

# Changed Countries, Changed Circumstances: Reopening Removal Proceedings under 8 USC § 1229a

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## INTRODUCTION

Contrary to popular belief, the decisions of the administrative state are not always swiftly and effectively realized. Immigration law often illustrates this disorder. Aliens scheduled for deportation after being denied asylum status can evade removal for years, creating an interval of time during which their home countries may experience dramatic political and social changes. Government upheavals may precipitate oppression of rival factions, ethnic violence can endanger cultural groups, and enforcement of social-planning policies often targets nonconforming families. In some cases, such national developments present grave, particularized risks to subjects of these countries who face removal from the United States long after they were initially refused asylum. Consider a situation in which a childless alien named Maddy enters the United States in 2000 and is denied asylum in 2001. After avoiding removal, she has children in 2005 and 2006. In 2009, her home country institutes a one-child policy under penalty of sterilization. Should Maddy be apprehended and deported, she will face new dangers that were not present during the 2001 hearing. Given these circumstances, Maddy likely will want to reopen her asylum application process.

8 USC § 1229a, which governs the removal process, contemplates this particular set of circumstances. Generally, a motion to reopen asylum proceedings must be “filed within 90 days of the date of entry of a final administrative order of removal.”<sup>1</sup> Section 1229a(c)(7)(C)(ii) offers an exception to the timing rule, however, when the motion to reopen “is based on *changed country conditions* arising in the country of nationality or the country to

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<sup>1</sup> 8 USC § 1229a(c)(7)(C)(i).

which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.”<sup>2</sup> If an immigrant slated for removal after escaping deportation for an extended period can demonstrate possible eligibility for asylum due to factual developments in his home country, he may be able to reopen his case.

Immigration courts, the Board of Immigration Appeals (BIA), and federal appellate courts agree that an immigrant wishing to reopen asylum proceedings under this provision must demonstrate some shift in national circumstances to satisfy the changed country conditions requirement. A change solely in personal circumstances is insufficient.<sup>3</sup> Courts disagree, however, on whether changes in personal circumstances may ever be considered in assessing the implications of the changed country conditions in a motion to reopen asylum proceedings. Two circuits have held that immigration judges must evaluate the effects of changed country circumstances in light of the petitioner’s situation at the time of the original deportation hearing. Four other circuits, however, permit the consideration of “mixed petitions,” which present developments in country conditions alongside the alien’s personal circumstances at the time of the later motion to reopen proceedings.<sup>4</sup>

To illustrate this division, recall the earlier hypothetical of Maddy, who had children after evading deportation and later attempts to reopen her asylum hearing in light of her home country’s new one-child policy. Under the minority rule, Maddy would be unable to reopen her removal proceedings, as the change in national policy would have been irrelevant to her at the time of the initial hearing. The majority rule, however, would permit Maddy to reopen her proceedings.

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<sup>2</sup> 8 USC § 1229a(c)(7)(C)(ii) (emphasis added). Department of Justice implementing regulations closely mirror this statutory scheme, directly borrowing the textual language of a default ninety-day reopening window with a “changed country conditions” exception. Relevant regulations do not further elaborate on or define these statutory provisions. See 8 CFR § 1003.2(c)(2)–(3); 8 CFR § 1003.23(b)(1), (4)(i).

<sup>3</sup> See, for example, *Yuen Jin v Mukasey*, 538 F3d 143, 153–56 (2d Cir 2008) (upholding the BIA’s interpretation of the regulations to require that, once a case is closed, a petitioner must show changes in country conditions to reopen proceedings, despite language in 8 USC § 1158(a)(2)(D) suggesting that “changed circumstances” alone justify “consider[ation]” of a successive asylum application); *Chen v Mukasey*, 524 F3d 1028, 1030 (9th Cir 2008) (upholding BIA requirements that an asylum applicant show changed country circumstances in a similar petition); *Zheng v Mukasey*, 509 F3d 869, 872 (8th Cir 2007) (upholding the BIA regulation).

<sup>4</sup> See *Rei Feng Wang v Lynch*, 795 F3d 283, 284, 286–87 (1st Cir 2015) (collecting cases and “declin[ing] to take a position on a potential circuit split on ‘mixed petitions’”).

While the particular combination of circumstances necessary for a mixed petition may arise in only a select number of asylum cases, the extraordinarily high stakes for affected aliens, as well as the underlying legal and policy questions, are of great significance. The consequences of deportation often involve political violence, religious persecution, forced abortion or sterilization, and other life-threatening perils. As declared by Congress and noted by the courts, it is “the policy of the United States” to “stand[ ] with the persecuted” and protect fundamental freedoms.<sup>5</sup> In many cases, immigrants have genuinely, not opportunistically, exercised these freedoms, building complex lives in America and demonstrating steadfast commitment to new religious and political beliefs.<sup>6</sup>

These ethical considerations, however, coexist with pressing administrative concerns. While each asylum applicant may be entitled to fair consideration of his circumstances, nearly seventy thousand refugees arrived in the United States in 2013, just over twenty-five thousand of whom were granted asylum.<sup>7</sup> This immense administrative task is intensified by the inherent burdens of reopening cases. Courts recognize that each layer of the asylum process cuts against the “strong public interest in bringing litigation to a close [ ] promptly,” although this efficiency must be limited by giving the parties “fair opportunity to develop and present their respective cases.”<sup>8</sup> Motions to reopen inevitably increase the number and complexity of hearings and frustrate conclusiveness, and “[g]ranted such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case.”<sup>9</sup> That a portion of the legal rule regarding reopening is unsettled only exacerbates the administrative burden. The same “aliens creative and fertile enough”<sup>10</sup> to manufacture grounds for reopening may also be more likely to take advantage

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<sup>5</sup> 22 USC § 6401(b). See also *Chandra v Holder*, 751 F3d 1034, 1039 (9th Cir 2014) (invoking the congressional statement of policy).

<sup>6</sup> See, for example, *Yu Yun Zhang v Holder*, 702 F3d 878, 879 (6th Cir 2012) (discussing a situation in which the woman seeking asylum had remained in the United States for nearly ten years, converted to Catholicism, married, and had two children).

<sup>7</sup> See Daniel C. Martin and James E. Yankay, *Refugees and Asylees: 2013 \*1* (Department of Homeland Security, Office of Immigration Statistics, Aug 2014), archived at <http://perma.cc/XZ2Q-7B2Q>.

<sup>8</sup> *Bi Feng Liu v Holder*, 560 F3d 485, 489 (6th Cir 2009), quoting *Immigration and Naturalization Service v Abudu*, 485 US 94, 107 (1988).

<sup>9</sup> *Abudu*, 485 US at 108.

<sup>10</sup> *Id.*

of jurisdictions with favorable interpretations of the reopening provisions of § 1229a(c)(7)(C).<sup>11</sup> Uncertainty as to the actual rule also incentivizes otherwise-unnecessary appeals to both the BIA and federal courts following denial of a motion to reopen. While fairness matters, finality discourages opportunism, preserves efficiency, and conserves the resources necessary for adjudicating other claims,<sup>12</sup> and thus is equally fundamental to immigration law. These pressing finality<sup>13</sup> and uniformity<sup>14</sup> interests, coupled with the reality that no end is in sight for the complex immigration questions facing the United States,<sup>15</sup> make this issue worthy of consideration.

This Comment addresses the question in three parts. Part I offers an overview of relevant immigration law before addressing the specific statutory, regulatory, and judicial rules that control the asylum process. Part II presents the specific legal issue of reopening removal proceedings, examining the legal and policy considerations and arguments proffered by both sides of the circuit split. Finally, Part III proposes a novel framework for approaching the issue that would have immigration judges and reviewing courts consider only those changes in personal circumstances that predate changed country conditions. Under this approach, Maddy from the earlier example would be entitled to reopen her case, as the 2009 change in her home country's policy came after the births of her children in 2005 and 2006. Part III then proceeds to

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<sup>11</sup> 8 USC § 1252(b)(2) states that a “petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings,” a requirement that allows the location of the original immigration court to dictate which appellate court can review an agency decision. See also *Trejo-Mejia v Holder*, 593 F3d 913, 915–16 (9th Cir 2010) (directing “transfer [of] the petition for review [of a BIA decision] to the United States Court of Appeals for the Fifth Circuit” in accordance with 8 USC § 1252(b)(2)). Under the current divided rule for mixed petitions, an alien has the option of preemptively bringing a motion to reopen in a favorable jurisdiction. See *Bi Feng Liu*, 560 F3d at 487 (noting that the alien “appeared to be forum shopping”).

<sup>12</sup> See *Immigration and Naturalization Service v Doherty*, 502 US 314, 323 (1992), citing *Abudu*, 485 US at 107–08.

<sup>13</sup> *Doherty*, 502 US at 323 (noting the importance of conclusiveness in immigration proceedings).

<sup>14</sup> See Cristina M. Rodríguez, *Uniformity and Integrity in Immigration Law: Lessons from the Decisions of Justice (and Judge) Sotomayor*, 123 Yale L J F 499, 500 (2014) (“In the immigration setting, the belief that judicial interpretation should be geared toward promoting a systemic objective of uniformity has exerted powerful influence over judges.”).

<sup>15</sup> See, for example, Kevin Liptak, *Obama Calls Caring for Refugees ‘American Leadership’* (CNN, Nov 21, 2015), archived at <http://perma.cc/RPE6-5VVV> (discussing the controversy over accepting Syrian refugees into the United States shortly after the 2015 terror attacks in Paris).

consider the legal viability, policy implications, and administrative feasibility of the proposed solution.

### I. THE LEGAL FRAMEWORK OF ASYLUM

Under current US law, asylum is available to “[a]ny alien who is physically present in the United States or who arrives in the United States . . . , irrespective of such alien’s status.”<sup>16</sup> A successful applicant generally must show that he or she is a refugee, defined as someone “unable or unwilling to return to, and [ ] unable or unwilling to avail himself or herself of the protection of, [his or her home country] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>17</sup> The applicant has the burden of proving refugee status,<sup>18</sup> and must also demonstrate past persecution or a well-founded fear of future persecution.<sup>19</sup> While this path to legal residency is available to newly arrived immigrants, it is also open to aliens who have been in the country for some time but who initially entered illegally, are facing expiring visas, or are otherwise not qualified for continued residence. If the immigrant is denied asylum and is not eligible to remain for other reasons—for example, under the Convention against Torture<sup>20</sup>—he may be deported.<sup>21</sup>

8 USC § 1229a creates a systemic framework for the deportation of unauthorized aliens deemed ineligible for asylum. Initial removal proceedings “for deciding the inadmissibility or deportability of an alien” are held before immigration judges,<sup>22</sup> attorneys appointed by the attorney general who serve within the Executive Office for Immigration Review under the Department of Justice.<sup>23</sup> These judges wield broad power, with the authority to “administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses” in making a final determination on whether an alien should be removed or granted asylum.<sup>24</sup>

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<sup>16</sup> 8 USC § 1158(a)(1).

<sup>17</sup> 8 USC § 1101(a)(42).

<sup>18</sup> 8 USC § 1158(b)(1)(B)(i); 8 CFR § 208.13(a).

<sup>19</sup> 8 CFR § 208.13(b).

<sup>20</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 113 (Dec 10, 1984, entered into force June 26, 1987). See also 8 CFR § 208.18(b).

<sup>21</sup> See 8 USC § 1229a(a)(3).

<sup>22</sup> 8 USC § 1229a(a)(1).

<sup>23</sup> See 8 CFR §§ 1001.1(l), 1003.10.

<sup>24</sup> 8 USC § 1229a(b)(1).

In reaching a decision, judges may “[c]onsider[ ] the totality of the circumstances[ ] and all relevant factors,”<sup>25</sup> which includes a wide latitude to make credibility determinations<sup>26</sup> based on evidence ranging from the “demeanor” of the applicant to information from State Department reports.<sup>27</sup>

The statute and attendant implementing regulations<sup>28</sup> provide a process for reviewing asylum and removal decisions. Immigrants deemed ineligible for asylum and scheduled for removal have two preappellate methods of challenging an adverse ruling under 8 USC § 1229a and 8 CFR § 1003.23. The first is a “motion to reconsider,”<sup>29</sup> which permits the alien to file one motion “specify[ing] [ ] errors of law or fact in the previous order . . . supported by pertinent authority” “within 30 days of the date of entry of a final administrative order of removal.”<sup>30</sup> The second is a “motion[ ] to reopen,”<sup>31</sup> which allows the petitioner to present for consideration “new facts that will be proven at a hearing.”<sup>32</sup> Under most circumstances, this second motion must “be filed within 90 days of the date of entry of a final administrative order of removal.”<sup>33</sup> When the alien is challenging the removal decision as an asylum applicant, however, this time bar does not apply if the motion to reopen is “based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.”<sup>34</sup> Regardless of how much time has elapsed since the initial removal decision, demonstration of changed country conditions may entitle an asylum applicant to revisit the deportation order.

Immigration judges’ decisions are reviewable by the BIA, a Department of Justice organization with appellate jurisdiction

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<sup>25</sup> 8 USC § 1229a(c)(4)(C).

<sup>26</sup> Credibility determinations are of great importance in immigration proceedings, for an immigration judge’s assessment of whether “testimony is credible, is persuasive, and refers to specific facts” is “weigh[ed]” in “demonstrat[ing] that the applicant has satisfied the applicant’s burden of proof” in removal proceedings. 8 USC § 1229a(c)(4)(B).

<sup>27</sup> 8 USC § 1229a(c)(4)(C).

<sup>28</sup> See 8 CFR §§ 1003.2(c)(3)(ii), 1003.23(b)(4)(i).

<sup>29</sup> 8 USC § 1229a(c)(6).

<sup>30</sup> 8 USC § 1229a(c)(6)(A)–(C).

<sup>31</sup> 8 USC § 1229a(c)(7).

<sup>32</sup> 8 USC § 1229a(c)(7)(B).

<sup>33</sup> 8 USC § 1229a(c)(7)(C)(i).

<sup>34</sup> 8 USC § 1229a(c)(7)(C)(ii). 8 CFR § 1003.2(e)(3)(ii) contains identical language.

over most immigration judge actions, including removal orders.<sup>35</sup> The BIA reviews immigration judges' findings of fact only for clear error, but reviews de novo "questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges."<sup>36</sup> Implementing regulations give the BIA the power, "through precedent decisions, [to] provide clear and uniform guidance to the [Immigration and Naturalization] Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations."<sup>37</sup> Similarly, 8 CFR § 1003.1(d)(7) makes the BIA's decisions "final except in those cases reviewed by the Attorney General,"<sup>38</sup> with § 1003.1(g) stating that designated decisions by the BIA, attorney general, and secretary of homeland security are "precedents in all proceedings involving the same issue or issues."<sup>39</sup>

8 USC § 1252 permits federal court review of a "final order of removal,"<sup>40</sup> including "review of motions to reopen or reconsider."<sup>41</sup> While the appellate court must "decide the petition only on the administrative record on which the order of removal is based,"<sup>42</sup> there remains "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States," provided that the BIA order is final.<sup>43</sup> Courts have interpreted this statute as granting jurisdiction to review exactly these types of motions to reopen.<sup>44</sup> Courts recognize that the BIA has "broad discretion, conferred by the Attorney General, to grant or deny a motion to reopen,"<sup>45</sup> and thus are generally hesitant to disrupt BIA determinations.<sup>46</sup> Review therefore proceeds under an abuse

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<sup>35</sup> 8 CFR § 1003.1(a)(1), (b).

<sup>36</sup> 8 CFR § 1003.1(d)(3)(i)–(ii).

<sup>37</sup> 8 CFR § 1003.1(d)(1).

<sup>38</sup> 8 CFR § 1003.1(d)(7).

<sup>39</sup> 8 CFR § 1003.1(g).

<sup>40</sup> 8 USC § 1252(a)(1).

<sup>41</sup> 8 USC § 1252(b)(6).

<sup>42</sup> 8 USC § 1252(b)(4)(A).

<sup>43</sup> 8 USC § 1252(b)(9).

<sup>44</sup> See *Cruz v Attorney General of the United States*, 452 F3d 240, 246 (3d Cir 2006). But see *Patel v United States Attorney General*, 334 F3d 1259, 1261–62 (11th Cir 2003) (noting that jurisdiction over review of an order denying a motion to reopen is limited by 8 USC § 1252(a)(2)(C), which restricts jurisdiction in cases in which the immigrant committed certain criminal offenses).

<sup>45</sup> *Kucana v Holder*, 558 US 233, 250 (2010) (quotation marks omitted).

<sup>46</sup> In extreme cases, however, certain courts have shown a willingness to remand agency decisions on the factual merits. See, for example, *Bromfield v Mukasey*, 543 F3d

of discretion standard.<sup>47</sup> Obvious agency misinterpretations or misapplications of law, however, are fully reviewable.<sup>48</sup>

## II. EXPLANATION OF THE LEGAL ISSUE: THE MIXED PETITION QUESTION

The scope and availability of the “changed country conditions” exception found in 8 USC § 1229a(c)(7)(C)(ii) and its parallel regulations are presently the subject of a circuit split. More specifically, federal courts disagree about whether “changed country conditions” can be established by developments in home country circumstances that have become relevant or threatening due only to changes in the asylum-seeker’s personal circumstances since the initial removal order.<sup>49</sup> As 8 USC § 1229a(c)(7)(C)(ii) is the primary opportunity asylum-seekers have to challenge a deportation decision more than ninety days after a final order, it is frequently invoked by petitioners challenging removal decisions in both agency proceedings and federal courts. While this agency-court relationship would appear to be prototypical grounds for a deference-based resolution, however, judicial skepticism of BIA determinations and aggressive application of the abuse of discretion standard indicate that such a solution is unlikely.<sup>50</sup>

### A. The Intersection of Changes in Country Conditions and Personal Circumstances

The issue of changed personal circumstances typically arises when an alien has evaded deportation for several years following

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1071, 1080 (9th Cir 2008) (holding that “[t]he [immigration judge] erred in failing to find that the Country Report established that there exists a pattern or practice of persecution of homosexual men in Jamaica” and remanding the case for further consideration).

<sup>47</sup> See *Khan v Attorney General of the United States*, 691 F3d 488, 495 (3d Cir 2012); *Najjar v Ashcroft*, 257 F3d 1262, 1301–02 (11th Cir 2001); *Bi Feng Liu v Holder*, 560 F3d 485, 489 (6th Cir 2009); *Gen Lin v Attorney General United States*, 700 F3d 683, 685 (3d Cir 2012); *Beni Tan v Attorney General of the United States*, 423 Fed Appx 257, 259 (3d Cir 2011).

<sup>48</sup> See *Smith v Holder*, 627 F3d 427, 433 (1st Cir 2010) (“A material error of law is an abuse of discretion.”); *Ming Chen v Holder*, 722 F3d 63, 66 (1st Cir 2013) (“[W]e review embedded legal conclusions de novo.”).

<sup>49</sup> Compare *Khan v Attorney General of the United States*, 691 F3d 488, 495, 497 (3d Cir 2012), and *Ying Chen v Holder*, 368 Fed Appx 202, 204 (2d Cir 2010), with *Chandra v Holder*, 751 F3d 1034, 1038 (9th Cir 2014), *Shu Han Liu v Holder*, 718 F3d 706, 709 (7th Cir 2013), *Yu Yun Zhang v Holder*, 702 F3d 878, 880 (6th Cir 2012), and *Jiang v United States Attorney General*, 568 F3d 1252, 1257–58 (11th Cir 2009).

<sup>50</sup> See, for example, *Jiang*, 568 F3d at 1257–58.

the initial removal order.<sup>51</sup> In the time between the first and second administrative proceedings, conditions in the alien's home country can change dramatically, sometimes for the worse. Government destabilizations or regime changes may result in persecution of members of the immigrant's political, racial, sexual, or religious group, with threats sometimes even specifically targeted at the alien himself.<sup>52</sup> Developments in stable political systems may have the same effect, for heightened scrutiny and suppression of unofficial religious and political groups can pose specific threats to dissenters and activists.<sup>53</sup> Finally, shifts in social programming, such as enforcement of one-child policies, may raise the specter of sterilization or forced abortions should immigrants return home.<sup>54</sup> Section 1229a clearly permits consideration of these realities in the interests of protecting potential deportees from hostile country conditions.<sup>55</sup> Courts and the BIA agree that if the country circumstances at the time of the motion to reopen would have qualified the petitioner for asylum given his status at the initial deportation hearing, it is appropriate to reopen proceedings.<sup>56</sup>

The same interval of time between the initial removal order and the motion to reopen also creates opportunities for changes in aliens' personal conditions that may put them at odds with circumstances in their home countries. Immigrants can evade deportation for years, giving them time to adopt new religions, become politically active, discover sexual or social identities, marry, or have children. The BIA and federal courts agree that if these changes in personal circumstances happen to be adverse to the status of the petitioner's land of origin as it was at the time of the initial removal order, the personal changes alone are insufficient

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<sup>51</sup> See, for example, *Ming Chen v Holder*, 722 F3d 63, 65 (1st Cir 2013) (noting that the petitioner had remained in the country for nine years after the initial removal decision).

<sup>52</sup> See, for example, *Khan*, 691 F3d at 495 (noting that the petitioners' political party is "targeted by extremists in Pakistan" and "the Pakistani government is less able to control [ ] violence than" it was at the time of the initial removal decision).

<sup>53</sup> See, for example, *Ming Chen*, 722 F3d at 66–67 (identifying political persecution as a possible ground for reopening).

<sup>54</sup> See, for example, *Jiang*, 568 F3d at 1257–58 (noting increased enforcement of China's one-child policy).

<sup>55</sup> See 8 USC § 1229a(c)(7)(C)(ii).

<sup>56</sup> See, for example, *Malty v Ashcroft*, 381 F3d 942, 945 (9th Cir 2004) (noting that "[t]he [ ] question is . . . whether circumstances have changed sufficiently that a petitioner who previously did not have a legitimate claim for asylum now has a well-founded fear of future persecution").

to reopen proceedings following the ninety-day window.<sup>57</sup> The rationale for this is fairly obvious and undisputed. First, the statutory language demands the existence of “changed country conditions” to reopen proceedings after ninety days.<sup>58</sup> Second, permitting changes in personal situation alone to justify reopening proceedings creates a strong incentive for immigrants to evade deportation for long enough to modify their personal circumstances and manufacture grounds for asylum.<sup>59</sup> To have any chance of reopening proceedings, the petitioner must demonstrate some change in country conditions.

Courts are divided, however, on whether alterations in personal circumstances may be considered in conjunction with the requisite changes in country conditions in assessing a motion to reopen. In several cases, the changes in country conditions would have been irrelevant to the petitioner as she was at the time of the initial removal order, but now pose a threat to the alien given shifts in her personal situation. A common example is a case in which, between the initial removal order and the second proceeding, an immigrant has converted to a religion of which her home country has allegedly heightened its persecution.<sup>60</sup> Having had children at a time of increasing enforcement of single-child policies is also a frequent intersection of personal and country changes.<sup>61</sup> Whether immigration judges must consider the petitioner’s present personal condition—or simply her condition at

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<sup>57</sup> See *Yuen Jin v Mukasey*, 538 F3d 143, 153–55 (2d Cir 2008) (upholding the BIA’s interpretation of regulations to require that once a case is closed, a petitioner must show changes in country conditions to reopen proceedings, despite language in 8 USC § 1158(a)(2)(D) suggesting that “changed circumstances” alone justify consideration of an asylum application); *Chen v Mukasey*, 524 F3d 1028, 1030 (9th Cir 2008) (upholding BIA requirements that an asylum applicant show changed country circumstances in a similar petition); *Zheng v Mukasey*, 509 F3d 869, 872 (8th Cir 2007) (upholding the BIA regulation).

<sup>58</sup> 8 USC § 1229a(c)(7)(C)(ii).

<sup>59</sup> See *Ying Chen*, 368 Fed Appx at 204 (noting that aliens should not “disregard [initial removal] orders and remain in the United States long enough to change their personal circumstances”).

<sup>60</sup> See, for example, *Shu Han Liu*, 718 F3d at 709, 712 (noting that the petitioner’s conversion to Christianity coincided with evidence of worsening religious conditions in China); *Li Zhang v Attorney General of the United States*, 543 Fed Appx 277, 284–87 (3d Cir 2013) (finding that while the petitioner had converted to Christianity since the initial removal hearing, religious persecution had not materially changed).

<sup>61</sup> See, for example, *Jiang*, 568 F3d at 1254 (noting that the petitioner had given birth to two children and China had increased enforcement of its one-child policy since the first deportation order); *Yu Yun Zhang*, 702 F3d at 879, 882 (noting the petitioner’s claim of intensified “enforcement of China’s coercive population control program in her native province of Fujian” but finding that the petitioner “failed to demonstrate that country conditions in this respect have worsened in her native province”).

the time of the initial removal order—in light of changed country conditions is an unsettled question.

### B. The Unavailability of Deference

Deference to agency determinations is unlikely to resolve this issue. First, *Chevron U.S.A. Inc v Natural Resources Defense Council, Inc*<sup>62</sup> offers little assistance. While the BIA has rendered judgments in individual proceedings concerning the general topic of motions to reopen,<sup>63</sup> it has not directly weighed in on the circuit split, and the only relevant regulations interpreting the statute, 8 CFR § 1003.23 and 8 CFR § 1003.2, simply restate 8 USC § 1229a's text.<sup>64</sup> Further, only a narrow subset of BIA decisions is even entitled to *Chevron* deference.<sup>65</sup> In order to invoke deference, the opinion must be by the BIA, rather than an immigration judge,<sup>66</sup> and it must be published<sup>67</sup> or at least rely on a published precedential decision.<sup>68</sup> No court has yet identified an agency opinion as worthy of deference on the mixed petition question.

The absence of deference-worthy agency action is secondary, however, to the larger issue that prevents deference from satisfactorily resolving this question. Put simply, while “[a]s a general matter, *Chevron* undoubtedly applies to the BIA’s interpretation[s,] . . . in practice courts have applied *Chevron* inconsistently to reach varying results in the immigration context.”<sup>69</sup> When asked to review BIA actions, “the circuits have split on whether to grant deference to the BIA’s interpretations of procedural provisions in the [Immigration and Nationality Act (INA)], such as statutes of limitation or effective date provisions. For example, in

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<sup>62</sup> 467 US 837, 866 (1984) (establishing the now-familiar rule of deference to agencies’ “permissible construction” of statutes).

<sup>63</sup> See, for example, *Chandra*, 751 F3d at 1035–36 (noting that the BIA had denied the petitioner’s motion to reopen based on its determination that “changes in the [alien’s] personal circumstances in the United States do not constitute sufficiently changed circumstances so as to allow for the untimely reopening”) (brackets omitted).

<sup>64</sup> Compare 8 CFR § 1003.23(b)(4)(i) with 8 USC § 1229a(c)(7)(C)(ii).

<sup>65</sup> See Stephen W. Manning, *Judicial Deference in Immigration Cases* \*3–4, archived at <http://perma.cc/X5ZP-LABX>.

<sup>66</sup> See *Miranda Alvarado v Gonzales*, 449 F3d 915, 924 (9th Cir 2006).

<sup>67</sup> *Mendis v Filip*, 554 F3d 335, 338 & n 3 (2d Cir 2009).

<sup>68</sup> See *Marmolejo-Campos v Holder*, 558 F3d 903, 910–11 (9th Cir 2009) (en banc).

<sup>69</sup> Paul Chaffin, Note, *Expertise and Immigration Administration: When Does Chevron Apply to BIA Interpretations of the INA?*, 69 NYU Ann Surv Am L 503, 506–07 (2013). See also *id* at 517, citing generally *Bamidele v Immigration & Naturalization Service*, 99 F3d 557 (3d Cir 1996). See also Eamonn Hart, Comment, *Citizens All Along: Derivative Citizenship, Unlawful Entry, and the Former Immigration and Nationality Act*, 82 U Chi L Rev 2119, 2157 (2015) (noting that “*Chevron* deference to the BIA is applied inconsistently”).

*Bamidele v. INS* the Third Circuit” split with three other circuits in “refus[ing] to defer to the BIA’s interpretation of the five-year statute of limitations contained in 8 U.S.C. § 1256” of the INA.<sup>70</sup> Rather than relying on the BIA, the court reasoned that the question “was ‘a general legal concept with which the judiciary can deal at least as competently as can an executive agency.’”<sup>71</sup> Similarly, “courts have split on whether to defer to the BIA’s interpretations of numerous ‘domestic policy’ provisions in the INA.”<sup>72</sup> These disputes range from “disagree[ments] on whether to defer to the BIA’s interpretation of 8 U.S.C. § 1101(a)(43)(S)’s ‘relating to obstruction of justice’ provision”<sup>73</sup> to conflicts over “whether the BIA’s interpretation of the provision ‘single scheme of criminal misconduct’ is eligible for deference.”<sup>74</sup> Commentary by other authors suggests that this inconsistency occurs against the broader backdrop of “a growing number of federal judges review[ing] decisions by the immigration courts with apparent skepticism,” a shift prompted by separation-of-powers concerns and worries about the “institutional competence” of “the administrative immigration courts.”<sup>75</sup> A deference-based solution is unlikely to be uniformly predictive or appealing.

This general judicial resistance to yielding to BIA determinations is apparent from a survey of federal appellate decisions on the mixed petition issue addressed in this Comment. No federal appellate court has yet identified a BIA decision on this particular statutory interpretation question as entitled to *Chevron* deference. Similarly, courts have freely and adamantly second-guessed the BIA’s application of both § 1229(a) and its mirror-language implementing regulations under an abuse of discretion standard. As outlined in this and the previous Section, several circuits have held that the “BIA abuse[s] its discretion” and “commit[s] legal error” when the BIA uses the statute and its parallel regulations to exclude consideration of changes in personal circumstances

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<sup>70</sup> Chaffin, Note, 69 NYU Ann Surv Am L at 517 (cited in note 69) (citation omitted).

<sup>71</sup> Id at 517–18, quoting *Bamidele*, 99 F3d at 562.

<sup>72</sup> Chaffin, Note, 69 NYU Ann Surv Am L at 518 (cited in note 69).

<sup>73</sup> Id, citing generally *Alwan v Ashcroft*, 388 F3d 507 (5th Cir 2004), and *Denis v Attorney General of the United States*, 633 F3d 201 (3d Cir 2011).

<sup>74</sup> Chaffin, Note, 69 NYU Ann Surv Am L at 518 (cited in note 69), quoting 8 USC § 1227(a)(2)(A)(ii).

<sup>75</sup> See, for example, Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U Chi L Rev 1671, 1671–72 (2007) (discussing problems with the application of *Chevron* to immigration questions).

when evaluating mixed petitions.<sup>76</sup> Rather than follow the BIA, these courts have independently reached the conclusion that “[p]ersonal conversion . . . does not foreclose the possibility that a country can[,] for its own reasons, become more hostile towards an alien or his group at the same time.”<sup>77</sup> Furthermore, circuits that have upheld BIA rulings on this issue have conducted independent textual interpretation exercises in agreeing with the BIA decision below.<sup>78</sup> While a definitive and coherent revision to agency implementing regulations might have the power to resolve this dispute—although the aforementioned judicial approach toward *Chevron* counsels otherwise—courts’ persistent conclusion that the correct application of the language at issue dictates a certain result,<sup>79</sup> alongside a generally inconsistent and resistant judicial attitude toward deference in the immigration context, makes deference an improbable and unsatisfactory solution to an ongoing problem.<sup>80</sup>

### C. Changed Country Circumstances Must Be Evaluated in Reference to the Immigrant’s Status at the Time of the Initial Removal Hearing

Two federal appellate courts have taken the minority position that immigration judges in § 1229a removal proceedings should consider the effects of changed country circumstances on the alien’s personal status only as it was at the time of the initial deportation hearing. The Second<sup>81</sup> and Third Circuits<sup>82</sup> exclude changes in

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<sup>76</sup> *Chandra*, 751 F3d at 1036, 1039. See also, for example, *Yu Yun Zhang*, 702 F3d at 880 (holding that “the BIA conflated the question of whether there were changed country conditions with the question of whether Petitioner had made out her *prima facie* case for asylum” in applying an abuse of discretion standard); *Chandra*, 751 F3d at 1038 (“[The Ninth Circuit] join[s] [its] sister circuits and hold[s] that a petitioner’s untimely motion to reopen may qualify under the changed conditions exception in 8 C.F.R. § 1003.2(c)(3)(ii), even if the changed country conditions are made relevant by a change in the petitioner’s personal circumstances.”).

<sup>77</sup> *Yu Yun Zhang*, 702 F3d at 880 (quotation marks and brackets omitted).

<sup>78</sup> See, for example, *Khan*, 691 F3d at 497–98 (outlining an interpretation of § 1229a in light of both the BIA’s decision and federal court precedent).

<sup>79</sup> See, for example, *Jiang*, 568 F3d at 1258 (holding that “[t]he BIA clearly abused its discretion” when it “overlooked” evidence of changed country conditions after concluding that “the [petitioner’s] claim is principally based on . . . changed personal circumstances”); *Yu Yun Zhang*, 702 F3d at 880.

<sup>80</sup> As recently as 2015, circuit courts have recognized the ongoing dispute over this question. See *Rei Feng Wang v Lynch*, 795 F3d 283, 284 (1st Cir 2015) (noting the existence of but “declin[ing] to take a position on a potential circuit split on ‘mixed petitions’”).

<sup>81</sup> *Ying Chen*, 368 Fed Appx at 204.

<sup>82</sup> *Khan*, 691 F3d at 495, 497.

personal circumstance from examination, even when these developments place aliens in significant danger should they be removed. The rationales for this approach include both legal and policy considerations.

First, these courts interpret the relevant statutory and regulatory language as mandating consideration of changed country conditions only as they would have applied to the immigrant's status at the time of the first deportation proceeding. 8 USC § 1229a and 8 CFR § 1003.2(c)(2) offer changed country conditions as the only basis for reopening proceedings after the ninety-day window. Under the minority view, this narrow exception implicitly excludes evaluation of personal circumstances that could "undermine the strict limitations on motions to reopen."<sup>83</sup> As all courts have recognized, alterations in personal circumstances alone are insufficient to reopen proceedings.<sup>84</sup> The circuits on this side of the split extend this principle one step further, reasoning that if changed country conditions become relevant only because of changed personal circumstances, it is really the personal change that is driving the petition, and thus the statutory exception to the ninety-day window cannot apply.<sup>85</sup> Under this form of but-for causation analysis, were it not for the change in personal circumstances, the changed country conditions would be fully irrelevant to the alien's case for asylum.<sup>86</sup>

For example, in *Li Zhang v Attorney General of the United States*,<sup>87</sup> the plaintiff converted to Catholicism while in the United States during the period following her initial removal order.<sup>88</sup> She alleged that persecution of unauthorized Christian denominations had worsened in her home country of China during the same period.<sup>89</sup> The Third Circuit reasoned that when "changed country conditions . . . [are] relevant to [an immigrant's] petition only by reason of her decision" to act in a way that brings her into conflict with changed national circumstances, the resulting "mixed petitions—presenting changes in both personal and country conditions—ordinarily also should be rejected."<sup>90</sup> Similarly, in

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<sup>83</sup> *Li Zhang*, 543 Fed Appx at 285.

<sup>84</sup> See, for example, *Yuen Jin*, 538 F3d at 155; *Chen*, 524 F3d at 1030; *Zheng*, 509 F3d at 872.

<sup>85</sup> See *Khan*, 691 F3d at 497–98.

<sup>86</sup> *Id.*

<sup>87</sup> 543 Fed Appx 277 (3d Cir 2013).

<sup>88</sup> *Id.* at 278–79.

<sup>89</sup> *Id.* at 279.

<sup>90</sup> *Id.* at 285, citing *Khan*, 691 F3d at 497–98.

*Ying Chen v Holder*,<sup>91</sup> the Second Circuit interpreted § 1229a when worsening circumstances for political dissidents in China coincided with the petitioner becoming a member of the Federation for Democracy organization, all after her removal order was issued.<sup>92</sup> In synthesizing these corresponding developments, the court held that although “conditions for pro-democracy supporters in China have worsened since the time of the IJ’s decision, changing one’s personal circumstances in a way that coincides with changes in one’s country—years after being ordered removed—does not meet the changed country conditions exception set forth at 8 U.S.C. § 1229a(c)(7)(C)(ii).”<sup>93</sup>

Other legal principles inform this analysis. Courts on this side of the split frequently note that “[m]otions to reopen immigration proceedings are traditionally disfavored” under current Supreme Court jurisprudence,<sup>94</sup> and therefore should be granted “only under compelling circumstances.”<sup>95</sup> The Court has repeatedly observed that “as a general matter [in removal cases], every delay works to the advantage of the deportable alien who wishes merely to remain in the United States,”<sup>96</sup> heightening the importance of administrative finality.<sup>97</sup> The Third Circuit’s decision in *Li Zhang* relied on these principles, recognizing that such petitions ought to be “granted only under compelling circumstances” before rejecting the alien’s assertion that her voluntary membership in a disfavored political group against the backdrop of heightened persecution justified disrupting administrative procedure.<sup>98</sup> According to the minority position taken by the Second and Third Circuits, immigration law’s emphasis on conclusiveness urges both a narrow reading of the availability of reopening provisions and limited judicial disruption of finalized removal orders.<sup>99</sup>

These courts also recognize a strong policy interest in excluding changed personal circumstances from motions to reopen. Most obvious is the moral hazard problem of encouraging aliens to alter

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<sup>91</sup> 368 Fed Appx 202 (2d Cir 2010).

<sup>92</sup> Id at 203–04.

<sup>93</sup> Id at 204.

<sup>94</sup> *Li Zhang*, 543 Fed Appx at 280 (quotation marks omitted). See also *Immigration and Naturalization Service v Doherty*, 502 US 314, 323 (1992).

<sup>95</sup> *Guo v Ashcroft*, 386 F3d 556, 561 (3d Cir 2004).

<sup>96</sup> *Doherty*, 502 US at 323.

<sup>97</sup> Id at 325–26.

<sup>98</sup> *Li Zhang*, 534 Fed Appx at 280–81.

<sup>99</sup> See id at 280.

their personal circumstances in light of changing country conditions in order to manufacture grounds for reopening asylum proceedings. The Second and Third Circuits have noted that “it would be ironic, indeed, if petitioners . . . who have remained in the United States illegally following an order of deportation[ ] were permitted to have a second and third bite at the apple.”<sup>100</sup> Examining only changed country conditions removes the incentive for aliens “to disregard [initial removal] orders and remain in the United States long enough to change their personal circumstances.”<sup>101</sup> The Second Circuit explicitly embraced this rationale in *Ying Chen*, finding that a petitioner who had become politically active since being “ordered removed” should not have “remain[ed] in the United States long enough to change [her] personal circumstances” after flouting a removal order.<sup>102</sup> Consideration of personal circumstances encourages disobedience of administrative orders and incentivizes opportunism.

D. Courts Requiring Evaluation of Changed Country Circumstances in Light of the Alien’s Present Personal Status

The Sixth,<sup>103</sup> Seventh,<sup>104</sup> Ninth,<sup>105</sup> and Eleventh<sup>106</sup> Circuits are more lenient. If a petitioner can demonstrate changed country circumstances, the decision whether to reopen asylum and removal proceedings must consider these changes in light of the alien’s current personal condition. Again, the courts offer both legal and policy rationales for this majority position.

This side of the circuit split treats the investigation of changed country and personal circumstances as separate legal inquiries.<sup>107</sup> Rather than examining whether changed country circumstances are made relevant by personal circumstances, these courts simply inquire whether there are any pertinent changed

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<sup>100</sup> *Khan*, 691 F3d at 498, quoting *Wang v Board of Immigration Appeals*, 437 F3d 270, 274 (2d Cir 2006) (ellipsis and brackets in original).

<sup>101</sup> *Ying Chen*, 368 Fed Appx at 204.

<sup>102</sup> *Id.*

<sup>103</sup> See *Yu Yun Zhang*, 702 F3d at 880.

<sup>104</sup> See *Shu Han Liu*, 718 F3d at 709.

<sup>105</sup> See *Chandra*, 751 F3d at 1035.

<sup>106</sup> See *Jiang*, 568 F3d at 1258.

<sup>107</sup> See, for example, *Yu Yun Zhang*, 702 F3d at 880 (chiding the BIA for “conflat[ing] the question of whether there were changed country conditions with the question of whether Petitioner had made out her *prima facie* case for asylum”).

country conditions.<sup>108</sup> Under this threshold approach, evidence of materially changed country conditions alone “clearly satisfie[s] the criteria for a motion to reopen [ ] removal proceedings.”<sup>109</sup> The Eleventh Circuit offered what is perhaps the most thorough account of this approach in *Jiang v United States Attorney General*.<sup>110</sup> In this case, the petitioner claimed that heightened enforcement of China’s one-child policy was a relevant changed country condition, even though she had been childless when she came to the United States and at the time of her initial removal hearing. Only after disregarding the deportation order did she marry and have multiple children.<sup>111</sup> The Eleventh Circuit, however, disregarded the timing of these events and the fact that her home country’s actions would have been irrelevant at the first removal hearing. Instead, the court held that as 8 USC § 1229a requires only the existence of changed country conditions, evidence of relevant national developments alone can “establish[ ] a prima facie case for asylum and withholding of removal.”<sup>112</sup> Provided that a petitioner technically complies with the “plain language” of the statutory and regulatory requirement of demonstrating changed country conditions relevant to her present circumstances, she is at least entitled to reopen the case.<sup>113</sup>

The Sixth Circuit has employed similar analysis. In *Yu Yun Zhang v Holder*,<sup>114</sup> the court considered an untimely motion to reopen brought by a petitioner who had converted to Catholicism and had two children since her removal order.<sup>115</sup> These changes occurred against the backdrop of “intensified [ ] repression of Christian groups” in the alien’s home country of China.<sup>116</sup> In assessing this blend of personal and national developments, the

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<sup>108</sup> See *Shu Han Liu*, 718 F3d at 709 (noting simply that the petitioner’s home country had intensified religious persecution and considering without finding significant that this persecution was made relevant only by petitioner’s conversion to Christianity).

<sup>109</sup> *Jiang*, 568 F3d at 1254, 1257 (criticizing the BIA for disregarding China’s intensified enforcement of its one-child policy as a clear change in country conditions, despite the fact that this policy was relevant to petitioner only because of her decision to marry and have children after the initial removal decision).

<sup>110</sup> 568 F3d 1252 (11th Cir 2009).

<sup>111</sup> See *id.* at 1254.

<sup>112</sup> *Id.* at 1258 (discounting the BIA’s finding that the changes in the one-child policy affected the petitioner only due to changes in her personal circumstances).

<sup>113</sup> *Chandra*, 751 F3d at 1036.

<sup>114</sup> 702 F3d 878 (6th Cir 2012).

<sup>115</sup> *Id.* at 879–80.

<sup>116</sup> *Id.* at 880 (quotation marks omitted).

court found that “[p]ersonal conversion to a group does not foreclose the possibility that a country can[,] for its own reasons, become more hostile towards an alien or his group at the same time,”<sup>117</sup> noting that “[i]n the instant case, the BIA conflated the question of whether there were changed country conditions with the question of whether Petitioner had made out her *prima facie* case for asylum.”<sup>118</sup> Under this approach, even those changes in country circumstances made relevant only by new personal circumstances can support a motion to reopen.

The courts adopting the majority position also have identified policy concerns weighing in favor of permitting mixed petitions. Given asylum law’s goal of protecting core elements of personal identity from state-sponsored or state-tolerated persecution, it makes little sense to discriminate based on the timing of “sincere” personal changes.<sup>119</sup> The Seventh Circuit articulated this disconnect in the 2013 case *Shu Han Liu v Holder*,<sup>120</sup> in which a recent convert to Christianity pointed to intensified Chinese persecution of unofficial churches as grounds for asylum.<sup>121</sup> The court rejected the BIA’s assertion that this heightened danger would have been irrelevant to the petitioner at the time of the initial removal hearing and thus was not a changed country condition for § 1229a purposes.<sup>122</sup> Although it recognized “that had [the petitioner] not converted to Christianity she would have no basis for seeking asylum on the ground that China persecutes Christians,” the Seventh Circuit nonetheless reasoned that “if her conversion was sincere, what would be the basis . . . for treating her differently from someone who had converted to Christianity before coming to the United States?”<sup>123</sup> If the goal of asylum is fair treatment of vulnerable aliens, such arbitrary discrimination is untenable.

The Ninth Circuit has similarly recognized that asylum’s fundamental purpose of protecting personal freedoms counsels in favor of permitting mixed petitions. In *Chandra v Holder*,<sup>124</sup> the court considered the petition of an alien who had converted to

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<sup>117</sup> *Id.* (quotation marks and brackets omitted).

<sup>118</sup> *Yu Yun Zhang*, 702 F3d at 880.

<sup>119</sup> *Shu Han Liu*, 718 F3d at 709.

<sup>120</sup> 718 F3d 706 (7th Cir 2013).

<sup>121</sup> *Id.* at 707, 709.

<sup>122</sup> *Id.* at 709.

<sup>123</sup> *Id.*

<sup>124</sup> 751 F3d 1034 (9th Cir 2014).

Christianity after his removal order.<sup>125</sup> Noting that recently intensified persecution by “Islamic fundamentalists [and the] Indonesian military”<sup>126</sup> would severely threaten the petitioner’s right to “freely choose and exercise [his] own religion,” the court determined that the “worthy policy interest” of personal freedom counseled in favor of permitting mixed petitions.<sup>127</sup> Rather than discriminating among petitioners based on when they developed fundamental aspects of personal identity or demanding that aliens renounce sincere beliefs, these courts err on the side of allowing reopening.

### III. A MIDDLE SOLUTION TO THE MIXED PETITION QUESTION

This Comment proposes an approach to mixed petitions that would permit consideration of changes in personal circumstances since the initial deportation hearing *only* when these changes have developed prior to the relevant changed country conditions. This solution necessarily adopts as a background rule the finality-focused minority position that certain changes in personal circumstances—under this rule, those that postdate developments in country circumstances—are irrelevant for reopening asylum proceedings. It tempers this approach, however, by addressing the key legal and practical concerns informing the majority rule. A closely divided circuit split and the compelling rationales supporting both positions suggest that a legally sound, policy-sensitive, and administratively feasible compromise is ideal.

This solution would come into play in a narrow, but important, set of cases. Consider circumstances in which an atheist refugee named Krista comes to the United States but is subsequently denied asylum. Rather than complying with the removal order, Krista instead evades the authorities. Eventually, she is apprehended and scheduled for removal, but not before she has converted to Christianity. In the same time frame, however, officials in Krista’s home country have heightened persecution of unofficial religious groups. Krista asserts that this intervening country circumstance change entitles her to reopen removal proceedings under § 1229a. Under the minority circuit position, the petition must be denied; if Krista were still an atheist—as she was at the time of the initial removal hearing—the change in

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<sup>125</sup> *Id.* at 1035.

<sup>126</sup> *Id.* (brackets in original).

<sup>127</sup> *Id.* at 1039.

country status would be irrelevant to her case. Under the majority position, however, Krista would be entitled to reopen her case as she can demonstrate a change in country conditions that is relevant to her present situation.

The proposed middle approach is more nuanced. If Krista can show that her conversion predates the adverse shift in government policy, she may reopen her case under the changed country conditions provision. If she cannot make this showing or if her conversion postdated alterations in national circumstances, however, the petition would be denied. By sorting petitions on the basis of event timing, this approach creates an administratively friendly and legally coherent framework consistent with the underlying mechanisms and purposes of immigration law.

#### A. Legal Justifications for the Middle Position

When viewed independently, the legal rationales given for each side of the circuit split appear to firmly support their respective positions. Considered as a whole within the context of this body of law, however, these discrete arguments firmly point to the viability of the middle solution.

The first point of disagreement concerns the plain meaning of the statutory and regulatory language at issue. Although “changed country conditions”<sup>128</sup> seems to be an unambiguous phrase, it is unclear whether these “conditions” are exclusive of other considerations. The Sixth and Eleventh Circuits’ decisions on this topic consistently treat the changed country conditions requirement as an independent hurdle that, once cleared, entitles the petitioner to reopening.<sup>129</sup> Conversely, the Third Circuit asserts that the changed country conditions language implicitly excludes evaluation of all other factors and circumstantial changes from the reopening decision.<sup>130</sup> Both sides of the circuit split do

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<sup>128</sup> 8 USC § 1229a(e)(7)(C)(ii).

<sup>129</sup> See *Yu Yun Zhang*, 702 F3d at 880 (noting that “separate but simultaneous changes [in personal and country situations] distinguish these facts from a purely personal change in circumstances”); *Jiang*, 568 F3d at 1257–58 (considering only evidence of changes in China’s enforcement of its one-child policy while ignoring that these developments were relevant to the petitioner only by virtue of her decision to have children since her initial removal hearing, and discounting the BIA’s finding that the changes in the one-child policy affected the petitioner only due to changes in her personal circumstances).

<sup>130</sup> See *Li Zhang*, 543 Fed Appx at 285 (discussing how consideration of personal circumstances inherently undermines the narrow textual language); *Khan v Attorney General of the United States*, 691 F3d 488, 497 (3d Cir 2012) (noting that consideration of changed country circumstances made relevant only by personal changes inherently involves an atextual consideration of personal changes).

agree, however, that some “changed country conditions” must be present.<sup>131</sup> This shared criterion of requiring at least some development in national circumstances is preserved by the mixed approach. It is worth noting that no court has discussed legislative history or intent in addressing the issue. Indeed, there seems to be no clear legislative purpose informing this statutory provision—investigation of its background shows a complicated, fragmented history with no records of debate or discussion over the relevant sections of 8 USC § 1229a that cast light on how it should be interpreted with respect to the question of mixed petitions.<sup>132</sup> Consequently, a middle position that respects the universally recognized facial requirement of some change in country circumstances is legally tenable within the boundaries of the circuit split.

Further investigation into the statute’s structure and context suggests that this Comment’s hybrid solution is a compelling legal approach. The text of similar statutes and regulations in this area of immigration law implies that different types of changed circumstances may be grounds for administrative leniency in different situations. For example, 8 USC § 1158(a)(2)(D) permits delays in asylum application filing due to “either the existence of *changed circumstances* which materially affect the applicant’s eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the [one-year] period.”<sup>133</sup> Although BIA regulations—and validating court decisions—have held that the changed country conditions provision of § 1229a is controlling *after* an initial asylum application has been denied,<sup>134</sup> a change in personal circumstances alone may be used to justify an exception to the time limit of § 1158(a)(2)(B) *before* final denial.<sup>135</sup> The specific inclusion of the term “country” in

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<sup>131</sup> See note 57 and accompanying text.

<sup>132</sup> 8 USC § 1229a grew out of a 1952 law that was relatively strict regarding immigration, setting precise quotas and providing for expedited deportation. See Immigration and Nationality Act, 66 Stat 163 (1952), codified in various sections of Title 8. Subsequent bills that have extensively updated the entire body of immigration law, including the relevant statute, show a more humanitarian purpose while still maintaining strict procedural rules and the goal of preventing illegal immigration. See, for example, William J. Clinton, *Statement on Signing the Omnibus Consolidated Appropriations Act, 1997*, 32 Weekly Comp Pres Doc 1935, 1937 (Sept 30, 1996) (noting that the bill “strengthens the rule of law . . . without punishing those living in the United States legally”). There is no legislative history showing discussion of the changed country circumstances provision.

<sup>133</sup> 8 USC § 1158(a)(2)(D) (emphasis added).

<sup>134</sup> See *Yuen Jin v Mukasey*, 538 F3d 143, 153 (2d Cir 2008) (holding that § 1229a(c)(7)(C) is controlling after “entry of a final order of removal [and after] the 90-day deadline for a motion to reopen”).

<sup>135</sup> 8 USC § 1158(a)(2)(D).

§ 1229a(c)(7)(C)(ii) therefore implies that the word in this context must narrow the broad circumstantial changes referenced in the § 1158(a)(2)(D) exception clause.

Indeed, the textual language of similar regulations further suggests that the word “country” should be afforded particular weight in determining the scope of § 1229a’s reopening exception. For example, 8 CFR § 208.13(b)(1)(i)(A) allows the government’s representative in an asylum hearing to rebut the alien’s fear of future persecution by showing “a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution *in the applicant’s country of nationality*.”<sup>136</sup> In applying this rule, courts tend to examine only changes in country conditions without inquiring into changes in the petitioner’s personal circumstances.<sup>137</sup> While the majority side of the circuit split claims to recognize this linguistic limitation in § 1229a by demanding that the petitioner show at least some change in country circumstances, this lenient construction undermines the very goal of the textually heightened *country* conditions requirement by allowing creative petitioners to take advantage of any change in national circumstances by making corresponding alterations in their personal situations.<sup>138</sup> This Comment’s proposed solution protects the statute’s plain language purpose of restricting reopening to changed *country* conditions by ensuring that only developments in national circumstances that become relevant for reasons beyond the immigrant’s control are considered in a motion to reopen.

Other related statutory provisions enhance the legal necessity of strictly construing the changed country conditions provision in order to protect against opportunistic behavior. 8 USC § 1229a(c)(6), which immediately precedes § 1229a(c)(7)’s motion to reopen rule, governs motions to “reconsider a decision that the alien is removable from the United States.”<sup>139</sup> In addition to giving the petitioner only thirty days to file the motion<sup>140</sup>—a notably shorter period than the ninety-day window for a motion to reopen<sup>141</sup>—the rule offers no saving provision allowing reconsideration outside of

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<sup>136</sup> 8 CFR § 208.13(b)(1)(i)(A) (emphasis added).

<sup>137</sup> See, for example, *Singh v Holder*, 753 F3d 826, 830 (9th Cir 2014); *Kasa v United States Attorney General*, 518 Fed Appx 831, 833–34 (11th Cir 2013).

<sup>138</sup> See *Li Zhang*, 543 Fed Appx at 285, citing *Liu v Attorney General of the United States*, 555 F3d 145, 151 (3d Cir 2009) (noting the possibility of “circumvent[ing] regulations designed to limit motions for asylum”) (quotation marks omitted).

<sup>139</sup> 8 USC § 1229a(c)(6)(A).

<sup>140</sup> 8 USC § 1229a(c)(6)(B).

<sup>141</sup> 8 USC § 1229a(c)(7)(C)(i).

this time frame. This nearby contextual preference for finality within the statutory scheme counsels in favor of narrowly construing the availability of reopening.

This persistent emphasis on finality and strict timing rules also appears in § 1158(a)(2)(B), which requires asylum applicants to demonstrate compliance with the one-year filing window through “clear and convincing evidence.”<sup>142</sup> As noted earlier in this Part, § 1158(a)(2)(D) offers a potential exception to this rule in the case of “changed . . . or extraordinary circumstances.”<sup>143</sup> This lenien-cy, however, is not available as a matter of absolute right. Instead, “the alien [must] demonstrate[ ] to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant’s eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within [one year].”<sup>144</sup> This highly discretionary exception demonstrates that the totality of the circumstances should be considered only in special cases when doing so would not eviscerate administrative rules. Immigration law’s persistent emphasis on avoiding opportunism while still permitting holistic evaluation of exceptional circumstances counsels that this Comment’s middle solution is legally consistent with the larger statutory and regulatory regime.

Supreme Court precedent on immigration law further indicates that courts consider finality interests to be overcome only when doing so will not open the door to evasion and manipulation. The Court has consistently denied attempts to force the attorney general and the BIA to use their discretion to reopen immigration proceedings even when the movant technically may be eligible for relief. For example, in *Immigration and Naturalization Service v Rios-Pineda*,<sup>145</sup> petitioners “moved [that] the BIA [ ] reopen [proceedings] and requested suspension of deportation” on the grounds of “extreme hardship” and under a seven-year residency exception.<sup>146</sup> Although the aliens technically met the facial requirements for an exception, the Court noted that when the “Attorney General decides that relief should be denied as a matter

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<sup>142</sup> 8 USC § 1158(a)(2)(B).

<sup>143</sup> 8 USC § 1158(a)(2)(D).

<sup>144</sup> 8 USC § 1158(a)(2)(D).

<sup>145</sup> 471 US 444 (1985).

<sup>146</sup> *Id.* at 447.

of discretion, he need not consider whether the threshold statutory eligibility requirements are met.”<sup>147</sup> The Court also emphasized that the petitioners had attained seven years of residency only by extending their stay through frivolous “appeals [that] were without merit,” before concluding that refusal to reopen proceedings is particularly appropriate when petitioners have facially qualified themselves for reopening by “prolong[ing] litigation in order to delay physical deportation for as long as possible.”<sup>148</sup> When exceptions to finality encourage “indefinite stalling” and evasion,<sup>149</sup> they are contrary to the fundamental structure of immigration law. This Comment’s proposed rule, which permits reopening only when doing so raises no opportunism problems, cleanly fits with Supreme Court precedent.<sup>150</sup>

A middle approach that allows consideration of personal developments only when they predate changed country conditions is a compelling legal solution to the problem of reopening asylum proceedings. This interpretation gives meaning to the presence of the term “country” in “changed country conditions,”<sup>151</sup> preventing obvious routes for evasion from rendering the word textually irrelevant. The solution is also consistent with its statutory context and relevant Supreme Court precedent, both of which strongly emphasize procedural efficiency and finality.

## B. Policy Justifications for the Middle Solution

The courts composing the circuit split have raised several policy justifications for their respective positions. This Comment

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<sup>147</sup> Id at 449.

<sup>148</sup> Id at 450.

<sup>149</sup> *Rios-Pineda*, 471 US at 450.

<sup>150</sup> This willingness to relax strict procedural requirements only when doing so will not invite administrative chaos echoes the Supreme Court’s habeas corpus jurisprudence. In interpreting the strict timing requirements for prisoner challenges under the Antiterrorism and Effective Death Penalty Act of 1996, the Court in *Holland v Florida*, 560 US 631 (2010), found that 28 USC § 2244(d)’s requirement that a “1-year period of limitation shall apply to an application for a writ of habeas corpus” is subject to equitable tolling. *Holland*, 560 US at 634–35, quoting 28 USC § 2244(d)(1). In reaching this conclusion about the availability of procedural leniency, however, the Court heavily relied on *United States v Brockamp*, 519 US 347 (1997), in which it had noted that such exceptions are disfavored when they “could create serious administrative problems,” particularly if a blanket liberal rule might expose government agencies to countless meritless claims. *Brockamp*, 519 US at 352. See also *Holland*, 560 US at 646–47.

<sup>151</sup> 8 USC § 1229a(e)(7)(C)(ii).

synthesizes these conflicting considerations, creating a compromise approach sensitive to the strongest concerns advanced by both sides.

The courts adopting the minority position are particularly worried that consideration of present personal circumstances will encourage deportable aliens to “disregard [initial removal] orders and remain in the United States long enough to change their personal circumstances,” incentivizing evasion of law enforcement and overburdening immigration courts.<sup>152</sup> These natural consequences of giving renegade aliens “a second and third bite at the apple . . . [by] gaming [ ] the system” caution against a relaxed interpretation of 8 USC § 1229a(c)(7)(C).<sup>153</sup> The proposed middle solution leaves little room for such opportunism. In order for an alien to intentionally take advantage of changed country circumstances, he would first need to be aware of what these changes were before altering his personal situation accordingly. While it is possible that uniquely perceptive aliens could predict future developments in national circumstances and make personal changes in anticipation, such scenarios seem intuitively unlikely. A hybrid approach therefore removes the incentive for aliens to evade removal with the intent of buying time to adversely modify their personal circumstances.

The middle solution also reasonably satisfies the policy concerns raised by courts adopting the majority position. These circuits contend that excluding consideration of personal circumstances undermines asylum law’s objective of protecting fundamental expressions of personal identity against the tyranny of the state. The Ninth Circuit is particularly insistent on this point, noting that asylum serves the “worthy policy interest” of defending freedoms such as the right “to freely choose and exercise [one’s] own religion.”<sup>154</sup> The Seventh Circuit has similarly argued that when the court determines that aliens’ personal decisions are “sincere,” it is nonsensical to discriminate among worthy asylum candidates simply on the basis of whether they made genuine personal changes before or after coming to the United States.<sup>155</sup> More specifically, the court has reasoned that if a pre-immigration personal change would constitute grounds for asylum, an identical change at an identical time by a different alien

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<sup>152</sup> *Ying Chen*, 368 Fed Appx at 204.

<sup>153</sup> *Khan*, 691 F3d at 498.

<sup>154</sup> *Chandra*, 751 F3d at 1039.

<sup>155</sup> See *Shu Han Liu*, 718 F3d at 709.

who is already in the United States should have an identical effect.<sup>156</sup> Creating arbitrary exceptions to reopening asylum proceedings cuts against a strong interest in consistently protecting human rights.

The hybrid solution is largely responsive to these considerations. First, it inherently captures a larger pool of applicants than the minority rule, reflecting the Ninth Circuit's humanitarian goal of making asylum available to deserving aliens. Second, it offers a viable proxy for discriminating between the Seventh Circuit's sincere and insincere changes in personal condition via a mechanism that is considerably more precise than the minority position's test, which simply looks to whether the relevant personal circumstances existed at the time of the first removal hearing. As previously noted, it is highly unlikely that aliens who changed their personal circumstances prior to national developments are attempting to exploit the system, so moving the cutoff date for sincere personal changes from the date of the initial proceedings to the time when changed country circumstances first emerged will both enlarge and better define the pool of legitimate applicants.

It is true, however, that the middle position does not fully address the worries of the majority. Under this rule, the possibility remains that genuine converts, dedicated political activists, and new parents will be excluded from reopening asylum proceedings simply because their personal decisions postdate the development of national conditions of which the aliens may not even be aware. Unless immigration judges, the BIA, and federal courts wish to reopen countless cases for the purpose of determining subjective sincerity, however, this bright-line rule is a necessary result of protecting the administrative process from opportunism. Indeed, it is impossible for any effective procedural mechanisms to perfectly achieve "freedom from error."<sup>157</sup> A middle rule that fully responds to the administrative and law enforcement concerns raised by one side of the circuit split while providing an enhanced ability to address the policy worries of the opposing side, however, represents a net improvement that balances efficiency and fairness.

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<sup>156</sup> *Id.*

<sup>157</sup> Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 *Harv L Rev* 441, 447 (1963).

### C. The Middle Solution Is Administratively Feasible

It would be odd to rely on principles of efficiency and finality to advocate for a rule that results in increased administrative costs. The hybrid approach to evaluating changed country circumstances, however, imposes little burden beyond that created by the minority rule while representing a considerable improvement upon the majority approach.

First, it is worth noting that if an alien can demonstrate changed country conditions, the immigration judge is bound to inquire into whether the petitioner is entitled to reopen his case. Given the mandatory language of the statute,<sup>158</sup> it will always be necessary to assess the impact of these changed country conditions on the personal situation—past or present—of the immigrant, regardless of whether the majority, minority, or compromise rule is selected. No approach can fully bar frivolous petitioners from at least taking the first step of moving to reopen proceedings in the presence of new country circumstances. After the reopening process has started, however, the proposed middle position provides a useful mechanism for identifying and rapidly disposing of certain petitions that would otherwise have proceeded under the majority rule.

Under the current system, an untimely petitioner hoping to reopen his case under the changed country conditions provision of § 1229a is required to file a motion containing “the new facts that will be proven at a hearing to be held if the motion is granted, [facts that] shall be supported by affidavits or other evidentiary material.”<sup>159</sup> These new facts must include information pertaining to the development of national circumstances and the petitioner’s personal situation, allowing immigration judges to determine both whether there are actually changed country circumstances and whether these factors are relevant to the applicant’s status. For example, in *Chandra*, the alien alleged that his conversion to Christianity would expose him to recently “escalated and widespread persecution of Christians by Islamic fundamentalists [and the] Indonesian military” should he be deported.<sup>160</sup> In support of these claims regarding his personal situation and its relationship to national events, the petitioner submitted

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<sup>158</sup> 8 USC § 1229a(c)(7)(A), (C)(ii) (stating that “[a]n alien may file one motion to reopen” and that “[t]here is no time limit on the filing of a motion to reopen” when there are “changed country conditions”).

<sup>159</sup> 8 USC § 1229a(c)(7)(B).

<sup>160</sup> *Chandra*, 751 F3d at 1035 (brackets in original).

the 2007 International Religious Freedom Report, prepared by the United States Department of State (“State Department”), news articles from 2008 reporting on violence perpetrated by Muslims against Christian religious leaders and followers in Indonesia, a 2009 travel warning issued by the State Department cautioning “Americans or other Western citizens and interests” about general terrorist threats in Indonesia, and other materials. Chandra also presented a letter from Tara Ongkowidjojo, the Church Administrator at City Blessing Church in Temple City, California, stating that Chandra “has been regularly attending [ ] church . . . and attends the Care Cell Fellowship meeting every week.”<sup>161</sup>

Other petitioners have produced similarly detailed records of relevant personal and political circumstances. In *Khan v Attorney General of the United States*,<sup>162</sup> the petitioners sought asylum on the basis that their recent involvement in “the Awami National Party [ ], which is targeted by extremists in Pakistan,” would expose them to political violence that the “Pakistani government is less able to control . . . than [it was] in 2000.”<sup>163</sup> In support of these allegations, the petitioners submitted detailed information concerning both personal and national circumstances, including “a report published on July 1, 2009 by the University of Maryland entitled ‘Pakistani Public Opinion on the Swat Conflict, Afghanistan, and the US,’” along with “a number of articles reporting violence and instability in Pakistan; a 2009 United States Department of State Human Rights Report documenting human rights abuses and politically motivated killings by extremists in Pakistan; information on the treatment of persons with mental illness in Pakistan; and the petitioners’ medical records.”<sup>164</sup>

As demonstrated by these cases, petitioners are required to submit extensive information regarding their personal situations and relevant changes in their home countries. These data often include specific and exhaustive details regarding aliens’ political ideologies, intimate relationships, medical conditions, and religious beliefs, as well as information on country conditions pertinent to the petitioners’ individual statuses.<sup>165</sup> Indeed, applicants may even furnish information specific to their native towns and

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<sup>161</sup> Id (brackets and ellipsis in original).

<sup>162</sup> 691 F3d 488 (3d Cir 2012).

<sup>163</sup> Id at 495.

<sup>164</sup> Id at 495–96.

<sup>165</sup> See, for example, id; *Jiang*, 568 F3d at 1255–56.

provinces in order to emphasize the nexus between political events and personal situations.<sup>166</sup> This preexisting allocation of the responsibility for producing persuasive evidence establishing personal and political circumstances indicates that this Comment's solution would impose minimal additional burden upon immigration judges. In addition to furnishing proof of changes in personal and country conditions, petitioners under the proposed regime would also have to identify and corroborate the timing and sequence of these developments. Birth certificates of children, baptism records, political party donation statements, affidavits of clergy members and political organization associates, and marriage licenses, in addition to more traditional information sources such as State Department reports on country conditions, could all be used to make this showing. Once presented with this information, the immigration judge would then determine whether the alien could reopen the case based on the timing of the relevant personal and political changes demonstrated by the petitioner, applying the proposed hybrid approach to the petition, just as judges currently apply the minority and majority rules. Rather than introducing a new layer of complexity into administrative proceedings, this Comment's solution simply changes the perspective from which immigration judges will evaluate the presented facts of each case while also allowing for rapid dismissal of a subset of mixed petition cases.

Of course, while the middle solution proposed in this Comment is most conducive to the resolution of easy cases—such as in *Jiang*, in which the refugee had multiple children years before the heightened enforcement of a one-child policy<sup>167</sup>—there will inevitably be cases that turn upon murkier facts. Details about exactly when a petitioner experienced a sincere religious conversion, discovered a sexual orientation, or truly adopted a political ideology are less easily identified than biological events. These sorts of nuanced inquiries, however, are inherent at all stages of an asylum system that inevitably requires difficult determinations regarding the veracity of subjective identities and the sincerity of personal

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<sup>166</sup> See, for example, *Jiang*, 568 F3d at 1255–56. The court in *Jiang* noted that “[the petitioner] offered previously unavailable evidence that officials in the Fujian Province of China had increased enforcement of the one-child policy,” allegations supported by “second-hand accounts of the forced sterilization of her sister-in-law and a village neighbor” and “[testimony] that village officials were aware that Jiang had two children, and [had] told her parents that family planning policies would be enforced against her if she returned.” *Id.* at 1255.

<sup>167</sup> See *id.* at 1254. For a more complete description of the case, see Part II.D.

changes. In any sort of immigration case, judges have extensive fact-finding duties thanks to the vast number of factors that go into establishing eligibility for asylum, and the immigration system is no stranger to making invasive inquiries and determinations regarding political affiliation, marital status, sexual orientation, and religious devotion. For example, in *Bromfield v Mukasey*,<sup>168</sup> the Ninth Circuit reached the conclusion that the petitioner “came out as a gay man” four years after he first moved to the United States, and that this identity subsequently could qualify him for asylum on the factual basis of both State Department country reports and the petitioner’s personal testimony about the state of his homeland.<sup>169</sup> Discerning the timing of these changes in personal circumstances in relation to shifts in country circumstances at the reopening stage, while not always a precise science, is therefore not an unreasonable expectation. This is especially true due to the fact that the burden of identifying and proving details related to the sequence of personal and country changes already falls on the applicant,<sup>170</sup> as well as due to the reality that these hazy changes in personal and political situations may not always be so contemporaneous as to create meaningful disputes over timing.

Indeed, immigration judges have great latitude to interpret and weigh evidence in making the factual determinations necessary for discerning the timing and relevance of changes in personal and country circumstances. 8 USC § 1158(b)(1)(B)(iii) offers a small window into the broad investigative powers of immigration judges, noting that, in an asylum hearing,

a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant’s or witness’s account, the consistency between the applicant’s or witness’s written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the

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<sup>168</sup> 543 F3d 1071 (9th Cir 2008).

<sup>169</sup> *Id.* at 1073–74, 1080 (quotation marks omitted) (remanding for the agency to decide “in the first instance whether [the petitioner] has established that he will more likely than not be persecuted in light of this pattern or practice”).

<sup>170</sup> See 8 USC § 1229a(c)(4)(B), (7)(B).

Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor.<sup>171</sup>

8 USC § 1229a(c)(4)(C) further reflects the wide scope of an immigration judge's investigative and fact-finding capacities, noting that credibility determinations in asylum hearings are based on "all relevant factors" including "the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, [and] the consistency between the applicant's or witness's written and oral statements."<sup>172</sup> The Supreme Court has also recognized the manifold considerations that inform asylum decisions, noting in *Immigration and Naturalization Service v Cardoza-Fonseca*<sup>173</sup> the ambiguity and "case-by-case adjudication" inherent in this area of law.<sup>174</sup> While immigration judges may not ignore or overlook relevant information,<sup>175</sup> they have broad discretion to reach decisions based on evidence that is often unclear or subjective, a power that is particularly relevant for making the timing determinations necessary for this Comment's proposed interpretation of § 1229(a).

In addition to information on personal and country circumstances furnished by petitioners, immigration judges also have access to extensive administrative documents detailing the national developments and global affairs that are relevant to motions to reopen, minimizing the need for independent investigation on the dual questions of whether changed conditions exist and, if so, when they arose.<sup>176</sup> For example, annual State Department reports, congressional committee findings, and even information published by foreign governments offer reliable data on these matters.<sup>177</sup> These sources, when supplemented with additional details about national conditions furnished by petitioners,<sup>178</sup> offer

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<sup>171</sup> 8 USC § 1158(b)(1)(B)(iii).

<sup>172</sup> 8 USC § 1229a(c)(4)(C).

<sup>173</sup> 480 US 421 (1987).

<sup>174</sup> *Id.* at 448.

<sup>175</sup> See *Shu Han Liu*, 718 F3d at 709 (chiding the Justice Department for overlooking what the court considered to be basic facts establishing changed country conditions).

<sup>176</sup> See *id.* at 707–11 (citing numerous governmental reports on relevant country conditions such as religious and ethnic persecution).

<sup>177</sup> See *id.* at 707–08 (relying on each of these sources of information to describe Chinese religious persecution).

<sup>178</sup> See, for example, *Jiang*, 568 F3d at 1258 (noting that the petitioner had submitted information specific to her home village about enforcement of China's one-child policy).

thorough information on the country circumstances component of the motion to reopen. Finally, as previously noted, § 1229a(c)(7)(B) requires that the petition include supporting facts regarding the details—and, under the proposed rule, the timing—of country and personal changes, further easing the burden on immigration judges first in assessing the initial request, and then later in evaluating cases that survive beyond the reopening stage.<sup>179</sup> Although implementation of the hybrid solution may necessitate some inquiry into the sequence of subjective personal events that lack definitive temporal boundaries, the petitioner's responsibility to identify and prove the timing and order of these developments, the availability of relevant government-produced data, and immigration judges' wide latitude in investigating and assessing factual claims make such a process feasible.

#### D. The Hybrid Solution in Action

Examination of illustrative case law reveals that the hybrid rule would capture deserving petitioners who would otherwise be excluded by the narrow minority position while simultaneously protecting the administrative viability threatened by the lenient majority position. For example, the plaintiff in the 2009 *Jiang* case had, since her 1999 removal decision, married in 2002 and given birth to children in 2002 and 2004.<sup>180</sup> In a 2007 petition to reopen, she cited evidence that “she had recently learned . . . that forced sterilization and forced abortions were on the rise” in China and feared the same fate should she return home.<sup>181</sup> Although the one-child policy had nominally been in place for some time, evidence showed that it had only recently been “implemented in [petitioner's] hometown.”<sup>182</sup> This particular timing of events suggests a genuine change in personal circumstances, minimizing the risks that the plaintiff was gaming the process. On their face, the timing of these new facts asserted by the petitioner's filing also demonstrates compliance with the proposed interpretation of § 1229a, allowing rapid determination that reopening is warranted and allowing deserving applicants a second chance to make a case for asylum.

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<sup>179</sup> See 8 USC § 1229a(c)(7)(B). See also 8 USC § 1229a(c)(7)(C)(ii) (discussing the changed country conditions exception).

<sup>180</sup> *Jiang*, 568 F3d at 1254.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 1255.

Conversely, the hybrid rule would foreclose reopening in situations in which aliens are likely attempting to manipulate the system, thus preventing unnecessary expenditures of administrative time and resources and discouraging opportunistic behavior. For example, *En Gao v Holder*<sup>183</sup> featured an undocumented alien who first applied for asylum on the grounds that the Chinese government's sterilization of his wife, who was still in their homeland of China, "amounted to persecution of him."<sup>184</sup> After his petition was denied, plaintiff then moved to reopen proceedings "[o]ne day after the applicable 90-day deadline" on the basis that "his anxiety over his impending removal had led him" to convert to Christianity, and that China's conditions had become increasingly hostile toward Christians since he first came to the United States—long before he had become a Christian.<sup>185</sup> Applying the same analysis used in *Shu Han Liu*, the Seventh Circuit found that even though the petitioner had only recently converted, he was entitled to "show[ ] changed conditions in China *since the time he [first] left [China]* with respect to the treatment of Christians."<sup>186</sup> By implementing a bright-line rule for reopening, immigration judges could quickly dispose of potentially manipulative petitions such as the one in *En Gao* on the basis of the timing sequence claimed by the alien in his petition, rather than being forced to begin the renewed assessment of opportunistic cases that § 1229a is designed to prevent. Though not a perfect proxy for sincerity or a complete bar to meritless petitions, the middle approach offers a useful mechanism for rapidly sorting untimely petitions that is in keeping with the policy goals and administrative realities of immigration law.

#### CONCLUSION

Immigration law represents a complex series of trade-offs and balances designed to protect both efficiency and fairness. The interplay between these competing considerations is particularly

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<sup>183</sup> 721 F3d 893 (7th Cir 2013).

<sup>184</sup> Id at 894.

<sup>185</sup> Id.

<sup>186</sup> Id at 895 (emphasis added). The court acknowledged that the government had not challenged the "genuineness" of the petitioner's conversion. Id. The court did, however, ultimately deny the claim on the grounds that "the Board's decision [was] supported by substantial evidence" that the alien had failed to meet his burden of proof on the issue of whether changed country circumstances existed. Id at 894–95.

apparent in asylum proceedings, for this area of immigration procedure features the twin interests when they are at their most extreme due to both heightened incentives for gamesmanship in last-chance motions and the severe risks faced by certain refugees should they be denied asylum. The current legal status of motions to reopen is the subject of a dispute that invokes these particular concerns, as courts are split over whether changes in personal circumstances may be used in evaluating changed country conditions in support of an untimely petition. To date, two circuits consider only the relationship between national developments and the alien's status at the time of the first removal proceeding, while four circuits permit analysis of country conditions in light of the alien's current personal circumstances.

A review of the governing statute's purpose, context, and doctrinal analogues points to the legal viability of a middle solution that requires consideration of only those personal changes that preceded country developments. This hybrid rule is consistent with the rest of the statutory scheme, gives meaning to the full text of the law, and upholds the legal preference for finality. A mixed approach also represents a holistic policy improvement, fully protecting the minority position's concerns regarding finality and subversion while substantially incorporating the majority's goal of making asylum accessible to aliens who genuinely exercise personal freedoms. Finally, this rule requires minimal expansion of administrative burdens, as it merely requires the application of a new rule without demanding novel fact-finding or procedural requirements.

Like any complex area of law, this subject would welcome additional academic development. For example, analytic predictions of the quantifiable consequences of a hybrid rule would provide useful policy-focused data for evaluating the proposed solution. Additionally, examinations of how this rule regarding routine deportations might interact with areas of law governed by treaties such as the Convention against Torture<sup>187</sup> may be instructive. For now, however, the suggested rule offers a strong legal framework that has practical benefits over the presently divided system.

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<sup>187</sup> See 8 CFR § 208.18(b) (discussing implementation of the Convention against Torture).