

203. *Moncrieffe v. Holder*, 569 U.S. 184 (2013).

204. *Id.* at 200.

205. *See supra* note 85 and accompanying text.

206. *See supra* notes 95–96 and accompanying text.

207. *Id.*

time. Considering administrative efficiency, the EOIR should allow new claims to be introduced during the proceeding, but not after. During a proceeding, all of the evidence, parties, and resources are already convened, and the noncitizen has no final judgment to rely upon. It is easier, fairer, and less expensive to introduce a claim during a proceeding. Presumably, the EOIR would have included express language if it wanted new charges to be brought during *or after* the proceeding.<sup>208</sup> Further, it would be redundant for the EOIR to include this regulation if DHS had the power to bring these claims at *any* time; as the Second Circuit reads it, the regulation is superfluous.

Section 1003.30 also helps quell potential concerns about requiring DHS to bring all charges at once. Of course, there is always a chance that all possible charges will not be apparent at first blush. But § 1003.30 allows DHS to bring new claims during the course of the proceeding. This is common for civil litigation, as the Federal Rules of Civil Procedure outline a process for amending pleadings.<sup>209</sup> In fact, the Federal Rules give plaintiffs less freedom than § 1003.30 gives DHS, as ordinary parties must amend their pleadings within twenty-one days or else receive consent of the court or other parties.<sup>210</sup> DHS is not similarly constrained and may amend its charges throughout a proceeding without consent.<sup>211</sup> Further, the reasons why a party may choose to assert new claims in typical civil litigation—like the emergence of new facts or evidence—are not as salient in immigration proceedings. Over the course of lengthy removal proceedings, the facts and evidence are unlikely to change, and at any rate, immigration courts do not look to the underlying facts of a conviction in the categorical approach analysis.<sup>212</sup> The only discoverable fact that likely materially alters the proceeding is the existence of a previously unknown conviction. Presumably, however, DHS would be able to uncover this conviction and analyze whether it warranted an additional charge of deportability within the almost year and a half that it has to litigate the matter.<sup>213</sup>

Further, under 8 C.F.R. § 1003.47, the BIA can remand the case to an IJ who may hold another hearing “[i]f new information is

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208. Cf. *City of Milwaukee v. Illinois*, 451 U.S. 304, 329 n.22 (1981) (“We prefer to read the statute as written. Congress knows how to say [something] when it means to . . .”).

209. FED. R. CIV. P. 15.

210. *Id.*

211. See *supra* note 88 and accompanying text.

212. See *supra* note 84 and accompanying text.

213. See *infra* note 273 and accompanying text (describing the average length of removal proceedings).

presented.”<sup>214</sup> At this point, DHS should only be able to bring new charges that are truly predicated on information it did not have—or could not have had—at the time of the initial hearing. And while § 1003.30 does give DHS the power to bring new charges at *any* point during the proceeding, this could be interpreted to mean that DHS can bring charges only before and during the initial hearing.<sup>215</sup> In other civil cases, amended pleadings are only allowed either before trial or due to special circumstances during or after trial.<sup>216</sup> The plaintiff failing to make their claim during the trial is not one of these special circumstances.<sup>217</sup> Especially in light of the enormous stakes, DHS should not be afforded greater flexibility in its ability to amend pleadings when it does not get it right the first time.

#### IV. THE PURPOSIVE CASE FOR RES JUDICATA IN REMOVAL PROCEEDINGS

In addition to the textual and structural evidence just described, notions of fairness and good governance also dictate that res judicata should apply in removal proceedings. In particular, the principles of fairness, finality and reliance, and efficiency that justify the common law doctrine apply equally in the immigration setting. Analysis of each of these considerations unequivocally demonstrates that the benefits of a uniform application of res judicata in removal proceedings outweigh any potential drawbacks.

##### A. *Fairness Dictates Only One Bite at the Apple*

Despite efforts like Operation Streamline<sup>218</sup> and expedited removal,<sup>219</sup> many noncitizens are still going through traditional

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214. 8 C.F.R. § 1003.47(h) (2020).

215. Although ultimately unsuccessful, at least one defendant has argued that a § 1003.30 “proceeding” only extends through IJ adjudications, not through BIA appeals. *In re Gavino Quito*, 2019 WL 2464431, at \*2 (B.I.A. Feb. 13, 2019).

216. FED. R. CIV. P. 15.

217. FED. R. CIV. P. 15(b) (permitting amended pleadings only with the parties’ consent or based on an objection at trial).

218. See HERNÁNDEZ, *supra* note 43, at 230–33 (describing Operation Streamline, which aims to criminally prosecute undocumented immigrants “en masse” prior to removal).

219. See generally AM. IMMIGR. COUNCIL, A PRIMER ON EXPEDITED REMOVAL (2019), [https://www.americanimmigrationcouncil.org/sites/default/files/research/primer\\_on\\_expedited\\_removal.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/primer_on_expedited_removal.pdf) [<https://perma.cc/8J7T-BEPR>] (describing a process in which immigration officials can circumvent normal court hearings and remove certain immigrants at their discretion). Operating largely at the border, expedited removal works against those who are inadmissible but

removal proceedings. The average deportation takes about a year and a half from the initial notice to appear to the final removal order.<sup>220</sup> Many people in these proceedings are detained during this time.<sup>221</sup> Not only are detainees taken away from their families, jobs, and homes, but detention centers may pose a threat to their mental and physical health. A June 2019 DHS Office of the Inspector General report found “unsafe and unhealthy conditions . . . at all [four] of the facilities” evaluated.<sup>222</sup> Violations included “inadequate detainee medical care,”<sup>223</sup> “spoiled and moldy food,”<sup>224</sup> improper segregation practices,<sup>225</sup> limited access to recreation space,<sup>226</sup> “unusable toilets” and mold-covered bathrooms,<sup>227</sup> lack of hygiene products and properly sized clothing,<sup>228</sup> unwarranted prohibitions on contact visitation,<sup>229</sup> and even nooses hanging in cells.<sup>230</sup>

Even if a defendant were not detained or could get out on bond, they may still face severe hardships. Because there is no Sixth Amendment right to effective counsel in civil proceedings,<sup>231</sup> noncitizens must pay for representation, find pro bono services, or represent themselves *pro se*. There is also the logistical issue of getting to immigration court. Currently, more than twenty states have no

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nevertheless enter the country. *Id.* at 2; *see also supra* note 69 and accompanying text (describing inadmissibility).

220. *See infra* note 273 and accompanying text.

221. *Moncrieffe v. Holder*, 569 U.S. 184, 201 (2013). In fiscal year 2018, 396,448 people were booked into detention centers. U.S. IMMIGR. & CUSTOMS ENF'T, FISCAL YEAR 2018 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 8 (2018), <https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf> [<https://perma.cc/S9NP-SFQQ>].

222. OFF. OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-19-47, CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT FOUR DETENTION FACILITIES 3 (2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf> [<https://perma.cc/9E89-STUG>].

223. *Id.*

224. *Id.*

225. *Id.* at 5.

226. *Id.* at 7.

227. *Id.* at 8.

228. *Id.* at 9–10.

229. *Id.* at 11.

230. *Id.* at 3.

231. *See supra* note 44 and accompanying text. Criminal defense attorneys do, however, have an obligation to counsel their clients on deportation risks. *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010).

immigration courts and seventeen states only have one.<sup>232</sup> Even though Texas has almost a dozen immigration courts,<sup>233</sup> a person living in northern Texas could have to drive for more than five hours to get to the closest immigration court.<sup>234</sup> Additionally, emotional turmoil comes with the looming threat of deportation, which has been described by the Supreme Court as “‘a particularly severe penalty,’ which may be of greater concern to a convicted alien than ‘any potential jail sentence.’”<sup>235</sup>

Findings of deportability may be appealed to the BIA or federal courts. Not only can this significantly increase the total length of the proceedings, but some noncitizens, even legal permanent residents like Adrian Moncrieffe, are actually deported while their appeals are pending.<sup>236</sup> This makes it extremely difficult to litigate an appeal and unjustifiably harms a noncitizen who should not have been deported. They may leave behind family, friends, homes, and jobs to “return” to a place where they have no support network.<sup>237</sup> This was certainly true for Adrian, who left behind his citizen wife, his five citizen children, and his career when he was deported to a country he had not lived in for almost thirty years.<sup>238</sup>

In short, removal proceedings can be significant financial, logistical, and emotional burdens for noncitizens and their families. When someone has been through the lengthy and taxing process and has acquired a favorable judgment, fundamental notions of fairness dictate that they not be put through the process again.<sup>239</sup> In fact, “in

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232. *EOIR Immigration Court Listing*, U.S. DEP’T OF JUST., EXEC. OFF. FOR IMMIGR. REV. (May 29, 2020), <https://www.justice.gov/eoir/eoir-immigration-court-listing> [<https://perma.cc/VW64-PU8N>].

233. *Id.*

234. This calculation is based on a hypothetical residence in Dalhart, Texas. The closest immigration court for nondetained defendants is in Denver, Colorado. Driving Directions from Dalhart, TX, to Denver, CO, GOOGLE MAPS, <http://maps.google.com> [<https://perma.cc/A9GB-6V7N>] (follow “Directions” hyperlink; then search starting point field for “Dalhart, TX” and search destination field for “Denver, CO”).

235. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018) (quoting *Lee v. United States*, 137 S. Ct. 1958, 1968 (2017)).

236. *See supra* note 17 and accompanying text.

237. *See Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 786 (9th Cir. 2014) (describing the ways in which noncitizens may be settled in the United States but detached from their home countries).

238. *See* Brief for the Petitioner, *supra* note 3, at 4–5.

239. *See Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 107–08 (1991) (“To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution.”).

most instances it is disruptive and unfair to revive a case that has already finished.”<sup>240</sup> Because of the extended wait times and particularly grueling conditions of detention centers, this disruption and unfairness are heightened in removal proceedings.

Moreover, because they do not have a right to counsel, immigration defendants may be more likely to agree to whatever terms DHS offers them.<sup>241</sup> The government wields immense power, and it is an abuse of this power to keep bringing claims until it finds one that a judge will agree with. It is particularly unfair for the government to relitigate these cases when they could have brought the claims the first time around. A defendant should not be punished because the government chose an unwise litigation strategy.

### B. *A Win–Win: Finality and Reliance*

For the immigration system to function properly, all actors must be able to rely on decisions and have a clear understanding of when res judicata should apply. First, immigration adjudicators have an obligation to resolve cases fairly, efficiently, and in line with the INA and related regulations.<sup>242</sup> The BIA has an additional duty to “provide clear and uniform guidance to [DHS], the immigration judges, and the general public on the proper interpretation and administration” of the law and regulations.<sup>243</sup> These duties are of particular importance in a system where immigration defendants, who have no right to legal counsel and may be detained during proceedings, are likely to be *pro se* defendants with limited access to resources.<sup>244</sup> A clear and robust application of res judicata could aid the BIA and IJs in fulfilling their duties to provide for timely deportation determinations that can be relied upon.

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240. *Arangure v. Whitaker*, 911 F.3d 333, 343 (6th Cir. 2018).

241. See HERNÁNDEZ, *supra* note 43, at 111 (“Without counsel, the typical defendant is left to fend off the state’s impressive power to punish without the tools needed to navigate legal processes.”).

242. 8 C.F.R. § 1003.1(d)(1) (2020) (BIA); *id.* § 1003.10(b) (IJs).

243. *Id.* § 1003.1(d)(1).

244. See *Moncrieffe v. Holder*, 569 U.S. 184, 201 (2013) (“[N]oncitizens are not guaranteed legal representation and are often subject to mandatory detention, where they have little ability to collect evidence.” (citing INA § 236(c)(1)(B), 8 U.S.C. § 1226(c)(1)(B) (2018); Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 5–10 (2008); Brief for National Immigrant Justice Center et al. as Amici Curiae in Support of Petitioner at 5–18, *Moncrieffe*, 569 U.S. 184 (No.11-702); Brief for Immigration Law Professors as Amici Curiae in Support of Petitioner at 27–32, *Moncrieffe*, 569 U.S. 184 (No. 11-702))).

Second, giving adjudicators the chance to understand and consider all potential grounds of removability at once aids DHS in its mission to ensure “the return of all removable aliens to their country of origin.”<sup>245</sup> Thus, bringing all possible claims serves a prophylactic function and preserves DHS’s causes of action in the face of uncertainties. For example, in its case against Adrian Moncrieffe, DHS protected its claim of deportability by bringing multiple charges. Although the Court found that his conviction was not an aggravated felony, he was still properly deportable for the controlled substances offense.<sup>246</sup> Had DHS not brought both charges, it would have had to go through the trouble of filing new charges, potentially after the case had gone all the way to the Supreme Court. Additionally, there may be no way for DHS to anticipate that a deportability offense will be found vague, or otherwise void, in the courts.<sup>247</sup> Recall that Ramon Jasso Arangure was charged as removable only under a crime of violence charge later found void.<sup>248</sup> When DHS sought to charge him as removable for a different offense after the proceedings were terminated, he raised a res judicata defense.<sup>249</sup> It took more than three-and-a-half years to get from the initial notice to appear<sup>250</sup> to the Sixth Circuit’s decision that res judicata applied.<sup>251</sup> And even then the Sixth Circuit still did not resolve whether DHS could bring the second charge.<sup>252</sup> A clear application of res judicata would lead to greater certainty for DHS and would prevent DHS from having to predict what removability grounds may later be superseded or nullified. And, of course, this certainty would aid IJs, the BIA, and the federal judiciary as they attempt to navigate the presently murky waters of res judicata in removal proceedings, and it would prevent inconsistent decisions among different authorities.

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245. *Removal*, U.S. IMMIGR. & CUSTOMS ENF’T (Apr. 17, 2020), <https://www.ice.gov/removal> [<https://perma.cc/3LQN-ZKV3>].

246. See Brief for Respondent in Opposition, *supra* note 29, at 5–6 (stating that Adrian was found deportable “as charged” and that he only appealed the aggravated felony ground of removal). The aggravated felony designation bars many avenues of relief from removal. See HERNÁNDEZ, *supra* note 43, at 67–90 (describing the eligibility requirements for various forms of relief). Because of his particular circumstances, Adrian was likely eligible for relief for the controlled substances offense. Totenberg, *supra* note 1.

247. See *supra* note 132 and accompanying text.

248. *Id.*

249. See *supra* note 135 and accompanying text.

250. *In re Jasso Arangure*, 27 I. & N. Dec. 178, 179 (B.I.A. 2017), *vacated*, *Arangure v. Whitaker*, 911 F.3d 333 (6th Cir. 2018) (“[DHS] issued a notice to appear on April 21, 2015 . . .”).

251. *Arangure v. Whitaker* was decided on December 18, 2018. *Arangure*, 911 F.3d at 333.

252. See *supra* note 164 and accompanying text.

To be sure, there could be various reasons why DHS might not initially bring all potential removability charges. For example, immigration officials may face pressure to carry out enforcement as quickly as possible and may only bring the claim perceived as the strongest.<sup>253</sup> An officer could also make an honest mistake in failing to bring all charges, or DHS may attempt to reduce its administrative burden in investigating and filing charges. This additional burden should not be dismissed, especially in light of the severe immigration court backlog. But oftentimes, multiple charges will be brought on the same conviction and will not require DHS to conduct much more fact-finding or legal analysis.<sup>254</sup> Even if the charges are based on separate convictions, the burden of filing an additional charge at the outset will be lighter than the burden of filing an entirely new case—or attempting to reopen a case—after a proceeding has concluded. It is simply easier to work through all possible theories of removal while the parties are convened, allowing adjudicators to make a final determination based on all relevant considerations.

Importantly, this requirement does not infringe on DHS's prosecutorial discretion, but rather it incentivizes DHS to bring comprehensive theories of deportability at the outset. DHS officers, like prosecutors, have discretion to decide what charges, if any, they will bring against noncitizens.<sup>255</sup> A broad application of *res judicata* will still allow DHS to make these determinations but will simply require DHS to bring all possible charges when any charge is brought—or else forfeit them. In this way, *res judicata* has a similar function in

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253. See Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409 (July 23, 2019) (indicating that “prompt removal” is a goal of DHS).

254. Recall that both Adrian Moncrieffe and Ramon Jasso Arangure were charged with two different deportability charges predicated on the same conviction—a Georgia marijuana conviction and a Michigan home-invasion conviction, respectively. See *supra* notes 158–61 and accompanying text (describing how the Sixth Circuit analyzed Ramon's two convictions as part of the same factual occurrence).

255. See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.”); Memorandum from John Morton, Dir., ICE, to All Field Office Directors et al., Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [<https://perma.cc/5JQN-XEHQ>] (describing the scope of ICE's prosecutorial discretion).



immigration proceedings as double jeopardy has in criminal proceedings: a permissible restraint on prosecutorial discretion.<sup>256</sup>

Third, if people are required to follow American laws, they should expect the U.S. government will follow them too.<sup>257</sup> Part of the government's legitimacy comes from the idea that there are processes that will be followed to generate results that people can trust and rely on. After the termination of a removal proceeding, noncitizens need to be able to go back to their lives with the assurance that their lives will not be uprooted by deportation.<sup>258</sup> Not only is this necessary for their own peace of mind, but it incentivizes people to invest in themselves and their communities.<sup>259</sup>

Often, deportability charges are lodged against a noncitizen years after a conviction.<sup>260</sup> Adrian Moncrieffe, for example, was charged as deportable two years after he pleaded guilty to the drug offense.<sup>261</sup> This temporal distance only increases if a noncitizen prevails in a proceeding and then is later charged again. In many cases, noncitizens have spent years building their lives on the assumption that they are not deportable. An emphasis on finality and reliance also supports the idea that intervening laws should not unravel *res judicata*.<sup>262</sup> When a noncitizen receives a judgment from the courts of this country, they deserve assurance that the court's decision is definitive in the moment and will not be upset unless they commit a new offense.

Lastly, this certainty will help the legal profession, as immigration lawyers will be able to better represent their clients. Without a clear understanding of how many times a noncitizen can face deportability charges for the same—or different—conviction, attorneys are unable

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256. See *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (finding that the “double jeopardy guarantee serves principally as a restraint on courts and prosecutors”).

257. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 284 (1990) (Brennan, J., dissenting) (“If we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them.”).

258. See *McLeod v. Peterson*, 283 F.2d 180, 183 (3d Cir. 1960) (“[T]here must be an end to litigation and thus, to uncertainty, so that officials and other persons may perform their duties and conduct their lives on the basis of reasonably firm principles and premises.”).

259. See Mai Thi Nguyen & Hannah Gill, *Interior Immigration Enforcement: The Impacts of Expanding Local Law Enforcement Authority*, 53 URB. STUD. 302, 318 (2016) (describing how the threat of deportation negatively impacts civic engagement and economic welfare).

260. See *supra* note 79.

261. Brief for the Petitioner, *supra* note 3, at 6.

262. See *infra* Part V.A.2.

to confidently advise their clients on the best course of action.<sup>263</sup> This extends to criminal defense lawyers who craft strategies to avoid immigration consequences for their clients, and it could affect many client decisions, like whether or not to accept a plea deal. In fact, there may be a disincentive for noncitizens to plead guilty to criminal offenses because of uncertainty about how it will affect their immigration status—now or in the future.

C. *Efficiency When It is Needed Most*

Efficiency is a common goal of government activity, especially civil litigation.<sup>264</sup> Immigration proceedings are no different in this respect. It is good policy to encourage immigration officials to bring all possible charges in one proceeding in order to make the most out of limited government resources. *Res judicata* in removal proceedings puts pressure on DHS to get it right the first time, which is imperative because immigration courts are extremely overwhelmed with no reprieve in sight. Yet there remains some flexibility for DHS, as 8 C.F.R. § 1003.47 provides a way to amend complaints if new charges become available during investigations—without initiating unnecessary proceedings and wasting valuable resources.<sup>265</sup>

At the end of fiscal year 2019, there were 987,274 pending cases under EOIR’s purview, a 341-percent increase from fiscal year 2009.<sup>266</sup> This data does not include an additional 322,535 reopened cases that had not been calendared.<sup>267</sup> Thus, there was an average of more than 2,000 cases per judge, or more than 3,000 cases per judge if the reopened cases were taken into account.<sup>268</sup> If the immigration courts were to stop accepting new matters today, it would take “an estimated 4.4 years to work through this accumulated backlog.”<sup>269</sup>

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263. See *infra* note 294 (explaining safe harbor pleas and the Sixth Amendment obligations attorneys hold in advising criminal defendants of immigration consequences).

264. See *supra* notes 101–04 and accompanying text.

265. See *supra* Part III.B.

266. U.S. DEP’T OF JUST. EXEC. OFF. FOR IMMIGR. REV., ADJUDICATION STATISTICS: PENDING CASES (2019), <https://www.justice.gov/eoir/page/file/1060836/download> [<https://perma.cc/XJ9M-N3WT>].

267. *Crushing Immigration Judge Caseloads and Lengthening Hearing Wait Times*, TRAC IMMIGR., (Oct. 25, 2019) [hereinafter TRAC, *Lengthening Wait Times*], <https://trac.syr.edu/immigration/reports/579> [<https://perma.cc/J4YL-ZBX8>].

268. *Id.*

269. *Id.*

The spike in pending cases is not a result of increased filings but rather is due to a backlog of adjudications that are taking longer and longer to complete.<sup>270</sup> The decision to reopen cases “has caused a much greater increase in the court’s backlog than have all currently pending cases from families and individuals arrested along the southwest border seeking asylum.”<sup>271</sup> Although wait times vary drastically by location, some immigration courts are scheduling hearings more than four years out.<sup>272</sup> As of May 2018, cases resulting in removal were spanning an average of 501 days from notice to appear to decision.<sup>273</sup> This is a 42-percent increase in length from fiscal year 2016 (the last full fiscal year of the Obama presidency).<sup>274</sup> These figures do not account for the almost 30,000 people who opted to depart the U.S. voluntarily in 2018.<sup>275</sup> It also could not possibly include the additional delays resulting from the response to the COVID-19 crisis, which included postponement of preliminary master calendar hearings for nondetained defendants.<sup>276</sup>

The amount of money poured into these adjudications has steadily increased as well. For fiscal year 2019, the EOIR received \$505 million

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270. *Immigration Court Backlog Jumps While Case Processing Slows*, TRAC IMMIGR., (June 8, 2018) [hereinafter TRAC, *Backlog Jumps*], <https://trac.syr.edu/immigration/reports/516> [<https://perma.cc/5QNV-QHQW>].

271. TRAC, *Lengthening Wait Times*, *supra* note 267.

272. *Id.*

273. TRAC, *Backlog Jumps*, *supra* note 270.

274. *Id.*

275. Christie Thompson & Andrew R. Calderón, *More Immigrants Are Giving Up Court Fights and Leaving the U.S.*, MARSHALL PROJECT (May 8, 2019, 5:00 AM), <https://www.themarshallproject.org/2019/05/08/more-detained-immigrants-are-giving-up-court-fights-and-leaving-the-u-s> [<https://perma.cc/K4RJ-U7LC>].

276. *See* DOJ EOIR (@DOJ\_EOIR), TWITTER (Mar. 15, 2020, 10:49 PM), [https://twitter.com/DOJ\\_EOIR/status/1239383175882776576](https://twitter.com/DOJ_EOIR/status/1239383175882776576) [<https://perma.cc/XFY4-YXY6>] (announcing the postponement beginning March 15, 2020). For example, one of my clients in the Duke University School of Law Immigrant Rights Clinic had a master calendar hearing scheduled for March 2020, which was rescheduled to January 2023. Of note, master calendar hearings are preliminary in nature, and the merits of a case are generally tried at a later individual hearing. U.S. DEP’T OF JUST., OFF. OF THE CHIEF IMMIGR. JUDGE, IMMIGRATION COURT PRACTICE MANUAL 66, 79 (2020), <https://www.justice.gov/eoir/page/file/1284746/download> [<https://perma.cc/VUE2-VW45>].

from federal taxes,<sup>277</sup> an 88-percent increase from fiscal year 2009.<sup>278</sup> This is in part due to an increase in hiring, with a 90-percent increase in judgeships since 2010.<sup>279</sup> The EOIR has also opened new immigration courts; during September and October 2019 alone, the EOIR opened up courts in New York City,<sup>280</sup> Sacramento,<sup>281</sup> and Atlanta.<sup>282</sup> Despite these additional resources being directed toward immigration adjudication, the backlog has not subsided. Thus, procedural measures aimed at efficiency, like a uniform application of res judicata, should be implemented to help alleviate this burden.

The volume and backlog problems currently facing the immigration courts are complex consequences of various immigration policies and circumstances that are beyond the scope of this Note. Although this Note does not argue that inconsistencies in the application of res judicata are primary causes of these issues, it does suggest that resistance to res judicata is one—among many—of the policies behind them. And while it is unclear how many of these “reopened” cases would have been barred by a broad and uniform application of res judicata, the sheer volume demonstrates that revisiting cases places a significant burden on the system. A consistent application of res judicata could reduce this burden by cutting caseloads and wait times.

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277. U.S. DEP’T OF JUST., EXEC. OFF. FOR IMMIGR. REV., FY 2020 BUDGET REQUEST AT A GLANCE (2019), <https://www.justice.gov/jmd/page/file/1142486/download> [<https://perma.cc/AZA7-MXLP>]. The EOIR requested \$673 million for fiscal year 2020, which amounts to a 33-percent increase from the previous year. *Id.*

278. U.S. DEP’T OF JUST., EXEC. OFF. FOR IMMIGR. REV., FY 2010 BUDGET REQUEST AT A GLANCE (2009), <https://www.justice.gov/sites/default/files/jmd/legacy/2014/04/14/eoir-bud-summary.pdf> [<https://perma.cc/8MPM-FB38>].

279. U.S. DEP’T OF JUST., EXEC. OFF. FOR IMMIGR. REV., ADJUDICATION STATISTICS: IMMIGRATION JUDGE (IJ) HIRING (2020), <https://www.justice.gov/eoir/page/file/1242156/download> [<https://perma.cc/26VT-8TFK>].

280. U.S. DEP’T OF JUST., EXEC. OFF. FOR IMMIGR. REV., NOTICE: EXECUTIVE OFFICE FOR IMMIGRATION REVIEW TO OPEN NEW YORK – BROADWAY IMMIGRATION COURT (2019), <https://www.justice.gov/eoir/file/1197226/download> [<https://perma.cc/MXL6-CUQK>].

281. U.S. DEP’T OF JUST., EXEC. OFF. FOR IMMIGR. REV., NOTICE: EXECUTIVE OFFICE FOR IMMIGRATION REVIEW TO OPEN SACRAMENTO IMMIGRATION COURT (2019), <https://www.justice.gov/eoir/page/file/1193011/download> [<https://perma.cc/X8FW-7ZSL>].

282. U.S. DEP’T OF JUST., EXEC. OFF. FOR IMMIGR. REV., NOTICE: EXECUTIVE OFFICE FOR IMMIGRATION REVIEW TO OPEN ATLANTA – W. PEACHTREE STREET (2019), <https://www.justice.gov/eoir/page/file/1206376/download> [<https://perma.cc/7QDT-VMNK>].

## V. THE PATH TOWARD A ROBUST APPLICATION OF RES JUDICATA

Taking the textual, structural, and purposive arguments together, it is clear that res judicata should apply in removal proceedings and should be consistently applied among all adjudicatory bodies. Indeed, res judicata should apply in the face of multiple convictions, regardless of whether new legislation is passed, and sometimes even if the prior proceeding was not officially terminated.

To be clear, this Note does not suggest that a previous removal proceeding should foreclose deportability charges based on offenses committed after the proceeding; res judicata does not provide a warrant to disregard the law. But rather, a finding against deportability should be definitive in the moment it is made and hold unless some new factual basis arises.

### A. *Res Judicata Beyond Arangure*

At a minimum, the Sixth Circuit's ruling in *Arangure* should be extended to all jurisdictions and tribunals adjudicating removal proceedings. But because *Arangure* only provides for res judicata when considering the same underlying conviction and claims dismissed with prejudice,<sup>283</sup> res judicata should be applied even more broadly. Specifically, res judicata should preclude new deportability charges, including when there are multiple predicate offenses, when new deportability grounds are created, and when a case is not dismissed with prejudice.

1. *Multiple Convictions Should Not Always Equal Multiple Proceedings.* Res judicata should prohibit relitigation of deportability for convictions (or other immigration charges) that could have been litigated, in addition to those that have actually been litigated. At the very least, the doctrine should cover offenses resulting from the same incident because they arise from the same series of facts.<sup>284</sup> But, fitting in with the principles of res judicata and its goal of efficiency, this Note argues that it makes most sense to require DHS to bring all possible deportability charges at once.

Despite arguments that this would lead to overly complex litigation,<sup>285</sup> it would be easier for DHS to review a noncitizen's file

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283. See *supra* Part II.B.2.

284. See *supra* notes 159–61 and accompanying text.

285. See, e.g., *De Faria v. INS*, 13 F.3d 422, 424 (1st Cir. 1993) (“[S]uch a rule would needlessly complicate proceedings in the vast majority of cases.”).

once, send them one notice to appear, and require them to come to court one time. Immigration officials who spend their careers adjudicating these matters have the institutional capacity to effectively juggle multiple charges and convictions in one efficient proceeding.<sup>286</sup> Conversely, another argument against requiring DHS to bring all claims at once is that it might result in redundancy.<sup>287</sup> Redundancy is almost certain to occur to some degree when multiple charges are brought based on the same underlying conviction. For example, the court likely looked at identical evidence for both of Adrian Moncrieffe's deportability charges, an illicit-trafficking aggravated felony and a controlled substances offense predicated on the same Georgia conviction. But this would only make it easier for the judge to quickly rule on multiple theories of deportation. It seems extremely unlikely that bringing multiple claims in one removal proceeding would absorb more time and resources than two separate, successive proceedings but extremely likely that adjudicators could effectively assess multiple charges concurrently.

Although in some cases separate convictions are based on the same underlying facts, oftentimes they are not. Multiple convictions pose an issue in applying the "same claim" prong of *res judicata*. This problem can be avoided by interpreting the "claim" to refer to the general charge of deportability instead of the conviction(s) or offense(s) underlying the charge. Multiple convictions may even be considered part of "the same transaction or series of transactions" that typically warrant *res judicata*.<sup>288</sup> This framing is the most logical as the general claim asserted by DHS is that a noncitizen is deportable. Although there may be several theories supporting that claim, they should not be tried separately for purposes of fairness and finality. Further, a favorable finding should be definitive at the moment it is

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286. *Cf. Drew v. United States*, 331 F.2d 85, 91 (D.C. Cir. 1964) (finding that juries are capable of juggling multiple criminal charges in one trial). In fact, all claims must be consolidated in appeals to the federal courts. INA § 242(b)(9), 8 U.S.C. § 1252(b)(9) (2018) ("Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section."); *see also INS v. St. Cyr*, 533 U.S. 289, 313 (2001) (finding that the "purpose" of INA § 242(b)(9) is "to consolidate 'judicial review' of immigration proceedings into one action in the court of appeals"); *supra* note 100 and accompanying text (explaining that plaintiffs in other civil suits are expected to bring all claims at once).

287. *See supra* note 144.

288. *See supra* note 98 and accompanying text.

made, which cannot be possible if other existing convictions are fodder for additional deportation charges.

2. *In the Face of New Legislation.* Traditional notions of fairness and due process require the law to be accessible and to give individuals the opportunity to “conform their conduct accordingly.”<sup>289</sup> Thus, “settled expectations should not be lightly disrupted.”<sup>290</sup> Despite precedent to the contrary,<sup>291</sup> these same notions of fairness should apply in cases where a certain crime was not a deportable offense at the time of conviction, but later became deportable through new legislation.

This issue was particularly salient after the passage of IIRIRA, which greatly expanded the definition of aggravated felony.<sup>292</sup> IIRIRA explicitly applies to convictions that were entered prior to the law’s enactment.<sup>293</sup> This raises serious due process and notice concerns because a defendant may make a decision in a criminal proceeding based on the applicable immigration consequences. For example, a defendant may plead guilty to reduce their sentence if under the impression that it would likely not result in negative immigration consequences.<sup>294</sup> If this same defendant is then unsuccessfully charged with deportability, Congress could later change the deportability statutes to include more offenses, and, without *res judicata*, DHS could charge the defendant with a new deportability offense based on the initial conviction. In such a case, the defendant may have spent years thinking he was safe from deportation only to have that reasonable assumption voided by new legislation.

Although the statutory language of IIRIRA unambiguously applies to a conviction regardless of whether it was entered before or after IIRIRA’s enactment,<sup>295</sup> the creation of a new, retroactive cause

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289. *St. Cyr*, 533 U.S. at 316 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994)).

290. *Id.*

291. *See supra* note 123.

292. *See supra* note 122 and accompanying text.

293. *Id.*

294. *See Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015) (acknowledging “safe harbor” pleas entered for the explicit purpose of avoiding immigration consequences); *see also Padilla v. Kentucky*, 559 U.S. 356, 359 (2010) (detailing a defendant who pleaded guilty because he was misinformed of the immigration consequences). In *Padilla v. Kentucky*, the Court found that Sixth Amendment protections require counsel to advise criminal clients on potential immigration consequences. *Padilla*, 559 U.S. at 368–69. Failure to do so can constitute ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). *Padilla*, 559 U.S. at 366.

295. *See supra* note 122 and accompanying text.

of action should not wipe away settled common law principles. IIRIRA allows DHS to remove noncitizens who were not previously deportable, but this does not mean that DHS should be able to relitigate previously decided cases under a new theory. Nowhere in IIRIRA is it implied that the expanded definition of aggravated felony gives DHS a do-over. But rather, IIRIRA and similar statutes should be interpreted only to give DHS the authority to bring new deportability charges based on convictions that had not been the subject of prior removal proceedings.

3. *A More Lenient Finality Standard.* A uniform application of res judicata has greater effect if more removability determinations are considered final. As such, this Note endorses regulatory interpretations and a view of remand that promote finality and prevent the perpetuation of issues that were—or should have been—settled.

Recall that one of the Sixth Circuit’s caveats in *Arangure* was that res judicata could not apply unless the IJ had dismissed the case with prejudice. However, the regulation defining finality, 8 C.F.R. § 1003.39, makes no mention of dismissals with or without prejudice, and no such affirmative requirement should be read into the regulation. Another regulation, 8 C.F.R. § 1239.2, establishes that certain proceedings are dismissed or remanded without prejudice by default.<sup>296</sup> But, as an administrative regulation, § 1239.2 does not undermine Congress’s intent that res judicata should apply. Instead, a plausible reading of the regulation could limit future proceedings to adjudications based on new—or newly discovered—convictions or offenses.

It has also been suggested that res judicata does not apply when a noncitizen wins an appeal and the case is then remanded to allow DHS to bring new charges.<sup>297</sup> But this view would allow tribunals to completely circumvent res judicata by declining to terminate the proceeding or dismiss it with prejudice; therefore, the noncitizen could never have a “final” decision to fall back on. By keeping the “proceeding” alive, this model permits DHS to keep bringing new claims after failing to make its case. Thus, if the application of res

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296. 8 C.F.R. § 1239.2(c), (d) (2020).

297. See *supra* note 174 and accompanying text.



judicata in removal proceedings is to have any force, this type of workaround must be foreclosed.<sup>298</sup>

Further, these additional barriers to finality and res judicata are not necessary in light of 8 C.F.R. § 1003.47, which permits the BIA to remand a case if new facts arise. If an additional charge becomes available based on newly disclosed or discovered information, then § 1003.47 allows IJs to hold another hearing. Outside of this circumstance, a dismissal without prejudice or a remand could unjustly allow DHS officials to bring new charges that were available during the first hearing before the IJ. As such, unless § 1003.47 applies, a finding on deportability should be deemed final as soon as all of the original charges have been litigated.

### B. *Potential Paths to Justice*

Uniformity in this comprehensive application of res judicata could be achieved in a number of ways. The easiest way would be for DHS or the EOIR to adopt a blanket res judicata policy for removal proceedings.<sup>299</sup> Specifically, DHS could create a regulation that requires its officers to bring all possible charges at once as well as limit the scenarios in which new charges may be brought. The EOIR could also promulgate one or more regulations to create explicit procedural requirements in line with the solution detailed by this Note. At the very least, the EOIR could amend the language in § 1003.30 to clarify when DHS can bring new charges and resolve the conflicting interpretations of the present regulation, especially around the use of the word “may.” It should also consider amending § 1239.2 to limit the circumstances in which IJs are dismissing and remanding proceedings without prejudice.

The BIA could also issue a new, precedential decision to replace *Matter of Jasso Arangure*. However, its relatively recent unpublished decision in *Matter of Gavino Quito*, which outright refuses to engage with the Sixth Circuit decision in *Arangure*, signals that a new, precedential decision is unlikely, at least in the current administration. Alternatively, the attorney general could overrule *Matter of Jasso Arangure* and issue a new, precedential decision in its place.<sup>300</sup> This

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298. *Cf. Romero v. Barr*, 937 F.3d 282, 293–94 (4th Cir. 2019) (finding power to administratively close was “appropriate and necessary” because without it “the proceedings may have continued indefinitely as the file shuttled back and forth between the two DHS divisions”).

299. *See* INA § 103(a)(3), (g)(2), 8 U.S.C. § 1103(a)(3), (g)(2) (2018) (granting the secretary of DHS and the attorney general the power to establish regulations).

300. *See supra* note 56 and accompanying text.

seems equally unlikely because, although Attorney General William Barr and previous attorneys general in the Trump administration have issued more immigration decisions than attorneys general of other administrations, their decisions have significantly restricted protections for noncitizens.<sup>301</sup>

Of course, Congress could also amend the INA to explicitly apply *res judicata* in removal proceedings and directly address the different wrinkles involving multiple convictions, intervening laws, and loopholes. But it has been more than three decades since the last comprehensive immigration bill was signed into law.<sup>302</sup> Congress is now at a “gridlock” and unable “to forge a bipartisan consensus on immigration.”<sup>303</sup> And even though this Note proposes a relatively modest amendment, it seems doubtful that Congress would mobilize around the issue or address it outside of an omnibus bill.

Federal courts could also take the lead. Although *Arangure* was not appealed to the Supreme Court, the BIA’s dismissal of the decision signals tension of authority. With an increase in immigration cases pending before our courts, this conflict will likely arise again. Circuit courts should take steps to align their jurisprudence with the Sixth Circuit, chipping away at the precedential effect of *Matter of Jasso Arangure*. This method would create incremental change and would not achieve the comprehensive application that this Note articulates. But other circuits could and should take a broader approach than the Sixth Circuit did in *Arangure*. Of course, the Supreme Court, if presented with the opportunity, could take up the issue to achieve uniformity across all tribunals. Although this Note does not attempt to predict how the current Court would come down on the issue of *res*

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301. See, e.g., *In re A-B-*, 27 I. & N. Dec. 316 (Att’y Gen. 2018) (overruling a precedential BIA decision and eliminating asylum protections based on domestic and gang violence); Kim Bellware, *On Immigration, Attorney General Barr is His Own Supreme Court. Judges and Lawyers Say That’s a Problem*, WASH. POST (Mar. 5, 2020, 9:51 AM), <https://www.washingtonpost.com/immigration/2020/03/05/william-barr-certification-power> [https://perma.cc/T4R3-MSKQ]; Adiel Kaplan, *AG Barr Issues 2 Decisions Limiting Ways Immigrants Can Fight Deportation*, NBC NEWS (Oct. 29, 2019, 12:43 PM), <https://www.nbcnews.com/politics/immigration/ag-barr-issues-2-decisions-limiting-ways-immigrants-can-fight-n1073026> [https://perma.cc/FP32-VLQT]; Dara Lind, *Jeff Sessions Is Exerting Unprecedented Control over Immigration Courts—By Ruling on Cases Himself*, VOX (May 21, 2018, 1:06 PM), <https://www.vox.com/policy-and-politics/2018/5/14/17311314/immigration-jeff-sessions-court-judge-ruling> [https://perma.cc/V4S8-Q4X2].

302. Elaine Kamarck & Christine Stenglein, *Can Immigration Reform Happen? A Look Back*, BROOKINGS (Feb. 11, 2019), <https://www.brookings.edu/blog/fixgov/2019/02/11/can-immigration-reform-happen-a-look-back> [https://perma.cc/8VUP-H5XB].

303. *Id.*

judicata in removal proceedings, at the very least, recent caselaw indicates that the Court is prepared to affirm presumptions of statutory construction and relies heavily on statutory context in its interpretations of the INA.<sup>304</sup> This may bode well for the solution promoted in the Note, which is strongly supported by the common law presumption of res judicata and by the statutory context of the INA.

#### CONCLUSION

Without a Supreme Court decision to guide our application of res judicata in removal proceedings, we must turn to inconsistent precedent across multiple tribunals in two different branches of government. In light of the recent Sixth Circuit decision, *Arangure v. Whitaker*, and the BIA's subsequent dismissal of the doctrine, it is time to adopt a uniform rule. A thorough analysis of the INA, judicial interpretations, and corresponding enforcement uncovers textual, structural, and purposive reasons for applying res judicata. A comprehensive and uniform application of the doctrine would improve outcomes for DHS and provide clarity for lawyers and adjudicators. Similarly, limiting DHS to only one bite at the deportation apple would help alleviate the burden on the immigration adjudicatory system while promoting fairness and justice for the noncitizens subject to it.

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304. *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069–70 (2020) (finding that a presumption of judicial review for executive action applies in interpreting INA § 242). While this is not perfectly analogous to a case involving the common law presumption of res judicata, this decision may signal the Court's willingness to read presumptions into the INA and intervene when executive and judiciary powers are in conflict.