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Illegal Emigration: The Continuing Life of Invalid Deportation Orders

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Federal appeals courts overturn more than one thousand deportation orders every year. A significant number of those reversals involve non-citizens who are abroad because they have been deported as a result of losing their cases at the administrative level. Although an order overturning a deportation order ordinarily restores non-citizens to their prior status of being lawfully present in the United States, federal immigration authorities have used the fact of the non-citizen’s now-invalidated deportation to subject such non-citizens to a new and previously inapplicable set of standards that has the effect of preventing them from returning. Under this practice, non-citizens who seek to return after winning from abroad are treated as “arriving aliens,” meaning that because they are now outside the United States, the government can keep them out, even if they never should have been removed in the first place.

Neither courts nor scholars have addressed the lawfulness of applying the law’s more stringent “arriving alien” standards to non-citizens who prevail from abroad rather than the more lenient “deportability” standards that apply prior the non-citizen’s removal. This Article examines the competing arguments for and against the government’s practice and concludes that relying on non-citizens’ wrongful deportations to apply new rules that keep non-citizens from returning deprives them of meaningful judicial review of their deportation orders in violation of both federal immigration law and the U.S. Constitution. Instead, requiring the government to apply the same “deportability” standards throughout a non-citizen’s removal proceedings will best ensure that erroneously deported individuals are permitted to re-enter the United States, reunite with their families, and resume their lives as they existed prior to their removal.
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INTRODUCTION

Numerous immigrants—“aliens” in legal parlance—1—who have been deported by the government have succeeded in overturning their deportation orders, but only after the government has removed them from the United States. 2 Although overturning deportation orders ordinarily restores non-citizens to their prior status of being lawfully present in the United States, federal immigration authorities have used the fact of the non-citizen’s (now invalidated) deportation to apply a previously inapplicable set of standards in order to prevent such non-citizens from returning. These entry standards, which typically are reserved for non-citizens seeking permission to enter the United States for the first time, are in many ways more stringent than deportation standards. Thus, under the government’s practice, wrongfully deported immigrants can be kept out of the United States even if they never should have been removed in the first place, simply because they happened to be outside the United States when they won their case rather than inside the United States.

The inability of wrongly-deported immigrants to return is a significant and growing concern. Federal courts are hearing record numbers of deportation challenges and are reversing deportation orders at substantially higher rates than for other appeals. 3 Many of those reversals involve non-citizens who already have been deported. 4 For non-citizens, the stakes could not be higher. Deportation, which is the equivalent of banishment from one’s home, family and community, is one of the most severe punishments that can be inflicted upon non-citizens. 5 Moreover, the government’s actions in subjecting wrongly deported aliens to new standards even after their deportation orders are overturned casts light on a larger problem of treating wrongfully deported immigrants differently from immigrants who remain inside the United States. The consequences that non-citizens suffer as a result are illustrated by the example of Ronaldo Quinones. 6

Mr. Quinones is a lawful permanent resident who has lived in the United States since he emigrated from Honduras as a young child. Soon after turning eighteen, he was found with marijuana rolling papers and

1 The term “alien” is a legal term of art that encompasses “any person not a citizen or national of the United States.” 8 U.S.C. § 1101(a)(3).
2 For example, federal courts overturn more than one thousand deportation orders every year. See infra note 101 and accompanying text.
3 See infra Part II.B.
4 See id.
5 See id.
6 The name “Ronaldo Quinones” is a pseudonym used to protect privacy. However, the story described here is closely based on the real experiences of immigrants who have succeeded in overturning their deportation orders from abroad.
charged with a misdemeanor offense of possession of drug paraphernalia near a school zone.\(^7\) Upon advice of counsel, he pleaded guilty, received a sentence of probation, and the case was closed.

For Mr. Quinones, however, the case was not closed. Soon after starting probation, he was detained by federal immigration authorities and placed in deportation proceedings pursuant to the Immigration and Nationality Act (INA).\(^8\) Even though Mr. Quinones never had any drugs on him, he was charged as being deportable as an immigrant who has been convicted of an offense “relating to a controlled substance.”\(^9\)

Mr. Quinones appeared before an immigration judge and argued that he was not deportable because his conviction falls within a statutory exception for crimes involving possession of thirty grams or less of marijuana.\(^10\) The immigration judge rejected his argument and ordered Mr. Quinones to be deported back to Honduras. Mr. Quinones appealed to the Board of Immigration Appeals (BIA) and by law received an automatic stay of the deportation order for the pendency of the appeal.\(^11\) The BIA also found that the thirty-gram exception did not apply and affirmed the immigration judge’s deportation order.

Mr. Quinones then filed a petition for review with the federal circuit court of appeals.\(^12\) Unlike when a case is pending before the BIA, federal law does not provide for an automatic stay of deportation when a case is pending in federal court.\(^13\) Mr. Quinones filed a request for a discretionary stay, but it was denied.\(^14\) Soon after, federal authorities executed the

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\(^7\) In addition to outlawing the possession of drugs, many states also criminalize the possession of drug paraphernalia, even if the accused possessed no drugs at all. See, e.g., N.J. STAT. ANN. § 2C:36-2.

\(^8\) The framework for subjecting non-citizens to removal proceedings is laid out in 8 U.S.C. § 1229a.

\(^9\) 8 U.S.C. § 1227(a)(2)(B)(i). The federal Immigration and Nationality Act (INA) makes deportable any immigrant who has been convicted of a controlled substance offense. Numerous courts have held that possession of drug paraphernalia relates to a controlled substance and therefore constitutes a removable offense. See, e.g., Barma v. Holder, 640 F.3d 749 (7th Cir. 2011); Luu-Le v. I.N.S., 224 F.3d 911, 915-16 (9th Cir. 2000).

\(^10\) The statute includes an exemption stating that an individual is not deportable if the controlled substance conviction was for a “single offense involving possession for one’s own use of 30 grams or less of marijuana.” 8 U.S.C. § 1227(a)(2)(B)(i).

\(^11\) See 8 C.F.R. § 1003.6(a) (stating that, with certain exceptions, orders relating to immigrants shall not be carried out while an appeal with the Board of Immigration Appeals is pending).

\(^12\) See 8 U.S.C. § 1252(a) (allowing aliens to file petitions for review of final deportation orders to the federal courts of appeals).

\(^13\) See infra notes 27-35 and accompanying text.

\(^14\) See infra notes 33-35 and accompanying text for an explanation of the process for seeking a stay of removal.
immigration judge’s deportation order and removed Mr. Quinones to Honduras.

One year after Mr. Quinones was deported, the court of appeals overturned the immigration judge’s removal order, finding that the thirty gram exception can be applied to Mr. Quinones’s offense. The court remanded to the immigration judge for a determination of whether, in Mr. Quinones’s specific case, his conviction involved thirty grams or less of marijuana.

By then, Mr. Quinones was abroad, but was no longer subject to a deportation order, as the order had been vacated as a result of the court’s ruling. He wanted to return to the United States so that he could be reunited with his family, all of which lives in the United States. On contacting the relevant federal authorities about reentering the country, he was told that he would be denied entry if he tried to come back. The reason, according to the government, was that because he was now outside the United States and seeking to come in, as opposed to someone inside the United States whom authorities were seeking to remove, he would be treated as an “arriving alien” who is subject to the statute’s more restrictive “admissibility” provisions rather than the deportability provisions under which he was originally charged.

In other words, even if Mr. Quinones’s conviction did not necessarily provide a basis for removing him from the United States in the first place, once he has been removed (even if on grounds that are subsequently overturned), it provides a basis for preventing him from coming back in. Just as a controlled substance conviction makes a non-citizen residing in the United States deportable, it also makes a non-citizen seeking to enter the United States “inadmissible.” However, while the deportability provisions provide for an exception for convictions involving thirty grams or less of marijuana, the inadmissibility provisions do not. For Mr. Quinones, this switch makes all the difference.

One might consider such behavior as changing the rules in the middle of the game. In the realm of immigration law, however, it appears to be standard practice. The executive branch has repeatedly taken the view that aliens who succeed in overturning their deportation orders after they have been deported must, as a result of their deportation, now be treated as “arriving aliens” subject to the Act’s inadmissibility provisions. The executive branch’s practice creates unfair results for individuals like Mr. Quinones who fall within what others have termed the “inadmissibility

17 See infra Part II.
The INA’s inadmissibility provisions, which apply to arriving aliens, are in many ways more onerous than its deportability provisions, which apply to aliens who have been living inside the country. As a result, certain aliens fall in the “gap” where their conduct renders them inadmissible but not deportable.

Consequently, under the government’s practice, a non-citizen who was wrongly deported may find himself barred from re-entry because of the very act of removal that was held to be wrongful. In other words, the alien will remain deported simply because he was outside the country when he won his case rather than inside the country.

Although the government has suggested publicly that aliens who prevail from abroad should be restored to their prior immigration status, in practice it has relegated them to a lesser status by taking aliens who were lawful permanent residents prior to deportation and reclassifying them as “arriving aliens” following their post-deportation success in court. This Article examines the government’s practice and concludes that it is inconsistent with federal immigration law and that it denies aliens their right to meaningful judicial review of deportation orders. From the alien’s perspective, the right to judicial review is of little value if an alien can win his case only to find that the government can use the fact of deportation to apply new rules that bar the alien from reentering the country.

The question of what rights and remedies are available to non-citizens who succeed in overturning their deportation orders from abroad has been little explored by scholars or the courts. In particular, no article has

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18 See Nancy Morawetz, The Invisible Border: Restrictions on Short-Term Travel by Non-Citizens, 21 GEO. IMM. L.J. 201, 207 (2007) (using the term “inadmissibility gap” to describe situations where an individual is inadmissible but not deportable).
19 See infra Part I.B; see also Judulang v. Holder, 132 S. Ct. 476, 479 (2011) (explaining that the inadmissibility and removability provisions of the INA are “sometimes overlapping and sometimes divergent”).
20 See infra notes 63-65 and accompanying text.
21 See, e.g., Rachel E. Rosenbloom, Will Padilla Reach Across the Border?, 45 NEW ENG. L. REV. 327 (2011) (addressing the ramifications of the Supreme Court’s decision in Padilla v. Kentucky, 130 S. Ct. 1473 (2010) for aliens who have already been deported) [hereinafter “Rosenbloom, Will Padilla Reach Across the Border?”]; Rachel E. Rosenbloom, Remedies for the Wrongly Deported: Territoriality, Finality, and the Significance of Departure, 33 U. HAW. L. REV. 139 (2010) [hereinafter “Rosenbloom, Remedies for the Wrongly Deported”] (arguing that the Board of Immigration Appeals’ rule prohibiting it from considering motions to reopen filed by aliens who are outside the United States is unreasonable); Trina Realmuto, Practice Advisory: Return to the United States after Prevailing in Federal Court (Legal Action Center of the American Immigration Council, May 28, 2009), http://www.legalactioncenter.org/sites/default/files/lac_pa_11607.pdf (last visited Jan. 6, 2011). The most extensive discussion of the problems facing this group of aliens comes from practice advisories and a Freedom of Information Act (FOIA) complaint filed in
analyzed whether any statutory or other legal basis exists to justify the
government’s practice of classifying such immigrants as arriving aliens. Similarly, neither the BIA nor any court of appeals has issued an
authoritative opinion regarding the government’s practice.

This Article undertakes that analysis by examining the competing
arguments for and against the government’s practice of applying
inadmissibility standards to non-citizens who prevail from abroad. It
concludes that the government’s practice of reclassifying such aliens as
“arriving aliens” lacks a statutory basis and violates the Due Process and
Equal Protection Clauses of the U.S. Constitution. Non-citizens who win an
their appeals while abroad should be fully restored to their prior status,
which means that they should be subject to the same deportability standards
that applied the first time around rather than to the more stringent
inadmissibility standards. That is not to suggest that inadmissibility and
deportability standards must be collapsed together in all circumstances. There may be legitimate reasons for treating arriving aliens differently from
aliens already present in the United States. What is important is that the
government not be allowed to apply a different set of standards to an
individual during different stages of the same case. A non-citizen should not
suffer prejudice by virtue of having been wrongfully removed from the
United States.

Part I provides statutory background by detailing the differences
between the INA’s deportability and inadmissibility standards, and by
discussing the procedures for allowing aliens to challenge deportation
orders from abroad that were enacted as part of the Illegal Immigration
Reform and Immigrant Responsibility Act of 1996 (IIRIRA).

Part II documents the government’s practice of classifying aliens who
win their appeals from abroad as “arriving aliens,” with the consequence
that those aliens now become subject to the Act’s inadmissibility standards
whereas they were formerly subject to the Act’s deportability standards.
Part II also explores the significance of the government’s practice by
discussing the high volume of appeals of deportation orders and the high
rate of reversal by federal courts.

Part III evaluates the competing arguments concerning whether the INA
and IIRIRA permit the government to apply inadmissibility standards to

federal court by a number of groups represented by the New York University Immigrant
Rights Clinic. See Complaint, Nat’l Immigration Project of the Nat’l Lawyers Guild v. U.S.
Dep’t of Homeland Security, No. 11-cv-3235 (S.D.N.Y. May 12, 2011) [hereinafter FOIA
Complaint]. That complaint alleges that federal agencies have failed to adequately assist
aliens in returning to the United States after they win their appeals and details how the
government has stated on repeated occasions that successful aliens who do return will be
treated as arriving aliens. Id.
aliens who prevail from abroad and concludes that the government’s
docile practice is not authorized by statute. First, the government’s practice
appears to be inconsistent with congressional intent to allow aliens to fully
vindicate their rights from abroad. Congress specifically amended the INA
to remove the automatic right to a stay of removal and replace it with a new
right to pursue a petition for review from abroad following deportation.
Second, although proponents of the government’s practice can point to
support in the statutory text, those portions of the statute were intended to
apply only to voluntary removals rather than to involuntary removals that
are subsequently invalidated.

Part IV addresses the constitutional concerns raised by the government’s
approach. First, allowing the government to remove a non-citizen, and then
rely on that removal order after it is subsequently overturned to prevent the
non-citizen from re-entering substantially curtails the non-citizen’s right to
judicial review in a way that gives rise to significant due process concerns.
Second, the practice creates potential equal protection problems by treating
an alien who wins an appeal while inside the United States under the Act’s
more favorable deportability standards, while treating an alien who wins
after being removed under the Act’s more restrictive inadmissibility
standards. This part questions whether a rational basis exists for this
distinction and concludes that in the absence of any legitimate rationale, the
government’s practice violates equal protection.

Part V discusses potential solutions and examines the feasibility of
requiring the government to continue to apply deportability standards to
aliens who prevail from abroad.

I. STATUTORY FRAMEWORK

The problem facing aliens who prevail in their petitions for review from
abroad stem from two unrelated portions of the INA: the procedural rules
regarding who can file a petition for review, and the substantive rules
regarding the conduct that renders an alien deportable or inadmissible. This
part first describes the procedural framework for filing petitions for review
and then identifies the differences between the Act’s deportability and
inadmissibility standards.

A. The Right to Pursue a Petition for Review from Abroad

An alien lawfully residing in the United States is entitled to certain
protections prior to deportation. If the government believes that a legal
resident is deportable, it initiates a deportation proceeding by filing a Notice
to Appear that identifies the grounds that the government contends renders
the alien deportable.\textsuperscript{22} Grounds for deportation can range from overstaying a visa to becoming a public charge to committing any of various types of criminal offenses.\textsuperscript{23} The alien then appears before an immigration judge. In the case of a lawful permanent resident, the government must prove deportability by “clear and convincing evidence.”\textsuperscript{24} The immigration judge issues a decision, and either the government or the alien can appeal that decision to the Board of Immigration Appeals (BIA).\textsuperscript{25} If the Board finds that the alien is not deportable, that is the end of the matter and the deportation proceedings are terminated. If the Board finds that the alien is deportable, then the alien has the right to seek review in a federal court of appeals by filing a petition for review.\textsuperscript{26}

While a deportation proceeding is pending before the immigration judge or the BIA, the alien automatically receives a stay of removal, meaning that the alien cannot be deported until the BIA issues a final decision.\textsuperscript{27} Prior to 1996, the process was similar for petitions for review in the courts of appeal. At that time, an alien could only pursue a petition for review from within the United States and the alien’s departure from the country constituted an automatic withdrawal of the petition.\textsuperscript{28} Because the alien could not pursue a petition for review from abroad, any alien who filed a petition automatically received a stay of removal pending a decision on the petition.\textsuperscript{29}

That structure changed following Congress’s enactment of IIRIRA in 1996. Congress believed that aliens too often were using litigation as a delay tactic to avoid removal and wished to speed up the removal process.\textsuperscript{30}

\textsuperscript{22} 8 C.F.R. § 1239.1(a).
\textsuperscript{23} 8 U.S.C. § 1227(a)-(b).
\textsuperscript{24} 8 U.S.C. § 1229(c)(3)(A); accord Woodby v. I.N.S., 385 U.S. 276, 286 (1966) (“[N]o deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true.”).
\textsuperscript{25} 8 C.F.R. § 1003.3(a).
\textsuperscript{26} 8 U.S.C. § 1252(b) (establishing the requirements for filing a petition for review).
\textsuperscript{27} 8 C.F.R. § 1003.6(a).
\textsuperscript{28} 8 U.S.C. § 1105a(c) (1994) (repealed) (“An order of deportation or of exclusion shall not be reviewed by any court . . . if [the alien] has departed from the United States after the issuance of the order.”). \textit{See also} Nken v. Holder, 129 S. Ct. 1749, 1755 (2009) (describing the changes effected by the 1996 amendments).
\textsuperscript{29} 8 U.S.C. § 1105a(a)(3) (1994) (repealed) (“The service of the petition for review . . . shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs.”).
\textsuperscript{30} \textit{See, e.g.,} S. REP. NO. 104-249, at 1 (1996) (identifying the need to expedite “the removal of excludable and deportable aliens” as one of the goals of IIRIRA); H.R. REP. NO. 104-469(I), at 106-07 (1996) (explaining how aliens manipulated the deportation system to delay proceedings and to find ways to avoid deportation). \textit{See also} Reno v. Arab-American Anti-Discrimination Comm., 525 U.S. 471, 490 (1999) (noting that “[p]ostponing justifiable deportation (in the hope that the alien’s status will change—by, for example,
In IIRIRA, “Congress inverted these provisions to allow for more prompt removal.”\(^{31}\) Specifically, Congress permitted aliens to pursue petitions for review from abroad by repealing the ban on post-departure petitions for review.\(^{32}\) To accompany that change, Congress then removed the automatic stay provision and provided instead that a petition for review “does not stay the removal of an alien . . . unless the court orders otherwise.”\(^{33}\) Under current law, aliens can still seek a stay, but the decision to grant or deny a stay is discretionary rather than automatic. The court’s discretion is governed by the traditional test for stays, which looks to (1) whether the party seeking the stay has made a “strong showing” of the likelihood of success on the merits; (2) whether the party will suffer “irreparable injury” in the absence of a stay; (3) whether the stay will substantially injure other parties to the proceeding; and (4) whether the public interest supports granting a stay.\(^{34}\) As the Supreme Court recently indicated, the standard is not an easy one to meet.\(^{35}\)

Congress had two principal aims regarding this aspect of the 1996 amendments. First, Congress sought to quicken the pace of removal by eliminating the right to an automatic stay during the pendency of a petition for review. Eliminating the automatic stay makes it harder for aliens to use legal proceedings solely for the purpose of delay, and also saves the government a substantial expense of housing aliens, as many aliens are kept in prison on immigration detainers for the duration of their proceedings.\(^{36}\) Second, allowing aliens to litigate their appeals following removal helps maintain the accuracy of removal determinations.\(^{37}\) In other words, the marriage to an American citizen—or simply with the object of extending the alien’s unlawful stay) is often the principal object of resistance to a deportation proceeding”).

\(^{31}\) *Nken*, 129 S. Ct. at 1755.


\(^{34}\) *Nken*, 129 S. Ct. at 1761.

\(^{35}\) *Id.*

\(^{36}\) Federal law requires the government to detain certain classes of individuals, primarily those who have committed certain types of crimes such as drug crimes, for the duration of proceedings. See 8 U.S.C. § 1226(c). Even aliens not subject to mandatory detention may still be incarcerated while their proceedings are ongoing if the immigration judge determines that they should not be released on bond, or if they cannot afford the bond that the immigration judge sets. See 8 U.S.C. § 1226(a) (authorizing the Attorney General to detain any alien who has pending removal proceedings). For a more general discussion and critique of federal immigration detention policies, see Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 24 (2010), http://www.columialawreview.org/sidebar/volume/110/42_Anil_Kalhan.pdf.

\(^{37}\) See, e.g., Prestol Espinal v. Att’y Gen. of the United States, 653 F.3d 213, 222-23 (3d Cir. 2011) (identifying “IIRIRA’s dual objectives ‘to expedite the physical removal of those aliens not entitled to admission to the United States, while at the same time
gravamen of the amendments is that the act of deportation should not affect an alien’s ability to fully vindicate his or her rights. The amendments allow the government to execute deportation orders more quickly, but without prejudice to the alien who can still obtain full relief if the alien wins his or her appeal after being deported.

B. Deportability vs. Inadmissibility

Prior to 1996, cases involving aliens seeking entry into the United States were dealt with separately from cases involving aliens whom the government was seeking to remove from inside the United States. The former were handled in what was known as “exclusion” proceedings and the latter were handled in what was known as “deportation” proceedings. Exclusion proceedings were governed by substantive inadmissibility standards, while deportation proceedings were governed by substantive deportability standards. In 1996, Congress scrapped the separate proceedings and created a single “removal” proceeding to govern both admission and deportation.

Congress, however, retained the distinct admissibility and removability standards. In many ways, the two standards overlap. For example, an alien who has been convicted of certain types of crimes, such as drug crimes, violent crimes, and “crimes of moral turpitude” can be both inadmissible and deportable. Similarly, aliens who have become or are at risk of becoming a public charge, and aliens who present a risk to national security, are both inadmissible and deportable.

increasing the accuracy of such determinations.”" quoting Coyt v. Holder, 593 F.3d 902, 906 (9th Cir. 2010)).


39 These standards are now codified at 8 U.S.C. § 1182.

40 These standards are now codified at 8 U.S.C. § 1227.

41 See 8 U.S.C. § 1229a(a).


43 See 8 U.S.C. § 1182(a)(4) (making public charges inadmissible); 8 U.S.C. § 1227(a)(5) (making public charges deportable); 8 U.S.C. § 1182(a)(3) (making national security threats inadmissible); 8 U.S.C. § 1227(a)(4) (making national security threats deportable). Even there, however, differences persist. A non-citizen is inadmissible if the government determines simply that the non-citizen is a risk of becoming a public charge after entry. By contrast, a non-citizen is deportable as a public charge only if the non-citizen becomes a public charge “within five years” of the date of entry and if the alien fails to show that the causes did not arise after entering the United States. 8 U.S.C. § 1227(a)(5).
In other important ways, however, the two standards diverge. The grounds for inadmissibility generally are considered to be broader than the grounds for deportability. Thus, there are numerous ways in which conduct that makes a person inadmissible does not make that person deportable, creating what Professor Nancy Morawetz has termed the “inadmissibility gap.”

First, the criminal grounds for deportability and inadmissibility differ in significant ways. As the example starting this Article shows, while drug crimes render an individual both inadmissible and deportable, the deportability grounds provide an exception for a single offense involving possession of thirty grams or less of marijuana. The inadmissibility grounds, however, provide no parallel exception.

Another important difference involves “crimes of moral turpitude.” This is a broad category that includes virtually any crime that is done knowingly and that is contrary to generally accepted views of morality. An alien generally is inadmissible if he or she has committed a single “crime of moral turpitude.” By contrast, an alien ordinarily is not deportable unless

44 See, e.g., Evelyn H. Cruz, Because You’re Mine, I Walk the Line: The Trials and Tribulations of the Family Visa Program, 33 FORDHAM URB. L.J. 155, 161 n.46 (2010) (“Grounds of inadmissibility do not always mirror grounds of deportability and generally are more expensive.”).

45 See Morawetz, supra note 18, at 207.


47 8 U.S.C. § 1182(a)(2)(A)(i)(II). While the inadmissibility grounds do permit an alien to seek a waiver of a conviction involving possession of thirty grams or less of marijuana, the waiver is discretionary and an alien is eligible only if the conviction occurred more than 15 years before the date of the alien’s application for admission and only if the alien demonstrates that he or she has been rehabilitated. 8 U.S.C. § 1182(h)(1)(A). Moreover, while the government carries the burden of proving that an offense does not involve thirty grams or less of marijuana in a deportation proceeding, see, e.g., Medina v. Ashcroft, 393 F.3d 1063, 1065 (9th Cir. 2005) (“The government bears the burden of establishing that an alien’s conviction does not fall within the exception for possession of 30 grams or less of marijuana.”); Sandoval v. Ashcroft, 240 F.3d 577, 581 (7th Cir. 2001), the alien bears the burden of proof when seeking a discretionary waiver and must affirmatively demonstrate that the conviction did involve thirty grams or less of marijuana. See Matter of Mendez-Moralez, 21 I. & N. Dec. 296, 299-300 (BIA 1996) (holding that the alien bears the burden of proof regarding entitlement to a discretionary waiver of inadmissibility).

48 See, e.g., Matter of Franklin, 20 I. & N. Dec. 867, 868 (BIA 1994) (“Moral turpitude refers generally to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.”), aff’d, 72 F.3d 571 (8th Cir. 1995).

49 8 U.S.C. § 1182(a)(2)(A)(i). The inadmissibility grounds provide for a “petty offense” exception whereby a crime of moral turpitude will not render an individual inadmissible. However, the exception only applies if (a) the individual has committed no other crime, (b) the crime carries a maximum penalty of one year or less, and (c) the individual was not sentenced to more than six months in prison. Id.
he or she has been convicted of two crimes of moral turpitude. The only time a single conviction for a crime of moral turpitude will make an alien deportable is if the conviction occurred within the first five years of the alien’s admission and was for a crime with a maximum penalty of one year or more. Moreover, if an alien has been convicted of two crimes of moral turpitude that happen to arise out of a single scheme of criminal misconduct, then the alien is not deportable. Furthermore, while an alien who has been convicted of two or more offenses of any type with an aggregate sentence, active or suspended, of five years or more in prison is inadmissible, there is no parallel ground of deportability.

Another important difference is that criminal deportability grounds require a higher level of proof than criminal inadmissibility grounds. In general, criminal deportability grounds require proof of an actual conviction. By contrast, an alien will be inadmissible not only if the alien has been convicted of a drug crime or a crime of moral turpitude, but also if the alien admits committing acts constituting such an offense, even if the alien was never tried or convicted. Other inadmissibility grounds do not require the alien to admit any conduct at all. For example, an individual is inadmissible as long as the government “knows or has reason to believe” that the individual is going to engage in drug trafficking, money laundering, or human trafficking.

A final difference concerns certain health-related grounds that make an individual inadmissible but that do not make an individual deportable. Specifically, any individual with a communicable disease, with a “physical or mental disorder” that may pose a threat to the property, safety or welfare of others, or with a history of drug use or addiction is inadmissible. Because immigration officers may consider a history of alcohol addiction to be a mental disorder especially if there is evidence that the alien has a history of driving while intoxicated, this ground can provide a broad basis for exclusion.

To be sure, the differences work in the other direction as well. Some criminal convictions may render an alien deportable but not inadmissible.

8 U.S.C. § 1227(a)(2), which identifies the criminal grounds of deportability, covers aliens who have been “convicted” of the crimes specified in that provision.
8 See William R. Yates, Associate Director of Operations, Memorandum Re: Requesting Medical Re-Examination (Jan. 16, 2004).
An alien is deportable, but not inadmissible, if an alien has been convicted of an “aggravated felony” for which the alien was sentenced to a year or more in prison. The INA defines an “aggravated felony” to include a list of various types of more serious crimes. Most aggravated felonies, however, are also likely to qualify as crimes of moral turpitude and thus would render an alien inadmissible notwithstanding the lack of an “aggravated felony” ground for inadmissibility. The one major exception is firearms offenses. Firearms offenses are deportable offenses, but are not crimes of moral turpitude and therefore do not render an individual inadmissible.

In short, an alien’s ability to reside in the United States may turn on whether the alien is subject to inadmissibility grounds or deportability grounds. In many cases, this classification is uncontroversial. For an alien who was lawfully admitted into the United States and is still present there, deportability grounds apply. For aliens who have never been to the United States and are seeking to enter for the first time, inadmissibility grounds apply. Uncertainty arises, however, where an alien who was previously present in the United States is found deportable and removed from the United States, and then seeks to return to the United States after successfully overturning the order of deportation from abroad. As explored in the next part, the federal government repeatedly has taken the position that returning aliens in such circumstances are subject to the more stringent inadmissibility standards than to the deportability standards that applied when the alien was originally removed. The effect is that certain aliens who were unlawfully removed will find that the fact that they have been removed will nonetheless bar them from re-entering the country.

II. THE GOVERNMENT’S PRACTICE AND ITS EFFECTS

The impact of the government’s practice of relying on invalidated deportation orders to prohibit wrongly deported non-citizens from returning to the United States is significant and widespread. According to the government’s public pronouncements, however, this issue should not exist at all. In public statements, the government has affirmed that aliens who win their cases following deportation should be restored to their prior status.

60 8 U.S.C. § 1101(a)(43) (providing a list of criminal offenses that constitute aggravated felonies).
61 See, e.g., Judulang v. Holder, 132 S. Ct. 476, 482 (2011) (noting that almost all criminal convictions that make an alien deportable also constitute crimes of moral turpitude).
In its briefing to the Supreme Court in *Nken v. Holder*, the government stated that its “policy and practice” is to “accord[] aliens who were removed pending judicial review but then prevailed before the courts effective relief by, *inter alia*, facilitating the alien’s return to the United States by parole under 8 U.S.C. § 1182(d)(5) if necessary, and according them the status they had at the time of removal.” Thus, an alien who had a status as a lawful permanent resident (LPR) before deportation should, according to the government, be restored to lawful permanent resident status upon winning his or her appeal. In *Nken*, the Supreme Court specifically relied on the government’s representation regarding restoration of pre-removal status in holding that deportation does not cause irreparable injury that would justify a stay of removal. The government’s statement in *Nken*, however, does not appear to be consistent with actual practice. In contrast to its public statements, the government often has accorded a lesser status to prevailing aliens, and the government’s actions have broad implications for the large number of aliens who challenge deportation orders from abroad.

### A. The Government’s Practice

The government’s statement regarding its “policy and practice” of restoring aliens to their prior status and facilitating their return appears to be inconsistent with the government’s actual policy and practice. As extensively documented in a Freedom of Information Act (FOIA) lawsuit filed recently by a coalition of immigrants’ rights organizations, the federal government appears not to have acted in accordance with its statement in *Nken* that it restores prevailing aliens to their prior status. The complaint, which is accompanied by numerous affidavits and other documentary evidence, asserts that the basis for the government’s statement in *Nken* that

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64 Brief of Respondent at 44, Nken v. Holder, 556 U.S. 418 (2009) (No. 08-681). See also Respondent’s Opposition to Petitioner’s Motion to Amend the Court’s December 22, 2008 Decision at 11, *Sandoval-Macias v. Mukasey*, 304 F. App’x 558 (9th Cir. 2008) (No. 07-71354) (“[O]nce the Court’s mandate issues in this case, there will no longer be a final order of removal against Sandoval and his status as a lawful permanent resident will be restored, along with his entitlement to evidence demonstrating that status.”).
65 *Nken*, 129 S. Ct. at 1761. Other courts similarly have relied on the government’s statement in *Nken* that an alien is returned to the same status as he had prior to removal when he prevails on a petition for review. See, e.g., *Leiva-Perez v. Holder*, 640 F.3d 962, 969 (9th Cir. 2011); *Rodriguez-Barajas v. Holder*, 624 F.3d 678, 681 n.3 (5th Cir. 2010); see also *Tapia Garcia v. INS*, 237 F.3d 1216, 1218 (10th Cir. 2001) (finding that if the petitioner prevailed before the court, his “status as a legal permanent resident would be restored and he could return to the United States”).
66 *FOIA Complaint, supra* note 21, at ¶¶ 1-6; *accord Realmuto, supra* note 21, at 1 (“There are no formal procedures for arranging the return of someone who has been deported.”).
it has a policy of restoring individuals to their prior status is unclear.\(^67\) When the plaintiffs served a FOIA request on the Office of the Solicitor General regarding the basis for the government’s statement in that case, the office responded that the only relevant documents were created for purposes of the litigation itself and were privileged from disclosure, meaning that any documents about the policy were created for the litigation itself.\(^68\) In other words, it is not clear whether any policy existed prior to \textit{Nken} or whether any such policy currently exists.

Rather, it appears that the opposite is true and that the government repeatedly has taken the position that such aliens, because they are now outside the United States, are properly classified as “arriving aliens” who are subject to inadmissibility standards rather than deportability standards. Specifically, the government has taken the position that it cannot restore an alien to the status of being lawfully inside the United States, even if the alien possessed such status prior to the initiation of removal proceedings.\(^69\) In one internal government e-mail communication, a federal official indicated that the only available relief would be to treat the alien as an arriving alien, which “would not be restoring him to the status quo that existed when he was improperly removed.”\(^70\) In a number of cases, the government has taken the position that prevailing aliens, including lawful permanent residents, should not be allowed to return because they are inadmissible, or has taken the position that post-deportation proceedings should be dismissed as moot because even if the alien prevailed and

\(^67\) \textit{FOIA Complaint, supra} note 21.


\(^69\) See \textit{FOIA Complaint, supra} note 21, at Exh. Y (letter from Joseph D. Hardy, Trial Attorney, Office of Immigration Litigation, United States Department of Justice, to the U.S. Court of Appeals for the Fifth Circuit) (“[T]here is no remedy that can return him to the status he had prior to his removal, \textit{i.e.} an alien seeking to \textit{remain} in the United States pending adjudication of his application for adjustment of status in conjunction with a discretionary waiver.”)

\(^70\) \textit{Id.} at Exh. CC.
regained LPR status, the alien nonetheless would be inadmissible.\(^{71}\) In another case, an immigration judge found that a prevailing alien who had his deportation order overturned was inadmissible under a statutory provision that makes any previously deported alien inadmissible unless the alien obtains permission to return from the Attorney General.\(^{72}\) In another case, even where the government agreed that where an alien should be restored to his LPR status after successfully showing that his conviction was not an aggravated felony, it took the position that he could not reside in the United States because his conviction was a crime involving moral turpitude, indicating that it was applying the inadmissibility standards that make a single moral turpitude conviction removable rather than the deportability standards that ordinarily require two moral turpitude convictions.\(^{73}\)

Even when the government has consented to an alien’s return, it appears to have taken the position that the only way an alien can return is through what is known as “parole.”\(^{74}\) By entering as a parolee an alien is treated as an arriving alien who must apply for admission.\(^ {75}\) Parole is not an admission at all and does not confer any immigration status on the alien. Rather, it permits a temporary reentry, usually for a period of one year or less, for reasons of exigency—such as the need to participate in legal proceedings or so the alien can obtain urgent and necessary medical care.\(^{76}\) Once parole expires, the alien loses any right to stay in the United States and is treated as an applicant for admission subject to inadmissibility standards.\(^ {77}\) And if the alien is inadmissible though not deportable, the alien ultimately will be

\(^{71}\) Id. at ¶ 36 (providing examples); Id. at Exh. E ¶ 9 (Declaration of Barbara Hines); Exh. F ¶ 7 (Declaration of Maile M. Hirota); Exh. G ¶¶ 28-30 (Declaration of Joseph Hohenstein); FOIA Press Release, supra note 68, at 5 ¶ 4.


\(^{73}\) FOIA Complaint, supra note 21, at Exh. G. ¶ 30 (Declaration of Joseph Hohenstein).

\(^{74}\) See 8 U.S.C. § 1182(d)(5).

\(^{75}\) Realmuto, supra note 21, at 4 ([B]ecause parolees are subject to the grounds of inadmissibility, not deportability, entering as a parolee may negatively impact the charges in the Notice to Appear and the type of relief available.”).

\(^{76}\) See, e.g., Amanullah v. Nelson, 811 F.2d 1, 6 (1st Cir. 1987) (“The legislative history of the parole statute, 8 U.S.C. § 1182(d)(5), demonstrates beyond cavil that Congress consistently visualized parole as an indulgence to be granted only occasionally, in the case of rare and exigent circumstances, and only when it would plainly serve the public interest.”).

\(^{77}\) 8 U.S.C. § 1182(d)(5); FOIA press release, supra note 68, at 5 ¶ 4 (noting that “many individuals are returned through parole, which subjects an individual to treatment as an ‘arriving alien’ and grounds of inadmissibility”); see also Nat’l Immigration Project of the Nat’l Lawyers Guild v. U.S. Dep’t of Homeland Security, _F. Supp. 2d_, No. 11 civ. 3235 (JSR), 2012 WL 375515 at *2 (S.D.N.Y. Feb. 12, 2012) (noting that government records “admit that the Government’s use of parole would not restore the status that removed aliens had prior to their removal.”).
unable to remain in the United States. In several cases, the government has assented to an alien’s return only through the issuance of parole.\textsuperscript{78}

In short, the government has taken the position that aliens who were lawful residents before removal are now applicants for admission following removal, even though none of these aliens would have been removed but for the faulty deportation orders that these aliens have succeeded in overturning.

\textbf{B. The Effect on Previously-Deported Aliens}

Because of the “inadmissibility gap,” the government’s practice threatens to significantly prejudice the rights of aliens who win their cases after being deported. Aliens who are not deportable but who are inadmissible might find themselves unable to return to the United States even though the only reason they were removed was because of an erroneous deportation order. In effect, an alien’s now defunct deportation order may continue to have adverse consequences by preventing the alien from returning to the United States.

From the non-citizen’s perspective, the stakes involved could not be higher. Deportation often is the most severe punishment that can be inflicted on a non-citizen, and the consequences of deportation “often far outweigh those of many criminal convictions.”\textsuperscript{79} Deportation is the equivalent of banishment or exile. It results in the forcible removal from one’s home and country of residence, as well as the severance of family, community and business relationships.\textsuperscript{80} According to Professor Peter Markowitz, deportation means that “[l]awful immigrants can face life sentences of banishment from their homes, families, and livelihoods in the United States and can potentially be sent to countries they have not visited since childhood, where they have no family, do not speak the language, and can face serious persecution or death.”\textsuperscript{81} Deported individuals may never

\textsuperscript{78} FOIA Press Release, supra note 68, at 5 ¶ 4; FOIA Complaint, supra note 21, at Exhs. A, B, E, L AA, CC, DD, EE.


\textsuperscript{80} See, e.g., Fong Yue Ting v. United States, 143 U.S. 698, 759 (1893) (Field, J., dissenting) (“As to its cruelty, nothing can exceed the forcible deportation from a country of one’s residence, and the breaking up of all the relations of friendship, family, and business. . . .”).

\textsuperscript{81} Peter L. Markowitz, Deportation is Different, 13 U. PA. J. CONST. L. 1299, 1301-02 (2011); accord Wedges v. Dixon, 326 U.S. 135, 147 (1945) (“[D]eportation may result in the loss of all that makes life worth living.”).
see their family again and may be forced to live in a place that often feels like a completely foreign land. Individuals who have been deported while their challenges were pending in court have found that they are unable to integrate into a foreign society, and have suffered from unemployment, destitution, homelessness, and physical violence.

Although no specific data exists on how many aliens remain deported because of the government’s practices, the lack of data is due in part to the executive branch’s refusal to disclose information about its policies for dealing with aliens who prevail post-deportation.\(^8^2\) What is known and undisputed is that the effects are much greater than anyone anticipated. The reason, as detailed below, is that the volume of petitions for review challenging deportation orders has exploded since the IIRIRA amendments of 1996, with a similarly dramatic increase in appellate court reversals of deportation orders. Moreover, because immigration judges have been criticized by the Courts of Appeals for being error-prone and engaging in sloppy reasoning the reversal rate in deportation cases (as much as 40% in some circuits) is much higher than the overall reversal rate in the court of appeals.\(^8^3\) Federal courts grant more than one thousand petitions for review a year, a significant number of which involve aliens who have been deported.\(^8^4\) Moreover, the government’s practice has implications for every non-citizen. Every alien who lives in the United States or who may enter in the future could potentially land in the “inadmissibility gap” and therefore every alien must live in fear of the possibility of being wrongly deported and then prohibited from returning.

Prior to 1996, petitions for review were relatively rare. For example, in the thirty-year period from 1972 to 2002, the Second Circuit, which has one


\(^8^3\) The reversal rate of deportation decisions has been as high as 20%-40% depending on the circuit. See, e.g., Lenni B. Benson, Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts, 51 N.Y.L. Sch. L. Rev. 37, 60 (2006-2007) (“The rate of remand or reversal in the Second Circuit is 20% and has reached as high as 40% in the Seventh Circuit.”). By contrast, the reversal rate is only 8.6% for appeals as a whole and only 13.4% for administrative appeals, of which deportation appeals comprise a large percentage. See Federal Judicial Caseload Statistics 2011, Table B-5, U.S. Courts of Appeals—Appeals Terminated on the Merits by Circuit, During the 12 Month Period Ending March 31, 2011, http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/B05Mar11.pdf(last visited Feb. 25, 2012).

\(^8^4\) FOIA Complaint, supra note 21, at ¶ 3 (“A significant number of [appellate reversals of deportation orders] involve individuals who challenge their removability from outside the United States.”).
of the busiest immigration dockets in the nation, received only 2,360 petitions, for an average of just under eighty a year.\footnote{John R.B. Palmer, \textit{The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis}, 51 N.Y.L. SCH. L. REV. 13, 14 (2006-2007).} However, there has been a “well-documented” explosion of petitions for review since the IIRIRA reforms of 1996.\footnote{John R.B. Palmer, \textit{et al., Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review}, 20 GEO. IMM. L.J. 1, 8 & n.17 (2004) (citing numerous reports).} One study shows that appeals of removal orders has increased by almost 1,000% from 1996 to 2006.\footnote{See Benson, supra note 83, at 39 (describing a 970% increase in federal court appeals of removal orders since 1996).}

Most commentators ascribe the bulk of the increase to a few causes. One cause was the 1996 amendments themselves. IIRIRA enacted new standards for deportation that were not clearly drafted and therefore inspired a great deal of litigation regarding whether aliens could properly be found deportable under those new standards.\footnote{See Rosenbloom, \textit{Remedies for the Wrongly Deported}, supra note 21, 149-50 (“The 1996 legislation was hastily drafted and included numerous ambiguities. In the wake of its passage, government attorneys aggressively pursued broad interpretations of the new laws—interpretations that in many cases were later rejected by the courts.”).} IIRIRA also significantly reduced opportunities for discretionary relief where an alien was found deportable.\footnote{See id. (explaining that the 1996 amendments had the effect of “greatly expanding the grounds of deportability and reducing the availability of discretionary relief”).} By closing off other avenues for relief, the Act pushed aliens to lodge more challenges to the finding of deportability itself, since that increasingly came to represent the only option for staying in the country. In turn, immigration attorneys who previously had limited their practice to the administrative level and had shied away from filing petitions in federal court became more comfortable with federal appellate practice and began filing more and more petitions for review.\footnote{See Palmer, supra note 85, at 28 (“Lawyers who had previously practiced only at the administrative level moved into the courts of appeals for the first time to fill the demand. Lawyers who had never filed more than a handful of petitions for review per year now began filing hundreds.”); Benson, supra note 83, at 49-55.}

A second major cause was the adoption of new “streamlining” regulations for the BIA in 2002.\footnote{See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54878-01 (Aug. 26, 2002) [hereinafter \textit{BIA Streamlining Regulations}].} In order to reduce a backlog of more than 50,000 appeals, the 2002 regulations allowed single board members, rather than three-member panels, to issue the bulk of decisions, and greatly expanded the authority for board members to issue Affirmances Without
Opinion. \textsuperscript{92} They also limited the scope of the Board’s review powers over immigration judge decisions. Whereas the Board previously could review the entire decision de novo, the new regulations required the Board to review factual findings under a deferential “clear error” standard while preserving de novo review of legal claims. \textsuperscript{93} The streamlining regulations also (and perhaps counter-intuitively) reduced the size of the Board from twenty-three members to eleven members, and a number of commentators have suggested that the cuts were politically motivated to remove those Board members who were generally the most sympathetic to aliens’ claims. \textsuperscript{94}

Consequently, the BIA began deciding more cases and ruled in favor of the government an increasing percentage of the time. Soon after the streamlining regulations went into effect, the BIA doubled its decision rate from 2,000 decisions per month to 4,000. \textsuperscript{95} The percentage of BIA decisions in which the BIA ruled against the alien also increased substantially, from 75\% in 2001 to 94\%-98\% for the years 2002 through 2004. \textsuperscript{96} The result was a substantial increase in the number of deportations. While the government deported 50,000 individuals in 1996, by 2010 that number had increased to 400,000. \textsuperscript{97}

Unsurprisingly, the volume of petitions for review filed in the federal courts of appeals increased dramatically. Whereas the two years preceding the streamlining reforms saw around 1,750 petitions filed per year, since the reforms, the number of petitions has ranged from a low of 8,446 petitions in 2003 to a high of 13,059 petitions filed in 2006, for an average of a fivefold increase. \textsuperscript{98} As of 2008, petitions for review of removal orders


\textsuperscript{93} 8 C.F.R. § 1003.1(d)(3)(i)-(ii).

\textsuperscript{94} Benson, supra note 83, at 61; Susan Benesch, Due Process and Decisionmaking in U.S. Immigration Adjudication, 59 ADMIN L. REV. 557, 560 (2007) (noting that the departing Board members “were widely seen as ‘the most immigrant-friendly Board Members’”).

\textsuperscript{95} Palmer, supra note 85, at 19-20.

\textsuperscript{96} See Palmer, supra note 85, at 23-24; Palmer, supra note 86, at 55-57; see also Legomsky, supra note 92, at 1662 (noting that “the percentage of cases in which the BIA reversed immigration judge decisions dropped precipitously after the 2002 reforms”).

\textsuperscript{97} Rosenbloom, Remedies for the Wrongly Deported, supra note 21, at 140; see also Maria Baldini-Potermin, It’s Time To Consider Automatic Stays of Removal: Petitions for Review, Motions to Reopen, BIA Regulations, and the Race to the Courthouse, 10-01 IMMIGR. BRIEFINGS 1 (Jan. 2010) (noting that the United States removed 356,739 individuals in 2008 and 369,483 individuals in 2009).

\textsuperscript{98} Legomsky, supra note 92, at 1658; see also Benson, supra note 83, at 47-48 (noting a 357\% increase in petitions for review between 2000 and 2005); Lenni B. Benson, You Can’t Get There from Here: Managing Judicial Review of Immigration Cases, 2007 U. CHI. LEGAL F. 405, 407-08 (2007) (providing similar statistics). The increase reflects both
comprised 17% of the federal appellate civil docket and more than 88% of all appeals of agency action, though those numbers may have dropped slightly in recent years. 99

The rise in petitions for review has been matched by a corresponding rise in reversals of deportation orders. A substantial number of aliens have been adversely affected by erroneous removal orders. Appellate courts have been reversing or remanding BIA decisions between 20 percent and 40 percent of the time, depending on the circuit. 100 The courts are granting more than 1,000 petitions per year and have granted 7,000 petitions since 2005. 101

In light of the BIA’s procedural reforms, a higher-than-average reversal rate is not entirely surprising. Shifting decision-making from three judges to one judge may increase the risk that errors in a decision get overlooked at the BIA level. Additionally, with the rising volume of decisions, Board members are issuing so many decisions in such a short period of time that they are bound to make errors. One commentator noted that the BIA’s caseload requires each Board member to issue 50 decisions per week, which substantially limits the amount of time a Board member can spend on any particular case. 102 Further, the Department of Homeland Security, which represents the government in immigration matters at the agency level, has been criticized for refusing to exercise prosecutorial discretion, meaning

the increase in decisions by the BIA as well as an increased rate of appeal. The appeal rate of BIA decisions has increased from around 6% prior to the streamlining reforms to almost 30% after the reforms. See Legomsky, supra note 92, at 1659; Benson, supra, at 423; Palmer, supra note 85, at 20.

99 In some circuits, the percentage of the docket devoted to immigration is even higher. “In fiscal year 2008, immigration cases comprised 41 percent of the entire Second Circuit docket and 34 percent of the Ninth Circuit docket.” Legomsky, supra note 92, at 1647; accord Benson, supra note 83, at 47.

100 See, e.g., Benson, supra note 83, at 60 n.95 (“The rate of remand or reversal in the Second Circuit is 20% and has reached as high as 40% in the Seventh Circuit.”). It is not clear whether the reversal rate has always been this high, or whether the rate has been increasing. See Palmer, supra note 86, at 50. Moreover, the Department of Justice has disputed that the reversal numbers are this high and contends that the reversal rate is no higher than 10%. Benson, supra note 98, at 425.

101 See Executive Office for Immigration Review Office of Planning, Analysis & Technology, FY 2010 Statistical Yearbook at T2 tbl. 16 (Jan. 2011) (listing the number of circuit court remands of BIA petitions by year), http://www.justice.gov/eoir/statspub/fy10syb.pdf (last visited Jan. 6, 2011); FOIA Complaint, supra note 21, at ¶ 3 (“Each year, the federal courts may vacate or reverse more than 1,000 removal orders.”); ¶ 20 (“Since 2005, the federal circuit courts alone have vacated or reversed more than 7,000 removal orders.”); Baldini-Potermin, supra note 97 (providing chart showing the number of petitions for review granted each year from 2005 through 2008).

102 Legomsky, supra note 92, at 1653-54.
that the agency aggressively pursues expansive pro-deportation interpretations of immigration statutes and pushes weak cases that may be prone to reversal.\footnote{103}

Indeed, appellate courts have not been shy about admonishing what they perceive as the poor quality of decision-making by immigration judges and the BIA.\footnote{104} In \textit{Bensalimane v. Gonzales}, the U.S. Court of Appeals for the Seventh Circuit emphasized that the Court’s “criticisms of the Board and of the Immigration Judges have frequently been severe” and explained that the result was that “[i]n the year ending on the date of this argument, different panels of this court reversed the Board of Immigration Appeals in whole or in part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits.”\footnote{105} Other courts have made similar criticisms.\footnote{106}

Many of the aliens who successfully obtain a reversal in the court of appeals may already have been removed from the United States.\footnote{107} Some


\footnote{104} \textit{See, e.g.,} Christine B. LaBrie, Third Circuit Describes “Disturbing Pattern of IJ Misconduct in Asylum Cases, available at http://www.ilw.com/articles/2005,1027-labrie.shtml (last visited Dec. 20, 2011) (describing the court’s decision in \textit{Wang v. Attorney General}, 423 F.3d 260, 267 (3d Cir. 2005), in which the court stated: “Time and again we have cautioned immigration judges against making intemperate or humiliating remarks during immigration proceedings. Three times this year we have had to admonish immigration judges who failed to treat the asylum applicants in their court with the appropriate respect and consideration.”).

\footnote{105} 430 F.3d 828, 829 (7th Cir. 2005); \textit{see also} id. at 830 (concluding that “the adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice”).

\footnote{106} \textit{See, e.g.,} Zuh v. Mukasey, 547 F.3d 504, 513-15 (4th Cir. 2008) (noting that “that academic literature and court decisions have grown increasingly strident in their criticism of the immigration review process” and expressing that its decision in granting an alien’s petition for review “adds to this rising tide of criticism”); \textit{N'Diom v. Gonzales}, 442 F.3d 494, 500-01 (6th Cir. 2006) (Martin, J., concurring) (“There are no doubt many conscientious, dedicated, and thorough immigration courts across the country. Unfortunately, their hard work is overshadowed by the significantly increasing rate at which adjudication lacking in reason, logic, and effort from other immigration courts is reaching the federal circuits.”); \textit{see also} Baldini-Potermin, \textit{supra} note 97 (providing additional examples). In 2006, then-Attorney General Alberto Gonzales issued a memorandum to all immigration judges criticizing them for failing to “produce the quality of work that I expect” from Justice Department employees. Memorandum from U.S. Attorney General to Immigration Judges (Jan. 9, 2006), available at http://www.justice.gov/ag/readingroom/ag-010906.pdf.

\footnote{107} \textit{See FOIA Complaint, supra note 21, at ¶ 20 (noting that a “significant number” of vacated removal orders “involve individuals challenging their removability from outside the United States”).}
aliens may file a petition for review but may fail to seek a stay of removal. Others may request a stay that the court ultimately denies. Still others may be removed before they have a chance to seek a stay. By statute, an alien has thirty days to file a petition for review, but in many cases the government removes an individual before that thirty-day period has passed. Because a motion for a stay is not a pro forma document in that an alien must make a substantial showing of likelihood of success on the merits and of irreparable injury, an alien may not be able to file a stay application before being deported, especially if the alien has obtained new counsel who needs to become familiar with the case. Finally, some aliens may prefer to be removed while their petition is pending rather than remain in the United States. Aliens who are detained while their proceedings are ongoing may reasonably decide that rather than spending a year or more in prison under difficult and often unsafe conditions while their petition is pending, they may stay safer and healthier if they are deported. In short, a significant number of aliens who prevail in a petition for review and who overturn their deportation orders will do so after having been deported.

Moreover, the number of aliens prevailing from abroad stands to increase in coming years. In addition to filing petitions for review, another

108 The government has the authority to remove an alien on the same day that the removal order becomes final. Baldini-Potermin, supra note 97. A non-citizen cannot obtain a stay “if he or she is removed from the U.S. before the noncitizen or his or her counsel even receives the [BIA’s] decision or has sufficient time to prepare the petition for review and the emergency motion for a stay.” Id.; accord Oral Argument of Steven Morley on behalf of Petitioner, Gracia-Moncaleano v. Attorney General, No. 08-3669 (3d Cir. Jan. 11, 2010), http://www.ca3.uscourts.gov/oralargument/audio/08-3669Moncaleanov.AtttyGenUSA.wma (petitioner’s counsel stated that petitioner was removed almost immediately after he was retained and before he had a chance to review the petitioner’s file); FOIA Complaint, supra note 21, at ¶ 20 (citing Reyes-Torres v. Holder, Nos. 08-74452 and 09-70214 (9th Cir. Apr. 7, 2011), in which the alien was deported seven days after the BIA’s final decision and before the alien had filed a petition for review, a motion to reopen, or a request for a stay of removal); see also Coyt v. Holder, 593 F.3d 902, 904 (9th Cir. 2010) (noting that the alien was deported while his motion to reopen was still pending before the BIA); Madrigal v. Holder, 572 F.3d 239, 245 (6th Cir. 2009) (noting that the petitioner was removed while her motion for stay of removal was pending before the BIA). It also possible that noncitzens, particularly detained non-citizens will be removed while their motion for a stay is in the mail to the court of appeals. See Baldini-Potermin, supra note 97.

109 See Kalhan, supra note 36, at 43 (“For many noncitizens, detention now represents a deprivation as severe as removal itself.”). In several cases, noncitizens have chosen to leave the country rather than stay detained. See FOIA Complaint, supra note 21, at Exh. G, ¶¶ 23-24 (Decl. of Joseph Hohenstein); Motion To Lift Stay of Removal at ¶ 5, Banuelos-Ayon v. Gonzales, 611 F.3d 1080 (9th Cir. 2010) (No. 07-71667) (on file with author) (withdrawing a motion for stay of removal because the petitioner “is incarcerated … and given the choice between remaining incarcerated and returning to Mexico, [petitioner] would prefer to return to Mexico”).
potential avenue for challenging deportation orders is to file a motion to reopen with the BIA. Until recently, that option was not available for aliens who had already been deported because pursuant to federal regulations, an alien’s departure, voluntary or otherwise, deprives the BIA of jurisdiction to consider a motion to reopen. While that regulation still exists, a number of appeals courts in recent years have struck down the regulation as an arbitrary and capricious exercise of agency authority. As a result, a greater number of aliens may obtain post-deportation relief now that many aliens can file motions to reopen with the BIA in addition to petitions for review with the courts of appeals.

Finally, not only does the practice of relegating deported aliens to a lesser status, even after they overturn their deportation order, directly affect a large number of aliens, it also is emblematic of a larger problem regarding how to best provide justice to aliens who prevail from abroad. As the current FOIA litigation indicates, the lack of a clear government policy for returning successful aliens means that even aliens who do not fall within the inadmissibility gap face substantial difficulty returning to the United States. In some cases, it has taken years after a victory for an alien to return to the United States as federal agencies have disclaimed responsibility for facilitating aliens’ return or have refused to issue the necessary travel documents to permit return. Although these aliens have no existing deportation order and therefore have a right to return to the United States, agency intransigence has placed them in limbo where they need authorization from the government to come back, but where no branch of the government claims to have the power to provide such authorization. An additional effect of treating returning aliens as “arriving aliens” is that they are threatened with or placed in detention of indefinite duration. Detention conditions for immigrants have been widely criticized, and include overcrowding, inadequate sanitation, and physical and emotional

110 See 8 U.S.C. § 1229a(c)(6)-(7) (conferring a statutory right on aliens to file one motion to reopen with the BIA).
111 8 C.F.R. § 1003.2(d).
112 See Contreras-Bocanegra v. Holder, _F.3d_, 2012 WL 255879 (10th Cir. Jan. 30, 2012); Prestol Espinal v. Att’y Gen., 653 F.3d 213 (3d Cir. 2011); Pruidze v. Holder, 632 F.3d 234 (6th Cir. 2011); Reyes-Torres v. Holder, 645 F.3d 1073 (9th Cir. 2011); Marin-Rodriguez v. Holder, 612 F.3d 591 (7th Cir. 2010); William v. Gonzales, 499 F.3d 329 (4th Cir. 2007); see also Luna v. Holder, 637 F.3d 85, 102 (2d Cir. 2011) (declining to decide the validity of the departure bar but stating that “the BIA must consider an alien’s motion to reopen even if the alien is no longer in the United States”). For a detailed explanation and criticism of the departure bar, see Rosenbloom, Remedies for the Wrongly Deported, supra note 21.
113 FOIA Complaint, supra note 21, at ¶¶ 5, 25-35.
114 Arriving aliens that are charged as inadmissible are subject to mandatory detention for the duration of their proceedings. 8 U.S.C. § 1225(b)(1)(B)(iv).
abuse, in addition to the hardships that detention places on an immigrant’s family.\textsuperscript{115} Furthermore, aliens who prior to their original removal obtained release from detention by posting bond have found themselves again placed in detention following their return, meaning that the alien has to pay the same bond twice (if the alien can afford it) to obtain release.\textsuperscript{116} None of these impediments would apply to aliens who win their cases while still inside the United States.

Thus, large numbers of aliens already have been affected by this practice and many more may be affected in the future. While the basis for the government’s position is uncertain, it is possible that government officials have concluded that classifying aliens who succeed post-deportation as “arriving aliens” and subjecting them to inadmissibility standards rather than deportability standards is compelled by statute, as it has stated that parole “is the only available method for returning an alien.”\textsuperscript{117} As the next two parts explain, the government’s position is not supported by the statute, and even if it were, it may violate both the Due Process Clause and the Equal Protection Clause of the U.S. Constitution.

III. Statutory Concerns

An analysis of the lawfulness of the government’s practice of treating wrongly deported immigrants as “arriving aliens” when they attempt to return to the United States requires looking first to whether the practice is authorized by statute. Two divergent views exist as to whether the government’s practice reflects the intent of Congress. One view is that it runs contrary to the purposes of the 1996 IIRIRA amendments, which by eliminating the right to an automatic stay during a petition for review and the bar on pursuing a petition for review from abroad, sought to both to expedite the removal of aliens while still allowing deported aliens to fully vindicate their rights.

The other view is that the government’s practice is legitimate because it derives straight from the text of the INA itself. The government has claimed that the text requires treating as “arriving aliens” those aliens who have been removed from the United States following the commission of a crime, or have been outside of the United States for more than six months, regardless of the reason for their departure from the United States. Further, under this view, an alien who is unable to return after prevailing from

\textsuperscript{115} Kalhan, supra note 36, at 46-47.
\textsuperscript{116} FOIA Complaint, supra note 21, at Exh. G ¶ 14.
\textsuperscript{117} FOIA Complaint, supra note 21, at Exh. DD (email from U.S. Justice Department attorney Kyle Hansen).
abroad has only himself to blame for not obtaining a stay of removal prior to being deported.

This part undertakes a careful review of each these arguments. It concludes that the government’s practice undermines Congress’s intent to allow aliens to fully vindicate their rights from abroad and that the textual sections relied upon by the government were not intended to apply to involuntary deportations that are subsequently invalidated.

A. Congressional Intent

The government’s practice of subjecting aliens who win their appeals from abroad to inadmissibility standards rather than to deportability standards is inconsistent with congressional intent in several ways and therefore likely contravenes the INA. First, it encourages aliens to seek stays of removal, which is exactly what Congress was trying to discourage in the 1996 amendments. Treating aliens who prevail from abroad as subject to inadmissibility standards as opposed to the deportability standards under which they were originally charged will substantially delay, rather than expedite, the removal of aliens. If aliens who prevail in their petitions for review following removal will find that they have been demoted to a lesser status and are now subject to inadmissibility grounds, then every alien will have the incentive to seek a stay of removal in order to avoid being prejudiced by a pre-appeal removal and the subsequent application of the more stringent inadmissibility grounds upon re-entry. Those aliens who will be unable to return if they prevail will have stronger grounds for obtaining a stay of removal because they will be able to show irreparable injury from deportation. Thus, under the government’s practice, the statute effectively reverts to its pre-IIRIRA structure for aliens subject to the “inadmissibility gap.”

Additionally, because the fact of deportation renders this class of aliens inadmissible even if an appeals court overturns their deportation orders, deportation operates as a functional withdrawal of the alien’s petition for review. Such a situation would thwart IIRIRA’s goal of expediting removal by limiting stays of removal and granting aliens the ability to pursue judicial review from abroad.

Second, subjecting prevailing aliens to inadmissibility standards rather than deportability standards undermines the goal of increasing accuracy. If the fact of removal can prevent a successful alien from returning to the United States by subjecting that alien to more stringent inadmissibility standards, then the government has little incentive to ensure that its allegations of deportability are correct. If the government knows that there is a good chance that the alien will not be able to reenter even if the alien
wins, then the government gets the result it sought even if it lacked legitimate grounds for deporting the individual in the first place. For the alien, winning on appeal becomes a hollow victory. An alien who is improperly removed and finds himself inadmissible as a direct consequence of the improper removal will receive no meaningful relief and will suffer the same fate as if the improper order were never corrected. The only way to maintain consistency with IIRIRA and to promote accuracy is to restore the alien to the precise status the alien possessed prior to removal, which includes being lawfully present inside the United States and subject to deportability grounds rather than inadmissibility grounds.

Third, subjecting prevailing aliens to inadmissibility standards undercuts their statutory right to judicial review of deportation orders. Although the effect of the government’s practice on an alien’s ability to obtain meaningful judicial review implicates due process concerns as discussed in Part IV, it also reinforces how the practice is inconsistent with the INA’s statutory scheme. The INA provides a statutory right to seek review of a final deportation order. The Supreme Court previously has refused to interpret the INA in a way that would limit an alien’s statutory right to obtain review of deportation orders. In Dada v. Mukasey, the Court addressed the interplay of an INA provision allowing for “voluntary departure” within 60 days of a removal order, an INA provision allowing aliens to file a motion to reopen with the BIA, and a regulation barring aliens from pursuing their motion to reopen following removal. The crux of the conflict was that an alien who is granted voluntary departure must depart within 60 days or face certain penalties, while a motion to reopen often takes longer than 60 days to decide. This meant that an alien who elected to voluntarily depart effectively gave up the right to pursue a motion to reopen, while an alien who refused to voluntarily depart in order to pursue the motion to reopen suffered other adverse consequences. The Court rejected the government’s proffered interpretation that an alien who seeks voluntary departure gives up the right to pursue a motion to reopen and held that at a minimum the alien must be permitted to withdraw the request for voluntary departure so that the alien does not suffer penalties for pursuing the motion to reopen.

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118 See infra Part IV.A.
120 554 U.S. 1 (2008).
121 Id. at 5.
122 Id. ("[A]n alien who seeks reopening has two poor choices: The alien can remain in the United States to ensure the motion to reopen remains pending, while incurring statutory penalties for overstaying the voluntary departure date; or the alien can avoid penalties by prompt departure but abandon the motion to reopen.").
123 Id. at 15-19.
some statutory language supported the government’s position, it nonetheless found the government’s view “unsustainable” because “[i]t would render the statutory right to seek reopening a nullity in most cases of voluntary departure.” Additionally, it found that the purpose of providing review through a motion to reopen was “to ensure a proper and lawful disposition” of immigration charges and determined that Congress would not have intended to eliminate the “important safeguard” of a motion to reopen for a large class of aliens.

The situation regarding aliens who overturn their deportation orders following removal is very similar. The INA expressly authorizes aliens to seek judicial review of final deportation orders by filing a petition for review in the court of appeals, and in fact makes petitions for review the “sole and exclusive means for judicial review of an order of removal.” The statute provides several restrictions on the right to judicial review, including prohibiting review of rulings regarding discretionary relief, yet contains no provision restricting relief based on whether or not the alien has been removed.

If an alien’s deportation acts to bar the alien from re-entering, even after the deportation order is overturned, then the alien’s statutory right to judicial review of the deportation order is nullified. Just as the Court in

\[124\] Id. at 15 (noting that the 60 day requirement of the voluntary departure provision “contains no ambiguity”). Indeed, the dissenting Justices argued persuasively in dissent that the statutory language regarding voluntary departure is mandatory and does not authorize an alien to withdraw in order to avoid statutory penalties. See id. at 23-30 (Scalia, J., dissenting).

\[125\] Dada, 554 U.S. at 16.

\[126\] Id. at 18.


\[129\] See 8 U.S.C. § 1252(a)(2)-(3). See also 8 U.S.C. § 1252(e) (limiting the type of relief a court may order in a petition for review). Although the statute bars aliens convicted of certain criminal offenses, including aggravated felonies, from seeking judicial review, the statute explicitly authorizes courts to address questions of law regarding whether the alien’s criminal conviction qualifies as one that would deprive the court of jurisdiction to review the case. See 8 U.S.C. § 1252(c) (“Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.”).

\[130\] To be sure, overturning a deportation order may bring an alien some ancillary benefits that are not nullified by treating the alien as inadmissible. For example, an alien who succeeds in vacating a removal order by showing that his criminal conviction is not an aggravated felony will no longer be subject to the rule that a previously deported alien cannot seek reentry for a specified number of years, depending on the ground for deportation. See 8 U.S.C. § 1182(a)(9) (listing the various bars on reentry following deportation). However, these small benefits pale in comparison to the benefit of
Dada determined that Congress did not likely intend to remove the availability of judicial review for large classes of aliens, it is similarly unlikely that Congress intended for a deportation order, once it has been vacated, to continue to live by taking away the alien’s right to reenter the United States.

There is no question that if the alien was never removed in the first place, the alien would be subject to the statute’s deportability standards and the inadmissibility standards never would come into play. The situation should not change simply because an alien prevails after deportation rather than before. The government should not be able to deport an alien, and then after the deportation order was found to be improper, use the fact of deportation to subject the alien to new inadmissibility grounds that did not apply previously. Doing so runs directly contrary to IIRIRA’s purposes of enabling aliens to seek judicial review from abroad and limiting an alien’s right to a stay of removal.

B. The Statutory Text

Although IIRIRA’s purposes support allowing aliens who prevail from abroad to re-enter the United States and to continue to be subject to deportability standards instead of being newly subject to inadmissibility standards, there are various sections of the statutory text that appear at first blush to support the government’s position that such aliens should be required to apply for admission in order to return to the United States. As explained below, however, it is unlikely that Congress contemplated applying these provisions to an alien who is involuntarily removed pursuant to a deportation order that is subsequently vacated, and to do so would run afoul of the principle requiring courts to avoid interpretations of statutes that lead to absurd results.131

1. Aliens Who Have Been Absent for More than 180 Days or Who Have Committed an Inadmissible Offense

One textual argument is that the statutory definition of “admission” requires an alien who wins a petition for review while abroad to submit a

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131 See 2A N. Singer, Sutherland Statutory Construction, §§ 46.05, 46.06, 46.07, at 90, 104, 110 (4th ed. 1985). See also United States v. Wilson, 503 U.S. 329, 334 (1992) (“[A]bsurd results are to be avoided”).
new application for admission in order to reenter. 132 The statutory definition of admission generally permits lawful permanent residents to leave and reenter the United States without having to reapply for admission each time. 133 However, the statute contains several exceptions. Of particular relevance here, a returning lawful permanent resident will be required to seek a new admission if the he or she “has been absent from the United States for a continuous period in excess of 180 days,” 134 or has previously “committed an offense” that would make the resident inadmissible and has not been granted a waiver for that offense. 135 Relying on these exceptions, the government has argued that an alien whose petition for review took more than two years to reach a decision “was an applicant for admission” because he stayed outside of the United States for more than 180 days. 136

These statutory provisions, however, should not apply to involuntary removals that result from subsequently-invalidated deportation orders. The 180-day provision was Congress’ replacement for the so-called Fleuti doctrine, which was a judicial doctrine establishing that aliens who voluntarily leave the United States for brief, casual trips do not have to reapply for admission upon return. Congress’ creation of a 180-day period to replace the Fleuti doctrine reflected Congress’ view that an alien who takes a trip of more than 180 days is not sufficiently committed to the United States to retain lawful permanent resident status. However, Congress’ concern about an alien’s dedication to the United States does not arise in the situation where an alien is involuntarily removed and where the alien attempts to preserve his ability to remain in the United States by challenging the validity of his deportation order. 137 If the 180-day absence

132 The government has made this argument in litigation before. See DHS Memorandum of Law, Matter of G-G-M- (Sept. 2011) [hereinafter DHS Memorandum] (on file with author).
133 8 U.S.C. § 1101(a)(13)(C) (stating that “[a]n alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws” unless a specific exception applies).
136 DHS Memorandum, supra note 132, at 5 (“[T]he respondent was outside the United States for more than 180 days, as [8 U.S.C. § 1101(a)(13)(C)](ii) above provides. Thus, . . . he was an applicant for admission . . . .”).
137 In analogous circumstances, the Sixth Circuit held that the government’s physical removal of an alien from the United States does not constitute an abandonment of the alien’s motion to reopen. See Madrigal v. Holder, 592 F.3d 239, 245 (6th Cir. 2009) (“Unlike the cases in which the petitioner either deliberately or inadvertently left the United States, it cannot be said that Madrigal relinquished or abandoned the right to appeal by virtue of her own conduct. Instead, her departure was forced by the government during the pendency of her appeal and hence, she did not take any action, either purposeful or unwitting, that can be construed as a waiver of her right to contest the immigration judge’s decision.”).
is taken literally, then an alien’s ability to retain lawful permanent resident status depends not on any behavior by the alien, but simply on the happenstance of whether the court of appeals takes more than 180 days to rule on a petition for review. Given that the average time from the filing of an appeal to final disposition by the court of appeals is at least eleven months, virtually every lawful permanent resident who is involuntarily removed and later wins a petition for review will have to seek readmission, even though the alien never would have left the United States but for the vacated removal order.

Viewing the statute as a whole also supports the conclusion that Congress did not intend to allow the government to rely on a subsequently-vacated deportation order to render an alien inadmissible. For example, the statute’s inadmissibility provisions provide that any alien who has been previously removed is inadmissible and may not reenter without first obtaining permission of the Attorney General. If applied literally, then no alien who was ordered deported would be permitted to return unless the Attorney General, in its discretion, permitted the alien to reenter. The Attorney General’s discretion to deny permission to reenter is quite broad, and reviewable only under a “very high standard of arbitrariness.” The statute also allows the Attorney General to deny permission to reenter for reasons other than whether the alien has committed a deportable or inadmissible offense. Applying this provision would subject aliens who successfully overturn their deportation orders to exactly the same constraints as aliens whose deportation orders remain valid. There is no

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138 See Administrative Office of the U.S. Courts, Federal Court Management Statistics at 2 (Sept. 2011), available at http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2011/Appellate%20FCMS%20Profiles%20September%202011.pdf&page=1. It is not uncommon for a petition for review to take more than two years from the filing of the petition to the issuance of a final decision. See, e.g., Valdiviezo-Galdamez v. Att’y Gen., 08-4564, 663 F.3d 582 (3d Cir. 2011) (petition filed Nov. 19, 2008 and final decision issued Nov. 8, 2011); Gracia-Moncaleano v. Att’y Gen., 08-3669, 390 F. App’x 81 (3d Cir. Aug. 13, 2010) (petition filed Aug. 28, 2008 and final decision issued August 13, 2010); Banuelos-Ayon v. Holder, 07-71667, 611 F.3d 1080 (9th Cir. 2010) (petition filed Apr. 30, 2007 an final decision issued July 14, 2010). The Ninth Circuit has a sufficient backlog that its local rules discourage attorneys from contacting the clerk’s office regarding when the court will schedule oral argument, let alone decide the case, until fifteen months have passed since the completion of briefing. See Ninth Circuit Advisory Committee Note to Circuit Rule 25-2 (advising counsel that they may contact the court regarding possible delays if “the parties have not received notice of oral argument or submission on the briefs within 15 months after the completion of briefing”).


140 CHARLES GORDON, STANLEY MAILMAN, & STEPHEN YALE-LOEHR, IMMIGRATION LAW & PROCEDURE, § 63.10, ¶ [4][b].

141 See id. (describing the discretionary factors that the Attorney General can consider).
evidence that Congress intended this provision to be applied to aliens whose removal orders have been overturned. Rather, it is more likely that the provision applies only to aliens with existing removal orders, which is reflected in judicial decisions holding that a ruling vacating a deportation order removes this particular bar on reentry.\textsuperscript{142} Nonetheless, at least one immigration judge has relied on this section to find that an alien who won his petition for review while abroad was inadmissible unless the alien first obtained permission to re-enter from the Attorney General.\textsuperscript{143}

Moreover, refusing to apply the statutory language to involuntary removals is consistent with the way that courts have drawn distinctions between aliens who leave voluntarily and those who are involuntarily removed when interpreting other portions of the INA, even when the text of those provisions draws no distinction between voluntary and involuntary removal. For example, the INA provides that aliens who apply to naturalize as United States citizens must demonstrate continuous residence in the United States for the five years immediately preceding the date of application and also provides than an absence of one year or longer during that time will break the alien’s period of continuous residence.\textsuperscript{144} Both courts and the executive branch, however, have interpreted that provision to mean that only voluntary absences from the United States break the alien’s period of continuous residence.\textsuperscript{145}

\textsuperscript{142} See, e.g., Contreras-Bocanegra v. Holder, _F.3d_, 2012 WL 255879 at *6 (10th Cir. Jan. 30, 2012) ("When the Board grants a motion to reopen, this action vacates the underlying removal order and restores the noncitizen to her prior status. As a result, the noncitizen is no longer subject to the reentry bar under § 1182(a)(9)(A)." (citation omitted)); Swaby v. Ashcroft, 357 F.3d 156, 160 (2d Cir. 2004) ("The government claims that petitioner would still be inadmissible under 8 U.S.C. § 1182(a)(9)(A)(ii) [§ 212(a)(9)(A)(ii)] for having been ordered removed after an aggravated felony conviction. This provision, however, would not bar petitioner's reentry if we were to, as petitioner requests, grant a writ of habeas corpus and vacate his order of removal."); Chong v. Dist. Dir., 264 F.3d 378, 386 (3d Cir. 2001) (finding that the "re-entry bar" of 8 U.S.C. § 1182(a)(9) would not apply if the alien succeeded in vacating his deportation order).

\textsuperscript{143} Durling Interlocutory Order, supra note 72.

\textsuperscript{144} See 8 U.S.C. § 1427(a)-(b).

\textsuperscript{145} See In re Yarina, 73 F. Supp. 688, 689 (N.D. Ohio 1947) ("It is evident that the statute which deprives a petition of naturalization and the right to citizenship contemplates a voluntary departure from the United States and a subsequent absence for a duration of more than one year within the period of required continuous residence."); id. ("Absence from the United States manifestly means absence voluntarily initiated."). Although the involuntary absence in Yarina was not caused by deportation (the petitioner was working abroad on an island that was attacked by Japanese forces during World War II and became a captive prisoner of war), the executive branch, in its interpretation of the naturalization provision, has not drawn any distinctions between different types of involuntary absences. Instead, it has stated that when "departure from the United States is involuntary and the absence which follows is enforced against the alien, he is considered as never having left the United
Similarly, at least two courts have refused to apply the plain language of 8 C.F.R. § 1003.4, which bars an alien from pursuing a motion to reopen from outside the United States, to an alien who was involuntarily removed, even though the regulation draws no distinction between voluntary and involuntary removals.146 In both cases, the courts found that interpreting the regulation literally would lead to unreasonable results that were inconsistent with Congress’s decision to provide a statutory right of review of deportation decisions.147

Consequently, while the text of the INA provides that a prolonged absence of more than 180 days can require an alien to reapply for admission, restricting that text to voluntary absences is the best way to maintain consistency with Congressional intent and to promote fairness. To hold otherwise risks punishing an alien for the government’s error in removing the alien in the first place, especially when the alien has actively asserted his or her right to remain in the United States.

2. Aliens Who Fail To Obtain a Stay of Removal

A second textual argument is that an alien who wins a petition for review while abroad should not be able to avoid the statute’s inadmissibility standards if the alien failed to seek or obtain a stay of removal as authorized by statute.148 Under this view, an alien who wishes to remain subject to deportability standards should obtain a stay of removal and any alien who does not obtain a statutorily-authorized stay can point only to his or her own

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146 See Coyt v. Holder, 593 F.3d 902 (9th Cir. 2010); Madrigal v. Holder, 572 F.3d 239 (6th Cir. 2009). See also Long v. Gonzales, 420 F.3d 516, 520 (5th Cir. 2005) (explaining that the regulation contains no exception for involuntary departures).
147 Coyt, 593 F.3d at 907 (“It would completely eviscerate the statutory right to reopen provided by Congress if the agency deems a motion to reopen constructively withdrawn whenever the government physically removes the petitioner while his motion is pending before the BIA.”); Madrigal, 572 F.3d at 245 (“To allow the government to cut off Madrigal’s statutory right to appeal an adverse decision, in this manner, simply by removing her before a stay can be issued or a ruling on the merits can be obtained, strikes us as a perversion of the administrative process.”). Cf. Long, 420 F.3d at 520 & n.6 (5th Cir. 2005) (declining to address whether an involuntary removal would constitute abandonment of a motion to reopen and finding that an alien abandoned his motion by incidentally crossing the border into Mexico).
148 The INA permits a court to order a stay of removal while a petition for review is pending. 8 U.S.C. § 1252(b)(3)(B) (stating that filing a petition for review “does not stay the removal of an alien pending the court’s decision on the petition, unless the court orders otherwise.”)
negligence in complaining about being subject to inadmissibility standards.\[^{149}\] This argument is flawed for the following reasons.

First, requiring aliens to seek a stay of removal in order to remain subject to deportability standards creates the very incentives to pursue stays of removal that Congress was seeking to eliminate when it enacted IIRIRA.\[^{150}\] Second, even if an alien seeks a stay, there is no guarantee that the alien would receive one. Stays of removal are not automatic.\[^{151}\] The standard for obtaining a stay is not easily satisfied.\[^{152}\] If an alien’s request for stay is denied, then the alien will be deported pending the outcome of the petition and will still face the same impediments to reentry as an alien who did not request a stay. Third, requiring an alien to seek or obtain a stay overlooks the fact that aliens may be deported before they have a chance to put together a motion for a stay or before the motion is ruled upon. An alien can be removed in a matter of days following a final deportation order, and in that time, the alien may be attempting to obtain counsel to file a stay or attempting to file one pro se. Even if an alien can retain counsel, deportation may occur before counsel, especially one that has been newly retained, has been able to obtain the documents necessary to put together a motion.\[^{153}\] Fourth, an alien may understandably prefer to return to his or her home country—which is what the 1996 amendments explicitly authorize—rather than remain incarcerated indefinitely in administrative detention in difficult conditions as the alien’s petition for review winds its way through the court system. Thus, hinging the determination of which substantive standards apply to an alien based on whether the alien obtained a stay of removal does not support Congress’s goals of expediting removal and promoting accuracy in removal decisions.

In short, although the language of certain portions of the INA and the availability of discretionary stays of removal may lend support to the government’s practice of treating as “arriving aliens” those aliens who seek

\[^{150}\] See supra text accompanying note 36. See also Nken v. Holder, 129 S. Ct. 1749, 1761 (2009) ("Congress’s decision in IIRIRA to allow continued prosecution of a petition after removal eliminated the reason for categorical stays, as reflected in the repeal of the automatic stay provision . . . ").
\[^{151}\] Nken, 129 S. Ct. at 1760 (“A stay is not a matter of right, even if irreparable injury may otherwise result.” (quotation omitted)).
\[^{152}\] Id. at 1762 (“A court asked to stay removal cannot simply assume thatordinarily, the balance of hardships will weigh heavily in the applicant’s favor,” (quotation omitted)); accord Baldini-Potermi, supra note 97 (“The standard for a motion for a stay of removal is high and [is] not the type of motion that counsel can generate in 20 or 30 minutes.”).
\[^{153}\] See supra notes 107-110 and accompanying text. Some circuits bypass this problem by allowing an alien to file a bare bones motion for a stay of removal and automatically granting a temporary stay of removal until the court is able to address the substantive grounds for the stay request. See, e.g., Ninth Cir. Gen. Order 6.4(c)(1).
to return after overturning their deportation orders from abroad, both the statute’s overall structure and the judiciary’s reluctance to apply the INA literally to involuntary removals suggest that the government’s practice is not compelled by the INA but in fact violates it. If a non-citizen happens to be outside the United States solely because of a deportation order that has been subsequently determined to be unlawful, the non-citizen should not find that the fact of his removal has erected a new and previously inapplicable barrier to residing inside the United States.

IV. CONSTITUTIONAL CONCERNS

Even if the INA did require subjecting aliens who prevail from abroad to inadmissibility standards rather than deportability standards, the government’s practice still would be unlawful if it violated the Constitution. Subjecting prevailing aliens to inadmissibility standards raises serious constitutional concerns under both the Due Process Clause and the Equal Protection Clause. With respect to due process, even if the Constitution does not categorically guarantee aliens a right to seek judicial review of deportation orders, applying the procedural due process balancing test laid out by the Supreme Court in Mathews v. Eldridge,154 likely would render the government’s practice invalid.155 With respect to equal protection, it may be difficult for the government can articulate any rational basis for applying different substantive standards solely based on whether the alien happens to succeed in overturning a deportation order while outside the United States rather than while inside the United States.

A. Due Process

A rule that permits the government to use the fact of deportation, even after the deportation order has been vacated, to bar an alien from returning to the United States risks violating due process in two different ways. First, due process protects against the imposition of arbitrary procedures, and changing the governing legal standards in the middle of the case is just such an arbitrary procedure. Second, the rule potentially violates due process by substantially restricting an alien’s right to judicial review of a deportation order.

The level of due process protection afforded to aliens is not uniform. Aliens who have been present in the United States are entitled to some level of due process protection while aliens who are seeking to enter the United States.

States for the first time receive no due process guarantees.\textsuperscript{156} Lawful permanent residents, including lawful permanent residents who are returning from abroad, receive the greatest due process protections, which include the right to a fair hearing before they can be deported or barred from reentering.\textsuperscript{157}

The first due process problem with the government’s practice of changing the applicable legal standards for aliens who succeed from abroad from deportability standards to inadmissibility standards is that doing so arbitrarily changes the rules in the middle of the game. The hallmark of due process is “protection of the individual against arbitrary action of government.”\textsuperscript{158} One aspect of procedural fairness is the expectation that the relevant rules for deciding a case should not change after the case has begun.\textsuperscript{159} In particular, they should not change by virtue of an action by the government—in this case deportation—that is ultimately determined to be improper. Sanctioning the government’s attempt to change the relevant standards governing an alien’s challenge from deportability standards to inadmissibility standards, and to do so based on the government’s own error, would be arbitrary and unwarranted. If deportation standards apply to an alien’s case when it is first initiated, then those standards should apply throughout the remainder of the proceeding. The government should not be able to take advantage of its own error to apply new rules while the case is still ongoing.

To be sure, reclassifying an alien as an “arriving alien” might be justified when it is based on the alien’s own conduct, such as when an alien leaves the United States for an extended period of time.\textsuperscript{160} But the circumstances are different when an alien is forced to leave even while pursuing all available avenues for relief. Consequently, courts have recognized that limiting an alien’s ability to challenge a removal decision as

\textsuperscript{156} Zadvydas v. Davis, 533 U.S. 678, 693 (2001); accord Rosenbloom, \textit{Remedies for the Wrongly Deported}, supra note 21, at 165-66.

\textsuperscript{157} \textit{See Landon}, 459 U.S. at 329-30; \textit{accord} Matter of Huang, 19 I. & N. Dec. 749, 754 (BIA 1988) (holding that “for purposes of the constitutional right to due process, a returning lawful permanent resident’s status is assimilated to that of an alien continuously residing and physically present in the United States”).


\textsuperscript{159} \textit{See}, e.g., Charles E. Rounds, Jr., \textit{Proponents of Extracting Slavery Reparations from Private Interests Must Contend with Equity’s Maxims}, 42 U. TOL. L. REV. 673, 691 (2011) (“The Anglo-American legal tradition does not take kindly to changing the rules in the middle of the game . . . .”); \textit{cf.} Iran Aircraft Indus. v. Avco Corp., 980 F.2d 141, 146 (2d Cir. 1991) (vacating arbitration award where the arbitration tribunal imposed a new evidentiary requirement in the middle of the proceeding).

\textsuperscript{160} \textit{See} 8 U.S.C. § 1101(a)(13)(C)(ii) (stating that a lawful permanent resident will be reclassified as an applicant for admission if the resident “has been absent from the United States for a continuous period in excess of 180 days”).
a result of an involuntary removal that the alien was actively protesting violates principles of fundamental fairness and constitutes a “perversion of the administrative process.”\footnote{161}

Second, the government’s practice risks violating due process by taking away an alien’s right to meaningful judicial review of a deportation order. It is not clear that the Constitution guarantees a right to judicial review of all administrative agency decisions. Because aliens do not possess a constitutional right to an appeal, either administrative or judicial, it is not clear that limiting judicial review would automatically violate due process.\footnote{162} However, once a right to judicial review is provided, as it is in

\footnote{161}See, e.g., Madrigal v. Holder, 572 F.3d 239, 245 (6th Cir. 2009) (rejecting a rule under which an alien’s involuntary removal would take away the alien’s ability to file a motion to reopen the adverse ruling as violating principles of fundamental fairness).

\footnote{162}It remains an unsettled question whether judicial review of a deportation order is constitutionally required. On the one hand, several courts have held that aliens do not have a constitutional right to an appeal from an administrative decision. See, e.g. Blanco v. Ashcroft, 362 F.3d 272, 280 (4th Cir. 2004) (stating that aliens possess “no constitutional right to any administrative appeal at all.”); Albathani v. INS, 318 F.3d 365, 376 (1st Cir. 2003) (same); Dia v. Ashcroft, 353 F.3d 228, 242 (3d Cir. 2003) (same); see also Benson, supra note 83, at 60 & n.96 (“Under current case law, due process may not require review by an Article III court.”). At the same time, courts have expressed discomfort with the notion that aliens might not be able to receive any judicial review of deportation decisions. See, e.g. Kolster v. INS, 101 F.3d 785, 790 (1st Cir. 1996) (characterizing the question of whether Congress could preclude judicial review of final removal orders as “thorny”); Nancy Morawetz, Back to the Future? Lessons Learned From Litigation Over the 1996 Restrictions on Judicial Review, 51 N.Y.L. SCH. L. REV. 113, 120 (2006-07) (emphasizing that several courts have expressed concerns that “elimination of all review [of deportation orders] would raise serious constitutional questions”); see also Lenni B. Benson, Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings, 29 CONN. L. REV. 1411, 1414 (1997) (noting the debate over whether due process requires some degree of judicial review of government action). In addressing judicial jurisdiction over deportation questions, the Supreme Court has emphasized “the strong presumption in favor of judicial review of administrative action.” I.N.S. v. St. Cyr, 533 U.S. 289, 298 (2001). At least with respect to deportation orders that traditionally could have been challenged through habeas corpus proceedings, the Court has found that “some judicial intervention in deportation cases is unquestionably required by the Constitution.” Id. at 300 (quotation omitted). Additionally, Congress amended IIRIRA’s judicial review provisions in the REAL ID Act of 2005 in order to make clear that courts retained jurisdiction to review legal and constitutional questions relating to an order of deportation. Pub. L. No. 109-13, 119 Stat. 231. Part of the motivation for the changes appears to have been the view that, following St. Cyr, judicial review of deportation orders may be constitutionally required. See H.R. Rep. No. 109-72, 109th Cong., at 174 (2005), reprinted in 2005 U.S.C.C.A.N. 240, 299 (stating that the REAL ID Act would “give every alien one day in the court of appeals, satisfying constitutional concerns”); Gerald L. Neuman, On the Adequacy of Direct Review After the REAL ID Act of 2005, 51 N.Y.L. SCH. L. REV. 133, 138-39 (2006-2007) (describing the legislative history of the REAL ID Act).
the INA, due process prohibits the government from taking away that right in an arbitrary fashion.\textsuperscript{163}

Even if limiting judicial review does not necessarily violate due process in all contexts, it likely does in this context. Due process requires that an individual receive the opportunity to be heard “in a meaningful manner.”\textsuperscript{164} Aliens facing deportation have a right to a fair hearing, and whether the hearing meets the constitutional minimum for fairness is governed by the three-part balancing test laid out in \textit{Mathews v. Eldridge}.\textsuperscript{165} Under that test, courts assessing the fairness of certain procedures consider (1) the strength of the interest of the individual who is affected by the government action; (2) the risk of an erroneous deprivation of that interest through the procedures used along with the probable value of additional procedures; and (3) the burdens to the government of different or additional procedures.\textsuperscript{166}

It seems likely that under this test, applying inadmissibility standards to aliens who prevail on a petition for review would fall short of these minimum constitutional safeguards.\textsuperscript{167} With respect to the first factor, there is no question that the alien’s interest in avoiding deportation, which often means permanent separation from family and uprooting of one’s livelihood, is significant.\textsuperscript{168} Thus, courts have determined that “the private liberty

\textsuperscript{163} The maxim of \textit{ubi jus ibi remedium} provides that where there is a right, there must also be a meaningful remedy. \textit{See} Texas & P. Ry. Co. v. Rigsby, 241 U.S. 33, 40 (1916). In the due process context, that means the right to a fair hearing also includes the right to “effective redress.” Catanzo by Catanzo v. Wing, 103 F.3d 223, 229 (2d Cir. 1996).

\textsuperscript{164} \textit{See} Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. (internal quotation omitted)).


\textsuperscript{166} Mathews, 424 U.S. at 334-35.

\textsuperscript{167} When the Justice Department issued its streamlining regulations in 2002, it questioned whether the Mathews test should apply to immigration proceedings given Congress’ unusually broad authority to regulate immigration and “the unique nature of the [INA] as the tool for managing the intersection of foreign and domestic policy interests regarding aliens.” Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,882 (Aug. 26, 2002). It is not clear whether the Justice Department continues to adhere to that view. While it does not appear that the government’s broad powers require dispensing with the Mathews test as applied to immigration, the scope of the government’s authority over immigration matters may be relevant to determining what procedures are considered fair under that test. \textit{Cf.}, Mathews v. Diaz, 426 U.S. 67, 79-80 (1976) (“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”).

\textsuperscript{168} \textit{See supra} text accompanying notes 79-81.
interests involved in deportation proceedings are among the most substantial” from a due process perspective.\textsuperscript{169}

The second factor, the risk of erroneous deprivation, also favors the alien. The issue of which grounds—deportability or inadmissibility—should apply to an alien who prevails from abroad only arises if the alien prevails in showing that the original deportation order was incorrect. In that sense, the risk of erroneous deprivation is not just a risk, it is a certainty. While not every alien who prevails from abroad will fall within the inadmissibility gap and so not every alien will end up unable to return, a substantial number likely will be barred from returning given the various differences in the inadmissibility and deportability grounds. Those aliens will suffer an erroneous deprivation when they prevail on their petitions for review.

Third, the burden on the government is minimal. Rectifying the problems created by the inadmissibility gap does not require the imposition of additional costly layers of procedure, or the creation of new legal standards. Rather, all that is required is to continue to apply the same deportability standards that the government applied the first time around when the alien was still inside the United States. Given that the deportability standards were already applied once, it is hard to see what the burden is of applying them again. If anything, it seems easier and less cumbersome for the government to continue prosecuting its original Notice to Appear than requiring the government to issue a new Notice to Appear that asserts new inadmissibility-based charges.

Thus, the Mathews factors strongly suggest that allowing the government to use a vacated removal order as a ground for preventing an alien from reentering the United States when that order was the only reason that the alien left in the first place would violate an alien’s due process right to a meaningful review of a deportation order. To be sure, such aliens who are not being denied judicial review in a formalistic sense. They have the right to file and litigate a petition for review in the federal courts of appeal, and winning that petition may even bring them some benefit by making certain statutory bars on reentering after deportation inapplicable.\textsuperscript{170} However, that right to judicial review is not “meaningful” if an alien can overturn his deportation order through a petition for review and still be

\textsuperscript{169} Padilla-Augustin v. I.N.S., 21 F.3d 970, 974-75 (9th Cir. 2002); accord Wedges v. Dixon, 326 U.S. 135, 147 (1945) (“[D]eporation may result in the loss of all that makes life worth living” (quotation omitted)); see also Landon, 459 U.S. at 34 (stating that a deported alien “lose[s] the right to stay and work in this land of freedom” as well as the right to “rejoin her immediate family, a right that ranks high among the interests of the individual” (quotation marks and citations omitted)).

\textsuperscript{170} See supra note 142 and accompanying text.
barred from returning based on the fact that he was deported pursuant to the now vacated order. In light of the high stakes for aliens facing deportation, the fact that the issue only arises after the government has made an error in finding the alien deportable, and the minimal burden on the government of continuing to apply deportability standards to aliens who prevail from abroad, aliens have strong constitutional grounds for challenging the government’s practice.

**B. Equal Protection**

In addition to violating due process, the government’s practice also likely violates an alien’s Fifth Amendment right to equal protection by treating aliens who win their case while abroad differently from those who win their case while inside the United States.\(^\text{171}\) Admittedly, among the arguments against the government’s practice, the equal protection argument likely is the weakest. Aliens are not a suspect class and therefore the government’s practice would be subject to the highly deferential rational basis review. Despite the difficulty of having government action declared unconstitutional under rational basis review, there are credible arguments that distinguishing between aliens who win their appeals while within the United States from those who win while abroad lacks a legitimate justification.

The Equal Protection Clause protects non-citizens as well as citizens.\(^\text{172}\) Specifically, equal protection guarantees apply in deportation proceedings.\(^\text{173}\) Because aliens are not a suspect class and because Congress possesses broad power to regulate immigration, classifications in immigration matters are acceptable as long as they satisfy rational basis review.\(^\text{174}\) Rational basis review is a “minimal” standard of review, which will be satisfied as long as the government can articulate some non-arbitrary reason that Congress would create the distinction subject to challenge, “whether such a reason was articulated by Congress or not.”\(^\text{175}\)

\(^{171}\) The Equal Protection principles of the Fourteenth Amendment also bind the federal government under the Fifth Amendment. See Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

\(^{172}\) See, e.g., Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

\(^{173}\) See, e.g., Yeung v. I.N.S. 76 F.3d 337 (11th Cir. 1995) (finding equal protection violation where an alien in deportation proceedings was denied the right to seek adjustment of status); Caroleo v. Att’y Gen., 476 F.3d 158 (3d Cir. 2007); Francis v. I.N.S., 532 F.2d 268 (2d Cir. 1976) (finding equal protection violation where aliens who left the United States prior to removal proceedings could seek relief from removal but those who never left could not).

\(^{174}\) See, e.g., Yeung, 76 F.3d at 339.

\(^{175}\) Arca-Pineda v. Att’y Gen., 527 F.3d 101, 105-06 (3d Cir. 2008).
The government’s practice of subjecting aliens who prevail while abroad to inadmissibility standards creates two classes of aliens that are differentiated solely by whether they happened to have been removed from the United States. One class of aliens—those aliens who successfully challenge their deportation orders while inside the United States—will remain subject to the Act’s deportability standards for any further proceedings, while a second class of aliens—those aliens who successfully challenge their deportation order after having been removed—will be subject to the Act’s inadmissibility standards in any further proceedings.

It would be a difficult chore for the government to articulate a legitimate basis for distinguishing these two classes of aliens. The arbitrary nature of this distinction can be seen in several ways. First, the only fact that differentiates these two classes is the fact of deportation. But this issue of whether to apply deportability or inadmissibility standards only arises when the order that led to the alien’s deportation is vacated. While there may be valid reasons for distinguishing between deported and non-deported aliens when a deportation order remains in force, it is hard to see a rational basis for distinguishing between deported and non-deported aliens when the deportation turns out to have been erroneous.

Second, various factors that are unrelated to the merits of the alien’s case may affect whether an alien is actually deported following a final deportation order. As Professor Rachel Rosenbloom has identified, “[a]ny number of circumstances might keep a person from physically leaving the United States following the entry of a final removal order: statelessness, lack of a repatriation agreement with the country designated for removal, the granting of a stay, or even simply the government’s failure to act.”

Thus, aliens who cannot be repatriated may end up remaining in the United States while their petitions for review are ongoing while aliens that can be repatriated will end up pursuing their petitions from abroad. It is hard to envision what the justification would be for applying one substantive standard to the former category but a different substantive standard to the latter.

Third, the government’s practice arbitrarily distinguishes between those aliens who win their appeal at the BIA level and those who win at the circuit court level. Because aliens receive an automatic stay of removal during an appeal to the BIA, any alien who gets a favorable decision...

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176 See, e.g., Avila-Sanchez v. Mukasey, 509 F.3d 1037, 1041 (9th Cir. 2007) (rejecting equal protection challenge to a regulation that barred illegally-reentering aliens from seeking a special form of relief, finding that “[t]he government has a legitimate interest in discouraging aliens who have already been deported from illegally reentering . . . .”).

177 Rosenbloom, Remedies for the Wrongly Deported, supra note 21, at 180.

178 See 8 C.F.R. § 1003.6(a).
from the BIA will remain subject to deportability standards once the case is remanded to the immigration judge while an alien who prevails at the circuit court level (and who did not receive a discretionary stay) will be subject to inadmissibility standards. One could argue that a rational basis exists for such a distinction because aliens who file petitions for review have already gone through one round of appellate review and already have had their appeal denied (or the government’s appeal sustained) by the BIA. However, the high reversal rate of BIA decisions and the federal appellate bench’s loud criticisms of the often shoddy decision-making of immigration judges and the BIA undercuts the force of that distinction.\footnote{See supra notes 100-106 and accompanying text.}

Finally, the government’s practice arbitrarily discriminates between aliens who obtain a stay of removal while their petitions for review are pending and aliens who do not. One could hypothesize that Congress may have wanted to distinguish between aliens who were able to demonstrate a high likelihood of success on the merits, thus justifying a stay, and those aliens who appeared to have a low chance of success and thus did not receive a stay. The standard for a stay, however, is not whether the alien will succeed on the merits but whether the alien is likely to succeed on the merits, and the decision on the stay occurs at an early stage of the appeal before the parties have had a chance to fully brief the issues on the merits. It would make little sense to say that an alien who in fact did succeed on the merits should be subjected to more restrictive inadmissibility requirements because the alien did not show at the outset that he or she was likely to succeed. Moreover, any attempt to provide a hypothetical rationale for distinguishing between aliens who receive a stay and aliens who do not runs headlong into Congress’s actual rationale for the 1996 amendments, which was to equalize the treatment of aliens inside and outside the United States by removing the automatic stay and permitting aliens to pursue their petitions for review from abroad.

While it is quite difficult to show that a classification fails to satisfy rational basis review, the argument here is not without support. In several other contexts, federal courts have found that applying different substantive standards to aliens who have not previously left the country than to those who have left the country lacked any rational basis and violated equal protection. In Yeung v. I.N.S., the Eleventh Circuit found that no rational basis existed for a rule that allowed aliens in deportation proceedings to seek a discretionary waiver for a deportable offense if they had departed and returned to the United States after having committed the offense at issue but that prohibited aliens from seeking that waiver if they had never left the
Similarly, in *Francis v. I.N.S.* the Second Circuit found that a rule which permitted aliens who committed a removable offense to seek discretionary relief from removal if they had departed and reentered the United States after committing their offense, but which prohibited that relief to aliens who were otherwise eligible but who had not departed the United States lacked a rational basis. Although it was not required to do so, the BIA subsequently adopted the *Francis* Court’s holding as binding throughout the country. While those two cases differ from the distinction created by the government’s practice here, in that those two cases both involved a distinction between aliens who voluntarily took a short trip abroad and those who did not, the logic underlying both decisions is equally applicable to aliens who win their petitions for review from abroad. If anything, the classification between aliens who prevail after being deported and those who prevail while in the United States has even less justification since in the latter case, the alien’s departure from the United States is involuntary rather than voluntary and is predicated on an order of removal that ultimately is determined to be invalid.

In short, while it may be possible for the government to articulate a rational basis for distinguishing between aliens who prevail from abroad and those who prevail from inside the United States, it is difficult to see what that basis would be. The lack of any clearly apparent justification for such a distinction renders the government’s practice of subjecting aliens who prevail while abroad to inadmissibility standards susceptible to an equal protection challenge.

V. SOLUTIONS

The previous sections have attempted to demonstrate the legal and practical problems associated with the government’s practice of subjecting aliens who successfully overturn their deportation orders while abroad to more stringent inadmissibility standards rather than to the deportability

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180 *Yeung*, 76 F.3d at 340 (“To claim, as the INS does here, that Po belongs to a different classification of persons simply by virtue of his failure to depart and reenter, is to recognize a distinction that can only be characterized as arbitrary, and that is without a fair and substantial relation to the object of the legislation.” (quotation omitted)).

181 532 F.2d 268, 269 (2d Cir. 1976). A number of other circuits have followed Francis. See, e.g., Caroleo v. Att’y Gen., 476 F.3d 158, 164 n.3 (3d Cir. 2007), *abrogated on other grounds by Judulang v. Holder*, 132 S. Ct. 476 (2011); de Gonzalez v. INS, 996 F.2d 804, 806 (9th Cir. 1993); Leal-Rodriguez v. INS, 990 F.2d 939, 949 (7th Cir. 1993); Butros v. INS, 990 F.2d 1142, 1143 (9th Cir. 1993) (en banc); Casalena v. INS, 996 F.2d 105, 106 n.3 (4th Cir. 1993); Ghassan v. INS, 972 F.2d 631, 633 n.2 (5th Cir. 1992); Campos v. INS, 961 F.2d 309, 313 (1st Cir. 1992); Vissian v. INS, 548 F.2d 325, 328 n. 3 (10th Cir. 1977).

standards that were applied to them during their original deportation proceedings. This section proposes what is hopefully a simple and easily-implemented solution, which is that if the government intends to continue pursuing removal actions against aliens who win their appeals, those actions should be governed by the same deportability standards that governed the proceedings when the alien was originally in the United States. Applying a consistent set of legal standards to an alien, irrespective of whether the alien happens to be inside the United States or outside the United States, makes deportation proceedings fair, ensures consistency with IIRIRA’s goal of allowing aliens to pursue their appeals from abroad, and maintains fidelity to the Constitution.

In addition to being doctrinally defensible, a policy of applying deportability standards to aliens who prevail from abroad offers several advantages. First, the policy is easily administered. No new legislation is required. No new procedures need to be implemented. Rather any continuation of the alien’s deportation proceeding would be governed by the same existing standards that governed during the original proceedings. Immigration judges would have the flexibility and authority to apply deportability standards rather than inadmissibility standards in any individual case in which the facts would warrant it.

Second, such a policy promotes general notions of fairness. Fairness principles support providing a remedy that rectifies the harm caused by unlawful conduct and that returns the victim to the status quo as it existed (or as close to it as possible) at the time the unlawful conduct occurred. In order to truly rectify the harm caused by a wrongful removal, it is essential to restore the alien to the precise status held before removal, which would be the status of having been lawfully present in the United States at the time that the deportation proceedings were initiated. In other words, it is not sufficient to merely restore the alien to his or her prior immigration status—i.e. that of a lawful permanent resident or a valid visa holder. To truly restore the status quo, the alien must also be treated as someone lawfully inside the United States pending the outcome of the deportation proceedings.

There may still be some exceptions to this general rule. For example, it is possible that Congress could amend the INA’s deportability grounds in the period between when the alien is deported and when the alien’s petition for review is decided. If Congress makes those amendments retroactive, and if doing so is constitutionally permissible, then in that case the new deportability standards would apply rather than the original standards. This is because the Constitution’s Ex Post Facto Clause, which prevents such retroactive application in criminal matters, does not apply to immigration proceedings. See, e.g., Marcello v. Bonds, 349 U.S. 302, 314 (1955).

For lawful permanent residents, it would appear to be required by statute that restoring an alien to lawful permanent resident status also restores the alien’s right to reside in the
While adding that extra requirement may seem semantic, it is of critical importance. If the alien is simply restored to his or her prior immigration status without being put back in the position of being lawfully inside the United States, then the government might have grounds for keeping a prevailing alien out of the United States even when applying deportability standards. This is because the deportability standards make an individual deportable if the individual was inadmissible at the time of entering the country. Thus, if an alien who is subject to the inadmissibility gap is not treated as being inside the United States, but is treated as re-entering the United States (whether lawfully or otherwise) after his petition for review is granted, the government may have grounds to argue that the alien is still deportable by virtue of having committed an inadmissible (but not deportable) offense at the time the alien reentered the United States following a victory in the court of appeals. In effect, this would allow the government to accomplish through the back door (applying inadmissibility standards to prevailing aliens) what it could not do through the front door. While the idea that the government would attempt such an end run may sound farfetched, the government has taken such a position before.

There is no reason why the effect of a federal court decision vacating a deportation order could not include treating the alien as lawfully inside the United States even if the alien is physically outside the United States at the time the ruling is issued. The BIA, however, has suggested that it might not have the authority to treat a departed alien as lawfully inside the United States on the ground that “[r]esponsibility for border security and the inspection and admission of aliens from abroad is delegated to the Secretaries of Homeland Security and State, but not to this Board.”

Government attorneys also appear to have taken the position that it may not be possible to provide a remedy that effectively places the alien inside the

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8 U.S.C. § 1227(a)(1)(A) (“Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.”).

See, e.g., DHS Memorandum, supra note 132, at 5-6. In that case, the government argued that even if a prevailing alien lawfully reentered the United States after his removal order was vacated, he should be charged as removable under 8 U.S.C. § 1227(a)(1)(A) for having committed a single crime of moral turpitude and a single drug offense—regardless of whether it involved possession of 30 grams or less of marijuana—prior to his lawful reentry. See id.

It is questionable whether these views are correct. First, several federal courts already have rejected the BIA’s position that it lacks authority to grant relief to aliens who are no longer inside the United States. Second, it is well-established that both immigration judges and federal judges have authority to grant nunc pro tunc relief, meaning relief that is back-dated to the time of injury. Nunc pro tunc relief allows a court to make its order effective as of the date of the original deportation order, a time when the alien was inside the United States and had not yet been removed. Third, even if the BIA for some reason lacks the power to assist an alien who is outside the United States, IIRIRA makes clear that the federal courts of appeals do retain jurisdiction over departed aliens. Thus, a court of appeals would have authority to grant relief that places the alien in the position of being lawfully inside the United States, even if the BIA would not.

Of course, requiring the government to apply deportability standards to aliens who prevail from abroad is not the only possible solution to the problem of wrongly-deported aliens who fall within the inadmissibility gap. Another solution would be to bring back the automatic stay of removal during the pendency of the petition for review so that aliens do not face the risk of having to seek reentry if they win their petitions. Some scholars and advocates have proposed reinstating the automatic stay of removal. This solution, however, is less practical. First, it would require legislative action to amend the INA, and it is not clear that there is any impetus in Congress

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188 In one case before the Fifth Circuit, the government asserted that “there is no remedy that can return [the petitioner] to the status he had prior to his removal, i.e. an alien seeking to remain in the United States pending adjudication of his application for adjustment of status in conjunction with a discretionary waiver.” See FOIA Complaint, supra note 21, at Exh. Y (letter from Joseph D. Hardy, Trial Attorney, Office of Immigration Litigation, United States Department of Justice, to the U.S. Court of Appeals for the Fifth Circuit).

189 See supra note 112 and accompanying text.

190 See, e.g., Iavorski v. INS, 232 F.3d 124, 130 n.4 (2d Cir. 2000) (the “far-reaching equitable remedy of granting relief nunc pro tunc in certain exceptional cases has long been available under immigration law”); Batanic v. INS, 12 F.3d 662, 667-68 (7th Cir. 1993) (affording petitioner the right to apply for asylum nunc pro tunc); Matter of Rapacon, 14 I. & N. Dec. 375, 378 (BIA 1973) (application for permission to reapply for admission to the United States after deportation is granted nunc pro tunc); see also Salgado-Diaz v. Ashcroft, 395 F.3d 1158, 1167-68 (9th Cir. 2005) (if petitioner is eligible to show that he was unlawfully removed from the country he “will be entitled to the relief available at the time of his original hearing”).

191 Black’s Law Dictionary defines “nunc pro tunc,” which is Latin for “now for then,” to mean “[h]aving retroactive legal effect through a court’s inherent power.” BLACK’S LAW DICTIONARY (9th ed. 2009) (citing 35A C.J.S. FEDERAL CIVIL PROCEDURE § 370, at 556 (1960) (“When an order is signed ‘nunc pro tunc’ as of a specified date, it means that a thing is now done which should have been done on the specified date.”)).

192 See, e.g., Legomsky, supra note 92, at 1719; Baldini-Potermin, supra note 97.
to change the INA in this manner any time soon. Second, it fails to account for those aliens who may prefer to be deported pending the outcome of their petition rather than to remain imprisoned in federal detention facilities for up to several years until their petitions for review are decided.¹⁹³

Another solution would be to harmonize the deportability and inadmissibility standards so that there is no inadmissibility gap. Again, however, this would require a substantial legislative overhaul by Congress. Furthermore, it may be that Congress generally has valid reasons for applying different standards those who are seeking to enter the United States for the first time than to those who have been permitted to enter the United States and the government is now seeking to remove. Thus, while the solution of requiring the application of deportability standards to aliens who prevail on their petitions for review from abroad may carry its own set of complications, it may be preferable, or at least more realistic, than other possible solutions.

CONCLUSION

Deportation is a serious matter. Policies governing deportation should be crafted with care to ensure that individuals who may have a right to remain in the United States do not have their lives irrevocably altered. Unfortunately, the government’s practice of creating an “inadmissibility gap” by applying inadmissibility standards to aliens who successfully challenge deportation orders from abroad does not reflect a level of thoughtfulness commensurate with the significant consequences of deportation. Instead, it causes substantial unfairness for the many aliens who are wrongly deported but then find themselves unable to return to the United States as a result of the very deportation that was wrongfully imposed. As a result, individuals who successfully challenge deportation decisions should be restored to their prior immigration status as it existed prior to the commencement of deportation proceedings. They should not be relegated to the lesser status of arriving aliens simply because they happened to win their challenge after being deported rather than before being deported. Any other result is inconsistent with the INA, with the U.S. Constitution, and with general notions of fundamental fairness.

¹⁹³ See supra notes 109-110 and accompanying text for an explanation of why some aliens may opt for deportation over staying in the country.