Effectively Irrebuttable Presumptions: Empty Rituals and Due Process in Immigration Proceedings

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Abstract

Rebuttable presumptions—ones that offer the opportunity to overcome a presumed fact—are a common fixture in U.S. civil law. Some rebuttable presumptions, however, are not in fact rebuttable at all and are instead rebuttable in name only. Nonetheless, courts often take at face value a presumption's claim to be rebuttable when reviewing challenges to such presumptions. This Article contends that such so-called rebuttable presumptions should be recognized as a distinct category of presumptions: effectively irrebuttable presumptions. It argues that effectively irrebuttable presumptions violate constitutional due process norms because, although they offer proceedings, they deprive process. Part I examines a so-called rebuttable presumption in the immigration context, which, once triggered, precludes individuals from applying for persecution-based forms of relief. Part II proffers a four-part framework for defining effectively irrebuttable presumptions, which looks at the structure of the presumption, the ways it has (and has not) been implemented, and the number of cases that have successfully rebutted it. Part III argues that such effectively irrebuttable presumptions offend procedural due process norms. Applying two procedural due process frameworks, it argues that effectively irrebuttable presumptions violate the axiomatic guarantee of a meaningful opportunity to be heard at a full and fair hearing. Part IV then sets forth recommendations for procedural safeguards necessary to identify and bring effectively irrebuttable presumptions in line with due process norms. This Article focuses on the constitutional dilemma effectively irrebuttable presumptions pose in the immigration context, but its implications may reach broadly to other civil contexts.

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Introduction

In 2012, members of a drug cartel in Venezuela demanded that Henry Sanchez work for them as a drug trafficker.[1] After he declined, the drug cartel returned with an iPad full of photos of his wife and child and threatened to torture or kill them if he did not reconsider.[2] Left with no choice, Mr. Sanchez agreed to their demands.[3] He ingested balloons of heroin and flew from Venezuela to the United States.[4] When he arrived in Boston, the balloons ruptured in his stomach, sending him into a coma for four days.[5] When he woke up, his wife told him that the drug cartel demanded that he waive his right to an attorney, decline assistance from the Venezuelan consulate, and confess to the police that he had acted alone in carrying drugs or they would kill her and

1 Sanabria Morales v. Barr, 967 F.3d 15, 17 (1st Cir. 2020), *petition for reh'g en banc denied*, Morales v. Garland, 12 F.4th 830 (1st Cir. 2021) (Mem.). This Author was co-counsel in petitioning for rehearing of Mr. Sanchez's case en banc, which was denied. *See id.* A pseudonym is used for purposes of this Article.

2 *Sanabria Morales*, 967 F.3d at 17.

3 *See id.*

4 *Id.*

5 *Id.*

their son.[6] Fearful of the cartel's threats, Mr. Sanchez initially complied with the demands and attempted to plead guilty to the charge of conspiracy to transport heroin; however, he later raised the possibility of a duress defense.[7] As a result, the court rejected his plea and he ultimately pleaded guilty to the lesser offense of trafficking in eighteen grams or more of heroin.[8] Based on this conviction, the Immigration Judge and the Board of Immigration Appeals ("Board" or "BIA") determined that Mr. Sanchez was deportable.[9] They further concluded that he was ineligible for asylum and withholding of removal because the conviction was deemed to be a particularly serious crime—a designation that, by statute, renders an individual ineligible for asylum and withholding of removal.[10]

The immigration adjudicators[11] reached their particularly serious crime determination after applying an agency decision from 2002 called *Y-L-*.[12] That case held that certain drug trafficking convictions are presumed to be particularly serious unless an individual rebuts the presumption by demonstrating extraordinary circumstances.[13] Yet, while *Y-L-* ostensibly announces a rebuttable presumption—a presumption that can be overcome—it is, in practice, not rebuttable at all. This reality is apparent from the structure of the presumption itself. To rebut the presumption, individuals must, at a minimum, meet six criteria, including that the transaction involved a de minimis amount of drugs and that the individual had only a peripheral role.[14] The presumption precludes adjudicators from considering circumstances of coercion or duress—such as the threats of torture or death to his family that Mr. Sanchez faced—unless and until individuals satisfy all six criteria. Mr. Sanchez could not do so because, as the individual who physically transported the drugs, albeit under duress, he necessarily failed the criteria that the

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6 *Id.*

7 *Id.* at 18.

8 *Id.*

9 *See id.*

10 Under the Immigration and Nationality Act ("INA"), an individual is ineligible for asylum and withholding of removal if he, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." 8 U.S.C. § 1158(b)(2)(A)(ii); *id.* § 1231(b)(3)(B)(ii). The INA does not define particularly serious crimes, but it provides that for withholding of removal, "an aggravated felony . . . for which [an individual was] sentenced to an aggregate term of imprisonment of at least 5 years" is per se a particularly serious crime. *Id.* § 1231(b)(3). For aggravated felony convictions resulting in sentences of fewer than five years, the Attorney General may determine that an aggravated felony constitutes a particularly serious crime. *See id.*

11 This Article uses the term "immigration adjudicators" to collectively refer to immigration judges and the BIA.

12 23 I. & N. Dec. 270 (A.G. 2002).

13 *See id.* at 270.

14 *See id.* at 276–77.

individual be only peripherally involved.[15] As a result, immigration adjudicators ordered Mr. Sanchez removed without considering, or being permitted to consider, the coercion and duress he suffered.[16]

Confounding results like that in Mr. Sanchez's case are rife in cases triggering *Y-L-*'s presumption. A review of publicly available Board decisions reveals that vanishingly few cases have, in fact, successfully overcome *Y-L-*'s so-called rebuttable presumption in the two decades since it came down.[17] Indeed, even cases that federal reviewing courts have identified as likely candidates for overcoming the presumption on remand have, when sent back down, failed to do so.[18]

Yet attempts to get courts to reckon with these implementation realities are unavailing. Litigants have argued that *Y-L-* amounts to a per se category—rather than a rebuttable presumption—of particularly serious crimes for drug trafficking aggravated felonies.[19] Courts that have addressed the issue, however, have taken *Y-L-* at face value to conclude otherwise.[20] Those courts stress that the "Attorney General in *Y-L-* purported *not* to be creating a per se rule," and thus that the presumption is "[p]resumably" rebuttable.[21]

At a minimum, this divergence between the expected ability to rebut the presumption—and the inability to rebut in practice—calls into

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15 Notably, there is no evidence that the immigration adjudicators in Mr. Sanchez's case considered the six-factor test. As Judge Ojetta R. Thompson challenged in her dissenting opinion on appeal, the immigration adjudicators' failure to apply the rebuttal test was legal error requiring remand. *See* Sanabria Morales v. Barr, 967 F.3d 15, 23–24 (1st Cir. 2020) (Thompson, J., dissenting). Nonetheless, the majority in Mr. Sanchez's petition for review applied the factors themselves in the first instance. They concluded that he was not peripherally involved because he transported the drugs himself, and it was not a de minimis amount because the weight exceeded 200 grams, and he received $8,000 in payment. *See id.* at 21–22.

16 *See id.* at 18.

17 As discussed *infra* Part I, this Author has encountered only one publicly available case that has successfully overcome the presumption.

18 *See infra* Part I.

19 *See, e.g.*, DeCarvalho v. Garland, 18 F.4th 66, 70 (1st Cir. 2021); Morales v. Garland, 12 F.4th 830, 832 (1st Cir. 2021) (Mem.); Miguel-Miguel v. Gonzales, 500 F.3d 941, 945 (9th Cir. 2007); Fernandez Segura v. Rosen, 832 F. App'x 517, 518 (9th Cir. 2020) (Mem.); Reyes-Sanchez v. Ashcroft, 261 F. Supp. 2d 276, 286–87 (S.D.N.Y. 2003); Ford v. Bureau of Immigr. & Customs Enf't, 151 F. App'x 152, 154 (3d Cir. 2005) (per curiam).

20 *See, e.g.*, *Miguel-Miguel*, 500 F.3d at 947 ("*Y-L-* creates a strong presumption, not a per se rule."); *Fernandez Segura*, 832 F. App'x at 518 n.1 (affirming *Miguel-Miguel* and holding that *Y-L-* "did not designate drug trafficking crimes as per se particularly serious crimes"); Ford v. Bureau of Immigr. & Customs Enf't, 151 F. App'x at 154 (same); *Reyes-Sanchez*, 261 F. Supp. 2d at 287 (same).

21 *See, e.g.*, *Miguel-Miguel*, 500 F.3d at 945–47 (emphasizing that the "Attorney General in *Y-L-* purported *not* to be creating a per se rule" and thus "[p]resumably *Y-L-* will be interpreted consistent with this statement and there will be some cases in which its exception applies"); Ford v. Bureau of Immigr. & Customs Enf't, 151 F. App'x at 154 (emphasizing that *Y-L-* concluded its discussion of "particularly serious crime[s] with an unambiguous disavowal" of creating a per se category (quoting *Y-L-*, 23 I. & N. Dec. 270, 276 (A.G. 2002))).

question courts' approach to deferring to, without analysis, the textual promises of presumptions. A presumption, while ostensibly proffering a rebuttal mechanism on its face, may not in practice be rebuttable at all. This Article proposes recognizing these presumptions as a distinct category and refers to them as "effectively irrebuttable presumptions" or "(ir)rebuttable presumptions." Such effectively irrebuttable presumptions exist in the interstice between rebuttable presumptions—ones that offer the opportunity to establish the nonexistence of a presumed fact[22]—and irrebuttable presumptions—ones that are, in effect, substantive rules of law once triggered.[23] They borrow the name of the former but take the effect of the latter.

This new, interstitial category of presumptions has not been explored in any normative sense by courts or scholars. Although courts and scholars have analyzed the legal validity of irrebuttable presumptions,[24] the contours of and constitutional dilemma posed by effectively irrebuttable presumptions have remained unexplored. And although courts have alluded to presumptions that are effectively irrebuttable in a descriptive sense,[25] they have not passed normative judgment on the validity of such presumptions. This Article undertakes the project of defining effectively irrebuttable presumptions and developing a framework for determining when a so-called rebuttable presumption is rebuttable in name only.

Categorizing presumptions as effectively irrebuttable is not a mere identification exercise. At base, individuals subjected to such presumptions are afforded proceedings at which they may attempt to rebut the presumption, but proceedings are not synonymous with process. Such hearings are mere "empty ritual[s]" indeed if, in reality, no amount of evidence can rebut the presumption because of the way it is structured or because of the way the rebuttal mechanism is implemented—if even it is implemented.[26] Mr. Sanchez's case provides a stark example of the potential consequences. As a result of being subjected to the *Y-L-* presumption, Mr. Sanchez was deemed to have been convicted of a particularly serious crime without consideration of the coercion or duress that he suffered, and, accordingly, was rendered ineligible for

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22 FED. R. EVID. 301 advisory committee's note on proposed rules; *see, e.g.*, Joel S. Hjelmaas, *Stepping Back from the Thicket: A Proposal for the Treatment of Rebuttable Presumptions and Inferences*, 42 DRAKE L. REV. 427, 433 (1993) (distinguishing among rebuttable presumptions, inferences, conclusive presumptions, prima facie cases, and assumptions).

23 *See* Hjelmaas, *supra* note 22, at 433 (explaining that an irrebuttable presumption differs from a rebuttable presumption because no rebuttable evidence will be admitted).

24 *See infra* Section II.A.

25 *See infra* Section II.B.

26 *See* Benham v. Ledbetter, 785 F.2d 1480, 1491 (11th Cir. 1986).

withholding of removal that would have protected him from returning to his persecutors in Venezuela.[27]

This Article thus argues that effectively irrebuttable presumptions violate the Fifth Amendment's Due Process Clause by depriving individuals of the right to an "opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[28] In so doing, this Article recognizes that effectively irrebuttable presumptions may arise in many civil contexts—administrative and nonadministrative—and that the constitutional inquiry may differ depending on the context. This Article limits its immediate analytical scope to the constitutional dilemma in the immigration context. It posits, however, that the impact of the due process concerns—and the defective hearings that they embody—may extend to other civil contexts, administrative or otherwise, in which effectively irrebuttable presumptions arise.

This Article proceeds in four parts. Part I explores the *Y-L-* presumption as a case study of how a presumption that is ostensibly rebuttable on the surface may, in fact, be irrebuttable in practice. This Part analyzes the structure of the *Y-L-* presumption and how immigration adjudicators have implemented it since its inception in 2002.

Part II proffers a framework for defining effectively irrebuttable presumptions. It does so first by laying the taxonomical foundation for rebuttable and irrebuttable presumptions before turning to cases in civil contexts that allude to presumptions that are effectively irrebuttable in a descriptive sense. A so-called rebuttable presumption crosses to being effectively irrebuttable when there is no realistic probability that the presumption can be rebutted, which may occur when one or more of the following four characteristics are present: (1) adjudicators fail to apply the rebuttal standard at all and instead treat the presumption, once triggered, as dispositive; (2) even where adjudicators do apply the presumption, structural barriers inhibit a party from rebutting it; (3) adjudicators set an unreasonable evidentiary standard for rebutting the presumption; or (4) few, if any, cases have successfully rebutted the presumption. This inquiry requires reviewing courts to look beneath a presumption's textual claim of being rebuttable to ascertain how the rebuttal mechanism is intended to operate and how it is, in fact, implemented.

Part III argues that hearings-turned-empty-rituals, by function of effectively irrebuttable presumptions, offend procedural due process norms. Applying two procedural due process frameworks, this Part argues that effectively irrebuttable presumptions violate the axiomatic guarantee of a meaningful opportunity to be heard at a full and fair hearing.[29] As a result, effectively irrebuttable presumptions cannot

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27 Sanabria Morales v. Barr, 967 F.3d 15, 19, 21 (1st Cir. 2020).

28 Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

29 *See id.*

constitutionally exist as an interstitial presumption category—they must be made rebuttable in fact, or they must be claimed as irrebuttable in both name and substance. Part IV then sets forth recommendations for procedural safeguards necessary to identify and bring effectively irrebuttable presumptions in line with due process norms.

At their core, effectively irrebuttable presumptions are ones in which no amount of evidence that a noncitizen presents can overcome the presumption. Thus, while a noncitizen may ostensibly be afforded process—there is a hearing before an immigration judge where a noncitizen may put forth evidence to attempt to rebut the presumption—once the presumption is triggered, immigration adjudicators have effectively prejudged the outcome without fairly considering the evidence. In this way, any process is but an "empty ritual."[30]

I. *Y-L-*: A Case Study on Rebuttable Presumptions in Name Only

In 2002, Attorney General John Ashcroft issued a decision in *Y-L-* that changed the immigration paradigm for all noncitizens with drug trafficking convictions seeking withholding of removal to flee persecution. *Y-L-* established that aggravated felony[31] drug trafficking convictions are presumed to be particularly serious crimes—and thus preclusive of asylum and withholding of removal relief—unless the individual demonstrates exceptional circumstances.[32] In practice, vanishingly few cases have successfully rebutted the particularly serious crime presumption since its 2002 inception. This Part explores the *Y-L-* presumption for particularly serious crimes and the ways in which it is—or is not—rebuttable in light of its structure and the way the presumption has—or has not—been implemented.

Under the Immigration and Nationality Act ("INA"),[33] an individual is ineligible for asylum and withholding of removal if, "having been convicted by a final judgment of a particularly serious crime, [the individual] constitutes a danger to the community of the United States."[34] The INA does not define particularly serious crimes but provides two per se categories of such crimes. For purposes of asylum, a conviction deemed to be an aggravated felony is per se particularly serious.[35] For

30 *See* Benham v. Ledbetter, 785 F.2d 1480, 1491 (11th Cir. 1986).

31 An aggravated felony is a term of art used to describe a category of offenses that carry particularly harsh immigration consequences for noncitizens. The list of aggravated felonies is statutorily enumerated in 8 U.S.C. § 1101(a)(43)(A)–(U). Notably, an offense need not be aggravated nor a felony to be considered an aggravated felony. *See Benham*, 785 F.2d at 1491.

32 *See* Y-L-, 23 I. & N. Dec. 270, 274 (A.G. 2002).

33 8 U.S.C. §§ 1101–1537.

34 *Id.* § 1158(b)(2)(A)(ii); *see also id.* § 1231(b)(3)(B)(ii).

35 *Id.* § 1158(b)(2)(B)(i).

purposes of withholding of removal, a conviction deemed to be an aggravated felony for which an individual was sentenced to an aggregate term of imprisonment of at least five years is per se particularly serious.[36] For all other offenses, the INA does not specify when a crime qualifies as particularly serious. In the withholding of removal context, the INA provides only that where an individual has an aggravated felony conviction for which they were sentenced to *fewer* than five years, that sentence "shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, [a noncitizen] has been convicted of a particularly serious crime."[37]

The agency has filled this statutory gap in the asylum and withholding of removal context by holding that, where the statute's per se rules do not apply, adjudicators must determine whether a conviction is a particularly serious crime on an individual, case-by-case basis, applying what are known as the "*Frentescu* factors."[38]

Attorney General Ashcroft's decision in *Y-L-* sidesteps the *Frentescu* factors and created a new regime for those seeking withholding of removal relief who have been convicted of an aggravated felony and were sentenced to fewer than five years. The decision consolidated the cases of Y-L-, A-G-, and R-S-R-, three separate individuals convicted of felony drug trafficking offenses.[39] Based on these convictions, Y-L-, A-G-, and R-S-R- were charged as removable for having been convicted of crimes that, among others, constitute aggravated felony offenses.[40] They applied for withholding of removal relief under 8 U.S.C. § 1231(b)(3)

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36 *Id.* § 1231(b)(3).

37 *Id.*

38 *See, e.g.*, B-Z-R-, 28 I. & N. Dec. 563, 564 (A.G. 2022); Frentescu, 18 I. & N. Dec. 244, 247 (B.I.A. 1982). The Board in *Frentescu* set forth a multi-factor test, known as the "*Frentescu* factors," to guide the case-by-case analysis. These include: "the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the [noncitizen] will be a danger to the community." *See id.* Professor Fatma Marouf has argued that courts should apply the categorical approach for analyzing convictions to the particularly serious crime determination. *See* Fatma Marouf, *A Particularly Serious Exception to the Categorical Approach*, 97 B.U. L. Rev. 1427, 1429 (2017).

39 Y-L- was convicted of trafficking in cocaine and resisting an officer with violence in violation of Fla. Stat. Ann. §§ 893.135, 843.01 (West 2000 & Supp. 2002), a first-degree felony in Florida, for which he was sentenced to twenty-five months of incarceration. Y-L-, 23 I. & N. Dec. 270, 271 (A.G. 2002). A-G- was convicted of two counts of felony distribution of cocaine and one count of felony conspiracy to distribute cocaine, in violation of 21 U.S.C. §§ 841, 846, for which he received concurrent sentences of one year and a day on each count. *Id.* at 271. R-S-R- pled guilty to felony conspiracy to possess and transport multi-kilogram quantifies of cocaine from Puerto Rico to New York, in violation of 21 U.S.C. § 846, and was sentenced to twenty-four months of incarceration. *Id.* at 271, 278.

40 *See id.* at 271; 8 U.S.C. § 1227(a)(2)(A)(iii) ("Any [noncitizen] who is convicted of an aggravated felony at any time after admission is deportable."); 8 U.S.C. § 1227(a)(2)(B)(i) ("Any [noncitizen] who at any time after admission has been convicted of a violation of (or a conspiracy

and protection under the U.N. Convention Against Torture ("CAT").[41] Immigration judges denied Y-L- and R-S-R- all requested relief but granted A-G-'s request for withholding of removal.[42]

On appeal, the Board, in three separate opinions, held that while the drug trafficking convictions at issue constituted aggravated felonies, they were not particularly serious crimes for purposes of withholding of removal.[43] The Board accordingly determined that Y-L-, A-G-, and R-S-R- were entitled to withholding of removal.[44] In so doing, the Board relied on *S-S-*,[45] a 1999 Board decision that held that Congress intended per se categories of particularly serious crimes to be based only on the length of sentence imposed rather than on the category or type of conviction.[46] The Board in *S-S-* thus concluded that the particularly serious crime inquiry required an individual assessment of the circumstances surrounding the conviction, looking to the *Frentescu* factors.[47] Looking to the individual facts in the cases before it, the Board in *Y-L-* looked to Y-L-, A-G-, and R-S-R-'s cooperation with federal authorities in collateral investigations, their limited criminal history records, and the sentences imposed, and concluded that the convictions at issue were not particularly serious.[48]

Attorney General John Ashcroft self-certified[49] the Board's decisions and reversed—a decision that came at a moment when

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or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . is deportable.").

41 *Y-L-*, 23 I. & N. Dec. at 271.

42 *Id.* at 272 & n.5.

43 *Id.* at 272.

44 *Id.*

45 22 I. & N. Dec. 458 (B.I.A. 1999).

46 *Y-L-*, 23 I. & N. Dec. at 270, 272; *S-S-*, 22 I. & N. Dec. at 461–66. The Board in *S-S-* rejected efforts to create a per se category of particularly serious crimes for robbery convictions.

47 *S-S-*, 22 I. & N. Dec. at 462.

48 *Y-L-*, 23 I. & N. Dec. at 272.

49 The Code of Federal Regulations authorizes the Attorney General to certify cases from the Board for review. 8 C.F.R. §§ 3.1(h)(1)(i), 1003.1(h)(1)(i) ("The Board shall refer to the Attorney General for review of its decision all cases which: (i) [t]he Attorney General directs the Board to refer to him."); *see* Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 Tul. L. Rev. 707, 741, 743 (2019) (examining forms of political interference in immigration law, including certification cases); Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 Iowa L. Rev. 841, 841, 852 (2016) (describing how attorney general certification "could play an efficacious role in the executive branch's development and implementation of its immigration policy" and explaining how the mechanism works). Historically, attorneys general only rarely used the self-certification mechanism, and when they did avail themselves of the process, it was a means of expanding the rights of respondents by reversing or vacating the certified Board decision. *See* Karen M. Sams, Comment, *Out of the Hands of One: Toward Independence in Immigration Adjudication*, 5 Admin. L. Rev. Accord 85, 99 (2019). This historical practice shifted in 2001 under Attorney General Ashcroft, who used the certification process in "areas such as aggravated felonies and national security." *Id.* at 100 (footnote omitted). The use of self-certification dramatically increased under

the confluence of drug enforcement, immigration, and national security reached a national fervor in the aftermath of the attacks of September 11, 2001.[50] *Y-L-* overrules *S-S-* and holds that "aggravated

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the Trump Administration; former Attorney General Jeff Sessions, for instance, certified eight cases to himself over the course of his twenty-one-month tenure, including the much-criticized *A-B-*, 27 I. & N. Dec. 316 (A.G. 2018), which sharply restricted the asylum standard. *Id.* at 102; *see also* Maureen A. Sweeney, *Enforcing/Protection: The Danger of* Chevron *in Refugee Act Cases*, 71 Admin. L. Rev. 127, 138–39 (2019) (describing how former Attorney General Sessions used his "powers aggressively" while in office, "with the apparent goals of limiting both procedural rights and substantive legal claims"); Jeffrey S. Chase, *The AG's Certifying of BIA Decisions*, Jeffrey S. Chase: Ops./Analysis on Immigr. L. (Mar. 29, 2018), https://www.jeffreyschase.com/blog/2018/3/29/the-ags-certifying-of-bia-decisions [https://perma.cc/2CWY-M4R2]. Scholars have cautioned that the attorney general certification process deprives individuals of basic procedural protections, such as notice about when decisions are being certified or an opportunity for briefing. *See* Laura S. Trice, Note, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. Rev. 1766, 1766–70 (2010).

50 Drug enforcement, immigration enforcement, and national security have intersected throughout history, but came to a head at a time of crisis in the early 2000s. As scholars have explained, illicit drug enforcement was not perceived as a serious issue in the eyes of public or law enforcement officials prior to the 1980s, but this narrative shifted after President Ronald Reagan proclaimed a war on drugs and President George H.W. Bush described illicit drug activity as the country's "most pressing problem." *See* César Cuauhtémoc García Hernández, *Deconstructing Crimmigration*, 52 U.C. Davis L. Rev. 197, 204–05 (2018); Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 62–73 (2010) (explaining the rise of the "War on Drugs" under the Reagan administration and its close ties to race in the United States). By the end of the 1990s, a public opinion poll reported that sixty-four percent of respondents considered drugs to be the United States' most significant problem. *See* García Hernández, *supra*, at 204–05. By contrast, an opinion poll in 1981 found that only three percent of respondents considered reducing the supply of drugs in the United States to be the most important method of reducing crime. *See id.*; Katherine Beckett, Making Crime Pay: Law and Order in Contemporary American Politics 44, 55 (1997). The public concern around illicit drug activity converged with immigration enforcement and national security following the attacks of September 11, 2001. While the intersection of immigration and criminal law enforcement began taking hold in the 1980s, the aftermath of September 11 firmly cemented immigration in the country's national security apparatus. *See, e.g.*, García Hernández, *supra*, at 200–07 (tracing the rise of the intersection between criminal and immigration law, also known as crimmigration). Congress created the Department of Homeland Security in November 2002 to prevent terrorism, secure U.S. borders, and administer U.S. immigration laws. *See Creation of the Department of Homeland Security*, Dep't of Homeland Sec. (May 8, 2023), https://www.dhs.gov/creation-department-homeland-security [https://perma.cc/3FGD-NN69]. Moreover, drugs became explicitly tied to terrorism in the national rhetoric. *See, e.g.*, *Narco-Terror: The Worldwide Connection between Drugs and Terrorism: Hearing Before the Subcomm. on Tech., Terrorism, & Gov't Info. of the Comm. on the Judiciary*, 107th Cong. (2002) [hereinafter *Narco-Terror Hearing*], https://www.govinfo.gov/content/pkg/CHRG-107shrg85660/html/CHRG-107shrg85660.htm [https://perma.cc/6KFG-BDEX]; *Drug Trade and the Terror Network: Hearing Before the Subcomm. on Crim. Just., Drug Pol'y & Hum. Res. of the Comm. on Gov't Reform*, 107th Cong. (2001), https://www.govinfo.gov/content/pkg/CHRG-107hhrg81496/html/CHRG-107hhrg81496.htm [https://perma.cc/TBB4-37PZ] (expressing concern that the international drug trade fueled terrorism). It is within this domestic and geopolitical context that Attorney General Ashcroft certified *Y-L-* to render drug trafficking aggravated felonies presumptively particularly serious crimes preclusive of persecution-based immigration relief. Indeed, Attorney General Ashcroft emphasized the "devastating effects of drug trafficking

felonies involving unlawful trafficking in controlled substances presumptively constitute 'particularly serious crimes,'" which bars individuals from withholding of removal.[51] In so doing, the Attorney General stated that it "might be well within [his] discretion to conclude that all drug trafficking offenses are *per se* 'particularly serious crimes' under the INA."[52] However, he explicitly purported to leave open "the possibility of the very rare case where [a noncitizen] may be able to demonstrate extraordinary and compelling circumstances that justify treating a particular drug trafficking crime as falling short of that standard."[53] While the Attorney General did not "define the precise boundaries" of those unusual circumstances, *Y-L-* clearly requires that, "at a *minimum*," a noncitizen must meet six requirements:

> (1) a very small quantity of controlled substance; (2) a very modest amount of money paid for the drugs in the offending transaction; (3) merely peripheral involvement by the [noncitizen] in the criminal activity, transaction, or conspiracy; (4) the absence of any violence or threat of violence, implicit or otherwise, associated with the offense; (5) the absence of any organized crime or terrorist organization involvement, direct or indirect, in relation to the offending activity; and (6) the absence of any adverse or harmful effect of the activity or transaction on juveniles.[54]

The Attorney General then specified that "[o]nly if *all* of these criteria were demonstrated by [a noncitizen] would it be appropriate to consider whether other, more unusual circumstances . . . might justify departure from the default interpretation that drug trafficking felonies are 'particularly serious crimes.'"[55]

Although the Attorney General in *Y-L-* explicitly disclaims creating a per se rule that aggravated felony drug trafficking convictions are particularly serious, in practice, the stated presumption operates as such. This is apparent from the structure of the presumption and its rebuttal mechanism. A noncitizen seeking withholding of removal must meet "*all* of these criteria;"[56] failure to meet any one factor is fatal to

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offenses" to the public and explicitly connected drugs and national security, stating that "international terrorists increasingly employ drug trafficking as one of their primary sources of funding." *Y-L-*, 23 I. & N. Dec. at 276. Eight days after *Y-L-* came down, Congress held a hearing on the worldwide connection between drugs and terrorism. *See Narco-Terror Hearing*, *supra*. In this way, *Y-L-* was a decision of its time.

51 *Y-L-*, 23 I. & N. Dec. at 274.

52 *Id.* at 276.

53 *Id.*

54 *Id.* at 276–77.

55 *Id.* at 277.

56 *Id.*

overcoming the presumption.[57] Consider, for example, a student who is convicted for possession with intent to distribute for sharing prescription Adderall to a classmate who struggled to fill her prescription due to a national shortage.[58] Under *Y-L-*, the student would fail to overcome the presumption because, under the third factor, she was more than peripherally involved in sharing Adderall.

Moreover, immigration adjudicators are not permitted to even consider "other, more unusual circumstances" until all six criteria are satisfied.[59] Immigration adjudicators, for example, may not consider mental health evidence,[60] ineffective assistance of

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57 *Y-L-* further provides that "such commonplace circumstances as cooperation with law enforcement authorities, limited criminal histories, downward departures at sentencing, and post-arrest (let alone post-conviction) claims of contrition or innocence do not justify such a deviation." *Id.*; *see also* Diaz v. Holder, 501 F. App'x 734, 739 (10th Cir. 2012) (concluding that once the BIA determined that the respondent failed to meet two of the criteria, it did not err in failing to analyze all six criteria).

58 Brief for Petitioner at 11, DeCarvalho v. Garland, 18 F.4th 66 (1st Cir. 2021) (No. 20-1711). Adderall is a drug prescribed to treat attention-deficit hyperactivity disorder ("ADHD")—a disorder that impacts 11.6% of college students in the United States. *See* Awista Sherzada, *An Analysis of ADHD Drugs: Ritalin and Adderall*, 3 Johnson Cnty. Cmty. Coll. Honors J. 1 (2012); Kevin Antshel, Anne Stevens, Michael Meinzer & Will Canu, *How Can We Improve Outcomes for College Students with ADHD?*, Additude (Oct. 11, 2023), https://www.additudemag.com/college-students-and-adhd-improving-outcomes [https://perma.cc/VCW3-P5J2]; *Data and Statistics About ADHD*, Ctr. for Disease Control & Prevention (Oct. 16, 2023), https://www.cdc.gov/ncbddd/adhd/data.html [https://perma.cc/4PRC-VF52] (reporting that 9.8% of children aged three to seventeen years old are diagnosed with ADHD). Adderall was in short supply in 2022. *See FDA Announces Shortage of Adderall*, U.S. FDA (Aug. 1, 2023), https://www.fda.gov/drugs/drug-safety-and-availability/fda-announces-shortage-adderall [https://perma.cc/2NM5-7NTZ] (reporting that the FDA posted a shortage of Adderall); Scott Simon, *There's a Nationwide Shortage of Adderall Even as Prescriptions Reach an All-Time High*, NPR (Sept. 17, 2022, 8:04 AM), https://www.npr.org/2022/09/17/1123629648/theres-a-nationwide-shortage-of-adderall-as-prescriptions-reach-an-all-time-high [https://perma.cc/D37G-5C2H].

59 *Y-L-*, 23 I. & N. Dec. at 277; *see also* Infante v. Att'y Gen., 574 F. App'x 142, 146–47 (3d Cir. 2014) (concluding that the noncitizen failed to rebut the presumption which she did not address the fifth and sixth factors even though the Board found it "troubling" that the noncitizen had been in an abusive relationship and that the noncitizen likely met the de minimis quantity and monetary criteria when the transaction involved fewer than two grams of cocaine and $100).

60 *See, e.g.*, Fernandez Segura v. Rosen, 832 F. App'x 517, 518 (9th Cir. 2020) (Mem.) ("*Y-L-*'s presumption requires a petitioner meet the six requirements before 'other, more unusual circumstances [such as mental health evidence] might justify departure from the presumption.'" (alteration in original)). Notably, the Board has explicitly held that immigration adjudicators "may consider a respondent's mental health in determining whether a respondent, 'having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States.'" B-Z-R-, 28 I. & N. Dec. 563, 567 (A.G. 2022). *B-Z-R-*, however, did not involve the *Y-L-* presumption and does not opine on whether immigration adjudicators may consider mental health evidence even if the respondent cannot meet all six *Y-L-* factors. *See id.* At least one nonpublic Board decision has applied *B-Z-R-* to the *Y-L-* context and remanded to the immigration judge to consider whether the respondent's mental health was a "mitigating factor rebutting the presumption of a particularly serious crime," but did not clarify whether this inquiry may occur if the six factors are not met. [Redacted] (Nov. 8, 2022) (this decision is a nonpublic decision and was

counsel,[61] or the fact that "the prospective distribution was solely for social purposes, rather than for profit" until individuals demonstrate all six criteria.[62] Nor can adjudicators consider circumstances of coercion, such as evidence that an individual was forced to transport drugs lest drug cartels murder his wife and child.[63] The result is that immigration adjudicators are required to maintain the presumption where any of the six criteria are unmet without the ability to consider evidence of circumstances that may be directly relevant to an individual's ability to meet the criteria and bear on the reason this presumption was deemed rebuttable in the first place. In this way, the mechanism for rebutting the particularly serious crime presumption is rigid and preclusive.

These structural barriers are compounded by the way immigration adjudicators have implemented the presumption in practice. A review of publicly available[64] BIA decisions demonstrate that immigration

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shared with the Author by the respondent's counsel of record; a copy of the decision is on file with the Author). The Board in that case did not opine on whether the respondent could rebut the *Y-L-* presumption. *Id.* The Board did, however, emphasize that "the Agency must take all reliable, relevant information into consideration . . . including the defendant's mental condition at the time of the crime"—strong language in favor of requiring mental health evidence to be considered even in the *Y-L-* context. *Id.* (quoting Gomez-Sanchez v. Sessions, 892 F.3d 985, 996 (9th Cir. 2018)).

61 *See* Diaz v. Holder, 501 F. App'x 734, 737 (10th Cir. 2012).

62 *Y-L-*, 23 I. & N. Dec. at 277; *see also Infante*, 574 F. App'x at 146–47.

63 *See, e.g.*, Sanabria Morales v. Barr, 967 F.3d 15, 16, 21 (1st Cir. 2020) (finding that the noncitizen failed to rebut the presumption because he did not meet all six criteria even though he was forced to transport drugs by drug cartels who threatened to murder his wife and young child); Summary Order, Nderere v. Holder, 467 F. App'x 56, 59 (2d Cir. 2012) (remanding for the BIA to determine whether it is reasonable to exclude factors of coercion and duress in determining whether a crime is a particularly serious crime).

64 This Author co-submitted a Freedom of Information Act ("FOIA") inquiry with the Executive Office of Immigration Review ("EOIR") requesting the number of cases in which respondents overcame *Y-L-*'s six-criteria test and copies of those cases. EOIR indicated that it could not produce this information or copies of any cases "because EOIR does not track this data." *See FOIA Litigation*, Nat'l Immigr. Litig. All., https://immigrationlitigation.org/transparency-litigation-foia/ [https://perma.cc/FA3J-KSET]. Accordingly, this analysis of *Y-L-*'s implementation is based on all publicly available immigration judge and BIA decisions on Westlaw, Lexis, and Ben Winograd's Index of Unpublished BIA Decisions, as well as federal appellate court decisions reviewing nonpublic Board decisions applying *Y-L-*. This Author notes, however, that many Board decisions are not made publicly available. The Board generally does not make publicly available unpublished decisions, which comprise the vast majority of its decisions. *See* U.S. Dep't of Just., Bd. of Immigr. Appeals Prac. Manual § 1.4(d)(1) (2022) ("The vast majority of the Board's decisions are unpublished, but the Board periodically selects cases to be published."). From 2012 to 2016, the BIA issued 30,000 decisions each year, but only designated about 30 as precedential each year. *See* Raul Pinto, *The Board of Immigration Appeals Will Now Provide the Public with Access to Its Unpublished Decisions*, Immigr. Impact (Feb. 15, 2022), https://immigrationimpact.com/2022/02/15/board-of-immigration-appeals-unpublished-decisions/ [https://perma.cc/X8MN-9UPG]. This practice is slated to gradually change pursuant to a settlement agreement arising from a lawsuit by the New York Legal Assistance Group. Stipulation of Settlement, *N.Y. Legal Assistance Grp. v. BIA*, No. 18-CV-09495 (S.D.N.Y. Feb. 9, 2022). Under the settlement, the Board is required to post its past decisions to a reading room. *Id.* at *3. This release will be gradual,

adjudicators have erected unreasonable evidentiary standards for the six criteria. As to the first and second criteria, immigration adjudicators have held that $320 does not meet *Y-L-*'s "*de minimis* or inconsequential"[65] value criteria,[66] and that ten pounds of marijuana and five ounces of cocaine do not meet the de minimis volume criteria.[67] Indeed, in *Diaz v. Holder*,[68] the immigration judge found that the individual had rebutted the *Y-L-* presumption where the offense involved only sixteen pills and $320.[69] On appeal, however, the Board reversed, summarily concluding that the immigration judge wrongly determined that $320 was a de minimis value.[70]

As to the peripheral involvement and lack of violence requirements under the third and fourth criteria, immigration adjudicators have rigidly relied on indictments and guilty pleas to find direct involvement without considering the circumstances of that involvement. In one case, a woman pleaded guilty to a grand jury indictment charging her with selling or dispensing 1.62 grams of cocaine to a police detective for $100.[71] In her immigration removal proceedings, the woman testified that she had an abusive partner who forced her to accompany him to drug sales and that, while she did not take money for the drugs, she pleaded guilty to the offense.[72] Affirming the Board's conclusion that she had not rebutted the presumption, the Third Circuit held that notwithstanding the de minimis volume and value involved and her testimony regarding the circumstances of the offense, her guilty plea was dispositive of the peripheral involvement criteria.[73] As to the sixth

however; the Board is set to post fifty percent of its past unpublished decisions by July 2026 and all of its past decisions by July 2027. *See id*. at *6. The reading room launched in January 2023. *FOIA Public Access Link (PAL)*, Exec. Off. of Immigr. Rev., https://foia.eoir.justice.gov/app/ReadingRoom.aspx [https://perma.cc/GY87-PE8K]. In the meantime, nonpublic Board decisions must be accessed through a FOIA request. *See* Emily Creighton, *In a Win for Transparency, Court Orders Board of Immigration Appeals to Make Immigration Court Decisions Public*, Immigr. Impact (Feb. 18, 2021), https://immigrationimpact.com/2021/02/18/immigration-court-decisions-public/ [https://perma.cc/X8MN-9UPG].

65 *Y-L-*, 23 I. & N. Dec. at 277.

66 *See Diaz*, 501 F. App'x at 737 (explaining that the immigration judge found that the individual rebutted the *Y-L-* presumption, but the BIA reversed because, inter alia, $320 was not "de minimis or inconsequential"); *see also* Abdulahad v. Barr, 838 F. App'x 126, 133 (6th Cir. 2020) (holding that $1000 to $1500 is not a de minimis value).

67 *See, e.g.*, Hui Zhao v. Att'y Gen., 191 F. App'x 160, 163 (3d Cir. 2006); *see also Abdulahad*, 838 F. App'x at 133 (finding that 500 grams of cocaine is not a small quantity).

68 501 F. App'x 734 (10th Cir. 2012).

69 *Id.* at 737.

70 *Id.* (affirming the Board's finding that the respondent did not rebut the *Y-L-* presumption).

71 *See* Infante v. Att'y Gen., 574 F. App'x 142, 146 (3d Cir. 2014).

72 *Id.* at 144, 146.

73 *See id.* at 146–47 ("While it is troubling that Santos-Infante was in an abusive relationship, the evidence . . . was not strong enough to overcome the presumption . . . especially when she pleaded guilty to being the actor who committed the crime.").

factor regarding the adverse effect of the activity on juveniles, immigration adjudicators have found that an individual fails to meet this requirement where he lives with his nine-year-old child[74] and where the conduct occurred within 1,000 feet of a school.[75]

Tellingly, one federal reviewing court took at face value that *Y-L-* is, as it claims to be, rebuttable, reasoning that the compelling circumstances of the case before it may well rebut the presumption—yet, on remand, the Board maintained the presumption. In *Ford v. Bureau of Immigration & Customs Enforcement, Interim Field Office Director for Detention and Removal*,[76] the court held that *Y-L-* was, in fact, a rebuttable presumption and further opined that, based on the facts of the case, there was a possibility that it was "one of the 'unusual circumstances' where departure from the presumption might be justified."[77] In that case, only a "small amount of cocaine" was involved; the noncitizen "testified that he had no involvement in the criminal activity" and was instead "merely in the wrong place at the wrong time"; the offense did not involve violence, organized crime, or adverse impact on juveniles.[78] On remand, however, the BIA held that no such departure was warranted because he failed to meet the *Y-L-* exception.[79]

Quite apart from setting unreasonable standards for rebutting the presumption, many immigration adjudicators simply fail to acknowledge that rebuttal is possible, much less conduct any rebuttal analysis. A review of publicly available Board cases illustrates varying degrees of inadequate application. Immigration adjudicators frequently summarily state that an individual is precluded from withholding of removal because their drug trafficking aggravated felony is a particularly serious crime by citing *Y-L-* without anywhere acknowledging that *Y-L-* creates a rebuttable presumption, not an automatic rule.[80] Where immigration adjudicators do allude to the presumption, they do so in a boilerplate parenthetical—"aggravated felonies involving unlawful trafficking in controlled substances are presumptively particularly serious

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74 *See* Delgado-Arteaga v. Sessions, 856 F.3d 1109, 1113 (7th Cir. 2017), *overruled on other grounds by* Garcia v. Sessions, 873 F.3d 553 (7th Cir. 2017).

75 Floreal v. Att'y Gen., 606 F. App'x 35, 38 (3d Cir. 2015).

76 294 F. Supp. 2d 655 (M.D. Pa. 2003).

77 *Id.* at 662–63 n.6.

78 *Id.*

79 *See* Brief in Support of Appellant at 3–5, Ford v. Bureau of Immigr. & Customs Enf't, 151 F. App'x 152 (3d Cir. 2005) (No. 04-3652), 2004 WL 5040622.

80 *See, e.g.*, Andre M. Gibbs, AXXX-XXX-841, 2006 Immig. Rptr. LEXIS 6750, at *2 (B.I.A. Nov. 17, 2006) (stating summarily that the "conviction is for a drug trafficking offense that is both an aggravated felony and a particularly serious crime" with no further explanation (citing *Y-L-*, 23 I. & N. Dec. 270, 276 (A.G. 2002))); Delroy Jones, AXXX-XXX-141, 2006 Immig. Rptr. LEXIS 12427, at *2 (B.I.A. Dec. 14, 2006) (same); Devon Bercham Kelly, AXXX-XXX-863, 2008 Immig. Rptr. LEXIS 10610, at *10 (B.I.A. Apr. 17, 2008) (same); Kwesi Shermon Bates, AXXX-XXX-987, 2006 Immig. Rptr. LEXIS 10625, at *2 (B.I.A. July 25, 2006) (same).

crimes"—and summarily apply the presumption without acknowledging that the presumption is rebuttable, much less analyze whether the respondent has overcome the presumption.[81] And where immigration adjudicators acknowledge that the presumption may be overcome in "the most extenuating circumstances that are both extraordinary and compelling," they do not elucidate the six mandatory criteria nor actually determine whether the case presents such extenuating circumstances.[82] At least one reviewing court has suggested that, given the failure to recognize the rebuttable presumption, it is unclear whether immigration adjudicators are "even aware of the exceptions to the presumption of seriousness announced in *Y-L-*."[83] What is clear, however, is the practical effect of *Y-L-* as implemented: the presumption, once triggered, is dispositive.

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81 *See, e.g.*, Cecilia D. Guerrero, AXXX-XXX-565, 2016 Immig. Rptr. LEXIS 3891, at *4 (B.I.A. Feb. 10, 2016) (stating the proposition that "aggravated felonies involving unlawful trafficking in controlled substances are presumptively particularly serious crimes," but finding that the "respondent has not put forth any argument to rebut application of the presumption in this case" (citing *Y-L-*, 23 I. & N. Dec. at 276)); Donald Duterval, AXXX-XXX-316, 2015 Immig. Rptr. LEXIS 26377, at *1–2 (B.I.A. Apr. 9, 2015) (stating that "we are sympathetic to the respondent's case," but finding him ineligible from withholding relief because his aggravated felony involving trafficking in a controlled substance is "presumptively deemed to constitute [a] particularly serious crime" (citing *Y-L-*, 23 I. & N. Dec. at 276)); Jose Manuel Bueno-Mercado, AXXX-XXX-194, 2010 Immig. Rptr. LEXIS 4141, at *3 (B.I.A. Oct. 25, 2010) (stating the proposition that "aggravated felonies involving unlawful trafficking in controlled substances presumptively constitute 'particularly serious crimes'" (quoting *Y-L-*, 23 I. & N. Dec. at 276)); Marc David Cadet, AXXX-XXX-303, 2008 Immig. Rptr. LEXIS 10167, at *2 (B.I.A. Dec. 17, 2008) (same); Mario D. Hernandez-Aguilar, AXXX-XXX-409, 2012 Immig. Rptr. LEXIS 4489, at *2 (B.I.A. Apr. 25, 2012) (same); Rene Marcelo Villarreal-Guajardo, AXXX-XXX-354, 2011 Immig. Rptr. LEXIS 1229, at *2 (B.I.A. May 4, 2011) (same); Luis C. Paulino, AXXX-XXX-037, 2014 Immig. Rptr. LEXIS 257, at *2–3 (B.I.A. Jan. 17, 2014) (same).

82 *See, e.g.*, Hatim Jamil Zakar, AXXX-XXX-033, 2017 Immig. Rptr. LEXIS 25428, at *8 (B.I.A. Sept. 22, 2017) (stating the proposition that "convictions for drug trafficking crimes are presumptively convictions for particularly serious crimes under the Act unless the respondent demonstrates 'the most extenuating circumstances that are both extraordinary and compelling'" (quoting *Y-L-*, 23 I. & N. Dec. at 274)); Lavira v. Att'y Gen., 478 F.3d 158, 165 (3d Cir. 2007), *overruled on other grounds by* Pierre v. Att'y Gen., 528 F.3d 180 (3d Cir. 2008) (remanding where the immigration judge failed to mention the six-part test, causing the court to "question, therefore, whether the IJ ever actually applied *Matter of Y-L-*"); Sanabria Morales v. Barr, 967 F.3d 15, 23–24 (1st Cir. 2020) (Thompson, J., dissenting) (explaining that the immigration judge and the Board legally erred by "appl[ying] the presumption" and making "[n]o reference to or discussion of the rest of the *Matter of Y-L-* test and its caveat with respect to extraordinary and compelling circumstances").

83 Summary Order, Gelaneh v. Ashcroft, 153 F. App'x 881, 887 (3d Cir. 2005); *cf.* Donald Adams, AXXX-XXX-350, 2005 Immig. Rptr. LEXIS 10613, at *3 (B.I.A. Dec. 19, 2005) (citing the *Y-L-* presumption and the need for "extenuating circumstances that are both extraordinary and compelling" to overcome the presumption) (remanding for the immigration judge to hold an evidentiary hearing to determine whether the respondent was convicted of a particularly serious crime for eligibility for withholding of removal and CAT protection).

As a result of these implementation realities, few, if any, cases have successfully rebutted the *Y-L-* presumption since its inception in 2003. In a First Circuit case in 2021, the government conceded at oral argument that it was not aware of any case that successfully rebutted the *Y-L-* presumption.[84] The First Circuit emphasized this dearth with concern and remanded to, inter alia, "provide the Attorney General with an opportunity to consider whether, based on the experience of two decades and Congress's increasingly nuanced view of drug trafficking offenses, *Matter of Y-L-* may have turned out to over-shoot the mark."[85]

Only one publicly available Board decision has successfully rebutted the presumption.[86] In *R-G-G-*,[87] the BIA concluded, without much explanation, that the respondent's 1992 California conviction for possession of cocaine base for sale was not a particularly serious crime because two to three grams of cocaine base is a "very small quantity of controlled substance," $80 to $100 is a "very modest amount of money," and "the additional aggravating factors specified in *Matter of Y-L-* are not present."[88] While *R-G-G-*'s outcome in successfully overcoming the *Y-L-* presumption is atypical, the Board's minimal explanation of its conclusion is assuredly typical of its approach to the presumption.

Y-L- thus serves as an example of a particular kind of presumption—an (ir)rebuttable presumption—that is explicitly rebuttable in name but may, in fact, be irrebuttable in practice. *Y-L-*, in this way, also serves as a cautionary example against accepting at face value a presumption's claim to be rebuttable.[89]

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84 DeCarvalho v. Garland, 18 F.4th 66, 70 (1st Cir. 2021); Oral Argument at 16:51, *DeCarvalho*, 18 F.4th 66 (No. 20-1711), https://www.ca1.uscourts.gov/sites/ca1/files/oralargs/20-1711_20210406-0832_01d5f06d17ba1430.mp3 [https://perma.cc/FVA2-BEE6].

85 *DeCarvalho*, 18 F.4th at 71. As of the publication of this Article, this case remains pending on remand before the Board.

86 This Article notes that it is possible that there are nonpublic cases that have successfully rebutted the presumption at the immigration judge or Board level. Decisions by the immigration judge and the Board, however, are largely not made public for privacy reasons. *See supra* note 64.

87 AXXXXXX-495 (B.I.A. Mar. 2, 2016) (on file with the Author, obtained from Ben Winograd's Index of Unpublished BIA Decisions).

88 *Id.*

89 *See, e.g.*, Miguel-Miguel v. Gonzales, 500 F.3d 941, 945–47 (9th Cir. 2007) (emphasizing that the "Attorney General in *Y-L-* purported *not* to be creating a per se rule" and thus "[p]resumably *Y-L-* will be interpreted consistent with this statement and there will be some cases in which the exception applies"); Fernandez Segura v. Rosen, 832 F. App'x 517, 518 & n.1 (9th Cir. 2020) (Mem.) (affirming *Miguel-Miguel* and holding that *Y-L-* "did not designate drug trafficking crimes as per se particularly serious crimes"); Reyes-Sanchez v. Ashcroft, 261 F. Supp. 2d 276, 287 (S.D.N.Y. 2003) (same); Ford v. Bureau of Immigr. & Customs Enf't, 151 F. App'x 152, 154 (3d Cir. 2005) (per curiam) (emphasizing that "*Y-L-* concluded its discussion of particularly serious crime[s] with an unambiguous disavowal" of creating a per se category).

II. A Framework for Effectively Irrebuttable Presumptions

Determining whether an ostensibly rebuttable presumption as in *Y-L-* is properly rebuttable or is in fact irrebuttable in practice presents a definitional inquiry—the contours of which have not yet been drawn. While courts and scholars have much discussed rebuttable presumptions and irrebuttable presumptions, none have identified or interrogated in any normative sense the interstitial category of presumptions that this Article refers to as effectively irrebuttable presumptions. This Part fills this gap by proffering a framework for effectively irrebuttable presumptions.

Drawing the contours of effectively irrebuttable presumptions is not a mere theoretical exercise; indeed, (ir)rebuttable presumptions may carry severe consequences. Where such effectively irrebuttable presumptions have a preclusive effect on forms of humanitarian relief, as in *Y-L-*, noncitizens may be deported to countries where they may be tortured or killed without a meaningful opportunity to defend against deportation. Mr. Sanchez's case illuminates these consequences. The immigration judge and the Board in his case did not inform him that the *Y-L-* presumption was rebuttable,[90] but whether this omission would have impacted the outcome of the case is doubtful. The presumption as structured prohibited the immigration judge and the Board from considering the circumstances of duress and coercion that forced Mr. Sanchez to transport drugs in the first instance and precluded Mr. Sanchez from overcoming the presumption.[91] Mr. Sanchez was accordingly deemed to have been convicted of a particularly serious crime and barred from withholding of removal relief.[92] As a result, he was ordered deported to a country where cartel members had threatened to murder his family.[93] Failure to interrogate the effect of presumptions—and whether and when ostensibly rebuttable presumptions cross into irrebuttable territory—thus has consequences of potentially fatal magnitude.

This Part begins by setting forth the extant taxonomy of rebuttable and irrebuttable presumptions as they are understood by courts and scholars. It then turns to the unexplored category of *effectively*

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90 Sanabria Morales v. Barr, 967 F.3d 15, 23 (Thompson, J., dissenting) ("[T]he IJ made no mention of the extraordinary-and-compelling-circumstances piece of the *Matter of Y-L-* test . . . .").

91 *See supra* Part I.

92 The immigration judge and the Board denied Mr. Sanchez's application for CAT protection after concluding that he did not demonstrate that he would be harmed by or with the acquiescence of the Venezuelan government. *See* Sanabria Morales v. Barr, 967 F.3d at 20.

93 *See id.* at 21.

irrebuttable presumptions, drawing upon civil cases[94] that allude in a descriptive sense to such presumptions.

A. Taxonomy of Rebuttable and Irrebuttable Presumptions

Presumptions are a "permanent fixture" in U.S. civil law.[95] Yet, as many scholars have recognized, they are "the slipperiest member[s] of the family of legal terms."[96] The Supreme Court has broadly defined a presumption as a "mandatory inference drawn from a fact in evidence."[97] Scholars have more particularly defined presumption as "a predicate showing of facts that are logically linked to a resulting assumption or conclusion."[98] In plain terms, a presumption provides that if fact X is true, then conclusion Y follows.[99]

Rebuttable presumptions, then, are conclusions that, once drawn, may be overcome by introducing contrary evidence. Such presumptions "plac[e] upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic facts giving rise to it."[100] In this way, rebuttable

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94 Use of presumptions in the criminal context involve different considerations that are beyond the scope of this Article. For discussion of the use of presumptions in criminal proceedings, see generally Harold A. Ashford & D. Michael Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 Yale L.J. 165 (1969).

95 *See* Hjelmaas, *supra* note 22, at 429, 433.

96 James J. Duane, *The Constitutionality of Irrebuttable Presumptions*, 19 Regent U. L. Rev. 149, 158 (2006) (quoting 2 Kenneth S. Broun, George E. Dix, Edward J. Imwinkelried, D. H. Kaye, Robert P. Mosteller, E. F. Roberts, John W. Strong & Eleanor Swift, McCormick on Evidence 497 (6th ed. 2006)). Scholars and courts have lamented that, despite the prevalence of presumptions in our legal system, courts and lawmakers have not settled on a uniform understanding of the concept. *See* Leo H. Whinery, *Presumptions and Their Effect*, 54 Okla. L. Rev. 553, 553–55 (2001) (describing "presumption" as "the slipperiest member of the family of legal terms," and setting forth at least seven ways the term has been used by courts and lawmakers); 21 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure Evidence § 5124 (2d ed. 2023) (lamenting that Congress and courts have failed to define presumption).

97 Taylor v. Kentucky, 436 U.S. 478, 483 n.12 (1978).

98 Maritza Karmely, *Presumption Law in Action: Why States Should Not Be Seduced into Adopting a Joint Custody Presumption*, 30 Notre Dame J.L. Ethics & Pub. Pol'y 321, 331 (2016) (quoting Nancy Ver Steegh & Dianna Gould-Saltman, *Joint Legal Custody Presumptions: A Troubling Legal Shortcut*, 52 Fam. Ct. Rev. 263, 266 (2014)). Black's Law Dictionary defines "presumption" as a "legal inference or assumption that a fact exists because of the known or proven existence of some other fact or group of facts." *Presumption*, Black's Law Dictionary (11th ed. 2019).

99 *See* Wright & Miller, *supra* note 96, at § 5124 ("A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action." (quoting Uniform Rule 13)).

100 Fed. R. Evid. 301 advisory committee's note on proposed rule; *Rebuttable Presumption*, Black's Law Dictionary (11th ed. 2019) ("An inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence.").

presumptions are evidentiary devices that switch the burden of proof or persuasion[101] to the party subject to the presumption to rebut it.[102]

An irrebuttable presumption, by contrast, is a "substantive rule of law that requires the finding of a presumed fact once certain basic facts are established."[103] Once a triggering fact X is demonstrated, fact Y is automatically taken as true as a matter of law without any opportunity for the individual to challenge the veracity of fact Y. No burden shifting occurs, and the irrebuttable presumption "simply ends the discussion entirely."[104]

As the Supreme Court and scholars have recognized, irrebuttable presumptions are synonymous with conclusive presumptions[105] and per se rules.[106] The Supreme Court in *Michael H. v. Gerald D.*,[107] for example, acknowledged that an irrebuttable presumption is the same as a

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101 Scholars have noted different approaches to rebuttable presumptions: in one, the presumption disappears upon the appearance of any contradicting evidence by the other party (the so-called "bursting bubble" theory); one where both the burden of proof and burden of persuasion shift to the party; and an intermediate position under which only the burden of proof shifts to the party but a presentation of contradicting evidence does not automatically defeat the presumption. *See, e.g.*, Hjelmaas, *supra* note 22, at 436–38; Whinery, *supra* note 96 at 556–67. Federal Rule of Evidence 301, governing presumptions in civil cases, adopts this latter intermediate approach. *See* WRIGHT & MILLER, *supra* note 96, R. 301.

102 *See* John M. Phillips, Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449, 451 n.7 (1975); Whinery, *supra* note 96, at 553–55 (describing different types of presumptions in the civil and criminal contexts).

103 *See* Hjelmaas, *supra* note 22, at 433 (explaining that an irrebuttable presumption, also referred to as a conclusive presumption, differs from a rebuttable presumption because no rebuttable evidence will be admitted); Phillips, *supra* note 102, at 451 (explaining that an irrebuttable presumption "may arise whenever a provision states or implies that one fact (the basic fact) is conclusive evidence of another fact (the presumed fact) that provides the ostensible rationale for the classification established by the provision").

104 Duane, *supra* note 96, at 158; *see also* JACK B. WEINSTEIN & MARGARET A. BERGER, 1 WEINSTEIN'S EVIDENCE MANUAL § 5.02 (1987) ("Fact B becomes another way of stating fact A if the presumption is irrebuttable.").

105 Black's Law Dictionary defines conclusive, absolute, irrebuttable, and mandatory presumptions as synonymous. *Presumption*, BLACK'S LAW DICTIONARY (11th ed. 2019). Indeed, some scholars question whether irrebuttable presumptions should be considered "presumptions" at all. *See* Duane, *supra* note 96, at 160 ("[C]ourts and legal scholars universally agree that any so-called 'irrebuttable presumption,' regardless of whether one chooses as a matter of semantics to call it a true presumption, is not really a rule of evidence at all, but is actually a rule of *substantive* law masquerading in the traditional language of a presumption. . . . Any ordinary rule of substantive law can be easily recast into the language of an irrebuttable presumption, and vice versa, with no change in its meaning or operation."); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 1 FEDERAL EVIDENCE § 3:6 (4th ed. 2023) (stating that conclusive or irrebuttable presumptions "are not really presumptions"); WEINSTEIN & BERGER, *supra* note 104 ("A so-called irrebuttable presumption does not satisfy the definition of a presumption because fact B must be assumed conclusively rather than conditionally.").

106 *See* Coleman v. Thompson, 501 U.S. 722, 737 (1991) (using "conclusive presumption" and "per se rule" interchangeably).

107 491 U.S. 110 (1989).

substantive rule of law, regardless of "whether framed in terms of a presumption or not."[108] At issue in that case was a procedural and substantive due process challenge to a California state law that provided that, for purposes of determining legal parentage, a child is "conclusively presumed" to be the child of a wife and her husband if they live together and are neither sterile or impotent, even if the child was fathered out of wedlock.[109] As the Court opined, although an individual subject to an irrebuttable presumption[110] is denied a particularized proceeding or any ability to refute the assumed fact, the same is true for any substantive rule of law that establishes classifications. In other words, "there is no difference between a rule which says that the marital husband shall be irrebuttably presumed to be the father, and a rule which says that the adulterous natural father shall not be recognized as the legal father."[111]

Having set forth the categorical foundation for rebuttable and irrebuttable presumptions, the next Section develops a framework for understanding a new, interstitial category of presumptions: effectively irrebuttable presumptions.

B. Defining Effectively Irrebuttable Presumptions

Effectively irrebuttable presumptions stand at the interstice between rebuttable and irrebuttable presumptions. They take the name of the former—individuals subject to them are entitled to an opportunity to demonstrate before an adjudicator that they overcome the presumption. In the *Y-L-* context, for example, respondents seeking withholding of removal are entitled to an individual merits hearing before an immigration judge to demonstrate their eligibility for relief. But effectively irrebuttable presumptions embody the consequences of irrebuttable presumptions—once the triggering fact is established, the conclusion automatically and irrevocably follows.

To understand the scope of effectively irrebuttable presumptions, it is useful to consider as a foil what *is* a properly rebuttable presumption. Consider, for example, the well-founded fear presumption in asylum law. To obtain asylum, an individual must demonstrate past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[112] Where an asylum seeker demonstrates past perse-

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108 *Id.* at 119–20 (1989).

109 *Id.* at 117 (quoting CAL. EVID. CODE § 621 (West 1989)).

110 The Supreme Court used the terms "conclusive presumption" and "irrebuttable presumption" interchangeably throughout the decision. *See id.* at 120–21.

111 *Id.* at 120.

112 *See* 8 U.S.C. § 1101(a)(42)(A) (defining a refugee as a person "unable or unwilling to return" to the country of origin because of "persecution or a well-founded fear of persecution" based on a protected ground); 8 C.F.R. §§ 208.13(b), 1208.13(b) (2022) ("The applicant may qualify

cution, that finding does not guarantee a grant of asylum;[113] rather, past persecution establishes a presumption of future persecution,[114] which the government may rebut by demonstrating by a preponderance of the evidence either that circumstances have changed such that the asylum seeker no longer has a well-founded fear of persecution, or that they can avoid future persecution by relocating to another part of their country of origin and that it would be reasonable to expect them to do so.[115] If the government rebuts the presumption of future persecution, an individual is generally ineligible for asylum.[116]

A review of the caselaw demonstrates that the government regularly rebuts the well-founded fear presumption under both prongs.[117] The government, for example, has demonstrated changed circumstances through changed political conditions, such as when the persecuting government has been removed from power[118] or changed

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as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.").

113 *See* Deborah E. Anker, Law of Asylum in the United States § 2:17 (2023 ed.).

114 8 C.F.R. §§ 208.13(b)(1), 1208.13(b)(1) (2022) ("An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim.").

115 8 C.F.R. §§ 208.13(b)(1)(i)–(ii), 1208.13(b)(1)(i)–(ii) (2022) (explaining that once the past persecution presumption is triggered, the burden shifts to the government to establish by a preponderance of the evidence either changed circumstances or that internal relocation is possible and reasonable).

116 If the government rebuts the presumption of a well-founded fear of future persecution, an asylum seeker may try to seek past-persecution-only asylum, also known as humanitarian asylum. A grant of humanitarian asylum requires establishing that there are compelling reasons arising out of the severity of the past persecution or the possibility of "other serious harm" in the applicant's country of origin. *See* 8 C.F.R. §§ 208.13(b)(1)(iii)(B), 1208.13(b)(1)(iii)(B); Chen, 20 I. & N. Dec. 16, 19 (B.I.A. 1989).

117 *See generally* Anker, *supra* note 113, §§ 2:19–2:22 (explaining the presumption and providing ample examples of cases in which the government rebutted the presumption). *See also* Ira J. Kurzban, Immigration Law Sourcebook § 7.h. (17th ed. 2020) (providing ample examples of cases in which the government rebutted the presumption).

118 *See, e.g.*, Thapachhetri v. Sessions, 690 F. App'x 726, 728 (2d Cir. 2017) (holding that the government rebutted the presumption of future persecution because, although the individual was previously persecuted on account of his membership in a political party, that political party was now in power); Trifoni v. Holder, 351 F. App'x 19, 23 (6th Cir. 2009) (same); Shehu v. Gonzales, 443 F.3d 435, 437 (5th Cir. 2006) (holding that the government rebutted the presumption of future persecution when the government that previously persecuted the individual was no longer in power); Mambwe v. Holder, 572 F.3d 540, 547–49 (8th Cir. 2009) (concluding that the government rebutted the presumption of future persecution when the civil war in Angola had ended); Singh v. Holder, 753 F.3d 826, 833 (9th Cir. 2014) (concluding that country reports from the United States and the United Kingdom were sufficient to determine that there were changed conditions in India that affected the applicant's claim that he would be persecuted as a Sikh member of a political party); Ruci v. Holder, 741 F.3d 239, 243–44 (1st Cir. 2013) (relying on 2009 Department of State report to establish changed conditions for Greeks in Albania); Koliada v. INS, 259 F.3d 482, 488 (6th Cir. 2001) (concluding that the government rebutted the presumption of future persecution when the political group that the asylum seeker supported was now in power in Ukraine).

personal circumstances of the asylum seeker.[119] The government has also rebutted the presumption by demonstrating that the asylum seeker could relocate within the country.[120] In the view of at least one circuit, the government can meet its burden of rebutting the well-founded fear presumption without introducing its own evidence.[121] The presumption of a well-founded fear of future persecution in asylum law is thus rebuttable in both name and practice, and stands in stark contrast to the *Y-L-* presumption.[122]

In this view, federal appellate courts ought not, as they have in the *Y-L-* context, reject out of hand arguments that an ostensibly rebuttable presumption, in fact, effectively creates a per se rule.[123] A number of federal courts beyond the immigration context have looked beneath the textual surface and alluded to the concept of effectively irrebuttable presumptions.[124] Although these courts have not reached any normative conclusions about the constitutionality of such effectively irrebuttable presumptions, interrogating the contexts in which courts have invoked the concept is informative.

Drawing upon these cases, this Section establishes a definitional framework for effectively irrebuttable presumptions: a so-called rebuttable presumption crosses to being (ir)rebuttable where there is no realistic probability that the presumption can be rebutted. This may occur when one or more of the following four characteristics are present:

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119 *See, e.g.*, Singh v. Barr, 920 F.3d 255, 258 (5th Cir. 2019) (concluding that the government rebutted the presumption of future persecution when the asylum seeker testified that he was no longer politically active); Ming Li Hui v. Holder, 769 F.3d 984, 986–87 (8th Cir. 2014) (holding that the government rebutted the presumption when the asylum seeker, who claimed membership in a social group involving an abusive parent, turned 18); Ixtlilco-Morales v. Keisler, 507 F.3d 651, 653–55 (8th Cir. 2007) (holding that the applicant's status as an adult was a changed circumstance for purposes of the presumption because his claim was based upon his mistreatment as a homosexual child).

120 *See, e.g.*, Sherpa v. Barr, 822 F. App'x 5, 6 (2d Cir. 2020) (upholding the Board's conclusion that the government rebutted the presumption because the asylum seeker could reasonably relocate to another part of the country of origin, given that he had lived there for eight or nine months without being persecuted); Saldana v. Lynch, 820 F.3d 970, 976–78 (8th Cir. 2016) (concluding that the government rebutted the presumption because the applicant could relocate to another region); Singh v. Holder, 720 F.3d 635, 641–43 (7th Cir. 2013) (concluding that the government rebutted the presumption because Sikhs were no longer in danger in India and the asylum seeker could safely relocate).

121 *See, e.g.*, *Singh*, 920 F.3d at 260 (concluding that the Board did not err in affirming that the government rebutted the presumption by using the asylum seeker's cross-examination testimony because the regulations only "require[] the DHS to rebut the presumption by the preponderance of *the* evidence, not by *its* [own] evidence"); Soto-Gomez v. Barr, 815 F. App'x 782, 783 (5th Cir. 2020) (affirming that the government rebutted the presumption based solely on the asylum seeker's own testimony that he had family in safer cities in Honduras).

122 *See supra* Part I.

123 *See supra* notes 20–22.

124 *See, e.g.*, Berry v. Sullivan, 738 F. Supp. 942, 945 (W.D. Pa. 1990); *infra* Sections III.B.1–.4.

(1) at a threshold level, adjudicators fail to apply the rebuttal standard at all and instead treat the presumption, once triggered, as dispositive, even where adjudicators do apply the presumption; (2) structural barriers inhibit a party from rebutting it; (3) adjudicators set an unreasonable evidentiary standard for rebutting the presumption; or (4) few, if any, cases have successfully rebutted the presumption. At bottom, an effectively irrebuttable presumption, whether based on one or a combination of these characteristics, is one where no amount of evidence proffered will reasonably rebut the presumption.

1. Adjudicators Fail to Evaluate Whether the Presumption Is Rebutted

Quite apart from *how* adjudicators employ the rebuttal standards is *whether* adjudicators, in fact, employ the rebuttal standard at all. Indeed, courts have found ostensibly rebuttable presumptions irrebuttable in practice when the adjudicator fails to conduct sufficient analysis of the rebuttal standard, reasonable or not, in the first instance.

In *Berry v. Sullivan*,[125] for example, the district court concluded that the presumption could, in theory, be rebutted but that, as implemented, it was irrebuttable.[126] *Berry* involved a claim for disability insurance and supplemental security income under the Social Security Act ("SSA").[127] Under the SSA, an individual who is deemed to engage in "substantial gainful activity" during the period of claimed disability is ineligible for benefits.[128] Implementing regulations at the time provided that an applicant earning more than $300 per month is presumed to engage in substantial gainful activity.[129] That presumption could be rebutted by showing that the applicant was not engaged in substantial activity "by evidence of the nature of the applicant's work, the conditions of employment[,] and the adequacy of the applicant's performance."[130] The administrative law judge ("ALJ") in *Berry* determined that the applicant triggered the presumption of substantial gainful activity and thus was ineligible for benefits for part of the claimed period because she received a stipend of $400 per month as a foster parent.[131]

The district court reversed the ALJ's decision because it treated the presumption as dispositive.[132] The district court observed that

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125 738 F. Supp. 942 (W.D. Pa. 1990).

126 *Id.* at 945.

127 Pub. L. No. 74-271, 49 Stat. 620 (codified as amended in scattered sections of 42 U.S.C.); *Berry*, 738 F. Supp. at 943–44.

128 *Berry*, 738 F. Supp. at 944.

129 *Id.* at 944–45.

130 *Id.* at 945.

131 *Id.*

132 *Id.* at 946.

"once [the ALJ] determined plaintiff had met the income guidelines set forth in the regulations, the analysis ended."[133] By failing to "view[] the actual circumstances involved" to determine whether the applicant could overcome the presumption by showing no substantial activity, the ALJ's decision "had the effect" of impermissibly turning a presumption that "can be rebutted" into an "irrebuttable presumption."[134] Perhaps intuitively, a presumption that is rebuttable on paper becomes irrebuttable in practice where the adjudicator fails to evaluate whether the presumption has been rebutted.

Even when an adjudicator applies the rebuttable presumption, however, a presumption may still be effectively irrebuttable in light of the presumption's structure and implementation. The following Sections discuss these factors.

2. Structural Barriers

There is no realistic probability that a presumption can be rebutted when the mechanism for overcoming the presumption is structured in a way that renders it effectively impossible for an individual to rebut the presumption. The Supreme Court's rejection of a proposed presumption regarding Exemption 7(D) of the Freedom of Information Act ("FOIA")[135] in *U.S. Department of Justice v. Landano*[136] illustrates this principle. Exemption 7(D) of FOIA exempts the government from disclosing requested agency "records 'compiled for law enforcement purposes'" if those records "'could reasonably be expected to disclose' the identity of," or "information provided by, a 'confidential source.'"[137] The government in *Landano* urged the Court to adopt a presumption that "all sources supplying information to the Federal Bureau of Investigation ["FBI"] . . . in the course of a criminal investigation are confidential sources" for purposes of Exemption 7(D).[138] The presumption "could be overcome only with specific evidence that a particular source had no interest in confidentiality."[139]

In rejecting the government's proposed presumption, the Court opined that the "proposed presumption, though rebuttable in theory, is in practice all but irrebuttable."[140] This is readily apparent from how the

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133 *Id.* at 945.

134 *Id.* ("[T]he court concludes that the ALJ erred in terminating his analysis upon a finding that plaintiff had met the regulation presumption, without also viewing the actual circumstances involved.").

135 5 U.S.C. § 552.

136 508 U.S. 165 (1993).

137 *Id.* at 167 (quoting 5 U.S.C. § 552(b)(7)(D)).

138 *Id.* at 167.

139 *Id.* at 174.

140 *Id.* at 176–77.

presumption is intended to operate. The presumption, once triggered, would permit the FBI to withhold information obtained from a confidential source as well as information about the source itself. In so doing, however, the presumption withholds from the requestor the prerequisite information it needs to overcome the presumption; without "knowledge about the particular source or the information being withheld," a requestor would only "very rarely . . . be in a position to offer persuasive evidence that the source in fact had no interest in confidentiality" sufficient to overcome the presumption.[141] The presumption, in other words, creates an effectively impossible task for the requestor, which violates principles of "fairness."[142] A presumption that demands individuals to present evidence that they do not and cannot have access to is rebuttable in name only.

Requiring an individual to prove a negative presents another structural barrier that may render a presumption effectively irrebuttable.[143] Consider, for example, Virginia's framework for determining which of two widows, apparently married to the same deceased individual, is the lawful spouse for purposes of insurance payouts. To mediate such situations, Virginia employs a presumption that the marriage last-in-time is the valid one unless the prior spouse can show that their marriage was not terminated by death or divorce.[144] Courts have found the presumption to be rebuttable but, in so doing, have been careful to clarify that the prior spouse seeking to prove that theirs is the valid marriage need not "document the absence of a divorce dissolving the first marriage in *every* jurisdiction where a divorce could possibly have been obtained."[145] That is, the prior spouse is not required to prove a negative,[146] as such a requirement would be "effectively irrebuttable."[147]

Whether a presumption is structurally rebuttable, however, "does not end the inquiry."[148] Even if a presumption as crafted does not inhibit a party from overcoming it, the presumption may nonetheless be

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141 *Id.* at 177.

142 *Id.* at 176 (quoting Basic Inc. v. Levinson, 485 U.S. 224, 245 (1988)).

143 *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 505 (1992) (Scalia, J., concurring) (characterizing the presumption as "effectively irrebuttable . . . because the school district cannot prove the negative").

144 *See* Hewitt v. Firestone Tire & Rubber Co., 490 F. Supp. 1358, 1362 (E.D. Va. 1980).

145 *Id.* at 1365. Instead, courts have clarified that to overcome the presumption, a litigant must "show[] that no divorce was entered in jurisdictions where the parties resided or where on any reasonable basis a decree might have been obtained." *Id.* at 1365; *see* Bonner v. SYG Assocs., 498 F. Supp. 3d 859, 870 (E.D. Va. 2020).

146 *See Hewitt*, 490 F. Supp. at 1362 (clarifying that an individual "need not 'make plenary proof of a negative averment'" (quoting DeRyder v. Metro. Life Ins. Co., 145 S.E.2d 177, 181 (Va. 1965))).

147 *Id.* at 1365.

148 Thorne v. U.S. Dep't of Def., 916 F. Supp. 1358, 1366 (E.D. Va. 1996).

effectively irrebuttable due to the manner in which adjudicators implement it in practice.

3. Unreasonable Evidentiary Standards to Overcome the Presumption

A presumption may be effectively irrebuttable where adjudicators set an unreasonable standard to satisfy the presumption's rebuttal mechanism. As courts have opined, where an adjudicator "requires extensive evidence to rebut [a] presumption," the adjudicator "effectively erects an irrebuttable and insurmountable barrier."[149]

Consider the Third Circuit's reasoning in *Gayle v. Warden Monmouth County Correctional Institution*.[150] At issue in *Gayle* was what process is due at *Joseph*[151] hearings to determine whether an individual is subject to mandatory immigration detention.[152] Under *Joseph*, an individual may be placed in mandatory detention if the government merely demonstrates that there is "reason to believe"—i.e., probable cause—that the noncitizen is properly included in a mandatory detention category.[153] The burden then shifts to the detained noncitizen to show that the government is "'substantially unlikely to prevail on its charge' at the eventual removal hearing . . . with either factual or legal arguments."[154]

To comport with due process, the Third Circuit raised the government's burden of proof from a probable cause standard to a preponderance of the evidence standard.[155] In so doing, the court emphasized that the individual's burden to show that the government is substantially unlikely to prevail "is a heavy one."[156] Legal arguments "may only succeed if she presents 'precedent caselaw directly on point that mandates a finding that the charge of removability will not be sustained.'"[157] To underscore this concern, the court pointed out that, in the Board's view, an individual does not meet the "substantially likely"

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149 Nunley v. City of Los Angeles, 52 F.3d 792, 796 (9th Cir. 1995).

150 12 F.4th 321 (3d Cir. 2021).

151 22 I. & N. Dec. 799 (B.I.A. 1999).

152 *See Gayle*, 12 F.4th at 326. Pursuant to the Board's decision in *Joseph*, noncitizens held in mandatory detention may challenge whether they are properly subjected to mandatory detention under 8 U.S.C. § 1226(c) in a hearing before an immigration judge. *See Joseph*, 22 I. & N. Dec. at 799. An individual is not considered properly included in a mandatory detention category if the immigration judge is convinced that the government is "substantially unlikely to establish, at the merits hearing, the charge or charges that subject the [noncitizen] to mandatory detention." *Id.* at 800, 808.

153 *Gayle*, 12 F.4th at 330; *Joseph*, 22 I. & N. Dec. at 802.

154 *Gayle*, 12 F.4th at 330.

155 *Id.* at 333 (quoting *Joseph*, 22 I. & N. Dec. at 807).

156 *Id.* at 330.

157 *Id.* (quoting Garcia, AXX XX1 884, 2007 WL 4699861, at *1 (B.I.A. Nov. 5, 2007)).

standard even when they invoke precedential circuit court caselaw interpreting an analogous crime in a favorable light.[158] Such a high burden is particularly problematic because once an individual is deemed to be properly included within a mandatory detention category, detention "is in effect irrebuttable."[159] Given the government's low threshold to trigger these dire consequences and the high burden to overcome it, the court raised the government burden of proof to trigger mandatory detention.[160]

A dissenting opinion in *United States v. McCall*[161] further illustrates how rebuttal standards, when set to unreasonable levels, may render the underlying presumption insurmountable in practice. The presumption at issue in *McCall* involved a two-level sentencing enhancement under U.S. Sentencing Guidelines 2D1.1(b)(1) for possessing a firearm.[162] To apply the enhancement, "if the government can show that the defendant actually or constructively possessed a weapon during the offense, it will enjoy a presumption that the weapon was connected to the offense."[163] To rebut the presumption, an individual must show that "it was 'clearly improbable' that the weapon was connected with the offense."[164] In the proceedings below, the district court applied the two-level sentencing enhancement after police officers found two rifles and drugs in Mr. McCall's car during a routine traffic stop.[165] The Sixth Circuit affirmed on appeal, rejecting McCall's argument that he rebutted the presumption.[166]

Judge Karen Nelson Moore dissented, arguing that the district court applied the wrong standard in determining that Mr. McCall had failed to rebut the presumption. In Judge Moore's view, the district court ignored the facts of the case—including that the firearms were unloaded hunting rifles and there was no ammunition in the car—and instead "relied on its own 'experience [that] firearms are traded for drugs and vice versa all the time.'"[167] Judge Moore opined that "[i]f the district court's general experience regarding the trade of firearms and drugs is all that is necessary to apply the enhancement, then the presumption

158 *Id.* at 330 n.6 (quoting Zamoripa-Tapia, AXXX XX3 787, 2010 WL 2390763, at *1 (B.I.A. May 21, 2010)).

159 *Id.* at 333.

160 *Id.* ("[T]he presumption of dangerousness or flight risk under § 1226(c) is in effect irrebuttable once a detainee is found to be 'properly included' within that provision." (quoting *Joseph*, 22 I. & N. Dec. at 805)).

161 433 F. App'x 432 (6th Cir. 2011).

162 *Id.* at 432.

163 *Id.* at 439.

164 *Id.* (quoting United States v. Wheaton, 517 F.3d 350, 367 (6th Cir. 2008)).

165 *See id.* at 433.

166 *Id.* at 440.

167 *Id.* at 440 (Moore, J., dissenting) (alteration in original).

that arises when a defendant possessed the firearm during the offense is, in effect, irrebuttable."[168] In other words, when an adjudicator's unsupported opinions supplant record evidence that supports overcoming the presumption, the adjudicator erects a near-impossible rebuttal standard that renders the presumption effectively irrebuttable.

Courts also look to outcomes in cases involving compelling circumstances as further indicia of whether adjudicators have erected unreasonable rebuttal standards.[169] These invoke, in a name, a sympathetic case inquiry: if not this case, then what case? Consider, for example, the court's reasoning in *Elgin v. United States*,[170] which concerned a federal law requiring that men between the ages of eighteen and twenty-six register with the Selective Service System. Failure to register for the Selective Service System precludes an individual from federal employment unless that failure was unknowing or unwilling. The statute establishes a presumption that individuals "shall be deemed to have notice" of the registration requirement "upon publication by the President of a proclamation."[171] Because President Carter had published such a proclamation, individuals were presumed to have knowledge unless they could show by a preponderance of the evidence that their failure to register was not knowing and willful.[172]

The district court concluded that the adjudicating body treated the presumption "for all intents and purposes [as] an irrebuttable presumption."[173] In so doing, the court pointed to two unrelated cases with "compelling circumstances" that, "but for the . . . presumption, appear to have the indicia of lack of knowledge and intent."[174] In one case, the individual moved to Canada when he was four years old and did not return to the United States until he was twenty-six years old.[175] By the

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168 *Id.*

169 *See, e.g.*, Dir., Off. of Workers' Comp. Programs, U.S. Dep't of Lab. v. Congleton, 743 F.2d 428, 431 (6th Cir. 1984) (reversing the ALJ's grant of benefits under the Black Lung Benefits Act after finding that the Director of Labor had, in fact, successfully rebutted the presumption that the claimant's widow was entitled to benefits; "[t]o hold otherwise" in light of the evidence "would, in effect, permit an *irrebuttable* presumption in favor of the claimant. . . . If the presumption has not been rebutted by the facts of the instant case, then this court is at a loss to conceive any situation in which the Director could prevail"); Nagel v. Osborne, 164 F.3d 582, 585 (11th Cir. 1999) (Clark, J., dissenting) ("If we say that the experts' testimony did not overcome the presumption of insanity, I do not see what evidence would overcome the presumption.").

170 594 F. Supp. 2d 133 (D. Mass. 2009), *reconsideration granted but dismissed on other grounds by* Elgin v. United States, 697 F. Supp. 2d 187 (D. Mass. 2010), *vacated and remanded sub nom.* Elgin v. U.S. Dep't of Treasury, 641 F.3d 6 (1st Cir. 2011), *aff'd* Elgin v. Dep't of Treasury, 567 U.S. 1 (2012).

171 *Elgin*, 594 F. Supp. 2d at 139.

172 *Id.* at 139.

173 *Id.* at 144.

174 *Id.*

175 *Id.* (discussing Clarke v. Off. Of Pers. Mgmt., No. H-07-0662, 2007 WL 2363295 (S.D. Tex. Aug. 17, 2007)).

time he learned of the registration requirement, he was statutorily precluded from registering because of his age. The adjudicator nonetheless "ruled woodenly" that he was presumed to have notice of the requirements.[176] The other case involved a veteran who had served on active duty immediately after high school for almost fourteen years.[177] While the adjudicator noted that its decision "does not seem equitable," it nonetheless found that he was ineligible for federal employment under the statutory presumption.[178] As *Elgin* illustrates, where cases present precisely the circumstances contemplated to overcome the presumption yet nonetheless fail to meet the standard as applied, the presumption is effectively irrebuttable in practice.

Intuitively, when a presumption sets forth a test for overcoming it, adjudicators must interpret and implement that rebuttal mechanism to an achievable degree. Adjudicators fail to do so, and the presumption is effectively irrebuttable, when they set an unreasonable evidentiary standard such that even cases with compelling circumstances directly relevant to the rebuttal mechanism cannot overcome the presumption.

4. Numerosity of Cases That Have Successfully Rebutted the Presumption

Finally, the extent to which cases have successfully overcome the presumption in the past is indicia of whether the presumption is in fact rebuttable. To be sure, it would be difficult to precisely define the number of successful rebuttals and the timeframe required to cross the threshold between rebuttable and (ir)rebuttable presumptions. Moreover, under the current regime where courts do not track presumption rebuttal rates, it would be difficult to statistically quantify in any certain terms the frequency at which the presumption is rebutted. Notwithstanding, historical case outcomes weigh in the balance in determining whether a presumption is rebuttable or (ir)rebuttable, along with other indicia of effectively irrebuttable presumptions discussed earlier.[179]

In *Elgin*, for example, the court emphasized that the parties had not submitted and the court had not found any decisions in which an individual successfully overcame the presumption that individuals who failed to register for the Selective Service System did so knowingly and willfully.[180] This dearth of successful rebuttals indicated to the court that the presumption was "for all intents and purposes . . . an irrebuttable presumption."[181] Where there are no known cases in which

176 *Id.*

177 *Id.*

178 *Id.*

179 *See supra* notes 169–78 and accompanying text.

180 *Elgin*, 594 F. Supp. 2d at 144.; *see supra* Sections II.B.1–.3.

181 *Elgin*, 594 F. Supp. 2d at 144.

a presumption has been rebutted, as in *Elgin*, that dearth is certainly strong indicia that the presumption falls on the effectively irrebuttable side of the spectrum.

Complete absence of cases successfully rebutting a presumption, however, is not required for that presumption to be effectively irrebuttable. In a concurring opinion in a securities fraud action, Justice Clarence Thomas emphasized that "only six cases out of the thousands" of cases involving the presumption at issue had successfully rebutted it.[182] He, accordingly, opined that "the so-called 'rebuttable presumption'" was "largely irrebuttable" and "conclusive in practice."[183]

By contrast, in a case about classifying students as in-state or out-of-state for tuition purposes, the district court rejected the plaintiff's contention that the presumption at issue was irrebuttable in practice because twenty-three of 106 appeals to the Review Committee—or 21.7%—and two of eight subsequent appeals to the Board of Regents—or 25%—successfully rebutted the presumption.[184] For that court, such numbers "tend[] to indicate that the presumption on nonresidence is rebuttable in its actual operation."[185] Similarly, a court concluded that a presumption pertaining to the Department of Defense's Don't Ask Don't Tell policy was in fact rebuttable because seven service members had successfully rebutted the presumption at issue.[186] Underscoring the importance of numerosity as a consideration, courts have requested that parties supplement the record with cases, if any, that have successfully overcome the presumption at issue.[187]

* * *

Effectively irrebuttable presumptions are thus ones that look and sound rebuttable but, beneath the guise, are (ir)rebuttable in practice because of one or a combination of the characteristics discussed. An adjudicator may treat the presumption, once triggered, as dispositive and fail to apply the rebuttal standard. Even where adjudicators apply the rebuttal mechanism, their proverbial hands may be tied—the presumption as written may structurally preclude rebuttal or the rebuttal test may be set to an unachievable standard such that few, if any, cases successfully overcome the presumption. Accordingly, courts must look

182 Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 296 (2014) (Thomas, J., concurring in judgement).

183 *Id.* at 296–97.

184 Michelson v. Cox, 476 F. Supp. 1315, 1319–20 (S.D. Iowa 1979).

185 *Id.* at 1320.

186 Richenberg v. Perry, 97 F.3d 256, 262 (8th Cir. 1996).

187 *See, e.g.*, Thorne v. U.S. Dep't of Def., 916 F. Supp. 1358, 1366 (E.D. Va. 1996) (requesting supplemental evidence after determining that the "record is too sparse to permit a confident conclusion on this issue").

beyond a presumption's facial claim that it is rebuttable to determine whether the presumption is, as written and as implemented, rebuttable.

III. Effectively Irrebuttable Presumptions Violate Procedural Due Process Norms

The cases discussed in Part II allude to presumptions that are effectively irrebuttable in a descriptive sense but do not offer any normative judgment on such presumptions or their significance on a constitutional due process level. Scholars similarly have not identified or analyzed the constitutional significance of effectively irrebuttable presumptions. This Part thus turns, for the first time, to the due process implications of this new category of presumptions.

In so doing, this Part recognizes that effectively irrebuttable presumptions may, and likely do, arise in many civil contexts, as demonstrated in the preceding definitional discussion. They may be agency-created, extra-statutory presumptions, as in *Y-L-*'s particularly serious crime presumption for immigration purposes and *Berry v. Sullivan*'s regulatory substantial gainful activity presumption for disability insurance.[188] Such presumptions may also arise from congressionally created statutes, as was the case with the Selective Service System presumption at issue in *Elgin v. United States*.[189] Although effectively irrebuttable presumptions, at core, all share the common characteristic of being ostensibly rebuttable but irrebuttable in practice, the analysis of their legality may depend on whether they arise in the administrative or non-administrative context and the precise contours of the adjudicatory and rebuttal procedures. As such, this Part does not undertake the task of analyzing effectively irrebuttable presumptions in *all* civil contexts. It instead returns to the immigration context as a case study of the constitutional dilemma such presumptions pose in the administrative law context. In particular, it explores whether the process that is provided to noncitizens—a hearing where they may attempt to rebut the presumption—satisfies the process that is constitutionally due. While the constitutional analysis here is limited to the immigration context, the underlying due process concerns may well apply more broadly to other civil contexts.

This Part proceeds in two steps. It first explains why effectively irrebuttable presumptions are procedurally and analytically distinct from irrebuttable presumptions and centers, descriptively, on hearings involving effectively irrebuttable presumptions as "empty rituals." It then argues that such hearings-turned-empty-rituals, by function of

188 *See supra* Section II.B.1.

189 *See supra* Section II.B.3.

effectively irrebuttable presumptions, violate procedural due process norms.

A. The "Empty Ritual" Dilemma

At base, the legal import of presumptions that falsely claim to be rebuttable is rooted in their practical impact: they offer *proceedings* but deprive *process*. Procedurally, individuals subjected to so-called rebuttable presumptions are afforded a hearing where they ostensibly have an opportunity to rebut the presumption. In the case of the *Y-L-* and the well-founded fear of future persecution presumptions,[190] for example, individuals and the government can attempt to rebut the respective presumptions at an individual merits hearing. By their nature and operation, however, effectively irrebuttable presumptions "cannot be rebutted by any amount of uncontradicted evidence."[191] Where immigration adjudicators fail to consider the rebuttal mechanism in the first instance, any evidence, no matter how compelling, is ignored. Where the rebuttal mechanism is structurally or interpretively insurmountable, no evidence can reasonably reach the requisite level.

Effectively irrebuttable presumptions, then, turn hearings into "empty ritual[s]"[192]—proceedings that, on the surface, permit individuals to present evidence and arguments to support their claims but, in reality, afford no process because action would be futile[193] or the adjudicator acts as a rubber stamp.[194] They embody pantomimes of the judicial process in performance only.

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190 *See supra* Section II.B.

191 Benham v. Ledbetter, 785 F.2d 1480, 1491 (11th Cir. 1986).

192 *Id.* Some courts have used the phrase "empty ritual" to generally describe futility or adjudicatory concerns at proceedings, but not in a constitutional sense. *See infra* notes 193–94.

193 Courts have used the phrase "empty ritual" in determining whether defendants are required to renew motions for acquittal at the end of a trial where such a motion was previously denied. In *United States v. Pennington* for example, the court determined that the defendant was not required to renew the motion for acquittal, explaining that any renewal efforts would have been "empty rituals" because the trial court made clear that it did not believe the case warranted a new trial or a motion for acquittal. 20 F.3d 593, 597 n.2 (5th Cir. 1994); *see, e.g.*, United States v. DeLeon, 247 F.3d 593, 596 n.1 (5th Cir. 2001) (concluding that the defendant was not required to renew the motion for acquittal where he first raised the motion when the government rested and did not present any of his own witnesses, explaining that "a subsequent motion minutes" after the court denied the first motion would have been an "empty ritual"); United States v. Esquivel-Ortega, 484 F.3d 1221, 1225 (9th Cir. 2007) (explaining that, given the "nature of the evidence" submitted following the denied motion for acquittal—the audio tape of a call whose transcript had already been admitted into evidence—"and the fact that the court had denied Esquivel's motion for acquittal only a few moments earlier, requiring Esquivel to renew his motion at that point would have been 'an empty ritual'" (quoting *Pennington*, 20 F.3d at 597 n.2)).

194 *See, e.g.*, United States v. Al Mudarris, 695 F.2d 1182, 1188 (9th Cir. 1983) (cautioning that "[t]he government is on notice that this court will not brook behavior that degrades the grand jury into a rubber stamp, and the testing of the prosecutor's evidence into an empty ritual"); United

Effectively irrebuttable presumptions are thus procedurally and analytically distinct from irrebuttable presumptions. In the latter, there is no illusion of process—irrebuttable presumptions embody a substantive rule of law that offers no means of challenging the assumed conclusion.[195] As such, courts generally review[196] irrebuttable presumptions under a rationality standard, determining whether the inference is rationally related to a legitimate legislative classification.[197] In *Michael H. v. Gerald D.*, for example, the Supreme Court concluded that the irrebuttable presumption at issue was a substantive rule of law and

States v. de la Cruz-Paulino, 61 F.3d 986, 999 n.11 (1st Cir. 1995) (rejecting the government's conclusory discussion of the sufficiency of the evidence of the defendant's guilt on appeal because, "[d]espite the prosecution-friendly overtones of the standard of review, appellate oversight of sufficiency challenges is not an empty ritual" (quoting United States v. Ortiz, 966 F.2d 707, 711–12 (1st Cir. 1992))); Rogers v. Barnhart, 446 F. Supp. 2d 828, 834 (N.D. Ill. 2006) (explaining that the ALJ was not required to accept the applicant's testimony at face value because ALJs are "not inert and wooden participants in an empty ritual, the preordained end of which is to award benefits to those in distress, regardless of whether they qualify under the [Social Security] Act").

195 *See supra* Section II.A.

196 A detailed discussion of irrebuttable presumptions is beyond the scope of this Article. For further discussion on irrebuttable presumptions, see Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1686–88 (1992) (describing the evolution of the Supreme Court's analysis of the constitutionality of irrebuttable presumptions); *see also* D. Michael Risinger, *"Substance" and "Procedure" Revisited with Some Afterthoughts on the Constitutional Problems of "Irrebuttable Presumptions,"* 30 UCLA L. REV. 189, 213 & n.70 (1982).

197 For a brief period in the 1970s, the Supreme Court developed the so-called irrebuttable presumption doctrine, which provided that irrebuttable presumptions deny due process where it is not "necessarily or universally true in fact" that the basic fact implied the presumed fact and alternative procedures were available. *See* Vlandis v. Kline, 412 U.S. 441, 452 (1973). *See generally* Bell v. Burson, 402 U.S. 535 (1971); Stanley v. Illinois, 405 U.S. 645 (1972); U.S. Dep't of Agric. v. Murry, 413 U.S. 508 (1973); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974). In *Vlandis*, the Supreme Court struck down a Connecticut statute that classified anyone living out of state at the time they applied to a state university to be a nonresident for purposes of tuition and fees. *See Vlandis*, 412 U.S. at 452. The Court concluded that the statute's "permanent irrebuttable presumption of nonresidence" unconstitutionally deprived individuals of the opportunity to present evidence demonstrating that they are bona fide residents entitled to the in-state rates "when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination." *Id.* at 452–53. As scholars have noted, the Court's analysis blurred the line between procedural and substantive due process and the irrebuttable presumption doctrine was conceptually equivalent to an equal protection challenge. *See, e.g.*, Phillips, *supra* note 102, at 450; Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534, 1534–36 (1974); Risinger, *supra* note 196, at 213 & n.70. The Supreme Court significantly curtailed the irrebuttable presumption doctrine just a few years later in *Weinberger v. Salfi*, 422 U.S. 749, 777, 784 (1975), announcing a return to a more substantive approach to legislative classifications, which were to be reviewed under a rational basis test for equal protection. *See* Black v. Snow, 272 F. Supp. 2d 21, 29–30 (D.D.C. 2003) (explaining that *Salfi*, 422 U.S. at 749, "narrow[ed] the *Vlandis* analysis to cases in which the legislature is engaged in a kind of sleight-of-hand, feigning interest in one concern only then to erect a classification that excludes evidence obviously relevant to that concern"); Michael H. v. Gerald D., 491 U.S. 110, 119, 124 (1989); Motomura, *supra* note 196, at 1686–88.

characterized the inquiry as "the adequacy of the 'fit' between the classification and the policy that the classification serves."[198]

Effectively irrebuttable presumptions, however, are more aptly considered under a procedural due process framework that interrogates the constitutional adequacy of the hearings they purport to offer. As will be discussed next, effectively irrebuttable presumptions render such hearings constitutionally defective.

B. Procedural Due Process

The Supreme Court has long held that the Fifth Amendment's Due Process Clause applies to noncitizens in removal proceedings.[199] Noncitizens are accordingly entitled to basic safeguards,[200] chief among them "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[201] That is, the right to "a full and fair hearing on their claims."[202]

The problem posed by effectively irrebuttable presumptions is that, while individuals are afforded a hearing, such hearings are rendered neither full nor fair in light of the presumption—they become empty rituals. At least one court has opined that the effect of presumptions as empty rituals is constitutionally suspect.[203] This Section evaluates the constitutional dilemma that effectively irrebuttable presumptions pose.

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198 *Michael H.*, 491 U.S. at 121; *see also* Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 791 (9th Cir. 2014).

199 *See* Reno v. Flores, 507 U.S. 292, 306 (1993) ("[T]he Fifth Amendment entitles [noncitizens] to due process of law in deportation proceedings."); Mathews v. Diaz, 426 U.S. 67, 77 (1976) ("Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to [the] constitutional protection [of the Fifth Amendment's Due Process Clause]."); Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("[T]he Due Process Clause applies to all 'persons' within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent."); Yamataya v. Fisher, 189 U.S. 86, 99–100 (1903) (holding that due process applies in removal proceedings).

200 *See* Erwin Chemerinsky, Constitutional Law 1162 (6th ed. 2020).

201 Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)); *see also* Goldberg v. Kelly, 397 U.S. 254, 261 (1970) (hearing required before termination of welfare benefits).

202 Rusu v. INS, 296 F.3d 316, 321–22 (4th Cir. 2002); *see also* Colmenar v. INS, 210 F.3d 967, 971 (9th Cir. 2000); Burger v. Gonzales, 498 F.3d 131, 134 (2d Cir. 2007).

203 *See, e.g.*, Benham v. Ledbetter, 785 F.2d 1480, 1491 (11th Cir. 1986) ("If no amount of evidence offered at a release hearing by an insanity acquittee could rebut the presumption of insanity, the processes of proof in the due process hearing would be an *empty ritual*. The sole basis for argument would be an appeal to judicial discretion or mercy rather than to a process of proof." (emphasis added)); Nagel v. Osborne, 164 F.3d 582, 585 (11th Cir. 1999) (Clark, J., dissenting) ("This court has stated that due process would not be consistent with a presumption that cannot be rebutted by any amount of uncontradicted evidence."); *see also* Foehl v. United States, 238 F.3d 474, 480 (3d Cir. 2001) (holding that the Drug Enforcement Administration violated due process by failing to make a reasonable effort to provide adequate notice, because the "constitutional mandate of adequate notice cannot be treated as empty ritual").

It does so by applying two due process frameworks. The Supreme Court in *Mathews v. Eldridge*[204] established the framework for determining what process is constitutionally required under the due process clause. That framework notwithstanding, appellate courts facing due process challenges in the immigration context often apply the so-called fundamental fairness test, which finds a due process violation when a defect in the proceedings prejudiced the noncitizen.[205] This Section argues that, under either framework, effectively irrebuttable presumptions violate noncitizens' due process rights. It begins by applying the latter fundamental fairness framework to demonstrate that effectively irrebuttable presumptions present procedural defects of constitutional proportions. It then applies the *Mathews v. Eldridge* framework to determine what safeguards due process requires.

1. Applying the Fundamental Fairness and No Prejudice Test

Appellate courts applying the fundamental fairness test start from the principle that noncitizens in removal proceedings are entitled to a full and fair hearing of their claims. Courts proceed with a two-step inquiry to determine whether a noncitizen was denied a full and fair hearing. The first step evaluates whether there was a defect in the removal proceeding—that is, the proceedings were "so fundamentally unfair that the [noncitizen] was prevented from reasonably presenting his case."[206] That defect reaches constitutional proportions at the second step if the noncitizen was prejudiced because of it.[207] Prejudice generally

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204 424 U.S. 319 (1976).

205 As numerous scholars have explained, many appellate courts in the immigration context apply the fundamental fairness or related inquiry in place of the *Eldridge* balancing test. This is so even though no court has explicitly stated that, following *Landon v. Plascencia*, 459 U.S. 21 (1982), the *Mathews* test only applies to citizens and legal permanent residents ("LPR"). *See* Nimrod Pitsker, Comment, *Due Process for All: Applying* Eldridge *to Require Appointed Counsel for Asylum Seekers*, 95 CAL. L. REV. 169, 174–78 (2007) ("Although *Eldridge* permanently replaced *Gagnon* in civil proceedings for citizens, a robust *Eldridge* analysis has not been consistently applied in the immigration context . . . . [I]n practice, courts have routinely applied the fundamental fairness criterion or one of its cousins . . . in determining constitutionally sufficient procedures."); John R. Mills, Kristen M. Echemendia & Stephen Yale-Loehr, *"Death is Different" and a Refugee's Right to Counsel*, 42 CORNELL INT'L L.J. 361, 364–65 (2009); Johan Fatemi, *A Constitutional Case for Appointed Counsel in Immigration Proceedings: Revisiting* Franco-Gonzalez, 90 ST. JOHN'S L. REV. 915, 924–29 (2016); Cindy S. Woods, *Barriers to Due Process for Indigent Asylum Seekers in Immigration Detention*, 45 MITCHELL HAMLINE L. REV. 319, 331–33 (2019) ("The *Eldridge* factors became the touchstone for fundamental fairness considerations in the civil context for citizens; however, courts have not traditionally applied this standard in non-citizen determinations."); Beth J. Werlin, Note, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393, 403–12 (2000).

206 *Colmenar*, 210 F.3d at 971 (citation omitted).

207 Vasha v. Gonzales, 410 F.3d 863, 872 (6th Cir. 2005); *see* Lopez-Umanzor v. Gonzales, 405 F.3d 1049, 1058 (9th Cir. 2005) ("For us to grant the petition for review on due process grounds,

occurs when the immigration adjudicator's conduct potentially affected the outcome of the proceedings.[208]

Effectively irrebuttable presumptions trigger concerns at both steps of the inquiry. This Section addresses the impact effectively irrebuttable presumptions have on two components of a full and fair hearing: a neutral arbiter[209] and an individualized determination.

First, the Supreme Court has established that a decision maker fails to be neutral in violation of due process when, for example, they stand to gain from their decision or have personal connections to a case.[210] Inherent in the right to a neutral arbiter is that the arbiter has not "prejudg[ed] . . . the facts."[211] Indeed, appellate courts in the immigration context have repeatedly established that a full and fair hearing requires an "unbiased arbiter who has not prejudged their claims."[212] Effectively irrebuttable presumptions confound the right to a neutral arbiter either

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Petitioner must show prejudice, 'which means that the outcome of the proceeding *may have been affected* by the alleged violation.'" (quoting Reyes-Melendez v. INS, 342 F.3d 1001, 1006 (9th Cir. 2003))).

208 *See Colmenar*, 210 F.3d at 972; Cano-Merida v. INS, 311 F.3d 960, 965 (9th Cir. 2002) (affirming that the respondent "need not 'explain exactly what evidence he would have presented' in support of his application" and the court "may infer prejudice in the absence of any specific allegation as to what evidence [the respondent] would have presented . . . had he been provided the opportunity to present that evidence" (citation omitted)); Abdallahi v. Holder, 690 F.3d 467, 472 (6th Cir. 2012) (defining prejudice as when the defect "led to a substantially different outcome from that which would have occurred in the absence of these violations" (citation omitted)).

209 *See, e.g.*, Chemerinsky, *supra* note 200, at 1162 (explaining that due process guarantees basic safeguards, including "an impartial decision maker").

210 *See, e.g.*, Gibson v. Berryhill, 411 U.S. 564, 579 (1973) (holding that it was unconstitutional to have an arbiter preside over a hearing where they could personally gain from their decision); Williams v. Pennsylvania, 579 U.S. 1, 24 (2016) (concluding that an individual was denied due process when a state supreme court justice participated in a decision after having been involved in the case as the district attorney); Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 886–87 (2009) (determining that an individual was denied due process when a state supreme court justice participated in a decision to overrule a $50 million judgment against a party who donated millions to get the justice onto the court).

211 *Gibson*, 411 U.S. at 578–79.

212 Ahmed v. Gonzales, 398 F.3d 722, 725 (6th Cir. 2005); *see also* Serrano-Alberto v. Att'y Gen., 859 F.3d 208, 213 (3d Cir. 2017) (stating that a noncitizen is entitled to "a decision on the merits of their claim by a 'neutral and impartial arbiter'" (quoting Abulashvili v. Att'y Gen., 663 F.3d 197, 207 (3d Cir. 2011))); Zolotukhin v. Gonzales, 417 F.3d 1073, 1075 (9th Cir. 2005) (holding that a neutral arbiter is "one of the most basic due process protections" and concluding that the "IJ's prejudgment of the merits of petitioner's case led her to deny Zolotukhin a full and fair opportunity to present evidence on his behalf" in violation of due process (citations omitted)); *Cano-Merida*, 311 F.3d at 964; Sanchez-Cruz v. INS, 255 F.3d 775, 779–80 (9th Cir. 2001); *Reyes-Melendez*, 342 F.3d at 1007; *Vasha*, 410 F.3d at 872–73; Hassan v. Gonzales, 403 F.3d 429, 436 (6th Cir. 2005); Marincas v. Lewis, 92 F.3d 195, 204 (3d Cir. 1996) (describing the need for a neutral judge as one of the most basic due process protections); *see also* Abdulrahman v. Ashcroft, 330 F.3d 587, 596 (3d Cir. 2003) ("[I]t is well established that 'due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities.'" (citation omitted)); Hussain v. Rosen, 985 F.3d 634, 642–45 (9th Cir. 2021).

because the presumption as structured effectively prejudges the outcome, thereby removing the adjudicator from being able to apply the law and arrive at a different conclusion, or because the presumption permits the adjudicator to disregard the rebuttal mechanism entirely when the adjudicator has some bias.

Consider, for example, *Colmenar v. INS*,[213] which involved a doctor seeking asylum from the Philippines after receiving death threats because he treated an opposition party leader's son, who later died.[214] At the outset of the merits hearing, the immigration judge "indicated that he had already judged Colmenar's claim," referring to the case as a medical malpractice dispute that was an improper basis for asylum.[215] As a result, the immigration judge refused to permit Mr. Colmenar to testify about an incident that may have elucidated a political motive for the death threats, which could have been grounds for asylum.[216] In so doing, the immigration judge "behaved not as a neutral factfinder interested in hearing the petitioner's evidence, but as a partisan adjudicator seeking to intimidate Colmenar and his counsel."[217] Such prejudgment, the court held, denied Mr. Colmenar a "full and fair hearing or a reasonable opportunity to present evidence on his behalf."[218] The court further held that this defect prejudiced Mr. Colmenar because, had he been able to testify, there may have been a different outcome.[219] The court found prejudice even though it was unclear what Mr. Colmenar would have testified about; he only needed to demonstrate that the adjudicator's conduct potentially affected the outcome of the proceedings.[220] In this way, an immigration adjudicator's prejudgment of a case may be constitutionally problematic because it precludes a noncitizen from presenting evidence on his behalf.

The constitutional concerns that prejudgment raises are not confined to cases where the immigration judge precludes an individual from presenting evidence. The right to be free of prejudgment and to fully present evidence would be meaningless without its logical corollary: evidence presented must, in fact, be considered.[221] As courts have held,

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213 210 F.3d 967 (9th Cir. 2000).

214 *See id.* at 969.

215 *Id.* at 971.

216 *Id.*

217 *Id.*

218 *Id.*

219 *Id.* at 968.

220 *Id.* at 972.

221 *Cf.* Getachew v. INS, 25 F.3d 841, 845 (9th Cir. 1994) (holding that "[c]orollary to the right to a hearing before deportation is the right to a deportation decision based on the record created during and before the hearing," and thus due process requires the Board "to refrain from taking administrative notice of facts not in the record unless the procedures it follows are fair under the circumstances").

"a hearing where an immigration judge cannot be said to have *fairly considered* the evidence presented by the petitioners is one where those petitioners have been deprived of due process."[222] To conclude otherwise would render proceedings empty rituals indeed.

The Ninth Circuit suggested as much in *Reyes-Melendez v. INS*.[223] At issue in that case was whether the noncitizen could demonstrate extreme hardship to his U.S. citizen child, whom he fathered through an affair, for purposes of suspension of deportation.[224] The immigration judge declined to find extreme hardship.[225] In so doing, however, the immigration judge "very early in the hearing" "judged" the noncitizen to be "morally bankrupt" for having a marital affair,[226] and stated that she would not "'reward' him for having an 'illicit relationship.'"[227] The immigration judge acknowledged that the laws and "mores may have changed" regarding marital affairs but not, in her opinion, "to the point where that is acceptable by a reasonable person."[228] The Ninth Circuit concluded that the immigration judge's conduct was constitutionally defective and prejudiced the noncitizen because her bias "prevented her from considering, yet alone weighing, the impact" of the evidence presented.[229] In other words, an adjudicator violates due process when they make up their mind "before considering all relevant evidence."[230]

Effectively irrebuttable presumptions mirror the concerns of this prejudgment dilemma: a presumption, once triggered, predetermines the outcome of the underlying issue, regardless of whether or what evidence is presented. In some cases, individuals may be precluded from presenting evidence in the first instance given the structure of the so-called rebuttable presumption. This was the case in *Landano*, in which the presumption operates to withhold the prerequisite information that individuals need to rebut the presumption.[231] In other cases, immigration adjudicators fail to inform individuals about the presumption or how it can be rebutted—as is common in cases applying *Y-L-*.[232]

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222 Ahmed v. Gonzales, 398 F.3d 722, 725 (6th Cir. 2005) (emphasis added) (holding that the noncitizen was deprived of a fair hearing where the immigration judge based his adverse credibility determination and asylum denial on his misunderstanding of the evidence presented); *see also* Amadou v. INS, 226 F.3d 724, 727 (6th Cir. 2000) (holding that the noncitizen's due process rights were violated when a translator prevented an immigration judge from understanding the evidence presented).

223 342 F.3d 1001 (9th Cir. 2003).

224 *Id.* at 1004–05.

225 *Id.* at 1005.

226 *Id.* at 1007.

227 *Id.*

228 *Id.* at 1005.

229 *Id.* at 1007.

230 *Id.* at 1009.

231 *See supra* Section II.B.2.

232 *See supra* Part I.

This adjudicatory failure to inform individuals about and properly implement the presumption is particularly consequential given that many immigrants—especially those who are detained,[233] as is the case for many individuals subjected to *Y-L-*'s ambit—are not represented and are instead forced to navigate the "labyrinthine"[234] immigration system pro se.[235] For these individuals who understandably do not know how to—or even that they can—rebut the presumption, such presumptions effectively preclude them from presenting evidence.[236] One cannot answer a question one did not know was asked. These cases, by operation of the effectively irrebuttable presumptions at play, suffer from the same defect as the adjudication in *Colmenar*: the presumption is akin to a prejudgment that obfuscates an individual's meaningful opportunity to present evidence.[237]

Even where individuals are able to present evidence, the impact of effectively irrebuttable presumptions is that the evidence is not fairly considered. Where adjudicators treat a presumption as dispositive and thus fail to evaluate the rebuttal standard, the adjudicators have, as in *Berry v. Sullivan*[238] and *Reyes-Melendez v. INS*,[239] effectively made up their minds before reviewing the evidence. The same holds true for

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233 *See, e.g.*, Aditi Shah & Eunice Hyunhye Cho, ACLU, No Fighting Chance: ICE's Denial of Access to Counsel in U.S. Immigration Detention Centers 6 (2022) (reporting that in fiscal year 2022, 78.7% of detained noncitizens in removal proceedings did not have counsel); *Who Is Represented in Immigration Court?*, TRAC Immigr. (Oct. 16, 2017), https://trac.syr.edu/immigration/reports/485/ [https://perma.cc/EED9-QQHC] (reporting that the representation rates for detained individuals have ranged between ten and thirty percent between 2000 and 2017); Ingrid Eagly & Steven Shafer, Am. Immigr. Council, Access to Counsel in Immigration Court 2–3 (2016) (reporting that only fourteen percent of detained immigrants manage to find legal counsel).

234 *See, e.g.*, Drax v. Reno, 338 F.3d 98, 99–100 (2d Cir. 2003) (describing immigration law as "a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion").

235 Although noncitizens have the right to counsel under the INA, they do not have the right to government-appointed and funded counsel. *See* 8 U.S.C. § 1362; *see, e.g.*, Andrew Leon Hanna, Note, *A Constitutional Right to Appointed Counsel for the Children of America's Refugee Crisis*, 54 Harv. C.R.-C.L. L. Rev. 257, 265–67 (2019). Representation in removal proceedings, however, drastically increases an individual's likelihood of success. *See Speeding Up the Asylum Process Leads to Mixed Results*, TRAC Immigr. (Nov. 29, 2022), https://trac.syr.edu/reports/703/ [https://perma.cc/GZC6-WPPE] (reporting that the grant rate for represented asylum seekers in 2022 was forty-nine percent, as compared to eighteen percent for those who were not represented).

236 Recognizing the complexity of the U.S. immigration system, particularly for pro se individuals, federal appellate courts have unanimously agreed that immigration judges have a legal duty to develop the record in immigration court proceedings, grounded in either constitutional due process norms or the INA's assurance that every noncitizen receives a meaningful, full, and fair hearing. *See, e.g.*, Quintero v. Garland, 998 F.3d 612, 622–23 (4th Cir. 2021) (collecting cases across circuits and holding that immigration judges have a legal duty to develop the record). Courts have held that this duty "becomes especially crucial in cases involving unrepresented noncitizens." *Id.* at 627.

237 *See supra* note 213.

238 *See supra* Section II.B.1.

239 *See supra* Section III.B.1.

adjudicators who set the standards for rebuttal to such levels that no amount of evidence can reasonably overcome the presumption.[240] In this way, effectively irrebuttable presumptions frustrate the fundamental guarantee to a neutral arbiter.

(Ir)rebuttable presumptions thus effectively deny individuals the right to a neutral arbiter by, through their structure or implementation, affirmatively precluding individuals from presenting evidence or rendering any evidence presented futile. Hearings applying effectively irrebuttable presumptions then become empty rituals far short of the right to a full and fair hearing.

Second, effectively irrebuttable presumptions further offend another component of a full and fair hearing: the right to an individualized determination.[241] As at least one circuit has articulated, merely providing an individualized hearing does not satisfy the individualized determination requirement.[242] The Board must show "sufficient indicia" that an individualized determination was made.[243] Immigration adjudicators fail to provide the individualized determination required by due process when they fail to provide any indication that they conducted a particularized consideration of the legal standard[244] or otherwise fail to offer any explanation beyond a conclusory statement justifying their conclusion.[245]

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240 *See supra* Section II.B.3.

241 *See, e.g.*, Abdulai v. Ashcroft, 239 F.3d 542, 549–50 (3d Cir. 2001), *superseded by statute* in Samet v. Att'y Gen., 840 Fed. App'x. 701 (3d Cir. 2020) ("[T]he question for due process purposes is not whether the BIA reached the *correct* decision; rather, it is simply whether the Board made an individualized determination of [the noncitizen's] interests . . . ."); Chong v. Dist. Dir., INS, 264 F.3d 378, 386 (3d Cir. 2001) (affirming that due process required that the noncitizen "have the right to an individualized determination of her interests"); Kamara v. Att'y Gen., 420 F.3d 202, 211 (3d Cir. 2005); de la Llana-Castellon v. INS, 16 F.3d 1093, 1096 (10th Cir. 1994) ("In the adjudicative context, due process entitles a person to . . . an individualized determination of his interests . . . ."); Rhoa-Zamora v. INS, 971 F.2d 26, 33 (7th Cir. 1992) ("[T]he Board is required to "'engage in a careful, individualized review of the evidence presented in [his] application[] and hearing[]." (alteration in original) (quoting Kaczmarczyk v. INS, 933 F.2d 588, 595 (7th Cir. 1991))).

242 *See, e.g.*, Ford v. Bureau of Immigr. & Customs Enf't's Interim Field Off. Dir. for Det. & Removal, 294 F. Supp. 2d 655, 662 (M.D. Pa. 2003) (concluding that the Board failed to provide an individualized determination even though there was an individualized hearing); Gelaneh v. Ashcroft, 153 F. App'x 881, 887 (3d Cir. 2005) (same); *Kamara*, 420 F.3d at 211–12 (conducting an individualized determination analysis even though there was an individualized hearing); *Chong*, 264 F.3d at 386 (same).

243 *Kamara*, 420 F.3d at 211 (quoting *Abdulai*, 239 F.3d at 550); *see Chong*, 264 F.3d at 386–87 (concluding that the Board provided an individualized determination when the noncitizen was afforded an opportunity to present arguments and evidence at a hearing and the Board "looked at the specific facts of Chong's case" rather than "blindly following a categorical rule" that all drug convictions are "particularly serious crimes").

244 *See, e.g.*, *Gelaneh*, 153 F. App'x at 887.

245 *See, e.g.*, Ford v. Bureau of Immigr. & Customs Enf't's Interim Field Off. Dir. for Det. & Removal, 294 F. Supp. 2d at 662–63.

In *Gelaneh v. Ashcroft*,[246] for instance, the Third Circuit explicitly noted that, as a strictly legal manner, *Y-L-* created a "*presumption*, and not a *per se* rule."[247] In practice, however, the immigration judge and the Board "automatically concluded" after a hearing that Mr. Gelaneh's offense fell within the *Y-L-* presumption: the Board "simply noted the presumption of seriousness, and then summarily applied the presumption to Gelaneh's offense."[248] Indeed, the Board "did not demonstrate that it was even aware of exceptions to the presumption of seriousness announced in *Y-L-*, let alone that it had determined that Gelaneh's offense did not constitute such an exception."[249] Such conduct did not meet the individualized determination requirement.[250] Although Mr. Gelaneh was afforded a hearing, the right to an individualized determination mandated that adjudicators determine whether Mr. Gelaneh met the six criteria enumerated in *Y-L-*.[251] The court opined that where "the Board treats a rebuttable presumption as an irrebuttable per se rule, it fails to provide the individualized determination that due process requires."[252]

The district court in *Ford* similarly concluded that the Attorney General in *Y-L-* created a rebuttable presumption, but that in applying *Y-L-*, the Board failed to make an individualized determination.[253] This was so because the Board stated only that it did "not find that the circumstances of the respondent's conviction warrant a conclusion that he falls within the narrow exception outlined in *Matter of Y-L-*" and "failed to offer any explanation concerning why Petitioner did not meet the requirements of the exception."[254] Problematically, the "Board did not specify which facts precluded Petitioner from the exception. Nor did the Board weigh" any of the *Y-L-* factors.[255] This violated the right to an

246 153 F. App'x 881 (3d Cir. 2005).

247 *Id.* at 886.

248 *Id.* at 886–87.

249 *Id.* at 887.

250 *Id.* at 886–87.

251 *Id.* at 887.

252 *Id.*; *see also* Chong v. Dist. Dir., INS, 264 F.3d 378, 386–87 (3d Cir. 2001) (suggesting that the Board would fail to provide an individualized determination if it "blindly follow[ed] a categorical rule"). Despite concluding that the Board failed to consider the rebuttal test, the Third Circuit weighed the six-criteria test itself in the first instance and found that the Board's error did not prejudice the respondent. *See Gelaneh*, 153 F. App'x at 887. Arguably, the reviewing court erred in applying the rebuttal mechanism in the first instance and should have instead remanded to the Board to do so.

253 Ford v. Bureau of Immigr. & Customs Enf't's Interim Field Off. Dir. for Det. & Removal, 294 F. Supp. 2d 655, 662–63 (M.D. Pa. 2003).

254 *Id.* at 662.

255 *Id.*

individualized determination, which "demands more than a conclusory statement."[256]

Effectively irrebuttable presumptions, by their nature and operation, violate this right to an individualized determination in numerous ways. In some cases—as illustrated in *Ford* and *Gelaneh*[257] regarding the *Y-L-* presumption and in *Berry*[258] regarding the substantial gainful activity presumption for disability benefits—adjudicators fail to address the rebuttal mechanism at all. They fail to state the presumption, how it can be rebutted, or offer any explanation or evidence that they considered whether the individual can overcome the presumption. A hearing in this way does not yield an individualized determination. While the adjudicator may perform the motions of accepting evidence to overcome the presumption, the adjudicator cannot be deemed to make an individualized determination if they do not apply the standard to overcome the presumption.

This same effect occurs when an immigration judge does consider the rebuttal standard, but such consideration is an exercise in futility because the presumption as structured and implemented is impossible to overcome. No matter how individualized the assessment is, only a standard outcome can result. Effectively irrebuttable presumptions, in this way, nullify any individualized assessment and are fundamentally at loggerheads with providing an individualized determination.

Although the fundamental fairness test calls for a case-by-case analysis, on the whole, the neutral arbiter and individualized determination defects posed by effectively irrebuttable presumptions prejudice noncitizens in their removal proceedings. At bottom, effectively irrebuttable presumptions are ones where no amount of evidence can overcome the presumption. Surely, the use of an effectively irrebuttable presumption over a rebuttable presumption that is, in fact, reasonably rebuttable "potentially affect[s] the outcome of the proceedings"[259] to a prejudicial degree.[260]

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256 *Id.* at 663.

257 *See supra* Section III.B.1.

258 *See supra* Section II.B.1.

259 Colmenar v. INS, 210 F.3d 967, 972 (9th Cir. 2000).

260 For these same reasons, effectively irrebuttable presumptions also violate the INA's requirement that noncitizens in removal proceedings "shall have a reasonable opportunity to examine the evidence against the [noncitizen], to present evidence on the [noncitizen's] own behalf, and to cross-examine witnesses presented by the Government." 8 U.S.C. § 1229a(b)(4)(B); *see also* 8 C.F.R. § 1240.1(c) (2022) (providing that immigration judges "shall receive and *consider* material and relevant evidence" (emphasis added)). A rigorous statutory analysis is beyond the scope of this Article, but the statutory violation is explored briefly here because courts generally prefer resolving challenges by statutory rather than constitutional interpretation, and because the statutory right to "present" evidence is rooted in constitutional due process precepts. *See* Jacinto v. INS, 208 F.3d 725, 727–28 (9th Cir. 2000). As others have argued, the right to meaningfully present evidence carries a necessary corollary—the right for that evidence to be fairly considered. *See*

2. *Applying the* Mathews v. Eldridge *Due Process Test*

Under the Supreme Court's *Mathews v. Eldridge* test, effectively irrebuttable presumptions similarly offend due process norms. In *Mathews v. Eldridge*, the Supreme Court explained that due process "is flexible and calls for such procedural protections as the particular situation demands."[261] To determine what process is due, courts balance three considerations:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[262]

When it comes to effectively irrebuttable presumptions, the private interest necessarily depends on the underlying subject of the presumption. Because presumptions in the immigration context often pertain to an individual's removability and eligibility for relief, the private interests coalesce around common harms: namely, deportation. Noncitizens precluded from applying for harm-based forms of relief may be deported to a country where they will suffer severe harm or death.[263] Such is the case with the presumption in *Y-L-*, which bars an individual from applying for withholding of removal even if they have otherwise

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Joshua S. Walden, Note, *A Right to Gather Evidence: Interpreting Statutory Protections for Detained Immigrants Facing Removal Hearings*, 31 STAN. L. & POL'Y REV. 103, 129 (2020) (interpreting the statutory term "present"). "Present," as defined by the dictionary, means "to lay . . . before a court *as an object of inquiry*." *Present*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/present [https://perma.cc/HYF4-TEEM] (emphasis added); *see* Walden, *supra* note 260, at 129 (interpreting the INA to require safeguards for detained immigrants). This latter clause in the INA's requirement is significant: presenting evidence does not merely entail laying it forth before an adjudicator; rather, that evidence constitutes an "object of inquiry" for the adjudicator to fairly consider. *See* MERRIAM-WEBSTER, *supra*. Effectively irrebuttable presumptions vitiate this right. As previously discussed, immigration adjudicators applying an effectively irrebuttable presumption have, in practice, prejudged the case and failed to consider the evidence. Where a presumption, once triggered, predetermines the outcome of the issue, the "opportunity . . . to present evidence" would be toothless indeed. *See* 8 U.S.C. § 1229a(b)(4)(B).

261 Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

262 *Id.* at 335.

263 *See, e.g.*, Mills et al., *supra* note 205, at 372–75 (arguing that refugees have a heightened private interest in avoiding death, torture, and serious bodily harm, and that "the interest of the refugee parallels the interest of death penalty litigants"); Sabrineh Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. MICH. J.L. REFORM 1001, 1004 (2015) ("Asylum seekers can face detention, torture, or even death if forced to return to their home countries.").

demonstrated that they will be persecuted or killed if forced to return to their country of origin.[264] Even if noncitizens do not fear persecution in their country of origin, deportation itself is an exacting consequence. As the Supreme Court has recognized, noncitizens' private interest against deportation "is, without question, a weighty one."[265] Noncitizens who are deported "lose the right to stay and live and work in this land of freedom'" or "lose the right to rejoin [their] immediate family, a right that ranks high among the interests of the individual."[266]

Deportation may also harm a noncitizen's U.S. citizen family members who rely on them for support, such as young children or relatives with medical ailments. These family members face a Sophie's Choice: go to a foreign country where they may not speak the language or remain in the United States without their primary caretaker. Studies have shown that having a parent be detained or deported can have long-term adverse impacts on a child's health and development.[267] These consequences are central to the presumption at issue in *In re Castillo-Perez*,[268] an attorney general self-certified decision regarding eligibility for cancellation of removal relief for certain noncitizens who have lived in the United States for ten years.[269] Among other requirements, individuals seeking cancellation of removal must demonstrate that they have good moral character and that their removal would cause extreme hardship to

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264 *See supra* Part I.

265 Landon v. Plasencia, 459 U.S. 21, 34 (1982); *see* Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (acknowledging the liberty interests at stake in removal proceedings as the potential for the loss "of all that makes life worth living"); Bridges v. Wixon, 326 U.S. 135, 164 (1945) (recognizing that the hardship noncitizens face in removal proceedings is "often as great if not greater than the imposition of a criminal sentence"); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (calling deportation "a drastic measure and at times the equivalent of banishment or exile"); Ardalan, *supra* note 263 at 1004 ("The consequences of deportation are often just as severe as, if not more severe than, the consequences of criminal conviction.").

266 *Landon*, 459 U.S. at 34 (citations omitted); *see also Ng Fung Ho*, 259 U.S. at 284 (stating that deportation may result "in loss of both property and life; or of all that makes life worth living").

267 *See, e.g.*, *U.S.-Citizen Children Impacted by Immigration Enforcement*, Am. Immigr. Council (June 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/us_citizen_children_impacted_by_immigration_enforcement_0.pdf [https://perma.cc/FGR3-MTLY] (collecting studies about the impact of family members experiencing immigration enforcement on children).

268 27 I. & N. Dec. 664 (A.G. 2019).

269 Cancellation of removal is available to both LPR and non-LPRs, with different eligibility requirements for each category. *See* 8 U.S.C. § 1229b(a)–(b). LPR cancellation terminates a removal order against an LPR and reinstates the former LPR status if they were an LPR for five years or more, resided in the United States continuously for seven years with legal status, and have not been convicted of an aggravated felony. *Id.* § 1229b(a). Non-LPR cancellation terminates a removal order and grants LPR status to individuals who have been physically present in the United States for ten or more continuous years, have good moral character, have not been convicted of certain offenses, and establish that their removal would result in "exceptional and extremely unusual hardship" to a qualifying relative. *Id.* § 1229b(b)(1).

a U.S. citizen family member.[270] As to the former, the Attorney General in *Castillo-Perez* held that an individual with two convictions for driving under the influence is presumed to lack good moral character unless the individual can demonstrate that the convictions "were an aberration."[271] As a result, if an individual cannot defeat the good moral character presumption, they are precluded from cancellation of removal and will be deported even if they have lived in the United States for ten or more years and their removal would cause extreme hardship to a U.S. citizen family member.[272] The private interest in having a realistic opportunity to overcome rebuttable presumptions is thus grave for both the individual themselves and their families and communities.

On the other side of the balance, the government's interests concerning effectively irrebuttable presumptions present a unique circumstance. The government's interests include efficiency in backlogged immigration courts and reducing additional costs and resource needs.[273] But concerning effectively irrebuttable presumptions, many of these efficiency and cost considerations have already been decided. Indeed, the agency necessarily opted to establish a rebuttable presumption rather than an irrebuttable presumption or per se rule.[274] Thus, although requiring immigration adjudicators to analyze and explain whether an individual has rebutted a presumption may take time, and ensuring that rebuttal mechanisms—both how they are structured and their standards are interpreted—may cost resources and result in more individuals receiving relief, this is what the government intended in the first instance by creating a rebuttable presumption. And rebuttable presumptions themselves are cost-saving: as scholars have noted, they "avoid wasted time and effort when the presumed fact is strongly based on logic and common sense" and "avoid a procedural impasse caused by a lack of evidence."[275] In other words, safeguards to identify and eliminate effectively irrebuttable presumptions would ensure that rebuttable presumptions operate as the government intended. Moreover, "Financial cost alone is not a controlling weight in determining

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270 8 U.S.C. § 1229b(b)(1)(B), (D).

271 *Castillo-Perez*, 27 I. & N. Dec. at 671. Whether or not the rebuttable presumption set forth in *Castillo-Perez* is in fact rebuttable is beyond the scope of this Article. Future work should apply the framework set forth in Part II *supra* to determine whether the presumption in *Castillo-Perez* is in fact rebuttable or effectively irrebuttable.

272 *See, e.g.*, *id.* at 665–66, 671–72.

273 *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 347 (1976) (including in the public interest "the administrative burden and other societal costs" associated with providing evidentiary hearings in disability benefit termination cases); Sabrineh Ardalan, *Asymmetries in Immigration Protection*, 85 Brook. L. Rev. 319, 344 (2019); Walden, *supra* note 260, at 130.

274 The Agency made this decision explicit in *Y-L-* when Attorney General Ashcroft opined that he could have, but declined to, establish a per se rule. 23 I. & N. Dec. 270, 276–77 (A.G. 2002).

275 Hjelmaas, *supra* note 22, at 434.

whether due process requires a particular procedural safeguard prior to some administrative decision."[276] In this way, government and private interests with respect to effectively irrebuttable presumptions are aligned.

The government and private interests align in other respects—namely, the public's interest in abiding by its international treaty obligations. Pursuant to international treaty, the United States has *non-refoulement* obligations to not deport refugees to countries where they may be tortured or killed.[277] Those treaty obligations are violated where, as in *Y-L-*, the government bars an individual from applying for humanitarian relief based on an extra-statutory, effectively per se rule disguised as a rebuttable presumption.[278]

The risk that applying an effectively irrebuttable presumption at a hearing erroneously deprives a noncitizen of their fundamental interests is, by the very nature of effectively irrebuttable presumptions, near certain. Be it the structure of the presumption or the ways in which it is implemented in practice, the import of effectively irrebuttable presumptions is that, once triggered, the outcome is all but predetermined. Hearings, in effect, become empty rituals. Unlike *Mathews v. Eldridge*, the inquiry is not whether a hearing is required by due process;[279] rather, it is how to ensure that a hearing applying an effectively irrebuttable presumption provides the process that is due.

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Under either analysis, effectively irrebuttable presumptions thus violate constitutional due process norms, which demand more than an empty ritual. Such presumptions cannot stand at the form-substance interstice between rebuttable and irrebuttable presumptions. If formulated as a rebuttable presumption, they must be, in fact, rebuttable.

These constitutional concerns supersede any agency deference that courts afford in the immigration context specifically and administrative agencies broadly.[280] While courts and scholars have long recognized that

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276 *Eldridge*, 424 U.S. at 348.

277 *See* Ardalan, *supra* note 273, at 328–30. The United States acceded to the 1967 Protocol Relating to the Status of Refugees, applying articles 2 through 34 of the 1951 United Nations Convention Relating to the Status of Refugees. U.N. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150, 176. Article 33 of the Convention provides that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened," except where the individual, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." *Id.* at art. 33(1)–(2).

278 *See Y-L-*, 23 I. & N. Dec. at 270; Ardalan, *supra* note 273, at 328–31.

279 *Eldridge*, 424 U.S. at 323.

280 Courts and scholars generally apply the two-step deference framework set forth in *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), to review agency interpretations of statutes, including BIA and attorney general certified decisions. *See, e.g.*, Negusie v. Holder,

the political branches are at their zenith when it comes to immigration matters,[281] agency authority to create per se rules is not unfettered.[282] So-called immigration exceptionalism and agency deference broadly stop at constitutional violations.[283] At bottom, so-called rebuttable

555 U.S. 511, 516–17 (2009) (stating that *Chevron*'s application to immigration agency decisions is "well settled"); INS v. Cardoza-Fonseca, 480 U.S. 421, 446–48 (1987); *see also* Rachel Gonzalez Settlage, *Rejecting the Children of Violence: Why U.S. Asylum Law Should Return to the Acosta Definition of "A Particular Social Group*," 30 GEO. IMMIGR. L.J. 287, 298 (2016) (explaining that federal courts generally apply the *Chevron* framework in reviewing BIA decisions). *See generally* Jaclyn Kelley-Widmer & Hillary Rich, *A Step Too Far:* Matter of A-B-*, "Particular Social Group," and* Chevron, 29 CORNELL J.L. & PUB. POL'Y 345 (2019) (applying the *Chevron* two-step framework to challenge the legality of Attorney General Sessions' certified decision in *A-B-*, 27 I. & N. Dec. 227 (A.G. 2018)). At the first step of the *Chevron* two-step framework, if courts determine that Congress has spoken unambiguously to the question at hand, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. If, however, "the statute is silent or ambiguous" as to Congress's intent, courts proceed to step two, which considers "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Courts uphold the agency interpretation so long as it is reasonable. *See id.* The *Chevron* analysis is admittedly deferential. *See, e.g.*, Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 6, 33 fig. 2, 35 fig. 3 (2017) (finding that circuit courts resolved cases at *Chevron* step one thirty percent of the time, and of those cases upheld the agency interpretation thirty-nine percent of the time; of the seventy percent of agency interpretations that reached *Chevron*'s second step, courts upheld the agency's interpretation 93.8% of the time). But the reasonableness analysis necessarily has bounds lest it be toothless. *See* Matthew F. Soares, Note, *Agencies and Aliens: A Modified Approach to* Chevron *Deference in Immigration Cases*, 99 CORNELL L. REV. 925, 948 (2014) ("Although [*Chevron* step two] has often been treated in a rubber-stamp fashion, it ought not be.").

281 *See* T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 34 (1990); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1392–94 (1999); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990) [hereinafter Motomura, *Phantom Constitutional Norms*] (describing the plenary power doctrine); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 465–83 (2009) (describing the evolution of deference principles in federal immigration law).

282 *See* Kelley-Widmer & Rich, *supra* note 280, at 368. More broadly, immigration scholars have traced the decline of immigration exceptionalism and the plenary power doctrine's hold. *See, e.g.*, Kevin R. Johnson, *Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 64, 118 (2015) (explaining that the Supreme Court has, "to a large extent, continued to bring U.S. immigration law into the jurisprudential mainstream" and that immigration exceptionalism is "slowly but surely . . . on its way out"); Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 153–58 (2015) (explaining the decline of the plenary power doctrine); *see also* Motomura, *Phantom Constitutional Norms*, *supra* note 281, at 610 ("[C]ourts will continue to avoid this directly applicable constitutional [plenary power] doctrine through subconstitutional decisions that rely on phantom constitutional norms much more favorable to [noncitizens].").

283 *See* Zadvydas v. Davis, 533 U.S. 678, 695–700 (2001) (explaining that plenary power "is subject to important constitutional limitations" and rejecting the government's argument that it can detain noncitizens indefinitely post-removal order); Hernandez-Carrera v. Carlson, 547 F.3d 1237, 1249 (10th Cir. 2008) ("It is well established that the canon of constitutional avoidance does constrain an agency's discretion to interpret statutory ambiguities, even when *Chevron* deference

presumptions that are, in fact, effectively irrebuttable may not use the rebuttable name as a shield from judicial and agency scrutiny and irrebuttable nature as a sword against individuals. The next Part accordingly recommends safeguards required to make effectively irrebuttable presumptions properly rebuttable in line with due process norms.

IV. Recommendations for Safeguards Against Effectively Irrebuttable Presumptions

Due process requires safeguards to identify effectively irrebuttable presumptions and ensure that such presumptions are in fact rebuttable. This Part proposes safeguards in the immigration context, but these recommended proactive and reactive measures may apply in other civil contexts in which effectively irrebuttable presumptions arise.

The first-order safeguard against effectively irrebuttable presumptions is identifying which presumptions are in fact rebuttable and which are effectively irrebuttable. The appropriate agency[284] should undertake this identification exercise proactively by applying the four-part framework set forth in Part II to existing rebuttable presumptions to determine whether, based on the presumption's structure of implementation, the presumption is effectively irrebuttable. Consider an illustrative appraisal of the *Y-L-* presumption, beginning with the threshold issue that immigration adjudicators regularly fail to consider the minimum six criteria needed to overcome the presumption.[285] In practice, the presumption, once triggered, is dispositive.[286] Any analysis of the *Y-L-* presumption further requires interrogating whether the presumption as structured is preclusive—namely, whether it is reasonable to require that a respondent establish all six criteria before an immigration adjudicator may consider other extraordinary circumstances such as the coercion and duress that Mr. Sanchez suffered or mental health concerns.[287] Or whether some of the factors contradict one another—for example, it would be difficult to make money from a drug transaction and be only peripherally involved. Even assuming that the presumption is structurally rebuttable, the standard for each of the minimum

would otherwise be due."); Das, *supra* note 282, at 191–92 ("[T]here is little doubt that, where applicable, constitutional avoidance operates to trump *Chevron* deference. . . . The canon thus blocks deference to an agency interpretation that raises serious constitutional concerns.").

284 In the immigration context, the responsible agency would be the EOIR or the Department of Justice.

285 *See supra* Part I.

286 *See supra* Part I (explaining that vanishingly few cases have successfully overcome the *Y-L-* presumption); DeCarvalho v. Garland, 18 F.4th 66, 71 (1st Cir. 2021) (expressing concern that "based on the experience of two decades and Congress's increasingly nuanced view of drug trafficking offenses, *Matter of Y-L-* may have turned out to over-shoot the mark" (footnote omitted)).

287 *See* Y-L-, 23 I. & N. Dec. 270, 281 (A.G. 2002).

criteria needed to rebut the presumption is set at an unreasonable level. These structural and implementation issues are reflected in the problematic reality that, as the government tacitly conceded in *DeCarvalho v. Garland*,[288] vanishingly few cases have successfully overcome the presumption. The *Y-L-* presumption, in this way, is ripe for amendment.

Admittedly, ascertaining whether immigration judges are, in fact, applying the presumption[289] and how many cases have successfully overcome the presumption[290] may be challenging where the agency has not maintained historical records about rulings on presumptions. Accordingly, to facilitate this identification process, the appropriate agency should establish a system to track and monitor how rebuttable presumptions are applied in proceedings and the outcomes thereof.[291] These efforts should track, at a minimum, whether the adjudicator evaluated the rebuttal mechanism or instead improperly treated the presumption as dispositive; what evidentiary or review standard the adjudicator applied in considering whether the presumption was rebutted; and whether the presumption was ultimately rebutted. Aggregating this information will facilitate proactively identifying effectively irrebuttable presumptions or, at the very least, marking for closer inspection presumptions with low rebuttal rates.

Safeguards are needed in a reactionary posture as well. Where litigants challenge presumptions as effectively irrebuttable, as numerous cases have done in the *Y-L-* context,[292] federal reviewing courts must look beyond the presumption's claim to be rebuttable. That the agency "purported . . . [to create only] a strong presumption, not a per se rule" cannot be taken at face value to yield a presumption that is "[p]resumably" rebuttable[293]: deference to agencies in creating extra-statutory interpretations halts at the borders of process violations.[294] This is particularly true where presumptions that are rebuttable in name only act to circumvent judicial review. The Ninth Circuit's decision in *Blandino-Medina v. Holder*[295] illustrates the discordance.

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288 18 F.4th 66, 70 (1st Cir. 2021. The First Circuit noted that the record was devoid of any examples that rebutted the *Y-L-* presumption. *See id.*, 18 F.4th at 71 n.4.

289 *See supra* Section II.B.1.

290 *See supra* Section II.B.4.

291 EOIR confirmed that it does not currently track the outcome of cases applying *Y-L-*, in response to a FOIA request filed by this Author. *See supra* note 64.

292 *See supra* note 19.

293 Miguel-Miguel v. Gonzales, 500 F.3d 941, 945–47 (9th Cir. 2007) (emphasizing that "[t]he Attorney General in *Y-L-* purported *not* to be creating a per se rule" and thus "[p]resumably *Y-L-* will be interpreted consistent with this statement and there will be some cases in which its exception applies"); *see also* Ford v. Bureau of Immigr. & Customs Enf't, 151 F. App'x 152, 154 (3d Cir. 2005) (per curiam) (emphasizing that *Y-L-* concluded its discussion of "particularly serious crime[s] with an unambiguous disavowal" of creating a per se category).

294 *See supra* Part III.

295 712 F.3d 1338 (9th Cir. 2013).

In *Blandino-Medina*, which involved the same particularly serious crime designation as at issue in *Y-L-*, the Board concluded that the offense of lewd and lascivious conduct with a child was per se a particularly serious crime that renders an individual ineligible for withholding of removal.[296] The Ninth Circuit vacated the Board's decision.[297] Applying the *Chevron*[298] framework, the Ninth Circuit held that the Board was not authorized to create a new category of per se particularly serious crimes in the withholding of removal context and vacated the Board's per se category.[299] The Ninth Circuit's decision notwithstanding, the Attorney General's decision in *Y-L-*, which effectively creates a per se category for certain drug trafficking aggravated felonies, circumvents a similar fate simply because it is a rebuttable presumption in name only.

In these cases involving effectively irrebuttable presumptions, courts should more closely examine the use of so-called rebuttable presumptions in immigration proceedings and apply the four-part framework set forth in Part II to determine if they are, in fact, rebuttable. In so doing, courts may instruct the parties to supplement the record with any known cases overcoming the presumption and the reasoning therein.[300] Yet, even while increasing judicial scrutiny of challenged presumptions is a necessary safeguard, it is not alone sufficient. This reality is particularly salient given that many immigrants facing effectively irrebuttable presumptions like *Y-L-* are unrepresented and may not know how to or that they can directly challenge the presumption as a matter of law. That is, of course, assuming that they are aware of the presumption in the first instance—a tenuous supposition given that immigration adjudicators regularly fail to inform pro se noncitizens that *Y-L-* is rebuttable, much less how to rebut the presumption.[301] Both proactive and reactive safeguards are thus necessary.

Central to identifying and challenging effectively irrebuttable presumptions is information transparency. While the Executive Office of Immigration Review ("EOIR") is making Board decisions publicly accessible pursuant to a settlement,[302] the release of cases is slow and does not include immigration judge adjudications. This omission is problematic because many respondents do not have counsel and are

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296 *See id.* at 1340–41.

297 *Id.* at 1340.

298 467 U.S. 837 (1984).

299 *See Blandino-Medina*, 712 F.3d at 1343–47.

300 *See* Thorne v. U.S. Dep't of Def., 916 F. Supp. 1358, 1366 (E.D. Va. 1996) (requesting supplemental evidence after determining that the "record is too sparse to permit a confident conclusion on this issue"); DeCarvalho v. Garland, 18 F.4th 66, 71 (1st Cir. 2021) (stating that, on remand, "the government will have the opportunity to supplement the record with any evidence that the presumption can be overcome").

301 *See supra* Part I, Section III.A.

302 *See supra* note 64 and accompanying text.

unable to appeal to the Board. Currently, immigration adjudications are generally available only through a FOIA request,[303] which is time consuming and resource intensive and thus a barrier to meaningfully identifying and challenging effectively irrebuttable presumptions. The appropriate agency should make data for monitoring and tracking efforts publicly accessible, and, at a minimum, the agency should expeditiously make redacted immigration judge and Board decisions accessible so that the public may identify and challenge effectively irrebuttable presumptions.

Once a presumption is identified as effectively irrebuttable in practice, the presumption may be vacated in one of two ways. The attorney general can certify the offending Board or attorney general opinion and reconstitute or clarify the presumption to ensure that it is, in fact, rebuttable. This oversight and amendment mechanism is precisely what the First Circuit contemplated in *DeCarvalho v. Garland* when it remanded to the Board to "provide the Attorney General with an opportunity to consider whether, based on the experience of two decades and Congress's increasingly nuanced view of drug trafficking offenses, *Matter of Y-L-* may have turned out to over-shoot the mark."[304] Alternatively, litigants may directly challenge the presumption's constitutional and statutory validity in a petition for review before a federal appellate court, which is the only avenue for review of Board and attorney general decisions.[305] Federal reviewing courts in this posture must carefully examine the effectively irrebuttable presumption and vacate it as violating due process.[306]

Surely, then, the probative value of establishing safeguards to ensure that so-called rebuttable presumptions are in fact rebuttable is high. The Due Process Clause "forbids the Government to stack the deck" against the noncitizen.[307] Establishing these safeguards would ensure that so-called rebuttable presumptions operate as intended and preserve a noncitizen's right to be meaningfully heard.

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303 *See* Creighton, *supra* note 64.

304 *DeCarvalho*, 18 F.4th at 71 (footnote omitted).

305 Congress has delegated the authority to administer immigration law to the attorney general and has statutorily mandated that Board decisions must be reviewed by the relevant circuit court where the immigration judge sits. 8 U.S.C. § 1252(a)(2)(5), (b)(2); *see* Kelley-Widmer & Rich, *supra* note 280, at 352 n.31 (explaining the process for appealing Board and attorney general decisions).

306 *See supra* Part III.

307 Landon v. Plasencia, 459 U.S. 21, 41 (1982) (Marshall, J., concurring in part, dissenting in part) (stating that the government stacked the deck against the noncitizen where the noncitizen was not given adequate notice of the standards for exclusion or her right to retain counsel and present a defense, which "virtually assured that the Government attorney would present his case without factual or legal opposition").

Conclusion

Rebuttable presumptions are a common fixture of the U.S. legal system and, when properly applied, offer adjudicatory efficiency in fair proceedings. Form and substance, however, do not always comport, as evidenced by presumptions that claim to be rebuttable in name but are effectively irrebuttable in practice. Individuals subject to such presumptions are offered a hearing at which they can attempt to overcome this presumption, but that hearing is merely an empty ritual when the presumption, as structured or implemented, is effectively impossible to rebut or where the adjudicator fails to apply the rebuttal standard at all. Any opportunity to overcome a presumption is also an empty ritual when the individual does not know about the presumption or that it can be rebutted in the first instance—a knowledge asymmetry facing many immigrants forced to navigate the complex U.S. immigration system pro se.

Effectively irrebuttable presumptions, understood as empty rituals, offend constitutional due process norms by circumventing fundamental components of fairness, including the right to a neutral arbiter and an individualized determination. In this light, immigration agencies and federal reviewing courts must look beneath the claim of a rebuttable presumption and instead look to its impact in practice. Agency deference norms stop at the borders of constitutional due process norms. Moreover, effectively irrebuttable presumptions cannot be used to impermissibly circumvent rebuttable presumptions.

Although this Article focuses on effectively irrebuttable presumptions in the immigration context, the impact of and constitutional dilemma inherent in such presumptions reaches beyond immigration to all civil contexts that employ rebuttable presumptions. Thus, agencies—whether the Department of Justice, the EOIR, or the appropriate governing agency in other civil contexts—must take affirmative action to identify and rectify effectively irrebuttable presumptions. Reviewing courts must take a closer look at challenges to presumptions as effectively irrebuttable and vacate those offending (ir)rebuttable presumptions. These safeguards are necessary to convert hearings as empty rituals to hearings that are full and fair as required by due process norms.