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> *Section 1546(a) [the immigration fraud statute] is certainly not a model of good draftsmanship; a better description would be that it is a masterpiece of obfuscation. Indeed, with this section, Congress has achieved in a single 124-word sentence a level of confusion it usually takes pages to create.*
>
> Judge O'Scannlain[1]

INTRODUCTION

The path to legal employment-based residency in the United States is paved with red tape.[2] Lawyers can assist aliens in successfully traversing this path, but lawyers must not do so by removing the inhibiting pieces of regulatory tape. Some lawyers, however, have made a business of detaching this tape. Instead of working on behalf of an alien's required sponsoring United States employer, they work directly for an alien client.[3] These lawyers allow their alien clients to sidestep the congressionally mandated immigration regulatory scheme, while helping their clients to obtain the same authentic Green Cards as are available to aliens that pursue the legal route to residency. An immigration fraud statute criminalizes the fraudulent manufacturing

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[1] *United States v Kristic*, 558 F3d 1010, 1013 (9th Cir 2009) (quotations and citations omitted).

[2] Section I.A of this Comment details the regulations governing the Green Card application process.

[3] In violation of 20 CFR § 656.10(a)–(b).

of Green Cards or other immigration-related entry documents, yet this same statute is less clear with respect to immigration-related application misconduct.[4] Currently, there is a split in authority between the Fourth and Tenth Circuits over whether the immigration fraud statute reaches such lawyerly misconduct.[5] This Comment explores this split in authority, and proposes several arguments in favor of the Tenth Circuit's reading of the statute.

A. Background: The Green Card Application Process

To obtain legal employment in the United States, alien workers must complete a three-step application process.[6] First, the alien's prospective employer must obtain a Labor Certification from the Department of Labor.[7] The Department of Labor issues Labor Certifications through its Employment Training Administration agency.[8] To petition for a Labor Certification, the alien's prospective employer, or an attorney acting on the employer's behalf, must file an Application for Alien Employment (Form ETA-750) with the Employment Training Administration.[9] The Employment Training Administration only issues the Labor Certification if it establishes that (1) there are an insufficient number of United States workers willing, able, and qualified to perform the job, and (2) employment of the petitioning alien will not adversely affect the working conditions or wages of similarly situated workers in the United States.[10]

After obtaining a Labor Certification, the employer files a Visa Petition for Prospective Immigrant Employment (Form I-140) with the Bureau of Citizenship and Immigration Service.[11] This Visa Petition amounts to a request to the Bureau of Citizenship for the alien to be designated eligible for one of the

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[4] For purposes of this Comment, these statutes are the four unnumbered paragraphs of 18 USC § 1546(a).

[5] See *United States v Ryan-Webster*, 353 F3d 353, 363 (4th Cir 2003); *United States v Phillips*, 543 F3d 1197, 1205 (10th Cir 2008).

[6] *Ryan-Webster*, 353 F3d at 355.

[7] Id.

[8] Id.

[9] Id at 356.

[10] See 8 USC § 1182(a)(5)(A)(i).

[11] *Ryan-Webster*, 353 F3d at 356.

relevant employment categories.[12] If Form I-140 is approved, the applicant receives an immigrant visa number.[13]

The third step of the alien's prospective employment process differs for resident alien applicants and nonresident applicants.[14] If the applicant is a resident, the employer files an Application to Adjust Status (Form I-485), commonly known as the Green Card Application.[15] If approved, the applicant becomes a lawful permanent resident entitled to live and work in the United States.[16] If the applicant is a nonresident, the alien must complete an immigrant visa application.[17] If approved, the applicant receives a Green Card and can then enter, work, and remain in the United States.[18]

B. How the Economic Downturn Increased Incentives for Immigration Fraud

The effects of the recession in the United States have been more acutely felt by Mexicans and other Latin Americans than by United States residents. In 2009, Mexico's economy contracted 6.8 percent, the greatest economic decline in that country in the last thirty years.[19] Eighty percent of Mexico's exports go to the United States.[20] As might be expected, when the economies of Mexico and other Latin American countries rely so heavily on US demand for imports, the decline in US demand is inevitably felt abroad.[21]

Immigration data suggests that the economic contraction led to an increase in legal rather than illegal immigration on the southern United States border.[22] After efforts to enact com-

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[12] Id at 356.

[13] Id.

[14] Id.

[15] *Ryan-Webster*, 353 F3d at 356.

[16] 8 USC § 1255(a).

[17] See 8 USC § 1181(a).

[18] *Ryan-Webster*, 353 F3d at 356.

[19] See *Mexico GDP Down 6.8% in 2009*, ABC News (Jan 30, 2010), online at http://abcnews.go.com/Business/wireStory?id=9705435 (visited Oct 3, 2010).

[20] Id.

[21] See generally M. Angeles Villarreal, *U.S. Mexico Economic Relations: Trends, Issues, and Implications* (Congressional Research Service March 31, 2010), online at http://www.fas.org/sgp/crs/row/RL32934.pdf (visited Oct 3, 2010); see also Alvaro Vargas-Llosa, *Latin America and the World Recession* 3 J of Globalization, Competitiveness & Governability 20, 21 (2009), online at http://gcg.universia.net/pdfs_revistas/articulo_117_1238082727472.pdf (visited Oct 3, 2010).

[22] See Steven Camarota and Karen Jensenius, *Homeward Bound: Recent Immigration Enforcement and the Decline in the Illegal Alien Population* (Center for

prehensive immigration reform failed in June of 2007, the Department of Homeland Security strengthened border protection and cracked down on businesses employing illegal workers.[23] Steve Malanga, a senior fellow at the Manhattan Institute, observed that if illegal workers leave their jobs because of increased enforcement of immigration laws, new positions should open for legal foreign workers.[24] Confirming this prediction, from May 2007 until August 2008, the illegal immigrant population in the United States decreased by 11 percent; during the same period, the number of legal immigrants continued to grow.[25]

At the same time, the incentive remained to obtain Green Cards through forged application documents. To legally obtain a Green Card, an alien worker must find a US employer to sponsor the alien's immigration application. However, the alien worker might not know where to find a US employer willing to sponsor his or her application. As a result, this requirement of the application process alone may remove the legal option for many potential immigrants. In response to the demand from potential immigrants, American lawyers have all-too-readily applied their knowledge to thwart the legal immigration process. As discussed in this Comment, American lawyers risked imprisonment to meet the demand from immigrants to provide fraudulent immigration services.

I. LEGAL ANALYSIS

A. The Fourth Circuit's Foundational Analysis of the § 1546(a) Interpretive Problem

Sylvia Ryan-Webster developed a legal practice focused on enabling alien workers to obtain Green Cards.[26] After engaging an alien client, Ryan-Webster would file an Attorney Appearance Notice with the Employment Training Administration.[27] In this notice, Ryan-Webster would falsely claim to represent an actual United States employer.[28] In the course of this fictitious repre-

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Immigration Studies July 2008), online at http://www.cis.org/articles/2008/back808.pdf (visited Oct 3, 2010).

[23] Gail Russel Chaddock, *Tide of Illegal Immigrants Now Being Reversed*, Christian Science Monitor 1–2 (July 31, 2008).

[24] Id.

[25] See Camarota and Jensenius, *Homeward Bound* (cited in note 22).

[26] *Ryan-Webster*, 353 F3d at 356.

[27] Id at 357.

[28] Id.

sentation, Ryan-Webster would forge all necessary employer signatures to make it possible to obtain Green Cards for her alien clients.[29] Ryan-Webster would charge her alien clients seven thousand dollars to complete this fabricated application process.[30] While it lasted, Ryan-Webster's immigration law practice was a booming economic success.[31]

Upon discovering the scheme, prosecutors charged Ryan-Webster with violating 18 USC § 371 and 18 USC § 1546(a). The first paragraph of § 1546(a) provides:

> Whoever knowingly . . . utters, uses . . . [or] possesses . . . any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made [is guilty of a felony].[32]

In particular, Ryan-Webster was charged with possessing documents "prescribed by statute or regulation for entry into, or as evidence of authorized stay or employment in the United States" which she "knew to be forged and falsely made."[33]

In challenging her conviction under § 1546(a), Ryan-Webster argued that Certification Applications and Visa Petitions did not amount to documents "prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States."[34] In analyzing this contention, the appellate court began by examining the plain language of the statute.[35] The court held that Ryan-Webster's conduct fell within the ambit of § 1546(a).[36] The court reasoned that an alien can only obtain entry into the United States with a "valid unexpired immigrant visa," and that the Department of Labor can only issue such a visa if it first issues a Labor Certification and approves a Visa Application.[37]

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[29] Id.

[30] *Ryan-Webster*, 353 F3d at 357.

[31] Id.

[32] 18 USC § 1546(a).

[33] *Ryan-Webster*, 353 F3d at 357.

[34] Id at 358.

[35] Id at 360.

[36] Id.

[37] *Ryan-Webster*, 353 F3d at 361.

The *Ryan-Webster* court chose an expansive interpretation of the provision: "document prescribed by statute or regulation for entry." The court recognized that only a Green Card has the ultimate power to gain an alien legal entry into the United States. But, according to the court, an alien cannot receive that Green Card without successfully completing the three-step application process (described in Section I.A of this Comment). Even though an alien cannot obtain entry into the United States by presenting a completed immigration application document at the border, those same application documents *are* prescribed by statute for an alien that desires to gain entry into the United States.

In response to the court's reading, Ryan-Webster argued that immigration application documents *alone* are insufficient to obtain entry into the United States.[38] The court accepted the accuracy of the defendant's contention, but held that such a fact need not remove application documents from the ambit of § 1546(a).[39] Instead, the court reasoned that application documents could be insufficient to authorize entry while remaining "plainly prescribed by law as prerequisites" to such entry documents.[40]

The *Ryan-Webster* court concluded that such unambiguous statutory language controls unless Congress has expressed a clear contrary intent.[41] Far from contravening the clear statutory language, the court found that congressional intent corroborated this interpretation.[42] The court's legislative intent analysis hinged on an amendment to § 1546(a) that was designed to overturn a Supreme Court decision interpreting the statute. In 1971, the Supreme Court evaluated the predecessor statute to § 1546(a) and found that an Alien Registration Receipt Card did not count as a "document required for entry into the United States."[43] Instead, the Court found that the essential purpose of such a Receipt Card was to "identify the bearer as a lawfully registered alien residing in the United States."[44] Regarding the language of § 1546(a), the Court held that it "denote[d] a very

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[38] Id.

[39] Id.

[40] Id.

[41] *Ryan-Webster*, 353 F3d at 362.

[42] Id at 362–63.

[43] *United States v Compos-Serrano*, 404 US 293, 295 (1971).

[44] Id at 299–300.

special class of 'entry' documents—documents whose primary *raison d'être* is the facilitation of entry into the country."[45]

In response to the Court's decision, Congress amended § 1546(a). In addition to listing Alien Registration Receipt Cards in the enumerated examples of relevant "entry" documents, the amendment also replaced "required for entry" with "document prescribed by statute or regulation for entry." In the legislative history of this amendment, Congress expressed an intent to expand the types of documents covered by § 1546(a).[46] A later court applying this amended statute, the Fifth Circuit in *United States v Osiemi*,[47] explained that possession of a counterfeited foreign passport violated § 1546(a) even though a foreign passport was not strictly "required" for entry.[48]

The dissenter in *Ryan-Webster*, Judge Williams, argued that a contextual reading of § 1546(a) contradicted the interpretation taken by the majority.[49] Judge Williams applied two canons of statutory interpretation in analyzing the meaning of the text. First, he applied *ejusdem generis*, which holds that when a general phrase in a statute follows a list of particular examples, courts should interpret that general phrase in a manner consistent with the common attributes of the particular examples.[50] In § 1546(a), the general phrase "other document" follows just such a specific list of examples——i.e. "visa, permit, border crossing card, alien registration receipt card." The dissenter found that each of the enumerated documents had "some independent evidentiary significance respecting the legality of the bearer's entry into or stay in the country."[51] For example, either a visa or a worker's permit allows the owner of that document to legally enter the United States.

In addition to the entrance-efficacy of the documents in the enumerated examples, these documents are also prepared by a governmental agency.[52] In contrast, application documents are prepared by the alien's prospective employer or his employer's

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[45] Id at 299.

[46] See Immigration Reform and Control Act of 1986, HR Rep No 99-682(I), 99th Cong, 2d Sess 94 (1986), reprinted in 1986 USCCAN 5698; Immigration Reform and Control Act of 1985, S Rep No 99-132, at 31 (1985).

[47] 980 F2d 344 (5th Cir 1993)

[48] Id at 346 (finding that a foreign passport was one type of document an alien *could*, but was not required to, use to enter the country).

[49] *Ryan-Webster*, 353 F3d at 365–67.

[50] Id.

[51] Id at 366.

[52] Id.

representing attorney.[53] Moreover, a visa or worker's permit is created and issued by the government in satisfaction of the alien's successful completion of the immigration application process.[54] In light of the shared attributes of the enumerated examples, interpreting "other document" to include application materials is plainly inconsistent with the canon of *ejusdem generis*.

Judge Williams applied a second canon of construction, the rule against superfluity, to support his reading of the statute.[55] Section 1546(a) contains four unnumbered paragraphs.[56] The above analysis all took place in the context of paragraph one. Paragraph four, however, speaks more specifically to misrepresentations in an alien's application documents: "[persons shall not] knowingly make[ ] under oath . . . any false statement with respect to a material fact in any *application*, affidavit, or other document required by the immigration laws or regulations prescribed thereunder."[57] Hence, Judge Williams concluded that the majority's interpretation of paragraph one renders the word "application" in paragraph four entirely superfluous.[58] The fourth paragraph is unnecessary to successfully prosecute application forgeries if "other document" in paragraph one criminalizes such forgeries.[59]

The majority's response to Judge Williams on this argument was to distinguish between paragraph one's prohibition against forgeries and paragraph four's proscription against "false statements."[60] Judge Williams countered by identifying paragraph one's additional proscription against "falsely made" statements.[61] He contended that there was no material distinction between statements "falsely made" in paragraph one and "false statements" in paragraph four, regardless of whether or not paragraph one also criminalizes forgeries.[62]

In response, the majority did not present any examples of application-related misconduct covered by paragraph four of § 1546(a) that would not also be covered by the court's broad

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[53] *Ryan-Webster*, 353 F3d at 366.

[54] Id.

[55] Id.

[56] There actually is a fifth paragraph in the statute, but it deals only with punishment for violating the offenses detailed in the previous four paragraphs.

[57] 18 USC § 1546(a) (emphasis added).

[58] *Ryan-Webster*, 353 F3d at 363 n 16.

[59] Id at 367.

[60] Id.

[61] Id.

[62] *Ryan-Webster*, 353 F3d at 367.

interpretation of paragraph one. It is possible that Congress intended to write duplicative paragraphs in § 1546(a), but the majority provided no evidence to support such a position. This gap in the Fourth Circuit's reasoning may have contributed to Judge Williams's favorable influence on the subsequent Tenth Circuit decision interpreting § 1546(a).

B. The Tenth Circuit's Divergence: The Split Occurs

In a case with similar facts to those in *Ryan-Webster*, the Tenth Circuit began its analysis of § 1546(a) by examining the plain language of the statute.[63] The forged application documents at issue in the case, according to Judge McConnell, author of the unanimous opinion, were not documents prescribed for entry or for evidence of authorized stay in the United States: "An alien seeking to cross the border or to prove eligibility for employment would get nowhere by flashing an ETA-750 [an Application for Alien Employment]."[64] Judge McConnell reasoned that immigration application documents are no more documents for entry than a credit card application is a credit card.[65] Citing the dissent in *Ryan-Webster*, the court found that application documents were nothing more than mere desires by the employer that the alien obtain the ability to enter and work in the United States.[66]

The court also found that interpreting "other document" in paragraph one of § 1546(a) to include application documents makes paragraph four of the statute redundant.[67] Moreover, use of the specific word "application" in paragraph four suggests that Congress did distinguish between official entry documents and the process for obtaining those entry documents.[68]

The court rejected the government's argument that the congressional amendment to § 1546(a) following the Supreme Court's decision in *United States v Compos-Serrano* broadened the scope of the statute enough to reach application documents. First, the court found that the congressional intent of this amendment was irrelevant given the clear meaning of the statu-

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[63] *Phillips*, 543 F3d at 1205.

[64] Id at 1206.

[65] Id.

[66] Id.

[67] *Phillips*, 543 F3d at 1206.

[68] See id at 1207.

tory language.[69] Second, even supposing the congressional intent was relevant, the court found that the "amended language is best read to include all documents that *can* be used to legally enter the country, even if the document's primary purpose is not to facilitate entry."[70]

II. ARGUMENTS IN FAVOR OF THE TENTH CIRCUIT'S INTERPRETATION OF § 1546(A)

A. Congressional Intent Supporting a Narrow Construction of § 1546(a)

1. Pre-1986 arguments on the interpretation of § 1546(a).

The Fourth and Tenth Circuits' arguments concerning the congressional intent of § 1546(a) lack historical mooring and inappropriately focus only on paragraph one of the statute. Both courts look only to the 1986 amendment to paragraph one of the statute. It is also important, though, to examine arguments regarding the statute's scope that occurred prior to this amendment. In *United States v Vargas*,[71] the court considered whether a foreign passport was a "document required for entry."[72] The defendant in the case was indicted for selling a Columbian passport to an undercover United States Customs agent. The court began its analysis by noting that the Immigration Act of 1924 only criminalized actions relating to documents issued for entry by appropriate officers of the United States.[73] The court then found that the Immigration and Nationality Act of 1952, which amended § 1546(a), only expanded the statute's reach to cover documents equivalent to permits or visas—documents issued by US officers in consulate offices outside the United States.[74]

The *Vargas* court also distinguished between the "document required for entry" language in paragraph one, two, and three of the statute and the more inclusive language in paragraph four. In paragraph four, the phrase "other document" was followed by the phrase "required by the immigration laws or regulations prescribed thereunder."[75] The court found that this expansive lan-

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[69] Id.

[70] Id at 1207–08.

[71] 380 FSupp 1162 (EDNY 1974).

[72] Id at 1163.

[73] Id 1163–65.

[74] Id at 1165.

[75] *Vargas*, 380 F Supp at 1165.

guage contrasted with the language of the preceding three paragraphs, and found that only paragraph four pertained to documents required to apply for an entry document.[76] The first three paragraphs of the statute pertained to entry documents themselves, not documents required to apply for entry documents. The court rejected the argument that the purpose of the immigration statute required interpreting paragraph one broadly enough to reach the defendant's conduct. Instead, the court found that other statutes appropriately reached the defendant's actions, and there was no discernable congressional intent that courts should apply § 1546(a) to anything but actual entry documents.

Independent of the 1986 amendment, then, the *Vargas* court identified a fundamental historical distinction between entry documents and documents required to obtain entry documents. If that distinction is carried through the 1986 amendment, paragraph one of § 1546(a) cannot reach application documents. The modification of paragraph one's language from "document required for entry" to "document prescribed by statute or regulation for entry" only changes the relevant analysis from required entry documents to permissible entry documents. The required/permissible distinction, however, does not expand the scope of the statute to anything *beyond* entry documents. The *Ryan-Webster* majority failed to recognize this historical distinction. As a result, the court read the statutory language of § 1546(a) without constraining the language to entry documents. Application materials are not entry documents, and hence the language of paragraph one of § 1546(a) cannot cover application related misconduct.

2. Congressional intent manifested by the 1986 amendment to § 1546(a).

The language of the House Report on the amendment to § 1546(a) in the Immigration Reform and Control Act of 1986 supports the Tenth Circuit's reading of the statute. The report found that the amendment "extend[ed] the criminal penalties for fraud and misuse of immigration-related documents to include border crossing cards, alien registration receipt cards, and *other documents issued as evidence of lawful entry or employment* in

[76] See id at 1166. This expansive language may seem to parallel the language of the 1986 amended statute, but this language is broader because it contains no reference to entry documents. Also, the enumerated examples in the fourth paragraph already include applications, so the expansiveness of the catchall phrase alone is unnecessary to the *Vargas* court's distinction between paragraph one and paragraph four.

the United States."[77] Every court that cited this report relied on it to support the proposition that the amendment was intended to expand the scope of relevant documents under § 1546(a).[78] While this expansion is obvious given the inclusion of new enumerated documents in the statute (like alien registration receipt cards), the catchall language in this report is not similarly expansive.

The only "documents issued as evidence" of an alien's immigration status are actual immigration documents, not immigration application documents. First, immigration application documents are never issued to an alien. Rather, they are obtained without restriction and used by the prospective employer/representing attorney on the alien's behalf. Second, only actual immigration documents provide "evidence" of legal immigration status. Application documents never provide evidence of "lawful entry or employment." This report's language does not perfectly track the language of the statute, but any evidence of congressional intent found in the report strongly suggests that paragraph one of § 1546(a) is aimed at preventing fraud or misuse of actual immigration documents.

Another section of the House Report contains more ambiguous language: it states that the amendment to § 1546(a) was meant to "bar the fraudulent use of certain documents to establish employment authorization."[79] Here, the language is of such generality that it can be read as encompassing application documents as well as issued immigration documents. The legislative comment below this section, however, undercuts this expansive interpretation. The legislative comment states that "[e]mployer sanctions will likely increase the manufacture and use of immigration documents for fraudulent purposes."[80] The phrase "manufacture and use" implies the wholesale fraudulent creation of a document. One does not "manufacture" an immigration application by disclosing false information within that application. One does "manufacture" a Green Card when one creates a fake Green Card rather than obtaining the authentic version from the government. Consequently, the available evidence of congressional intent supports the Tenth Circuit's narrow reading of the statute.

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[77] HR Rep No 99-682(I) at 94 (cited in note 46) (emphasis added).

[78] See, for example, *United States v Pool-Chan*, 453 F3d 1092, 1093 (8th Cir 2006).

[79] HR Rep No 99-682(I) at 111 (cited in note 46).

[80] Id.

B. Interpretive Canons: How the *Ryan-Webster* Majority's Plain Reading Suffers by Ignoring Them

The *Ryan-Webster* majority never answered Judge Williams's analysis based on an application of the interpretive canon of *ejusdem generis*. Most likely, this was because the majority believed the statute was clear on its face, and hence considered it unnecessary to apply canons of statutory construction to the text of the statute. Courts should ascertain whether a statute is clear or ambiguous by examining the statute's language, the specific context of its language, and the broader context of the statutory whole.[81] With reference to § 1546(a), the specific context of "other document prescribed by statute or regulation" is the list of entry documents preceding this catchall phrase. The canon of *ejusdem generis* provides a methodology for examining that contextual language. The *Ryan-Webster* majority, then, cannot claim statutory clarity to circumvent an application of *ejusdem generis* when the clarity inquiry turns on an analysis of specific contextual language. The court could analyze the specific statutory context without an interpretive framework, but such an approach would be mistaken if the interpretive canon has any claim to legitimacy. If valid, the canon informs a contextual reading, ensuring that the reader properly evaluates the relational nature of linguistic operators.

In response, a defender of the *Ryan-Webster* majority might argue that interpretive canons are merely fallback tools of statutory construction. The Supreme Court has noted that the canons are not "mandatory rules"; instead, they are tools to aid the judge in divining congressional intent.[82] The Court has further found that the canons only apply in the face of statutory ambiguity.[83] Even when applied, these interpretive principles must yield to clear evidence of contrary congressional intent.[84] Hence, given the *Ryan-Webster* majority's finding of statutory clarity, the court did not err in failing to evaluate Judge Williams' application of the canons.

This response is question-begging, assuming linguistic clarity by employing a contextual reading the majority's argument claims to avoid. A catchall phrase like "other document prescribed by statute or regulation for entry" has no self-evident

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[81] *Robinson v Shell Oil Co*, 519 US 337, 341 (1997).

[82] *Chickasaw Nation v United States*, 534 US 84, 94 (2001).

[83] *Garcia v United States*, 469 US 70, 74–75 (1984).

[84] *Chickasaw Nation*, 534 US at 94.

meaning. The enumerated examples in the statute preceding this catchall phrase denote actual documents issued by immigration officials. Those enumerated examples do have clear meaning. "Other document," on the other hand, fails to denote an actual immigration document. If the phrase referred to an actual document, the statute could simply name that document. The phrase may encompass application documents, or it may not. The ambiguity allows for the disagreement between the majority and dissent in *Ryan-Webster*, and for the disagreement between the Fourth and Tenth Circuits on the proper scope of § 1546(a). "Other document" may have a clear contextual meaning, but it cannot be clear by itself or the meaningful disagreement between the circuits would be no debate at all.

Moreover, the fact that application of *ejusdem generis* yields a different result than that obtained by the *Ryan-Webster* majority evidences the statute's ambiguity. The Supreme Court's admonition in *Garcia v United States*—to only apply *ejusdem generis* when faced with statutory ambiguity[85]—seems puzzling. Ambiguity exists when two readings are possible. An *ejusdem generis* contextual reading of the statute that differs from a non-contextual reading seems to be an obvious instance of ambiguity. As long as a contextual reading works no violence on the statute—which it certainly does not do here—it is groundless to resist that reading by asserting its irrelevance in light of the statute's clarity. To be sure, legislative history may demonstrate that Congress intended to enact the non-contextual reading of the statute, but that non-contextual reading alone cannot prevail over the contextual one without a resort to some form of extra-textual justification.

Other rationales for refusing to apply *ejusdem generis* are also absent in this statute. The Supreme Court has declined to apply the canon when the enumerated items preceding the catchall phrase are insufficiently specific.[86] The enumerated examples in § 1546(a), however, are sufficiently specific; they refer to concrete, existent documents. The Court has also refused to apply the canon when commonalities are not derivable from the enumerated examples, or when it is unclear which commonality is relevant to the catchall provision.[87] The *Ryan-Webster* dissent identified three commonalities in the statute. As for their

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[85] *Garcia*, 469 US at 74–75.

[86] See *Ali v Federal Bureau of Prisons*, 552 US 214, 225 (2008).

[87] Id.

relevancy, each commonality excludes application documents from the statute's scope, so there is no difficulty in discerning which limiting principle should receive effect. Finally, the Court has refused to limit the catchall phrase through the enumerated examples when the language in the catchall provision was sufficiently broad.[88] Here, the catchall phrase is broad, but it does not use the word "any." Whether the phrase "any other document prescribed by statute" would be broader than the actual language of "other document prescribed by statute" is debatable, but the Supreme Court has held that there is a meaningful expansion in meaning when the legislature uses the word "any."[89] Thus, § 1546(a) contains none of the linguistic sequences that justify a refusal to apply the canon of *ejusdem generis*.

C. Rule of Lenity

The *Ryan-Webster* and *Phillips* courts both claimed that the plain language of § 1546(a) supports their position. Because the respective courts' positions contradict each other, one must necessarily be in error. Both courts made valid arguments (see Section I.A and B) and neither seems to have been plainly mistaken, therefore their contradictory interpretations of the plain language suggest the statute's textual ambiguity. Perhaps "other document prescribed by statute or regulation" is ambiguous because it does not clearly include or exclude the application documents at issue in these cases.

If the language is ambiguous, resorting to the legislative history is in order. Yet, that history is largely indeterminate. It may be clear that the 1986 amendment expanded the scope of § 1546(a), but this expansion does not necessarily mean that the statute covers application-related misconduct.

There may be good reasons to construe the ambiguity against the government in these cases. Paragraph four of § 1546(a) clearly reaches the defendants' conduct in *Ryan-Webster* and *Phillips*. Apart from the superfluity/redundancy argument for interpreting paragraph one narrowly, there may be an argument for using the rule of lenity when there is no danger that the defendant's crime will go unpunished. For whatever reason, the prosecution did not charge the defendants under

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[88] Id at 227 (finding "the unmodified, all-encompassing phrase 'any other law enforcement officer' indicated an intent not to limit the catchall provision with the characteristic of the preceding examples).

[89] Id at 219.

paragraph four in *Phillips*.[90] Despite this prosecutorial slip, the court still affirmed the *Phillips* defendants' conviction under 18 USC § 1001, which criminalizes the knowing and willful making and using of a false writing and document to the Department of Labor.[91] Among other counts, Ryan-Webster was convicted, and did not appeal her conviction, under paragraph four of § 1546(a).[92]

The *Ryan-Webster* majority rejected the argument that the appropriateness of paragraph four of § 1546(a) casts doubt on the court's interpretation of paragraph one of the statute. The court held that the issue was not whether one statute was a "better fit" than another; the only relevant consideration was whether the first paragraph provided "a proper statutory basis for [the] charges."[93] The court was correct in an absolute sense, but of course the majority held that the statute was unambiguous. If paragraph one is ambiguous as to application documents but not as to actual entry documents, and paragraph four is unambiguous as to application documents, the rule of lenity may be appropriate to provide for the clearest application of law to facts.

The rule of lenity, one might counter, is designed to ensure that the defendant was put on fair notice regarding the criminality of his or her conduct.[94] In these cases, paragraph four of § 1546(a) provided that fair notice. Accordingly, there is little reason to fear applying an ambiguous statute to a defendant's conduct when that defendant's conduct was in clear violation of a separate law. The defendant, however, could counter by arguing that she would not have committed the illegal act if she had known it was a violation of paragraph one as well as paragraph four. Each violation of § 1546(a) counts as a separate felony, so the potential for dual liability under separate paragraphs of the statute equals the potential for doubled prison time. Therefore, if it is important to provide fair notice with respect to the content of a given crime, it is also important to provide such notice with respect to the number of violations a given offense could constitute.

Even if one rejects this fair notice argument for the rule of lenity, this does not entail the conclusion that its application is inappropriate here. The justice system's legitimacy, in part,

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[90] See *Phillips*, 543 F3d at 1206.

[91] Id at 1200, 1211.

[92] *Ryan-Webster*, 353 F3d at 357.

[93] Id at 362.

[94] See, for example, *US v Kozminski*, 487 US 931, 952 (1988).

depends on applying statutes that clearly criminalize a defendant's conduct. A defendant may believe that a particular statute is unjust, but justification for such a belief is weakened from a public legitimacy perspective since that statute was promulgated through the democratic process. When a judge construes an ambiguous statute to cover a defendant's conduct, especially when another statute demonstrates that the democratic process was capable of clearly criminalizing the defendant's conduct, the legitimacy of the justice system is damaged. Federal criminal laws abound. These laws circumscribe vast areas of human conduct. If the enterprising prosecutor's indictment power is to remain limited, courts should shut down attempts to prosecute defendants under ambiguous statutes when the prosecutor fails to indict under a statute that *does* precisely cover the conduct at issue.

CONCLUSION

The interpretive split between the Fourth and Tenth Circuits is not only interesting because of the impact it has on criminal defendants, but also because it highlights fundamental difficulties in the law regarding the use of interpretive canons, the role of legislative history in discerning congressional intent, and the appropriate application of the rule of lenity. While this Comment's advocacy of the Tenth Circuit's interpretation of § 1546(a) on interpretive methods and rule of lenity grounds may be tendentious, what little legislative history is available also supports the Tenth Circuit's position. Even though the Supreme Court is unlikely to resolve this dispute soon, as evidenced by its rejection of the *Phillips* certiorari petition,[95] future circuits that address the divide should side with the Tenth Circuit's view of the statute.

[95] *Phillips v US*, 129 S Ct 946 (2009) (cert denied).