deadlines established in the pretrial scheduling order, Judge Nelson denied the defendant's motion to exclude both reports, finding that they were "highly important," and that the defendant had not been "sufficiently prejudiced or harmed" by the late disclosures "to justify striking" the expert. ***Hernandez v. Ecolab, Inc.***, 2023 WL 3984815 (D. Minn. 6/13/2023).

Motion to compel arbitration granted; arbitration clause not "unreadable." Judge Frank granted a motion to compel arbitration despite the plaintiff's argument that arbitration clause was "unreadable" where it appeared on the back side of contract in an "extremely small font," finding that the arbitration clause was "valid and enforceable" where the heading of the arbitration clause was underlined and in capital letters, and that the arbitration clause was "not unreadable." ***Acuity Ins. v. Vivint, Inc.***, 2023 WL 4186303 (D. Minn. 6/26/2023).

Motions for leave to serve pre-Rule 26 conference subpoenas granted. In a series of recent decisions, Magistrate Judge Foster has applied the so-called *Arista Records* factors (*Arista Records, LLC v. Doe*, 604 F.3d 110 (2d Cir. 2010)) and granted motions for leave to serve pre-Rule 26 Conference subpoenas on internet service providers in an attempt to identify 47 John Doe defendants. ***Strike 3 Holdings, LLC v. Doe***, 2023 WL 4074544 (D. Minn. 6/20/2023); ***Strike 3 Holdings, LLC v. Doe***, 2023 WL 3336809 (D. Minn. 5/10/2023); ***Strike 3 Holdings, LLC v. Doe***, 2023 WL 2728821 (D. Minn. 3/31/2023).

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Exhaustion requirement does not require request to reconsider an unfavorable BIA decision. On 5/11/2023, a unanimous U.S. Supreme Court ruled that INA §242(d)(1) is not jurisdictional and, furthermore, a noncitizen need not request discretionary forms of administrative review, such as reconsideration of an unfavorable BIA determination, in order to satisfy §242(d)(1)'s exhaustion requirement. The Court accordingly vacated the 5th Circuit's determination that the petitioner—a transgender woman from Guatemala seeking withholding of removal and Convention Against Torture (CAT) relief—was required to seek reconsideration from the BIA before pursuing judicial review. The case was remanded for further proceedings. ***Santos-Zacaria v. Garland***, 598 U.S. ___, No. 21-1436, *slip op.* (2023). *https://www.supremecourt.gov/opinions/22pdf/21-1436_n6io.pdf*

Offense "relating to obstruction of justice" does not require pending investigation or proceeding under INA §101(a)(43)(S). On 6/22/2023, the U.S. Supreme Court issued a decision involving a conviction for "obstruction of justice." It noted that an aggravated felony may include federal or state offenses "related to obstruction of justice" under INA §101(a)(43)(S) and that noncitizens convicted of an aggravated felony are removable from the United States. The question addressed by the Court was whether an offense could "relate to obstruction of justice" if it did not require that an investigation or proceeding be *pending*. The Court held an offense may "relat[e] to obstruction of justice" even if the offense does not require an investigation or proceeding to be pending. ***Pugin v. Garland***, 599 U.S. ___, Nos. 22-23 and 22-331, *slip op.* (2023). *https://www.supremecourt.gov/opinions/22pdf/22-23_d18e.pdf*

Biden administration's immigration enforcement priorities upheld. On 6/23/2023, the U.S. Supreme Court observed this case to be "extraordinarily unusual." It noted that the states of Texas and Louisiana challenged the Biden administration's 2021 Guidelines for the Enforcement of Civil Immigration Law—a memorandum seeking to prioritize the arrest and removal of noncitizens who are suspected terrorists or dangerous criminals or recent and unlawful entrants to the country. The Court noted that the two states in effect "want a federal court to order the Executive Branch to alter its arrest policies so as to make more arrests. Federal courts have not traditionally entertained that kind of lawsuit...." The Court found that both states clearly lacked Article III standing to challenge the 2021 guidelines. Beyond the standing issue, the Court expounded on the Executive Branch's authority to develop its enforcement priorities. "In light of inevitable resource constraints and regularly changing public-safety and public-welfare needs, the Executive Branch must balance many factors when devising arrest and prosecution policies." There is nothing unusual in the Court's decision here. As it pointed out, this decision "does not alter the balance of powers between Congress and the Executive, or change the Federal Judiciary's traditional role in separation of powers cases." ***United States, et al. v. Texas, et al.***, 599 U.S. ___, No. 22-58, *slip op.* (2023). *https://www.supremecourt.gov/opinions/22pdf/22-58_i425.pdf*

Provision of the Immigration and Nationality Act (INA) criminalizing the encouragement of illegal immigration is not unconstitutionally overbroad. On 6/23/2023, the U.S. Supreme Court held that INA §274(a)(1)(A)(iv), which criminalizes acts "encouraging or inducing" illegal immigration (in the instant case, U.S. citizenship obtained through an "adult adoption" program run by Hansen), forbids only the purposeful solicitation and facilitation of specific acts known to violate federal law, and is thus not unconstitutionally overbroad under the 1st Amendment. Citing *United States v. Williams*, 553 U.S. 285, 292 (2008), the Court opined that the provision "does not 'prohibi[t] a substantial amount of protected speech'—let alone enough to justify throwing out the law's 'plainly legitimate sweep.'" ***United States v. Hansen***, 599 U.S. ___, No. 22-179, *slip op.* (2023). *https://www.supremecourt.gov/opinions/22pdf/22-179_o75q.pdf*

Proposed social group (witnesses who cooperate with law enforcement) is not socially distinct. On 6/5/2023, the 8th Circuit Court of Appeals held that the Board of Immigration Appeals (BIA) did not err when it concluded the Guatemalan petitioner's proposed social group, "witnesses who cooperate with law enforcement," was not socially distinct. Consequently, the petitioner was deemed ineligible for asylum and withholding of removal. ***Oxlaj v. Garland***, No. 22-1734, *slip op.* (8th Circuit, 5/3/2023). *http://media.ca8.uscourts.gov/opndir/23/05/221734P.pdf*

Asylum based on sexual orientation denied. On 6/5/2023, the 8th Circuit Court of Appeals held that substantial evidence supported the Board of Immigration Appeals' (BIA) finding that the petitioner failed to demonstrate a well-

founded fear of persecution based on his membership in the particular social group "married homosexual males in Mexico." At the same time, the court found his alternative particular social group, "homosexual men in Mexico," was prohibited by the one-year bar under INA §208(a)(2)(B). The court further found the petitioner failed to preserve for review his third proposed particular social group, "Mexicans perceived to be against Catholicism." ***Pacheco-Moran v. Garland***, Nos. 21-3779 and 22-2383, *slip op.* (8th Circuit, 6/5/2023). *http://media.ca8.uscourts.gov/opndir/23/06/213779P.pdf*

Removable under INA §237(a)(2)(B)(i) for Kansas conviction involving possession of methamphetamine. On 6/14/2023, the 8th Circuit Court of Appeals denied the petition for review, holding that the Board of Immigration Appeals (BIA) correctly found that the petitioner's Kansas conviction for possession of methamphetamine in violation of Kan. Stat. Ann. §21-5706(a) made him removable from the United States for having committed a controlled substance offense under INA §237(a)(2)(B)(i). ***Rincon Barbosa v. Garland***, No. 22-1655, *slip op.* (8th Circuit, 6/14/2023). *http://media.ca8.uscourts.gov/opndir/23/06/221655P.pdf*

BIA's evaluation did consider hardship to petitioner's relatives. On 6/14/2023, the 8th Circuit Court of Appeals concluded that the Board of Immigration Appeals (BIA) properly evaluated the hardship to the Sierra Leonean petitioner's relatives as one of her positive equities when it reviewed and denied a waiver of inadmissibility. At the same time, the court found that it lacked jurisdiction to review the BIA's balancing of equities, specifically in relation to how it weighed the petitioner's crimes. ***King v. Garland***, No. 22-2166, *slip op.* (8th Circuit, 6/14/2023). *http://media.ca8.uscourts.gov/opndir/23/06/222166P.pdf*

Adverse credibility determination damages asylum claim. On 6/16/2023, the 8th Circuit Court of Appeals held that sufficient evidence warranted the immigration judge's adverse credibility determination. The petitioner, a citizen of Burkina Faso with an asylum claim based on fears due to his political opinions and affiliation with the Congress for Democracy and Progress, was not credible because the immigration judge had identified specific and cogent reasons to disbelieve his testimony. As such, the Board of Immigration Appeals (BIA) did not commit error when it affirmed the immigration judge's denial of both asylum and withholding of removal. As to the question of relief under the Convention Against Torture (CAT), the court ruled it had no jurisdiction since no arguments relating to CAT had been raised earlier before the BIA. ***Zongo v. Garland***, No. 21-3847, *slip op.* (8th Circuit, 6/16/2023). *http://media.ca8.uscourts.gov/opndir/23/06/213847P.pdf*

No violation of due process when immigration judge continued, rather than terminated, the case. On 6/27/2023, the 8th Circuit Court of Appeals found that the Honduran petitioner was not prejudiced by the continuation, rather than termination, of her case when the immigration judge determined her humanitarian parole would expire in two months. At the same time, the court concluded the Board of Immigration Appeals (BIA) articulated the appropriate standard for evaluating "past persecution" and did not commit error when it concluded that threats from the MS-13 gang did not rise to the level of past persecution. ["(T)he threats were telephonic, sporadic, and over a period of four years."] The court also found no error in the BIA's finding that the petitioner failed to establish a "well-founded fear of future persecution." ***Brizuela v. Garland***, No. 22-1738, *slip op.* (8th Circuit, 6/27/2023). *https://ecf.ca8.uscourts.gov/opndir/23/06/221738P.pdf*

ADMINISTRATIVE ACTION

"Asylum transit ban" final rule promulgated. On 5/16/2023, the Departments of Homeland Security (DHS) and Justice (DOJ) published a final rule ("Circumventing Lawful Pathways," aka asylum transit ban) establishing a rebuttable presumption of asylum ineligibility, with a few exceptions, for certain noncitizens who enter the United States (between 5/11/2023 and 5/11/2025) at the southwest border without documentation while travelling through a country that is a signatory to the 1951 Refugee Convention or its 1967 Protocol. (The category includes Colombia, Panama, Costa Rica, Nicaragua, Honduras, Guatemala, Belize, and Mexico.) In short, these individuals neither availed themselves of a lawful, safe, and orderly pathway to the United States nor sought asylum or other protection in a country through which they traveled. **88 Fed. Register, 31314-452** (5/16/2023). *https://www.govinfo.gov/content/pkg/FR-2023-05-16/pdf/2023-10146.pdf*

The ACLU, ACLU of Northern California, Center for Gender and Refugee Studies, and National Immigrant Justice Center have filed a complaint in the U.S. District Court for the Northern District of California on behalf of the East Bay Sanctuary Covenant, American Gateways, Central American Resource Center, Immigrant Defenders Law Center, National Center for Lesbian Rights, and the Tahirih Justice Center. ***East Bay Sanctuary Covenant, et al. v. Biden, et al.***, No. 4:18-cv-06810-JST (N.D. Cal. 5/11/2023). *https://www.aclu.org/documents/complaint-east-bay-sanctuary-covenant-v-biden*

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Indian Law

JUDICIAL LAW

The Indian Child Welfare Act does not exceed Congress's powers under Article I of the Constitution and does not violate the 10th Amendment's anticommandeering principle. Consolidating three separate child-custody proceedings involving the participation and intervention of several states, hundreds of Indian tribes, and dozens of advocacy groups, the Supreme Court issued a 7-2 decision upholding the Indian Child Welfare Act from numerous constitutional challenges. The Court first held that the law itself does not violate Congress's Article I authority in the Indian Commerce Clause, the Treaty Clause, and the trust relationship, and that the law does not impermissibly encroach on the family law authority of the states. Next, the Court held that the law's requirements of active efforts prior to termination, searches for preferred-order placements, and record-keeping responsibilities do not violate the 10th Amendment's anticommandeering principle. The case also involved equal protection and non-delegation doctrine challenges to the law's placement preferences, but the Court held that no parties in the case had standing to raise those challenges. ***Haaland v. Brackeen***, ___ U.S. ___, 143 S. Ct. 1689 (2023).