COMMENT

GANGING UP ON TERRORISM: TRANSNATIONAL GANGS AND TIER III TERRORIST ORGANIZATIONS

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The Immigration and Nationality Act sets forth three distinct tiers of terrorist organizations. Unlike Tiers I and II, Tier III does not require official designation in the Federal Register by cabinet level officials. Instead, the tier calls for case-by-case adjudication by executive branch employees such as asylum officers and immigration judges. Noncitizens who engage in certain activities with or who have certain ties to any of the three tiers of organizations are inadmissible to the United States and barred from most forms of immigration relief, subject to limited exceptions. Nevertheless, in recent years, a variety of entities—including the Trump administration—have called for officially designating transnational gangs as terrorist organizations.

This Comment argues that transnational gangs should not be considered Tier III terrorist organizations because careful statutory interpretation demonstrates they are not a definitional match. First, through application of the whole text canon of construction, this Comment concludes Congress intended a political motivation requirement to terrorist organizations. Further, the avoidance of absurdity canon demonstrates a broad reading of the Tier III statute is impermissible. Third, this Comment explains why a direct authorization

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requirement to terrorist activity and limitations to the term "subgroup" are properly implied into the Tier III statute. Appling these principles to transnational gangs, this Comment concludes that the gangs cannot permissibly be construed as Tier III terrorist organizations.

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INTRODUCTION

Ana, who lived in a rural village in El Salvador, was twenty years old when she became romantically involved with a sergeant in the Salvadoran Army named Ruby.[1] The country was in the midst of a civil war, and guerrillas who had camped in the nearby mountains kidnapped Ana and Ruby, ultimately killing Ruby in front of her.[2] The

1. Jenna Krajeski, *A Victim of Terrorism Faces Deportation for Helping Terrorists*, NEW YORKER (June 12, 2019), https://www.newyorker.com/news/news-desk/a-victim-of-terrorism-faces-deportation-for-helping-terrorists [https://perma.cc/KWW2-ZV5G].

2. *Id.*

guerrillas demanded Ana perform manual labor for them.[3] Afraid she would meet the same fate as Ruby unless she acquiesced, Ana made tortillas for the guerrillas and washed their clothes in the river.[4] When one of the guerrillas realized Ana had three children at home, he took pity on her and helped her escape.[5] Her children had not been kidnapped but rather were back in her village with her mother.[6] Assuming it was safest for both her and her children, she fled without them, trekking through El Salvador, Guatemala, and Mexico, and ultimately arriving in the United States in 1991.[7] After a tumultuous and storied history applying for various immigration benefits while in the United States, the Board of Immigration Appeals (BIA)—an appellate administrative body responsible for reviewing decisions of immigration judges and interpreting U.S. immigration laws[8]—ultimately determined Ana was ineligible for asylum and withholding of removal.[9] The BIA found she had provided "material support" to a terrorist organization by cooking and cleaning for the guerillas back in El Salvador.[10] Despite the fact that Ana herself was a victim of the guerrillas, the United States was attempting to deport her for aiding the guerrillas, which the United States deemed a terrorist group.[11] Unfortunately, Ana is far from alone in falling victim to the U.S. definition of terrorism.[12]

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3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Board of Immigration Appeals*, U.S. DEP'T. OF JUST., https://www.justice.gov/eoir/board-of-immigration-appeals [https://perma.cc/MF85-V6R5].
9. *See In re* A-C-M-, 27 I&N Dec. 303, 309–11 (B.I.A. 2018) (denying Ana's defense of duress).
10. *See id.* The decision also noted that she had "received military-type weapons training from the guerrillas," despite the fact that she had refused the training on the one and only occasion the guerrillas had attempted to train her to shoot. *Id.* at 304; *see also* Krajeski, *supra* note 1 (recounting Ana's story). The material support bar will be discussed in more depth in Section I.D. *infra.*
11. *See In re A-C-M-*, 27 I&N Dec. at 304, 311 (classifying the guerillas as a terrorist group and issuing the order to deport Ana).
12. *See* STEPHEN H. LEGOMSKY & DAVID B. THRONSON, IMMIGRATION AND REFUGEE LAW AND POLICY 552 (7th ed. 2019) (estimating thousands have been excluded from the United States based on allegations of providing material support to terrorist groups).

Terrorism has proven to have an elusive definition. Indeed, a variety of conflicting definitions are accepted internationally and domestically.[13] Nevertheless, despite the imprecise and inconsistent definitions, U.S. immigration law includes extremely broad "terrorism bars"[14] which prevent those involved with terrorist organizations, subgroups of terrorist organizations, or those who provide material support to terrorist organizations from receiving a visa.[15] One past Board Member of the BIA noted the extreme breadth of the terrorism bars in a now famous concurrence.[16] He explained that "[r]ead literally, the definition includes, for example, a group of individuals discharging a weapon in an abandoned house, thus causing 'substantial damage to property.'"[17] Further, the terrorism statute includes providing material support for a terrorist organization as a "terrorist activity."[18] This material support bar is the statute the BIA applied to Ana.[19] The statute has a potentially vast impact on asylum seekers because it can include people like Ana who engage in activity not normally thought to be terrorism.[20]

The potential overreach of the terrorism bars was front and center during the last presidential administration.[21] Former President Trump and Attorney General Jeff Sessions used hardline rhetoric for one transnational gang (MS-13), stating it "could qualify" as a terrorist organization.[22] Further, Trump expressly identified immigration

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13. *See infra* Section I.A (listing various definitions of terrorism in different contexts).

14. *See* 8 U.S.C. § 1182(a)(3)(B).

15. *Id.*

16. *See In re* S-K-, 23 I&N Dec. 936, 947–50 (B.I.A. 2006) (Osuna, Acting Vice Chairman, concurring).

17. *Id.* at 948.

18. § 1182(a)(3)(B)(iv)(VI).

19. *In re* A-C-M-, 27 I&N Dec. 303, 311 (B.I.A. 2018).

20. *See, e.g.*, Jillian Blake, *MS-13 as a Terrorist Organization: Risks for Central American Asylum Seekers*, 116 MICH. L. REV. ONLINE 39, 45 (2017) (explaining how the material support bar may impact victims of gangs); Daniella Pozzo Darnell, Comment, *The Scarlett Letter "T": The Tier III Terrorist Classification's Inconsistent and Ineffectual Effects on Asylum Relief for Members and Supporters of Pro-Democratic Groups*, 41 U. BALT. L. REV. 557, 566–69 (2012) (averring that the terrorism bars undermine the goals of the U.S. asylum system by classifying some pro-democratic groups as terrorist organizations).

21. *See* Blake, *supra* note 20, at 39–40 (explaining that former President Trump viewed MS-13 as a terrorist organization during his administration).

22. Cristiano Lima, *Sessions: MS-13 Gang Could Be Labeled a Terrorist Organization*, POLITICO (Apr. 18, 2017, 10:34 PM), https://www.politico.com/story/2017/04/

policies as a reason he believed the gang had been able to grow in the United States.[23] However, the idea of designating gangs as a terrorist organization is not a fringe idea with no support. A poll found 47% of Americans polled supported the idea of designating MS-13 as a terrorist organization, while only 17% were opposed.[24] Moreover, some have advocated similar ideas to combat gang violence, and the Department of Justice recently charged gang leaders with various terrorism offenses.[25] While express calls to designate gangs as terrorist organizations have seemed to decrease with the change in administration, Biden's top Department of Homeland Security leadership continues to list national security as one of the three most important immigration priorities.[26]

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sessions-salvador-gang-terrorists-237345 [https://perma.cc/EB3W-ZL9Z]; *see also* Blake, *supra* note 20, at 39.

23. *See* Gabby Morrongiello, *Trump Vows to Wipe Out MS-13 Gang in Short Order*, N.Y. POST (May 15, 2017, 1:43 PM), https://nypost.com/2017/05/15/trump-vows-to-wipe-out-ms-13-gang-in-short-order [https://perma.cc/K39B-5GX2] (referring to Trump's vows to "eradicate" MS-13 which were made at a ceremony for fallen police officers at the U.S. Capitol).

24. Marialuisa Rincon, *Survey Shows Americans Favor Classifying MS-13 Gang a Terrorist Group*, CHRON. (Apr. 26, 2017), https://www.chron.com/news/houston-texas/article/Survey-shows-Americans-favor-classifying-MS-13-11100258.php [https://perma.cc/WV3G-WD3V].

25. *See, e.g.*, Colin M. Harnsgate, Note, *A New Strategy to End Gang Violence: Classifying Certain Offenses Committed in the Context of Gang Violence as Acts of Terrorism*, 39 SUFFOLK TRANSNAT'L L. REV. 391, 392–93 (2016) (arguing public safety necessitates classifying violent gang activity as terrorism and subjecting gang members to federal terrorism laws); *MS-13's Highest-Ranking Leaders Charged with Terrorism Offenses in the United States*, U.S. DEP'T. OF JUST. (Jan. 14, 2021), https://www.justice.gov/opa/pr/ms-13-s-highest-ranking-leaders-charged-terrorism-offenses-united-states [https://perma.cc/V3Z4-5LD8] (disclosing the indictment of fourteen MS-13 members for conspiracy to commit international terrorism, conspiracy to provide material support to terrorism, and a variety of other federal crimes related to terrorism).

26. *See Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion*, U.S. IMMIGR. & CUSTOMS ENF'T, Memorandum from Kerry E. Doyle (Apr. 3, 2022), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf [https://perma.cc/BT8Q-7LYY] (listing the three immigration enforcement priorities as apprehension and removal of those who pose threats to national security, public safety, and border security); *Guidelines for the Enforcement of Civil Immigration Law*, U.S. DEP'T. OF HOMELAND SEC., Memorandum from Alejandro N. Mayorkas (Sept. 30, 2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf [https://perma.cc/BU85-N4BY] (same). The validity of these enforcement memos is

The possibility of further immigration implications for gang involvement is notable, considering that "gangs are a significant worldwide phenomenon with millions of members."[27] Further, gangs continue to grow in power and numbers in many parts of the world.[28] As such, if gangs are accepted as terrorist organizations, the overbroad terrorism bars are likely to arise in a broad range of cases with potentially devastating impact for immigrants. For instance, providing water to a thirsty gang member under duress could potentially bar immigration to the United States.[29]

This Comment will argue that transnational gangs should not be considered Tier III terrorist organizations under 8 U.S.C. § 1182(a)(3)(b)(vi)(III) of the Immigration and Nationality Act (INA) because: (1) properly read, the statute implies both a direct authorization requirement and limitations to what constitutes a subgroup; (2) Congress intended terrorist organizations to include politically motivated groups, rather than groups that are financially motivated, as demonstrated by the whole text canon of construction; and (3) reading the statute more broadly would violate the avoidance of absurdity canon of construction. Part I of this Comment will provide a broad background of the differing definitions of terrorism.[30] It will

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currently being litigated in the federal courts; recently, the Supreme Court refused to reinstitute these policies until the conclusion of the litigation. *See* Adam Liptak, *Supreme Court Refuses for Now to Restore Biden Plan on Immigration Enforcement*, N.Y. TIMES (July 21, 2022), https://www.nytimes.com/2022/07/21/us/politics/supreme-court-biden-immigration.html [https://perma.cc/7J2N-BZTN] (explaining the procedural history of the litigation thus far).

27. John M. Hagedorn, *The Global Impact of Gangs*, 21 J. CONTEMP. CRIM. JUST. 153, 153 (2005).

28. *See Frequently Asked Questions About Gangs*, NAT'L GANG CENT., https://nationalgangcenter.ojp.gov/about/faq#faq-4-how-extensive-is-the-current-gang-problem [https://perma.cc/S252-8928] (stating gang membership has increased eleven percent and the number of gangs has increased eight percent in the last five years); Catherine Porter & Natalie Kitroeff, *'It's Terror': In Haiti, Gangs Gain Power as Security Vacuum Grows*, N.Y. TIMES (Oct. 21, 2021), https://www.nytimes.com/2021/10/21/world/americas/haiti-gangs-kidnapping.html [https://perma.cc/EP42-V3W6] (describing the recent expansion of Haitian gangs' power); Michael Dulaney, *The Rise of the Vory, Russia's 'Super Mafia'*, AUSTL. BROAD. CORP. (June 28, 2018, 5:00 PM), https://www.abc.net.au/news/2018-06-29/the-vory-russias-super-mafia-world-cup/9899542 [https://perma.cc/32NJ-CECU] (detailing Russian gangsters' expanding power and suspected ties to the Kremlin).

29. *See In re* A-C-M-, 27 I&N Dec. 303, 314 (B.I.A. 2018) (Wendtland, Board Member, concurring and dissenting) (bemoaning the far-reaching extent of the terrorism bars).

30. *See infra* Section I.A.

also discuss the bars which prevent immigration to the United States generally, and the terrorism bars specifically.[31] Additionally, Part I will provide a brief overview of transnational gangs and the process of statutory interpretation.[32] Part II of this Comment will analyze 8 U.S.C. § 1182(a)(3)(b)(vi)(III) and argue that, due to its inconsistent application by adjudicators, the avoidance of absurdity and whole text canons of construction should be applied to interpret the statute.[33] The Comment will also argue that the Third and Seventh Circuit Courts of Appeal properly read an implied direct authorization requirement into the statute,[34] but that courts should go further, accepting implied limits to the term "subgroup."[35] This Comment will finally discuss how transnational gangs do not fit into the proper narrower reading of the statute.[36]

I. BACKGROUND

A complete understanding of the breadth and complexities of the terrorism bars requires some knowledge of the context the bars developed within. Thus, this Section begins with a discussion of the differences between national and international definitions of terrorism and the problems lawmakers face in crafting those definitions. Then, this Section turns to U.S. immigration law, its bars to immigration, and how the terrorism bars developed and are currently structured. That synopsis is followed by consideration of the potential impact the terrorism bars pose to noncitizens and a brief audit of some of the legal challenges noncitizens have mounted to push back against the statute's expansiveness. Next, an analysis

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31. *See infra* Sections I.B–F.
32. *See infra* Sections I.G–H.
33. *See infra* Section II.A.
34. *See* Hussain v. Mukasey, 518 F.3d 534, 538–39 (7th Cir. 2008) (determining that when an actor commits violence, even in furtherance of the organization's goals, absent authorization, the actor's violence will not make the organization a terrorist organization); Khan v. Holder, 766 F.3d 689, 699 (7th Cir. 2014) (stating that unless a person knows the organization they are a part of has authorized the violent terrorist acts committed by other members of the group, the person may not know they are supporting a terrorist organization); Uddin v. Att'y Gen., 870 F.3d 282, 284, 292 (3d Cir. 2017) (concluding that authorization is determined on a case-by-case basis that takes into account, inter alia, the "the structure of the organization, the relationship between the organization and its members, and the information each has about the other").
35. *See infra* Section II.B.
36. *See infra* Section II.C.

discussing the prevalence of transnational gangs, how such organizations are defined, and examining a common structure of gangs follows. This Section concludes with an overview of statutory interpretation.

A. What is Terrorism?

Countries around the world have struggled to craft an adequate response to terrorism. One of the biggest reasons for this struggle is that defining terrorism is a difficult endeavor.[37] Jurisdictions have been left to determine if terrorism should be defined by its purpose or target, if freedom fighters should be included, where the line should be drawn between terrorism and war, and if force directed at a colonizer or occupying force should be included, to name a few issues.[38] Despite attempts to legally define terrorism dating back nearly a hundred years, there is still no clear definition under international law.[39] Instead, what has developed is a variety of sources of international and domestic law with vastly differing definitions.[40]

For instance, in the United Kingdom, terrorism is defined by a three-part test which relies heavily on the actor's purpose.[41] Under this test, an act is only considered terrorism if: (1) the act involves serious violence against a person, serious damage to property, or fits other statutorily defined acts; (2) the act was intended to influence the government or intimidate the public; *and* (3) the threat is made to "advance[] a political, religious, racial or ideological cause."[42] New Zealand, on the other hand, lists three means of committing terrorist acts.[43] Two of the means to commit terrorism in New Zealand include

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37. *See* BETH VAN SCHAACK & RONALD C. SLYE, *Terrorism*, *in* INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT 539, 540 (2007) (disclosing that creating an adequate definition has been one of the hardest parts of attempts to craft a legal response to terrorism).

38. *See id.* (posing various rhetorical questions to illustrate the difficulty of defining terrorism).

39. *See id.* at 539–40 (summarizing the first attempt to codify the crime of terrorism into international law).

40. *See id.* at 541–44 (cataloging various international definitions of terrorism).

41. *See* Terrorism Act 2000, c. 11, § I (UK) (laying out the elements to the criminal terrorism statute).

42. *Id.* The second element of this test is not necessary in cases where the threat of action involves firearms. *Id.* § (3).

43. *See* Terrorism Suppression Act 2002, § 5(1)–(5) (N.Z.), https://www.legislation.govt.nz/act/public/2002/0034/latest/DLM152702.html [https://perma.cc/5L79-KDWF].

an element regarding motive; however, the third is "an act against" certain targets—including The Hague, internationally protected persons, or airports—no matter the motive behind the act.[44] One international convention has described terrorism as acts aimed specifically at civilians or "any other person not taking an active part in the hostilities in a situation of armed conflict."[45] Unsurprisingly, no one-size-fits-all definition of terrorism has emerged on an international scale.

Even within the United States there are conflicting definitions. Despite a Congressional subcommittee's previous recommendation that all federal agencies should agree on one definition for clarity's sake, the United States Code contains nineteen different definitions of terrorism.[46] Many of these definitions vary materially, and even though the Criminal Code, Title 18 of the United States Code, contains a chapter titled "terrorism," a variety of other definitions of terrorism are scattered in other chapters throughout the title.[47] The federal immigration law definitions of terrorism vary even further, covering the largest swath of conduct out of all federal terrorism definitions.[48] Moreover, each state has its own criminal definition of terrorism.[49] The art of defining terrorism is a sticky subject with much room for improvement.

Definitions aside, the United States has embraced the goal of combating terrorism and has used U.S. foreign policy strategies to affect that goal. One of these strategies is placing an emphasis on global cooperation and "burden sharing" to undercut terrorist organizations.[50] For instance, the Bureau of Counterterrorism, a subgroup of the Department of State, lists "securing the counterterrorism cooperation of international partners" as part of

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44. Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, 29 B.C. INT'L & COMP. L. REV. 23, 85–86 (2006).

45. International Convention for the Suppression of the Financing of Terrorism, art. 2(1)(b), Dec. 9, 1999, Public L. No. 107-197, U.N. Doc. A/54/109.

46. Young, *supra* note 44, at 76–77.

47. *See* Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of too many Grails*, 30 J. LEGIS. 249, 256 (2004) (describing the various definitions of terrorism contained in U.S. criminal code).

48. *Id.* at 261.

49. Young, *supra* note 44, at 77–78.

50. *Countering Terrorism*, U.S. DEP'T OF STATE, https://www.state.gov/policy-issues/countering-terrorism [https://perma.cc/2B59-T9PA].

their mission statement.[51] Additionally, counterterrorism efforts have focused on preventing foreign nationals tied to terrorism from immigrating to the United States.[52]

B. Grounds of Inadmissibility and Deportability

There are two broad categories of immigration laws in the United States that bar immigration to this country—inadmissibility grounds and deportability grounds.[53] Inadmissibility grounds render an applicant ineligible to be admitted to the United States.[54] Immigration law requires that applications for nonimmigrant status, asylum, or green cards be denied for those found inadmissible, who cannot qualify for a waiver of that inadmissibility.[55] Inadmissibilities include health-related grounds, criminal grounds, security grounds, "public charges," documentary requirements, immigration violations,

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51. *Bureau of Counterterrorism*, U.S. DEP'T OF STATE, https://www.state.gov/bureaus-offices/under-secretary-for-civilian-security-democracy-and-human-rights/bureau-of-counterterrorism [https://perma.cc/FGQ9-GDQV].

52. *See infra* Sections I.C–D (describing the history of the terrorism bars in the United States, how some of their amendments are tied to the September 11 attacks, and how the bars function in their current form to prevent certain noncitizens from immigrating to the United States).

53. Prior to Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, noncitizens who were not admissible and who had not yet entered the United States were "excluded" while those who had entered were found "deportable." LEGOMSKY & THRONSON, *supra* note 12, at 514. IIRIRA amended the vocabulary so that the two separate processes of exclusion proceedings and deportation proceedings were now a singular "removal" proceeding. *Id.* Exclusion grounds were also replaced with the term, inadmissibilities. *Id.*; *Inadmissibility & Deportability*, IMMIGRANT LEGAL RES. CTR. 1–9 (2015), https://www.ilrc.org/sites/default/files/sample-pdf/inadmiss_deport-4th-2016-ch_01.pdf [https://perma.cc/P8BM-D7MS] ("There is no real difference between the terms 'grounds of inadmissibility' and 'grounds of exclusion.'"). For ease of reading, pre-1996 exclusion grounds will also be referred to as inadmissibilities.

54. *Terrorism-Related Inadmissibility Grounds (TRIG)*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/laws-and-policy/other-resources/terrorism-related-inadmissibility-grounds-trig [https://perma.cc/S3CE-TKTR] (last updated Nov. 19, 2019).

55. *See generally* 8 U.S.C. § 1182(a) (enumerating the inadmissibility grounds and waivers).

noncitizens[56] previously removed, and more.[57] A noncitizen bears the burden of proving that they are admissible and must demonstrate so "clearly and beyond doubt."[58]

Deportability grounds, on the other hand, render a legally admitted noncitizen removable from the United States unless eligible for relief.[59] Generally, inadmissibilities cover more conduct than deportabilities.[60] Lawfully admitted immigrants can be deemed deportable for committing certain criminal offenses, having been inadmissible at the time of entry or getting their green card, violating their status, falsifying documents, violating security grounds, and more.[61] Unlike inadmissibilities, in order to find a noncitizen deportable, the government bears the burden of proof and must establish a ground of deportability by "clear and convincing evidence."[62]

The statute provides both inadmissibilities and deportabilities related to terrorism,[63] both of which are commonly referred to as Terrorism-Related Inadmissibility Grounds (TRIG).[64] TRIG include being a member or representative of a terrorist organization, soliciting funds or people to support a terrorist organization, and engaging in specific enumerated "terrorist activities."[65] Additionally, the statute sets forth a so-called "material support bar" which makes anyone who provides material support for the commission of terrorist activity or to a terrorist organization inadmissible.[66] TRIG make an applicant ineligible for discretionary forms of relief, including asylum, withholding and cancellation of removal, and adjustment of status to

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56. The Immigration and Nationality Act refers to noncitizens as "aliens." *Id.* § 1101(a)(3). This Comment will use the term noncitizen in its place. Some recent Supreme Court decisions have also adopted this practice. *See* Barton v. Barr, 140 S. Ct. 1442, 1446 n.2 (2020) (using the term "noncitizen" in lieu of "alien"); Nasrallah v. Barr, 140 S. Ct. 1683, 1689 n.2 (2020) (same).

57. § 1182(a).

58. § 1229a(c)(2)(A).

59. *See generally* § 1227(a) (listing the deportability grounds and waivers to them).

60. *Compare* § 1182(a), *with* § 1227(a).

61. *See* § 1227(a) (enumerating the deportability grounds).

62. § 1229a(c)(3)(A).

63. *See* § 1182(a)(3)(B) ("Any [noncitizen] who has engaged in a terrorist activity . . . is inadmissible."); § 1227(a)(4)(B) (describing deportability grounds for "terrorist activities").

64. *See Terrorism-Related Inadmissibility Grounds (TRIG)*, *supra* note 54.

65. § 1182(a)(3)(B).

66. *See* § 1182(a)(3)(B)(iv)(VI) (outlining the material support inadmissibility).

lawful permanent residence.[67] Sometimes these TRIG are also referred to as "terrorism bars."[68]

C. History of the Terrorism Bars

The first reference to "terrorist activity" in United States immigration law did not arise until the passage of the Immigration Act of 1990,[69] which amended the grounds of inadmissibility and deportability related to national security.[70] While the previous national security bars focused on those who posed a threat to the United States, these new bars instead sought to exclude people who threatened the national security of *any* nation.[71] Not long after, Congress again amended the fledgling terrorism bar twice in 1996 by passing the Anti-Terrorism and Effective Death Penalty Act (AEDPA)[72] and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[73] A response to the 1995 Oklahoma City bombing,[74] AEDPA barred

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67. *See* §§ 1158(b)(2)(A)(v) (restricting asylum), 1182(a)(3)(B) (preventing lawful permanent residence), 1229b(c)(4) (foreclosing cancelation of removal), 1231(b)(3)(B) (rendering withholding of removal unavailable).

68. *See, e.g.*, Islam v. Sec'y, Dep't of Homeland Sec., 997 F.3d 1333, 1336 (11th Cir. 2021) (using the term "terrorism bar"); Bojnoordi v. Holder, 757 F.3d 1075, 1076 (9th Cir. 2014) (same).

69. Immigration Act of 1990, Pub. L. No. 101-649, § 601(a), 104 Stat. 4978, 5069.

70. Scott Aldworth, Comment, *Terror Firma: The Unyielding Terrorism Bar in the Immigration and Nationality Act*, 14 LEWIS & CLARK L. REV. 1159, 1166 (2010). Prior to 1990, United States immigration law contained various exclusionary bars based on national security concerns. *See id.* at 1165–66. A 1798 Act gave the President the power to order any noncitizens he judged as "dangerous to the peace and safety of the United States" to depart. *Id.* at 1165 n.34. Though this power expired two years later, various provisions premised on national security continued to appear in immigration law, including an inadmissibility ground in the original Immigration and Nationality Act of 1952 which prevented immigration of those seeking "to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." *Id.* at 1165.

71. *Id.* at 1166.

72. Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8 U.S.C.).

73. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. 104-208, div. C, 110 Stat. 3009, 3009-546 (codified as amended in scattered sections of 8 U.S.C.).

74. Mandi Rene Moroz, *Protecting Access to the Great Writ: Equitable Tolling, Attorney Negligence, and AEDPA*, 51 GA. L. REV. 647, 651 (2017); *see also* Andrew Cohen, *Two of the Oklahoma City Bombing's Lasting Legacies*, BRENNAN CTR. FOR JUST. (Apr. 21, 2015), https://www.brennancenter.org/our-work/policy-solutions/two-oklahoma-city-bombings-lasting-legacies [https://perma.cc/K5U8-M9ZY].

representatives of foreign terrorist organizations and individuals who "incite, engage in, or are likely to engage in terrorist activity" from receiving asylum or withholding of removal.[75] AEDPA also contained a provision that allowed the Attorney General discretion to grant asylum to a noncitizen despite their association with a terrorist group if they found that there were "not reasonable grounds for regarding the [noncitizen] as a danger to the security of the United States."[76] This discretionary provision, however, was swiftly limited by the passage of IIRIRA to only cases where the noncitizen was inadmissible as a representative of a terrorist organization.[77] After IIRIRA, the terrorism bars remained untouched for several years, until the terrorist attacks of September 11, 2001.[78]

In response to the September 11 attacks, Congress passed the USA PATRIOT Act of 2001[79] within a mere six weeks.[80] The Act again reshaped immigration law's terrorism bars, making the previous provisions even stricter, a recurring trend.[81] In addition to the preexisting definition of terrorist organizations, known as "Tier I", the Act added two new Tiers, including an "undesignated category" ("Tier III").[82] The Act also broadened the definition of terrorist activity in general and shifted the burden of proof to the noncitizen to demonstrate that they "did not know, and should not reasonably have known, that the solicitation [of a person or funds to support an organization] would further the organization's terrorist activity."[83] Additionally, the Act included a broad waiver of material support when the Secretary of State and Attorney General exercised their discretion to decide the bar should not apply.[84] Further, prior to the September 11th attacks, twenty-seven organizations had been designated as

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75. Regina Germain, *Rushing to Judgment: The Unintended Consequences of the USA PATRIOT Act for Bona Fide Refugees*, 16 GEO. IMMIGR. L.J. 505, 508–09 n.17 (2002).

76. AEDPA § 421(a).

77. *See* IIRIRA § 604(a).

78. *See* Aldworth, *supra* note 70, at 1167 (cataloging the history of the terrorism bars).

79. USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

80. Germain, *supra* note 75, at 505.

81. *See* Craig R. Novak, *Material Support to Terrorists or Terrorist Organizations: Asylum Seekers Walking the Relief Tightrope*, THE MOD. AM., 19, 19 (2008) (observing the changes the PATRIOT Act had on U.S. asylum law).

82. *See* USA PATRIOT Act § 411(a)(1)(G); *infra* Section I.D (discussing the statute's three-tiered system to terrorist organizations).

83. USA PATRIOT Act § 411(a)(1)(F).

84. *See id.*

terrorist organizations on the Federal Register.[85] Following the attacks, Secretary of State Donald Rumsfeld promptly added an additional fifteen organizations to the list.[86]

The last major amendment to the terrorism bars occurred in 2005 with the passage of the REAL ID Act.[87] The Act included twenty-nine amendments to the Immigration and Nationality Act.[88] One of the major immigration amendments newly denied asylum seekers procedural protections that were previously available to them.[89] Specifically regarding the terrorism bars, the Act adjusted the material support waiver to include consultation with the Secretary of the newly-created Department of Homeland Security and broadened the definition of Tier III terrorist groups to include groups as terrorist organizations "solely by virtue of having a subgroup within the scope of" the terrorism bars.[90]

D. The Structure of the Terrorism Bars Today

The current version of the terrorism bars is in 8 U.S.C. §§ 1182(a)(3)(B) and (F) and 1227(a)(4)(B).[91] There are three tiers of terrorist organizations in the immigration statute.[92] Tier I, also known as Foreign Terrorist Organizations, refers to organizations that are "designated under section 1189" of 8 U.S.C.[93] That section sets out three requirements for designation:

> [(1)] the organization is a foreign organization;
>
> [(2)] the organization engages in terrorist activity (as defined in section 1182(a)(3)(B) of this title or terrorism (as defined in section 2656f(d)(2) of title 22), or retains the capability and intent to engage in terrorist activity or terrorism; and

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85. Novak, *supra* note 81, at 19.

86. *Id.*

87. REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, 302 (codified as amended in scattered sections of 8 U.S.C.).

88. Novak, *supra* note 81, at 20.

89. *Id.* For instance, it removed the writ of habeas corpus form removal proceedings and created a totality of circumstances test for determining credibility. *Id.*

90. REAL ID Act § 104.

91. 8 U.S.C. § 1182(a)(3)(B), (F); § 1227(a)(4)(B).

92. *See* § 1182(a)(3)(B)(vi)(I)–(III) (listing three distinct means to label an organization a terrorist organization).

93. § 1182(a)(3)(B)(vi)(I); *see also Terrorism-Related Inadmissibility Grounds (TRIG)*, *supra* note 54.

> [(3)] the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.[94]

Designation requires publication in the Federal Register and allows the Secretary of the Treasury to freeze the organization's assets.[95] Tier I terrorist organizations include Shining Path, Hizballah, al-Qa'ida, al-Shabaab, Boko Haram, and various factions of ISIS.[96]

Tier II, or the "Terrorist Exclusion List," includes other organizations "otherwise designated . . . by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in [the INA]."[97] The primary purpose of Tier II designation is to enable government officials to more easily find noncitizens involved with the groups inadmissible.[98] Like Tier I, designations of Tier II organizations are also published in the Federal Register.[99] Unlike Tier I, an organization does not need to specifically endanger the United States or United States nationals to be designated as a Tier II group.[100] Tier II organizations include the Continuity Irish Republican Army, the Orange Volunteers, Harakat ul Jihad I Islami, the Lords Resistances Army, and the Japanese Red Army.[101]

Lastly, Tier III organizations, with the broadest definition, are any other organization "that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in [the INA]."[102] Similar to the second tier, these organizations do not have to specifically endanger U.S. national security or U.S. nationals.[103] The Tier III determinations are not published in the Federal Register and are instead made on a case-by-

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94. 8 U.S.C. § 1189(a)(1)(A)–(C).

95. §§ 1189(a)(2)(A)(ii), (a)(2)(C).

96. *Foreign Terrorist Organizations*, U.S. DEP'T OF STATE, https://www.state.gov/foreign-terrorist-organizations [https://perma.cc/FF5C-BF2F].

97. § 1182(a)(3)(B)(vi)(II).

98. *Terrorist Exclusion List*, U.S. DEP'T OF STATE, https://www.state.gov/terrorist-exclusion-list [https://perma.cc/73AS-LDYD].

99. *See* § 1182(a)(3)(B)(vi)(II) (authorizing designation as Tier II "upon publication in the Federal Register").

100. *Compare* § 1182(a)(3)(B)(vi)(I), *with* § 1182(a)(3)(B)(vi)(II).

101. *Terrorist Exclusion List*, *supra* note 98.

102. § 1182(a)(3)(B)(vi)(III).

103. *Compare* § 1182(a)(3)(B)(vi)(II), *with* § 1182(a)(3)(B)(vi)(III).

case basis.[104] As such, adjudicators such as immigration judges (during removal proceedings in immigration court) or asylum officers (when assessing eligibility for asylum) are responsible for Tier III determinations.[105] Thus, great power is afforded to adjudicators like immigration judges and asylum officers.[106] In their sole discretion, these adjudicators may determine that any organization of two or more people is a terrorist organization, then find a noncitizen removable for belonging to that group or providing material support to that group.[107] This makes Tier III stand in stark contrast to Tiers I and II with their rigid formalities.[108] The Tier III classification has largely been criticized by immigration practitioners as "inconsistent, lacking in transparency, and harmful to noncitizens seeking immigration relief."[109] This Comment focuses on the proper interpretation of Tier III and its application to noncitizens.

The terrorism inadmissibility statute is labyrinthian. For a noncitizen to be found inadmissible under 8 U.S.C. § 1182(a)(3)(B) ("Terrorism Inadmissibility Statute"), they must meet an enumerated set of circumstances.[110] This list includes noncitizens who are members, representatives, or recipients of a military-type training from or on behalf of a terrorist organization. These noncitizens must also have engaged in terrorist activity or incited terrorist activity with an intention to cause death or serious bodily harm. Finally, government officials must have reasonable grounds to believe these noncitizens are engaged in or likely to engage in terrorist activity, or endorse, espouse,

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104. Uddin v. Att'y Gen., 870 F.3d 282, 292 (3d Cir. 2017); Denise Bell, *Tier III Terrorist Organizations: The Role of the Immigration Court in Making a Terrorist Determination*, 10 IMMIGR. L. ADVISOR, no. 5, 2016, at 1, 2.

105. *Id.*; *see also* Kathryn White, *A Chance for Redemption: Revising the "Persecutor Bar" and "Material Support Bar" in the Case of Child Soldiers*, 43 VAND. J. TRANSNAT'L L. 191, 205–06 (2010).

106. *See id.* (explaining these adjudicators' ability to classify groups as Tier III terrorist groups).

107. *Id.*

108. *See supra* notes 93–101 and accompanying text (highlighting that Tiers I and II can only be designated by the Secretaries of State and Homeland Security and the Attorney General and must be published in the Federal Registrar).

109. KHALED ALRABE, CHALLENGING A "TIER III" TERRORISM DETERMINATION IN REMOVAL PROCEEDINGS 1 (2018), https://nipnlg.org/PDFs/practitioners/practice_advisories/pr/2018_20Sept_tierIII.pdf.

110. *See* 8 U.S.C. § 1182(a)(3)(B)(i)–(iv) (outlining the activity that is categorized as terrorist activity, the manner in which that activity must be done, and other inadmissible actions).

or solicit another to endorse or espouse terrorist activity.[111] The list also includes spouses and children of a noncitizen who are subject to the terrorist inadmissibility, subject to a few exemptions.[112]

The Terrorism Inadmissibility Statute also specifically defines "terrorist activity."[113] In order to qualify as a terrorist activity, an act must be "unlawful under the laws of the place where it is committed," or in the United States.[114] It must also involve one of the following:

> (1) hijacking and sabotage of a conveyance;
>
> (2) kidnapping or threatening someone to compel a third person to act a certain way;
>
> (3) attacking an internationally protected person;
>
> (4) assassination;
>
> (5) using a biological agent, chemical agent, or nuclear weapon or device "with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property;"
>
> (6) using an explosive, firearm, or other weapon or dangerous device "(other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property;" or
>
> (7) threatening, attempting, or conspiring to do any of the above.[115]

Further, to be classified as *engaging* in terrorist activity, the activity must have occurred in a certain manner, enumerated in a third list in the statute.[116] This list specifies that one has engaged in a terrorist activity if they have: committed or incited to commit a terrorist activity with intent of causing death or bodily injury, prepared or planned a terrorist activity, gathered information for potential targets, solicited funds or other things of value for a terrorist activity or terrorist organization, solicited an individual to a terrorist activity or terrorist

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111. § 1182(a)(3)(B)(i)(I)–(VIII). An exception is available for members (not representatives) of Tier III terrorist organizations if they "can demonstrate by clear and convincing evidence that [they] did not know, and should not reasonably have known, that the organization was a terrorist organization." § 1182(a)(3)(B)(i)(VI). Similarly, exemptions are available for solicitation of funds or individuals or for providing material support to a Tier III organization where the noncitizen did not know or should not reasonably have known it was a terrorist organization. §§ 1182(a)(3)(B)(iv)(IV)(cc), (a)(3)(B)(iv)(V)(cc), (a)(3)(B)(iv)(VI)(dd).

112. § 1182(a)(3)(B)(i)(IX).

113. § 1182(a)(3)(B)(iii).

114. *Id.*

115. §§ 1182(a)(3)(B)(iii), (a)(3)(B)(iii)(I)–(VI).

116. *See* § 1182(a)(3)(B)(iv) (identifying the inadmissible behavior).

organization, or provided material support for a terrorist activity or terrorist organization.[117]

Taking all subsections of the inadmissibility statute together demonstrates its complex nature. For instance, imagine a noncitizen hijacks a car on the freeway. Government officials cannot simply remove this noncitizen under the terrorism bar.[118] Though the statute states "[a]ny [noncitizen] who . . . has engaged in a terrorist activity . . . is inadmissible" and defines one terrorist activity as "[t]he hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle)," to classify as engagement in a terrorist activity, the activity must be done in a specific way.[119] In this case, the commission of a terrorist activity only counts as engagement if it is done "under circumstances indicating an intention to cause death or serious bodily injury."[120]

Conversely, though the motivation for an activity may meet the statutory requirement for *engaging* in terrorist activity, the act itself may not qualify. Imagine Jill, a noncitizen, and Jack, her accomplice, decide to rob someone. Jack shoots the stranger using a pistol, killing them as intended, and the two take the victim's wallet. Though Jill is a member of "a group of two or more individuals"—thus part of a Tier III terrorist group if the group engages in terrorist activities—this example does not meet the definition of terrorist activity, despite the robbery being committed "under circumstances indicating an intention to cause death or serious bodily injury."[121] Here, Jill and her accomplice used the firearm for "personal monetary gain," exempting the action from classification as a terrorist activity under the statutory definition.[122] Though the statute is extremely broad in nature, a close reading shows some limitations.

The material support bar also merits further discussion.[123] Providing material support to a terrorist organization is one way to establish engagement in a terrorist activity.[124] The bar specifies that engagement in a terrorist activity is met if one "commit[s] an act that the actor

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117. § 1182(a)(3)(B)(iv)(I)–(VI).

118. *See* § 1182(a)(3)(B)(i)(I)–(II) (requiring not only terrorist activity, but also engagement in terrorist activity).

119. §§ 1182(a)(3)(B)(i), (a)(3)(B)(i)(I), (a)(3)(B)(iii), (a)(3)(B)(iii)(I).

120. § 1182(a)(3)(B)(iv)(I).

121. §§ 1182(a)(3)(B)(iv), (a)(3)(b)(iv)(I), (a)(3)(B)(vi), (a)(3)(B)(vi)(III).

122. § 1182(a)(3)(B)(iii)(V)(b).

123. *See In re* A-C-M-, 27 I&N Dec. 303, 311 (B.I.A. 2018) (finding Ana had provided material support of a terrorist group and was thus inadmissible).

124. *See* § 1182(a)(3)(B)(iv)(VI).

knows, or reasonably should know, affords material support" to a terrorist organization, an individual the actor knows has committed or plans to commit a terrorist activity, or for the commission of a terrorist activity.[125] The statute also provides a broad, yet non-exhaustive, list of support which qualifies as material support.[126] The list includes providing "areas of lodging, communications, transportation, financing, weapons[,] and provision of other means to accomplish terrorist activities."[127] Lastly, the statute also includes a small exception for noncitizens who "can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization."[128]

In an appeal to the BIA, an ethnically Chin and Christian Burmese noncitizen sought asylum in the United States because she feared returning to possible persecution by the military dictatorship in Burma.[129] The Burmese military kidnapped the noncitizen's brother and fiancé, and ultimately killed her fiancé.[130] Later, she became sympathetic to the Chin National Front's (CNF) "goal of securing freedom for ethnic Chin people" upon meeting her deceased fiancé's friend who was an undercover agent for the group.[131] Over a period of eleven months, the noncitizen gave approximately $685 of monetary support, as well as some items, such as a camera and binoculars, to support the CNF.[132] Ultimately, however, she fled to the United States when the Burmese military, known to torture those affiliated with the CNF, intercepted some goods she had provided and a letter she had written.[133] An immigration judge found that the noncitizen had a valid asylum claim, but nonetheless denied her application, finding she provided material support to a Tier III terrorist organization, the CNF.[134] The BIA upheld that decision.[135]

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125. *Id.*

126. Singh-Kaur v. Ashcroft, 385 F.3d 293, 298 (3d Cir. 2004), aff'g *In re* Singh-Kaur, No. AXX XX2 930, 2004 WL 1167312, at *1 (Jan. 21, 2004 B.I.A.) (per curiam) (upholding the inadmissibility determination on the grounds that "providing food" and "setting up tents" amount to material support of a terrorist organization).

127. *Id.*

128. § 1182(a)(3)(B)(iv)(VI)(dd).

129. *In re* S-K-, 23 I&N Dec. 936 , 937 (B.I.A. 2006).

130. *Id.*

131. *Id.*

132. *Id.* at 937, 945 n.13.

133. *Id.* at 937.

134. *Id.*

135. *Id.* at 946.

Then-Acting Vice Chairman Juan Osuna wrote separately in a concurrence to highlight how the BIA's decision seemed to contradict Congressional intent.[136] Osuna agreed the statute mandated the denial of the respondent's asylum and withholding of removal applications.[137] However, he also noted that the CNF—an ally of an organization recognized by the United States as the legitimate representative of the Burmese people—had "engage[d] in violence primarily as a means of self-defense" and would not be recognized as a terrorist group under common definitions.[138] He further wrote that the respondent posed no threat to the United States and arguably acted in tandem with United States foreign policy by supporting an organization which opposed the repressive Burmese government.[139]

Generally, Acting Vice Chairman Osuna also discussed how the statute swept into its definition activity not normally considered terrorism and threatened United States foreign policy.[140] Osuna observed that, "[r]ead literally, the definition includes, for example, a group of individuals discharging a weapon in an abandoned house, thus causing 'substantial damage to property.'"[141] In a footnote, he also discussed how material support to the United States Armed Forces, if illegal where it occurred, could potentially trigger the terrorist bars.[142] This demonstrated Osuna's belief that a broad reading of the terrorism bars frustrated Congress' humanitarian intent for the asylum program.[143]

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136. *See id.* at 946–50 (Osuna, Acting Vice Chairman, concurring) ("[I]t is difficult to conclude that this is what Congress intended."). Juan P. Osuna went on to hold a variety of high-level positions at the Department of Justice (DOJ), including Chair of the BIA, Executive Director of the Executive Office of Immigration Review, and the Associate Deputy Attorney General with responsibility for the DOJ's full immigration portfolio. *See A Tribute to Juan Osuna | Access to Justice, Due Process and the Rule of Law in the US Immigration System—Present Realities and a Vision for the Future*, CTR. FOR MIGRATION STUD., https://cmsny.org/event/osuna-due-process [https://perma.cc/Z7K9-VXZJ].

137. *See In re S-K-*, 23 I&N Dec. at 946 ("I agree with the majority that the Immigration Judge properly denied the respondent's applications for asylum and withholding of removal.").

138. *Id.* at 947–48.

139. *Id.* at 950.

140. *See id.* at 948–49.

141. *Id.* at 948.

142. *See id.* at 949 n.15 ("[I]n certain instances, [the material support bar] could potentially bar from relief those who provide assistance to United States or allied armed forces.").

143. *See id.* at 948 (bemoaning the breadth of the statute).

E. Impact of the Terrorism Bars

The terrorist bars have a huge effect on asylum seekers'—and potentially gang violence victims'—ability to seek asylum in the United States.[144] Because there is no statutory duress exception to the bars, many asylum seekers who were forced to give support to a terrorist organization under threat, like Ana, qualify as terrorists under the INA.[145] Consider *In re M-H-Z-*,[146] where a hotel owner had previously provided the Revolutionary Armed Forces of Columbia (FARC, a Tier I group) with food and other goods after they threatened her.[147] Later, due to government officials staying in her hotel, the FARC again threatened the hotel owner, but this time they also destroyed her hotel.[148] After fleeing and requesting asylum in the United States, an immigration judge denied her application, finding that the terrorism bar applied to her because she provided material support to a terrorist organization.[149] It is estimated that thousands have been excluded or denied immigration benefits based on alleged material support of a terrorist organization.[150]

Another example of an immigrant facing the harsh consequences of the Terrorist Inadmissibility Statute is that of Saman Kareem Ahmad. Ahmad was an Iraqi who served as a translator of the United States Armed Forces for almost four years during the War on Terror.[151] The then-Major General David Petraeus, as well as the Secretary of the Navy, supported Ahmad's application to come to the United States on a special visa program for Iraqis and Afghanis who risked their lives to

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144. Blake, *supra* note 20, at 45–46.

145. There are situational exemptions which are sometimes made available due to duress. *Terrorism-Related Inadmissibility Grounds (TRIG)—Situational Exemptions*, U.S. CITIZENSHIP & IMMIGR. SERVS. (June 14, 2022), https://www.uscis.gov/laws-and-policy/other-resources/terrorism-related-inadmissibility-grounds-trig/terrorism-related-inadmissibility-grounds-trig-situational-exemptions [https://perma.cc/6ALN-B44A] (providing a list of approved exemptions, including those for applicants who supported terrorist organization in response to a reasonably-perceived threat of serious harm). However, as discussed below, they are difficult to obtain.

146. *In re* M-H-Z-, 26 I&N Dec. 757 (B.I.A. 2016).

147. *Id.* at 757–58.

148. *Id.*

149. *Id.*

150. LEGOMSKY & THRONSON, *supra* note 12, at 552.

151. Karen DeYoung, *Stalwart Service for U.S. in Iraq Is Not Enough to Gain Green Card*, WASH. POST (March 23, 2008), https://www.washingtonpost.com/wp-dyn/content/article/2008/03/22/AR2008032202228.html?hpid=topnews [https://perma.cc/Z75G-ATCA].

support the United States Armed Forces.[152] However, Ahmad had once served in the Kurdish Democratic Party ("KDP"), a group that had rebelled against and sought to overthrow Saddam Hussain's regime.[153] Despite the fact that the KDP's actions coincided with the United States' foreign policy goals and that the KDP was a legitimate political party serving in the Iraqi parliament, the group was deemed a Tier III terrorist organization for its actions.[154] After risking his life to serve the U.S. Armed Forces for years, USCIS determined Ahmad was inadmissible due to his involvement with a terrorist organization, and he was barred from admission to the United States.[155] Ultimately, Ahmad did receive a green card, but only after the Washington Post's reporting publicized his case, and Cabinet officials granted an exemption for certain Kurdish-related groups.[156]

The terrorism bars have a wide-ranging impact on noncitizens. As exemplified by the cases presented above, the terrorism inadmissibility and deportability grounds prevent a grant of asylum, a green card, or even citizenship.[157] Even further, however, the terrorism bars also prevent a grant of important forms of discretionary relief, including cancelation of removal and withholding of removal.[158]

Perhaps with an understanding of the harsh nature of the terrorism bars, Congress provided the Secretaries of State and Homeland Security with the power to authorize exemptions to the bars, in consultation with the Attorney General.[159] There are two broad categories of exemptions—situational exemptions and group-based exemptions.[160] Currently, approved situational exemptions include: material support under duress, solicitation under duress, military-type

152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. Krajeski, *supra* note 1.
157. *See supra* Section II.B. (pointing out that inadmissibility grounds make a noncitizen ineligible for admission to the United States).
158. *See* 8 U.S.C. § 1229b(c)(4) (making an inadmissible noncitizen ineligible for cancelation of removal); 8 U.S.C. § 1231(b)(3)(B) (rendering withholding of removal unavailable to noncitizens charged with a particularly serious crime or who pose a threat to national security).
159. *See* 8 U.S.C. § 1182(d)(3)(B) (providing a waiver to noncitizens in limited circumstances); *see also Terrorism-Related Inadmissibility Grounds Exemptions*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 19, 2019), https://www.uscis.gov/laws-and-policy/other-resources/terrorism-related-inadmissibility-grounds-trig/terrorism-related-inadmissibility-grounds-exemptions [https://perma.cc/LK3H-AA5Z].
160. *Id.*

training under duress, voluntary medical care, certain applicants with existing immigration benefits, Iraqi uprisings, certain limited material support, and insignificant material support.[161] On the other hand, the group-based exemptions are blanket exceptions created for certain groups that further foreign policy and national security goals. These groups include: groups related to the Iraq war (the Iraqi National Congress, Kurdish Democratic Party, and Patriotic Union of Kurdistan) and groups related to Ethiopian/Eritrean conflict (Eritrean Liberation Front, Ethiopian People's Revolutionary Party, Tigray People's Liberation Front, and Oromo Liberation Front). The list also includes groups related to Burmese conflict (All Burma Student's Democratic Front, Karen National Union/Karen National Army, All Burma Muslim Union, etc.), as well as others.[162] In administering the exemptions, the Departments of State, Homeland Security, and Justice consider "[v]arious factors, including national security, humanitarian, and foreign policy concerns."[163]

While these exemptions can provide some relief, there are a variety of roadblocks which could prevent one from receiving an exemption. Firstly, Tier I and Tier II terrorist organizations are not eligible for exemptions.[164] Secondly, receiving an exemption requires high-level officials to approve it.[165] Additionally, the requisite agencies have neither published a specific procedure for applying for an exemption, nor provided a specific application.[166] Further, consideration of exemptions requires significant amounts of time, as the governmental agencies conduct "a thorough search of intelligence resources . . . in order to identify any derogatory information."[167] Perhaps most disconcerting, the government will not even consider an exemption

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161. *Id.*

162. *Terrorism-Related Inadmissibility Grounds (TRIG) – Group-Based Exemptions*, U.S. CITIZENSHIP & IMMIGR. SERVS. (November 19, 2019), https://www.uscis.gov/laws-and-policy/other-resources/terrorism-related-inadmissibility-grounds-trig/terrorism-related-inadmissibility-grounds-trig-group-based-exemptions [https://perma.cc/8VQS-8URY].

163. *Hearing on: The Syrian Refugee Crisis Before the Subcomm. on the Const., C.R. and Hum. Rts. of the U.S. S. Judiciary Comm.*, 110th Cong. 4 (2014) (written testimony of Molly Groom, Acting Deputy Assistant Secretary, U.S. Dep't of Homeland Sec.).

164. *Id.*; 8 U.S.C. § 1182(d)(3)(B).

165. Blake, *supra* note 20, at 46.

166. *Id.*; Ay v. Holder, 743 F.3d 317, 321 (2d Cir. 2014).

167. *See* Groom, *supra* note 163, at 4–5.

until a noncitizen receives a final order of deportation.[168] Thus, while exemptions do exist, receiving one is a particularly challenging undertaking.

F. Legal Challenges Mounted

Because of the dire consequences and extreme breadth of the Tier III statute, various entities have mounted challenges to the statute. However, many of these challenges have failed.[169] For one, courts have found the statute is not unconstitutionally vague or unconstitutionally overbroad.[170] Nor have arguments under international law succeeded, such as the argument that freedom fighters, liberation movements, or armed resistance groups are engaged in justified force under international law.[171]

Thus far, one of the most successful challenges to the Tier III terrorism bar is that of "direct authorization," challenging a Tier III determination by stating a group's leaders did not authorize the terrorist acts.[172] Two Circuit Courts of Appeal and many unpublished BIA decisions have interpreted the Tier III classification to require the organization's leadership to directly authorize the terrorist activities in question.[173]

The first case to accept this implied "direct authorization" requirement was *Hussain v. Mukasey*,[174] a case involving a lawful permanent resident (green card holder) from Pakistan.[175] Roughly

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168. *See* Department of Homeland Security Implements Exemption Authority for Certain Terrorism-Related Inadmissibility Grounds for Cases with Administratively Final Orders of Removal, U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 23, 2008), https://www.uscis.gov/sites/default/files/USCIS/Laws/TRIG/USCIS_Process_Fact_Sheet_-_Cases_in_Removal_Proceedings.pdf [https://perma.cc/8J2M-BNPC]; A.A. v. Att'y Gen., 973 F.3d 171, 189 (3d Cir. 2020) (explaining the same requirement).

169. Bell, *supra* note 104, at 9 (collecting cases).

170. *See* Islam v. Sec'y, Dep't Homeland Sec., 997 F.3d 1333, 1342–45 (11th Cir. 2021); Khan v. Holder, 584 F.3d 773, 786 (9th Cir. 2009); Hussain v. Mukasey, 518 F.3d 534, 537 (7th Cir. 2008); McAllister v. Att'y Gen., 444 F.3d 178, 186–87 (3d Cir. 2006).

171. *See* Bell, *supra* note 104, at 9 (collecting cases).

172. *See e.g.*, *Hussain*, 518 F.3d at 538–39; *Khan*, 766 F.3d at 699; Uddin v. Att'y Gen., 870 F.3d 282, 290 (3d Cir. 2017).

173. *See Hussain*, 518 F.3d at 538–39; *Khan*, 766 F.3d at 699; *Uddin*, 870 F.3d at 284, 292; *Practice Advisory: Challenging a 'Tier III' Terrorism Determination*, NAT'L IMMIGR. PROJECT (Sept. 2018), https://nipnlg.org/PDFs/practitioners/practice_advisories/pr/2018_20Sept_tierIII-appendix.pdf [https://perma.cc/75LU-GAB9] (gathering unpublished BIA decisions that stand for this proposition).

174. 518 F.3d at 537.

175. *Id.* at 535–36.

twenty years after arriving in the United States, he was arrested and charged with "committ[ing] immigration fraud by means of false documents that had enabled him to enter and remain in the United States."[176] Ultimately, he was convicted and placed in removal proceedings.[177] An immigration judge ordered Hussain's removal and ruled that he had gained admission through fraud and was, therefore, barred from seeking asylum for being a member of Mohajir Qaumi Movement-Haqiqi, which the judge found was a Tier III terrorist organization.[178] The BIA affirmed that judge's decision.[179] While the Seventh Circuit ultimately dismissed Hussain's appeal, Judge Posner penned, "[a]n organization is not a terrorist organization just because one of its members commits an act of armed violence without direct or indirect authorization, even if his objective was to advance the organization's goals."[180]

The Seventh Circuit again addressed the direct authorization requirement in *Khan v. Holder*.[181] Khan, like Hussain, joined the Mohajir Qaumi Movement-Haqiqi.[182] Khan's petition for review was also denied.[183] But once again, the Circuit Court gave helpful limiting language to the breadth of the Tier III designation.[184] The decision clarified that, "[a]n entire organization does not automatically become a terrorist organization just because some members of the group commit terrorist acts. The question is one of authorization."[185]

Most recently, the Third Circuit has addressed the direct authorization requirement in *Uddin v. Attorney General*.[186] In 2013, Joshim Uddin entered the United States contrary to immigration laws.[187] Immigration officers initially arrested Uddin on charges that were later dismissed, but shortly after, they served him with a Notice to Appear in immigration proceedings.[188] At his removal proceedings, the

176. *Id.* at 535.
177. *Id.* at 535–36.
178. *Id.*
179. *Id.*
180. *Id.* at 538.
181. 766 F.3d 689 (7th Cir. 2014).
182. *Id.* at 691.
183. *Id.* at 702.
184. *See id.* at 699 (explaining the necessity of considering authorization when deciding whether an organization is a terrorist organization).
185. *Id.*
186. 870 F.3d 282 (3d Cir. 2017).
187. *Id.* at 286.
188. *Id.*

immigration judge found that Uddin was ineligible for withholding of removal because of his involvement with a major political party in his homeland of Bangladesh, namely, the Bangladesh National Party (BNP).[189] The immigration judge determined that the BNP was a Tier III terrorist organization because of "abundant" evidence the group was involved in political violence, had provided "tacit support of radical Islamic groups," and was responsible for "torching dozens of polling centers."[190] Further, during strikes called for by the group's leader, a truck driver's wife and baby were burned alive, four were killed by a bomb thrown on a bus, a thirteen-year-old was badly burned by a bomb, and a seven-year-old's hand, legs, and abdomen were injured by a bomb.[191]

The Third Circuit, like the Seventh Circuit, ruled there was an implied direct authorization requirement to the Tier III statute.[192] However, their reasoning went much further than the previous two decisions.[193] In *Uddin*, the Third Circuit conducted initial research which led the Circuit to discover that some unpublished BIA decisions had held the BNP was not a terrorist organization, despite the immigration judge in the plaintiff's case finding it was.[194] The Circuit Court requested the BIA send it all BIA opinions, published or not, relating to the BNP from 2015–2017 to understand its jurisprudence more fully.[195] The BIA submitted fifty-four opinions.[196] In six, it found BNP was a terrorist organization, and in ten, it found it was not, relying on the direct authorization requirement to make its findings.[197] Though the government argued the determinations are "case-specific," the Third Circuit noted many of the cases discussed BNP's terrorist status during the same time periods with radically different results.[198]

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189. *Id.* at 284.
190. *Id.* at 286–87.
191. *Id.* at 287.
192. *Id.* at 290–91.
193. *Cf.* Hussain v. Mukasey, 518 F.3d 534, 537 (7th Cir. 2008) (reasoning the direct authorization requirement was necessitated by common sense, and not based on legislative history and administrative interpretation reasons); Khan v. Holder, 766 F.3d 689, 699 (7th Cir. 2014) (same).
194. 870 F.3d at 291.
195. *Id.*
196. *Id.*
197. *Id. Uddin* does not directly address the conclusions reached in the remainder of the cases. *Id.*
198. *Id.*

With this background research, the Third Circuit held that the plain language of the statute, the BIA's previous reasoning in some unpublished cases adopting the implied requirement, and common sense all dictated that it adopted the direct authorization requirement.[199] In so writing, they noted that,

> If a single member of the Democratic or Republican Party committed a terrorist act, we would not impute terrorist status to the entire group, absent some showing that party leadership authorized the act. So too here, it cannot be that the acts of any single member of the BNP can transform the organization into a terrorist group.[200]

Unlike the Seventh Circuit respondents, the Third Circuit granted Uddin's petition for review in part and remanded for further proceedings because the Court determined "neither the IJ nor the Board in [the] case addressed whether the terrorist activity was authorized by party leadership."[201]

Though concurring in judgment and agreeing that a direct authorization requirement was implied in the statute, Judge Greenaway, Jr. went even further than the other judges on his panel.[202] He argued that, based on the Tier III statute's structure, the term "subgroup" must be given meaning.[203] He also found two limitations implied in the term: (1) that a subgroup only covers significant subgroups, and (2) that the term applies only if a subgroup is subordinate to or affiliated with the larger group and dependent on the larger group to maintain operations.[204] Judge Greenaway, Jr. also stated that these limitations were "interdependent with the [direct] authorization requirement."[205]

Thus far, the Third and Seventh Circuits are the only Circuit courts to directly address the direct authorization requirement.[206] However, a number of unpublished BIA decisions have adopted the requirement.[207] Thus, the direct authorization challenge to the statute has been one of the strongest legal challenges mounted against Tier III.

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199. *Id.* at 291–92.
200. *Id.* at 290.
201. *Id.* at 292.
202. *Id.* at 292–93 (Greenaway, Jr., J., concurring).
203. *Id.*
204. *See id.*
205. *Id.* at 293.
206. ALRABE, *supra* note 109, at 9.
207. *Practice Advisory: Challenging a 'Tier III' Terrorism Determination*, *supra* note 173.

G. Gangs

Like terrorism itself, a "gang" is another word that is difficult to define, with individual jurisdictions—federal, state, and local—left to craft their own definitions.[208] Even the federal government has adopted multiple definitions to define the word "gang."[209] One prevailing definition of gangs issued by the Department of Justice considers a gang to be three or more people with a group identity whose primary purpose is engaging in criminal activity.[210] Further, the Justice Department noted that "[g]angs are typically organized upon racial, ethnic, or political lines and employ common names, slogans, aliases, symbols, tattoos, style of clothing, hairstyles, hand signs[,] or graffiti."[211] Gangs' use of violence and intimidation is usually to further the organization's "power, reputation, or economic resources" or to defend its members or the interests of the gang.[212]

Transnational gangs have a presence across the globe.[213] For instance, one of the largest motorcycle gangs, the Hells Angels, has a chapter in every continent except Antarctica.[214] Additionally, many countries have had to address the prevalence of gangs in their borders. China, for one, has recently embarked on a strict crackdown of gang related crimes.[215] This crackdown resulted in 230,000 people being

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208. *See Frequently Asked Questions About Gangs*, NAT'L GANG CTR., https://nationalgangcenter.ojp.gov/about/faq#faq-1-what-is-a-gang [https://perma.cc/XJF2-PSPV] ("There is no single, generally accepted definition of a 'gang.'").

209. *Compare About Violent Gangs*, U.S. DEP'T OF JUST. (Apr. 30, 2021), https://www.justice.gov/criminal-ocgs/about-violent-gangs [https://perma.cc/E4A9-XX8E] (defining a gang as "three or more individuals who adopt a group identity"), *with* 18 USC § 521(a) (defining a "criminal street gang" as "an ongoing group, club, organization, or association of 5 or more persons" that meets certain other criteria).

210. *See About Violent Gangs*, *supra* note 209.

211. *Id.*

212. *Id.*

213. Hagedorn, *supra* note 27, at 153. What differentiates gangs from transnational gangs is simple; scholars generally consider transnational crime to be any form of illegal activity that affects more than one country. Michael Paarlberg, *Gang Membership in Central America: More Complex than Meets the Eye*, MIGRATION POL'Y INST. (Aug. 26, 2021), https://www.migrationpolicy.org/article/complexities-gang-membership-central-america [https://perma.cc/8F39-UFJ5].

214. *See Hells Angels Motorcycle Club World*, HELLS ANGELS WORLD, https://hells-angels.com/world [https://perma.cc/4JHW-8E2U] (providing a world map of its chapters).

215. *See* Zhang Changyue, *China Reaffirms Determination to Wipe Out Mafia Gangsters, Protectors*, GLOB. TIMES (July 18, 2022, 11:11 PM), https://www.globaltimes.cn/page/202207/1270842.shtml [https://perma.cc/68S5-BEB9].

criminally indicted from 2018 to 2021.[216] Gangs are also highly prevalent in South Africa, Burma, and other countries.[217] Worldwide gang membership is in the millions, and the power of gangs is growing in many places.[218] As such, it is clear gangs are not a problem endemic to only one region of the world, but instead are a global phenomenon.

The definition and conception of gangs are particularly important to immigration law. As a general matter, immigration officials have consistently prioritized deporting gang members.[219] A February 19, 2021, Department of Homeland Security memorandum set "public safety" as a priority category, which included deporting gang members.[220] Immigration and Customs Enforcement (ICE) also specifically set its sights on focusing "to identify violent street gangs and to arrest, prosecute, imprison[,] and/or deport transnational gang members" and created the Operation Community Shield task force in 2005 to enact those goals.[221]

Gangs are structured in different ways that permit varying levels of decision-making authority. One gang structure used by some of the largest transnational gangs, such as MS-13 and Barrio 18, is the so-

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216. *Id.*

217. *See* Jason Burke, *Calls for Crackdown on Gangs in South Africa after Spate of Gun Attacks*, THE GUARDIAN (July 11, 2022, 12:21 PM), https://www.theguardian.com/world/ 2022/jul/11/calls-for-crackdown-on-gangs-in-south-africa-after-spate-of-gun-attacks [https://perma.cc/FW2R-CWFK]; Jim Pollard, *Crime Gangs Control Some Myanmar, Laos Economic Zones: UN*, ASIA FINANCIAL (June 26, 2022), https://www.asiafinancial.com/crime-gangs-control-some-myanmar-laos-economic-zones-un [https://perma.cc/279C-BEHL].

218. *Supra* notes 27–28.

219. Paarlberg, *supra* note 214.

220. *See Interim Guidance: Civil Immigration Enforcement and Removal Priorities*, U.S. IMMIGR. & CUSTOMS ENF'T, Memorandum from Tae D. Johnson, February 18, 2021, 4–5, https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf [https://perma.cc/N5DV-V5YW]. It stated those who had

> been convicted of an offense for which an element was active participation in a criminal street gang . . . or is not younger than 16 years of age and intentionally participated in an organized criminal gang or transnational criminal organization to further the illegal activity of the gang or transnational criminal organization

were to be a removal priority. *Id.* at 5.

221. *Transnational Gangs*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/investigations/transnational-gangs [https://perma.cc/GF23-WGQY] (last updated Aug. 17, 2022).

called "decentralized franchise model."[222] This model allows for a more local-level clique to operate in a largely autonomous way with their own *palabreros* (or "shot-callers") making decisions.[223] Ranging from a handful of members to several hundred, cliques rarely coordinate with one another.[224] However, in some cases, the cliques are further organized into groups called programs.[225] The cliques, or programs, then answer to a *ranfla* (a ruling council) and provide a certain amount of their earnings to the *ranfla*.[226] Further, geography can also have in impact on gang autonomy.[227] For instance, within MS-13, West Coast members enjoy more autonomy while East Coast members are more integrated into a hierarchy.[228] This decentralization has clear implications on the direct authorization requirement, as discussed below.

H. Statutory Interpretation

Before turning to an analysis of the Terrorism Inadmissibility Statute, a general discussion of proper statutory interpretation is warranted. Statutory interpretation is the process by which courts determine the meaning of the laws passed by Congress.[229] Courts use several tools to divine statutory meaning, usually progressing in the following order: (1) plain meaning, (2) canons of construction, then (3) legislative history.[230] Generally, the starting point in conducting statutory interpretation is the statute's plain meaning.[231] If a statute is ambiguous, or both plaintiff and defendant offer reasonable interpretations of the statute, courts consult the canons of construction to resolve ambiguity.[232] When plain language and the

222. Paarlberg, *supra* note 213.
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 4, https://crsreports.congress.gov/product/pdf/R/R45153 [https://perma.cc/BD2T-B4Q2] (citation omitted).
230. *See id.* at 21.
231. *See, e.g.*, United States v. Turkette, 452 U.S. 576, 580 (1981) ("In determining the scope of a statute, we look first to its language."); United States v. Piervinanzi, 23 F.3d 670, 677 (2d Cir. 1994) (noting that statutory interpretation starts with the statute's language).
232. *See Turkette*, 452 U.S. at 581.

canons of construction do not resolve ambiguity, courts may resort to legislative history.[233]

The canons of construction are instructive principles for interpreting statutes.[234] A judicial creation, the canons are "maxims or aphorisms" that aid in determining the intended meaning of a statute.[235] The intention of the canons is the limitation of judicial discretion though "rooting interpretive decisions in a system of aged and shared principles."[236] This Comment will discuss the whole text, avoidance of absurdity, and *expressio unius* canons of construction.

The first canon explored in this Comment is that of the "whole text canon."[237] The canon stands for the proposition that a statute should be interpreted in the context of the full statutory construction.[238] The whole text canon recognizes that "[s]tatutory construction . . . is a holistic endeavor."[239] Though ambiguous in isolation, a statute may be more clearly understood in light of the entire statutory scheme.[240] For example, identical terms within the same statute should be interpreted to have identical meanings.[241] Further, the whole text canon emboldens courts to look to "nearby statutory provisions"[242] and compare statutory phrases "across various statutes."[243]

The avoidance of absurdity canon holds that one should "[f]ollow the plain meaning of the statutory text, except when a textual plain meaning requires an absurd result or suggests a scrivener's error."[244] Put another way, this canon gives judges the power to ignore the plain meaning of a statute if a literal reading of the statute would result in

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233. *See, e.g.*, Lee v. Bankers Trust Co., 166 F.3d 540, 544 (2d Cir. 1999).

234. BRANNON, *supra* note 229, at 28.

235. ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 114 (2d ed. 2002).

236. *Id.*

237. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 167 (2012).

238. *See id.* (conceptualizing the canon and describing its features).

239. United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988).

240. *Id.*

241. BRANNON, *supra* note 229, at 26.

242. Unicolors, Inc. v. H&M Hennes & Mauritz, L.P., 142 S. Ct. 941, 947 (2022).

243. Peter v. NantKwest, Inc., 140 S. Ct. 365, 373 (2019).

244. BRANNON, *supra* note 229, at 54 (citation omitted); *see also* United States v. Turkette, 452 U.S. 576, 580 ("[A]bsurd results are to be avoided[.]"); United States v. Dauray, 215 F.3d 257, 264 (2d Cir. 2000) ("A statute should be interpreted in a way that avoids absurd results.").

absurdity.[245] By setting boundaries on Congress's power and serving reliance interest, this canon fosters the rule of law.[246] Most commonly, the canon refers to rationality, reasonableness, and common sense when defining what is "absurd."[247]

A third and last canon of construction is discussed in this Comment—that of *expresio unius*. The canon derives from the Latin phrase *expressio unius est exclusio alterius,* which translates to "[t]he expression of one thing implies the exclusion of others."[248] Essentially, this canon holds that "items expressed [as] members of an 'associated group or series,' justify[] the inference that items not mentioned were excluded by deliberate choice, not inadvertence."[249]

II. ANALYSIS

This Comment next turns to an analysis of the Tier III statute under statutory interpretation. Using the whole text canon and the avoidance of absurdity doctrine, this Comment argues the Tier III statute should be read more narrowly. Further, it argues that the statute implies a direct authorization requirement and two limitations to the term "subgroup." Under this more appropriate narrow reading of the text and the implied limitations, this Comment argues that transnational gangs should not be considered Tier III terrorist organizations.

A. Tier III Should be Read More Narrowly

The Tier III statute is remarkably broad and could have a potentially devastating impact on immigrants.[250] To give the statute the meaning intended by Congress, courts must apply the steps of statutory interpretation.[251] The statute describes Tier III organizations as any organization "that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages

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245. Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127, 128 (1994).

246. *Id.* at 158–63.

247. *Id.* at 164.

248. SCALIA & GARNER, *supra* note 237, at 107.

249. Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003) (quoting United States v. Vonn, 535 U.S. 55, 65 (2002)).

250. *See supra* sections II.D–E (describing the breadth of the statute and its impact on noncitizens seeking to immigrate to the United States).

251. *Cf.* United States v. Am. Trucking Ass'ns, 310 U.S. 534, 542 (1940) ("In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress.")

in, the activities described in [the terrorist bars]."[252] This language appears to be unambiguous, with a clear plain meaning which can be determined on the statute's face.[253] According to this plain language reading, any two people in a group or subgroup who engage in terrorist activity within the meaning of the Terrorist Inadmissibility Statute should be excluded from the United States.[254] However, the BIA itself has not consistently applied this seemingly simple, yet rigid test.[255]

One example of this inconsistency is how the BIA applied the statute to the Bangladesh National Party (BNP), as noted in *Uddin*.[256] From 2015 to 2017, the BIA addressed the status of the BNP at least forty-four times, six times finding the organization to be a Tier III terrorist organization and ten times finding it was not.[257] In the *Uddin* decision, Judge Rendell wrote, "something is amiss where, time and time again, the Board finds the BNP is a terrorist organization one day, and reaches the exact opposite conclusion the next."[258] The Circuit also noted the BIA's Tier III analysis was "highly inconsistent."[259]

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252. 8 U.S.C. § 1182(a)(3)(B)(vi)(III).

253. *Id.*

254. *See id.* However, the Supreme Court has held statutes should give words their "normal and customary meaning." Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 388 (1951). A plain language reading of the Terrorism Inadmissibility Statute seems to run contrary to the "normal and customary meaning" of the word terrorism. The common conception of terrorism, and most definitions of terrorism internationally, include some requirement of political or military motivation. Black's Law Dictionary defines terrorism as "[t]he use or threat of violence to intimidate or cause panic, esp. as a means of achieving a political end." *Terrorism*, BLACK'S LAW DICTIONARY (11th ed. 2019). Additionally, the Oxford Dictionary defines terrorism as "[t]he unofficial or unauthorized use of violence and intimidation in the pursuit of political aims." *Terrorism*, OXFORD ENGLISH DICTIONARY (3d ed. 2011). Further, the Seventh Circuit has stated that "[t]errorism as used in common speech refers to the use of violence for political ends." Hussain v. Mukasey, 518 F.3d 534, 537 (7th Cir. 2008). *But see id.* at 537–38 (averring that the statutory definition of terrorism in Tier III is broader than common speech and that it is "irrelevant" if the organization in question was politically motivated). These common conceptions of terrorism place political motivation or aims at the center of defining what terrorism is, unlike a plain language reading of the Terrorist Inadmissibility Statute.

255. *See supra* notes 194–201 and accompanying text (observing the BIA's inconsistent application of the terrorism statute to the Bangladesh National Party).

256. 870 F.3d 282, 291 (3d Cir. 2017).

257. *Id.*

258. *Id.*

259. *Id.*

While *Uddin* is only one example of how courts interpret the Tier III statute inconsistently, it is a telling one. The statute's plain language cannot be considered unambiguous where adjudicators arrive at completely opposite outcomes while analyzing the same organization for possible terrorist status.[260] Traditionally, a statute's plain language reading will be given effect unless it is ambiguous or two parties offer differing colorable interpretations of the statute.[261] Here, the BIA went a step further by *itself* offering two varying interpretations of the statutes—sometimes accepting the direct authorization requirement, sometimes not, sometimes finding the BNP a terrorist organization, sometimes not.[262] Given such an inconsistent interpretation, this Comment turns to the second step of statutory interpretation—the canons of construction.

1. Designating nonpolitical organizations as tier III is inconsistent with the whole text canon

The whole text canon demonstrates that Tier III should only include politically motivated violence. Tier I and Tier II, unlike Tier III, are more clearly defined and both include aspects of political motivation as a requirement.[263] Additionally, other sections of the United States Code define terrorism through political motivation.[264] This is important considering the whole text canon holds that identical terms should have identical meanings across statutes and that courts may look to nearby statutory provisions or compare definitions across various statutes to inform their interpretation of an ambiguous provision.[265]

Turning first to Tier I organizations, the terrorism bar requires the organization to engage in terrorist activity as defined in one of two

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260. *See* United States v. Turkette, 452 U.S. 576, 581 (1981).

261. *See id.* at 580 ("If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'") (quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).

262. *See* Uddin v. Att'y Gen., 870 F.3d 282, 291 (questioning the BIA's inconsistencies).

263. *Compare* § 1182(a)(3)(B)(vi)(I) *and* § 1182(a)(3)(B)(vi)(II), *with* § 1182(a)(3)(B)(vi)(III).

264. *See, e.g.*, 22 U.S.C. § 2656f(d)(2) (defining terrorism as "politically motivated violence").

265. *Supra* notes 241–243 and accompanying text.

statutes: 22 U.S.C. § 2656f(d)(2) or 8 U.S.C. § 1182(a)(3)(B).[266] The prior section of code states that terrorism is "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents."[267] This section unambiguously requires engagement in violence that is "politically motivated."[268]

However, there is no requirement to utilize this more limited definition, as "terrorist activity" also includes actions enumerated in 8 U.S.C. § 1182(a)(3)(B).[269] A Tier II group likewise needs to meet the definition of terrorist activity as defined in that section.[270] Section 1182(a)(3)(B) includes several categories of terrorist activity that do not expressly call for political motivation, including hijacking or sabotage, kidnapping, and the use of a "biological agent, chemical agent, or nuclear weapon or device."[271] However, the statute states that the use of an "explosive, firearm, or other weapon or dangerous device" is only classified as terrorist activity if it is for a purpose "other than for mere personal monetary gain" and must be committed with "intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property."[272] Further, that section includes "assassination" as terrorist activity.[273] The definition of assassination is subject to differing interpretations itself and is thus beyond the scope of this Comment. However, in general, assassination "may be viewed as an intentional killing of a targeted individual committed *for political purposes*."[274] Further, for Tier I, terrorist activity must "threaten[] the security of United States nationals or the national security of the United States."[275] Most crimes which endanger national

266. 8 U.S.C. § 1189(a)(1). Two other elements are required for Tier I classification are that the organization is foreign and that the terrorist activity threatens United States nationals or U.S. national security. *Supra* note 94 and accompanying text.

267. 22 U.S.C. § 2656f(d)(2).

268. *Id.*

269. A.A. v. Att'y Gen., 973 F.3d 171, 186 n.9 (3d Cir. 2020).

270. *See* § 1182(a)(3)(B)(vi)(II).

271. 8 U.S.C. § 1182(a)(3)(B)(iii).

272. *Id.*

273. 8 U.S.C. § 1182(a)(3)(B)(iii)(IV).

274. ELIZABETH B. BAZAN, CONG. RSCH. SERV., RS21037, ASSASSINATION BAN AND E.O. 12333: A BRIEF SUMMARY 2 (2002) (emphasis added).

275. 8 U.S.C. § 1189(a)(1).

security have a political element.[276] Thus, large swaths of the activity that could meet terrorist activity requires a political, or at least non-monetary, motivation for its commission.

Additionally, the whole text canon promotes an accurate statutory interpretation by allowing a reader to look to nearby statutory provisions and compare statutory phrases across various statutes.[277] A variety of other sections of the United States Code define terrorism. For one, 50 U.S.C. § 1801(c) defines terrorist attacks as those violent attacks intended to: "intimidate a civilian population; [] to influence the policy of a government by intimidation or coercion; or [] to affect the conduct of a government by assassination or kidnapping."[278] Additionally, 22 U.S.C. § 2656f(d)(2) discussed above specifically requires terrorism be "politically motivated."[279] Furthermore, the United States has signed onto United Nations resolutions related to terrorism.[280] One such resolution defined terrorism as follows: "[C]riminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular person for political purposes . . . ."[281] All of these sources, national and international, have clearly defined terrorism as requiring political motivation.

It is worth noting that, despite the many references to political motivation throughout the INA and other federal statutes, some may argue that the absence of political motivation text in Tier III clearly shows Congressional intent. Under the *expresio unius* canon, the lack of an express political requirement in the Terrorism Inadmissibility Statute may have been deliberate.[282] However, this counterargument is less persuasive when considering the express political motivation language was only present in one of the two ways to meet the Tier I definition and was altogether absent in the Tier II definition.[283] The

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276. *See 13.1 Crimes Involving National Security*, UNIV. MINN., https://open.lib.umn.edu/criminallaw/chapter/13-1-crimes-involving-national-security [https://perma.cc/SZ6L-T3PJ] (examining national security related crimes including treason, sedition, sabotage, and espionage).

277. *Supra* Section II.H.

278. 50 U.S.C. § 1801(c).

279. 22 U.S.C. § 2656f(d)(2).

280. *See, e.g.*, U.N. General Assembly Resolution 51/210 (1997) ("Measures to Eliminate Int'l Terrorism").

281. *Id.*

282. *See* Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003) (quoting United States v. Vonn, 535 U.S. 55, 65 (2002)) (standing for the inference that Congress may deliberately exclude a phrase in one location if it was included elsewhere in a statute).

283. *See* § 1182(a)(3)(B).

lack of a series of definitions in the INA requiring political motivation indicates that the exclusion of a political motive in Tier III may be the result of Congress' inadvertence rather than a calculated decision.[284] Further, the whole text canon, unlike the *expresio unius* canon, is bolstered by a variety of other federal statutes which likewise construe terrorism as having a political element.[285] As such, reliance on the whole text canon is warranted and aids a more holistic understanding of the ambiguous Tier III statute. Some element of political (or at least non-monetary) motivation should be required for an organization to be designated as a Tier III organization.

2. A plain language reading of the tier III statute promotes absurd results

In addition to the whole text canon, the avoidance of absurdity canon also provides insight as to the proper interpretation of the Terrorism Inadmissibility Statute; this is because a plain language reading of Tier III compromises U.S. foreign policy interests. The bar prevents groups sympathetic to the U.S. campaigns overseas from aiding U.S. Forces in the future.[286] Further, the statute could apply to a group whose "activities coincide with our foreign policy objectives" or "who provide assistance to United States or allied armed forces."[287]

Though written only a year after the terrorism bars took their present form, Acting Vice Chairman Osuna's concurrence in *In re S-K-*[288] was extremely insightful and pointed out several ways the decision seemed to promote absurd results.[289] His concurrence noted that, under the right conditions, both support of the U.S. Armed Forces and two people shooting a gun in an abandoned building could be classified as terrorist activity under the statute.[290] Acting Vice Chairman Osuna also highlighted the strange outcome where an asylum seeker who provides monetary support to the CNF—an ally of an organization

284. *Cf.* BRANNON, *supra* note 229, at 51–52 (indicating the *expresio unius* canon is strongest when the excluded item is elsewhere included in an "associated group or series" because such occurrence more fully gives rise to the inference the exclusion of was deliberate) (citing Barnhart, 537 U.S. at 168).

285. *See supra* notes 278–281 and accompanying text (cataloging a variety of these other sources of law).

286. *See* Khan v. Holder, 584 F.3d 773, 786–87 (Nelson, J., concurring).

287. *In re* S-K-, 23 I&N Dec. 936, 948–49 n.15 (2006) (Osuna, Acting Vice Chairman, concurring).

288. 23 I&N Dec. 936 (2006).

289. *See id.* at 948–50 (Osuna, Acting Vice Chairman, concurring) (bemoaning several results which Congress could not have intended).

290. *Id.*

recognized by the United States as the legitimate representative of the Burmese people—and who does not appear to pose any threat to the United States could be found inadmissible.[291]

Acting Vice Chairman Osuna's prediction that the broad Terrorism Inadmissibility Statute could include "activities [which] coincide with our foreign policy objectives" came to life in the case of Saman Kareem Ahmad.[292] Despite risking his life to serve as a translator of the United States Armed Forces for nearly four years during the War on Terror, Ahmad initially faced denial of his visa application for his service in the KDP.[293] Despite the KDP being a legitimate political party in Iraq, which sought to overthrow the Saddam Hussain regime,—thus making its actions coincide with U.S. foreign policy—the KDP was determined to be a terrorist group.

In promulgating a statute that labels groups sympathetic to the U.S. foreign policy aims as terrorists, Congress has disincentivized aiding the U.S. Armed Forces.[294] This is anathema to counterterrorism goals.[295] The United States government has identified global cooperation and "burden sharing" as key strategies to undercut terrorist organizations.[296] For instance, the Bureau of Counterterrorism, a subgroup of the Department of State, lists as part of its mission statement "securing the counterterrorism cooperation of international partners."[297] Clearly then, an act of Congress that undercuts such strategies undercuts the counterterrorism efforts of the United States by decreasing the likelihood of international cooperation for fear of being labeled a terrorist.[298] Such an outcome demonstrates that a broad reading of the terrorism bar creates absurd results because it disincentivizes and even punishes those who act in ways complimentary to U.S. foreign policy.[299]

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291. *Id.*

292. *In re S-K-*, 23 I&N Dec. at 948, 949 n.15 (Osuna, Acting Vice Chairman, concurring).

293. DeYoung, *supra* note 151.

294. *Id.*

295. *See Countering Terrorism*, *supra* note 50 (emphasizing promotion of international cooperation as a strategy to combat terrorism).

296. *Id.*

297. *Bureau of Counterterrorism*, *supra* note 51.

298. *See Countering Terrorism*, *supra* note 50 (expressing international cooperation and "burden sharing" are important to US. Counterterrorism).

299. Tackling a similar issue, the Third Circuit has previously found that it is not an absurd result that the terrorism bars place foreign policy powers in the hands of the

The plain meaning of the Terrorism Inadmissibility Statute sweeps into its grasp those engaged in activities that coincide with U.S. foreign policy. Such a result is contrary to the common sense, rationality, and reasonableness that the avoidance of absurdity doctrine seeks to enshrine.[300] Thus, such a reading of the statute should not survive judicial scrutiny.

B. Implied Limitations to the Terrorist Inadmissibility Statute

While applying the rules of statutory interpretation provides some clear guidance on the limitations of the statute, the statute also contains implicit limitations: the direct authorization requirement and limitations on the word "subgroup." The interpretation in *Uddin* and *Hussain* was correct; an *organization* has not engaged in terrorist activities unless its leaders have directed such activities take place or have acquiesced to them.[301] A direct authorization requirement is implied into the statute due to the plain meaning of the statutory text, reasonable BIA interpretation that has held as such, and common sense that compels this outcome. Using the same reasoning, limitations to the word "subgroup" should also be recognized.

Firstly, the statute defines Tier III as "a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described [in the statute]."[302] As the majority in *Uddin* noted, if the statute said, "a group *whose members* engage in terrorist activity," then the authorization would not matter.[303] However, given a reading of the plain text, the actions of the group, not the actions of the group's members, are of concern.[304] "A rule that there must be evidence of authorization from party leaders is most faithful" to a plain meaning reading of the statute.[305]

Secondly, the direct authorization requirement follows the reasonable interpretation of the BIA. In its research for *Uddin*, the

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individual adjudicators making Tier III terrorism organization determinations. A.A. v. Att'y Gen., 973 F.3d 171, 183–84 (3d Cir. 2020).

300. Dougherty, *supra* note 245, at 164.

301. *See Uddin*, 870 F.3d at 290 ("Today, we hold that absent such a finding [of direct authorization] by a group's leaders, Tier III status cannot be assigned to a group."); *Hussain*, 518 F.3d at 537 (same).

302. 8 U.S.C. § 1182(a)(3)(B)(vi)(III).

303. *Uddin*, 870 F.3d at 290.

304. *See* § 1182(a)(3)(B)(vi)(III) (clarifying the group, and not the group's members, must engage in terrorist activity).

305. *Uddin*, 870 F.3d at 290.

Third Circuit requested that the BIA send all of its 2015-2017 opinions analyzing if the BNP was a terrorist organization.[306] Some of those requested decisions demonstrated that the BIA would remand cases to relevant immigration judges if they had not addressed the authorization of terrorist activities in their decisions.[307] The BIA also applied the reasoning from *Khan* and *Hussain* in several of their decisions, "suggesting that some finding on authorization is necessary to assign a group Tier III status."[308] Further, an appendix for a practice advisory published by the National Immigration Project contains sixteen unpublished BIA decisions where the Board adopted the direct authorization requirement.[309]

Lastly, common sense also requires this outcome. As Judge Posner noted in his *Hussain* decision, "[a]n organization is not a terrorist organization just because one of its members commits an act of armed violence without direct or indirect authorization, even if his objective was to advance the organization's goals."[310] Further, a strong example of this was presented by the *Uddin* majority: "If a single member of the Democratic or Republican Party committed a terrorist act, we would not impute terrorist status to the entire group, absent some showing that party leadership authorized the act."[311] This logic should hold true for any group and subgroup. Two or more rogue members should not be able to singlehandedly color the legal status of the entire organization through actions that enjoy no support from other group members or the group's leadership.[312] Thus, taking together common sense, the BIA's reasonable interpretation, and the plain statutory text, the direct authorization requirement is properly read into the Tier III statute.

However, Judge Greenaway, Jr.'s concurrence went further than the majority opinion by elaborating on the meaning of "subgroup" in the text.[313] He wrote the statutory structure of the Tier III language necessitated an understanding of the term subgroup and that two

306. *Supra* notes 194–196 and accompanying text.
307. *Uddin*, 870 F.3d at 290.
308. *Id.*
309. *See Practice Advisory: Challenging a 'Tier III' Terrorism Determination*, *supra* note 173 (containing the unpublished decisions).
310. *Hussain*, 518 F.3d at 538.
311. *Uddin*, 870 F.3d at 290.
312. *Id.*
313. *Id.* at 292–93 (Greenaway, Jr., J., concurring).

limitations are implicit in the statute.[314] The two limitations discussed were that (1) a subgroup only covers significant subgroups and (2) the term applies only if a subgroup is subordinate to or affiliated with the larger group and dependent on the larger group to maintain operations.[315] He noted these two limitations are "interdependent with the authorization requirement."[316]

Congressional intent, the BIA and Department of State's reasonable interpretations, and common sense all support Judge Greenaway Jr.'s interpretation. Firstly, there are very few Congressional materials which provide insight into the intent of the Tier III statute. However, a House Judiciary Committee report provides some insight.[317] That report shared that the statute was intended to encompass "any group which has a *significant* subgroup that carries out [terrorist] activities."[318] Some textualists may argue that, legislative history aside, the absence of the word "significant" qualifying "subgroup" in the text of the Terrorist Inadmissibility Statute should be the end of the inquiry; the plain text of subgroup does not necessitate significance.[319] Purposivists, on the other hand, would disagree, arguing that "judges should construe [the statute] to execute [its] legislative purpose."[320] The issue of implied limitations to the word subgroup need not be decided on textualist versus purposivist arguments, however, because agency interpretation and common sense also support the acceptance of these limitations.

Additionally, the Department of State's Foreign Affairs Manual provides that a Tier III subgroup includes only groups "where there are reasonable grounds to believe that [a subgroup] is subordinate to, or affiliated with, [the larger group] and [the subgroup] is dependent on, or otherwise relies upon, [the larger group] in whole or in part to support or maintain its operations."[321] The policy manual also states there must be reasonable grounds to believe that the subgroup as a

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314. *Id.*
315. *See id.*
316. *Id.*
317. *See* H.R. Rep. No. 107-236, pt. 1, at 63 (2001).
318. *Id.* (emphasis added).
319. *See* BRANNON, *supra* note 229, at 14 (explaining textualists emphasize the statute's words "over any unstated purpose").
320. *Id.* at 12 (quoting ROBERT A. KATZMANN, JUDGING STATUTES 31 (2014)). Purposivists recognize that each statute represents an attempt on Congress' behalf to solve a specific issue, and that the statute should be viewed in light of attempts to accomplish that goal. BRANNON, *supra* note 229, at 12.
321. 9 F.A.M. 302.6-2(B)(3)(h).

whole or members of the subgroup are affiliated with the larger organization.[322] "If a subgroup engages in terrorist activities," then an adjudicator can consider both groups as terrorist organizations.[323]

The BIA, drawing on the aforementioned legislative history and Foreign Affairs Manual, held in one of its unpublished decisions that these two limitations were "persuasive."[324] The BIA's reasonable interpretation should be followed.[325] Further, common sense also requires this outcome. If whichever two or more individuals committed the terrorist acts in question counted as a subgroup,[326] then terrorist status could be imputed on the organization, despite its "size, shape or formality" and despite the fact that it may not have supported the acts or the individuals.[327] Returning to the example of the Democratic or Republican party, if two or more members within the political party gathered together to engage in terrorist activities as defined in the act, one would generally not classify those rogue terrorists as a subgroup of the political party.[328] Instead, this subgroup of terrorists would need to receive support from the political party or be a significant portion of the political party, such as a large number of the political party or its most influential members or leaders, for the political party as a whole to be construed as a terrorist organization.[329] For this reason, avoidance of absurdity also dictates these two limitations be followed to avoid possible absurd results.[330] Thus, properly understood, the Tier III statute contains an implicit direct authorization requirement and two implicit limitations on the word "subgroup" in the statute.

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322. *Id.*

323. *Id.*

324. *Practice Advisory: Challenging a 'Tier III' Terrorism Determination*, *supra* note 173, at 36.

325. *See* Perez-Vargas v. Gonzales, 478 F.3d 191, 193 n.3 (4th Cir. 2007) ("[W]hen an agency fails to present a reasoned basis for departing from a previous decision, 'it may be deemed to have acted arbitrarily.'") (quoting Balt. Gas & Elec. Co. v. Heintz, 760 F.2d 1408, 1419 (4th Cir. 1985)).

326. Recall that the statute states a subgroup may be organized or not. 8 U.S.C. § 1182(a)(3)(B)(vi)(III).

327. *Uddin*, 870 F.3d at 293 (Greenaway, Jr., J., concurring).

328. *See id.* at 290.

329. *See id.*

330. *See* Dougherty, *supra* note 245, at 164 (arguing the canon should be employed when the result of a plain meaning reading would promote bizarre results).

C. Gangs Do Not Fit in the Appropriate Narrower Reading

Using the foregoing analysis as a basis, this Comment now turns specifically to the Tier III statute's application to transnational gangs. For two primary reasons, transnational gangs do not fit within the Tier III category: first, because gangs are not politically motivated—as required by a proper reading of Tier III using the whole text canon—and second, because certain gangs, especially those using a decentralized franchise structure, will not fulfill the implied direct authorization requirement properly read into the text.

Transnational gangs do not fit within Tier III because they are criminal organizations which are traditionally motivated by money.[331] Gang violence and intimidation is usually for the purpose of further "power, reputation, or economic resources" or to defend its members or the interests of the gang.[332] In general, gangs are not politically motivated. Therefore, under a proper reading of the Statute, which includes a political motivation requirement, designation of transnational gangs as Tier III terrorist organizations would violate the whole text canon.[333]

Fortuitously, it seems USCIS has, at least in the past, accepted both the narrower reading of the statute advanced in this Comment and this Comment's primary argument, that gangs are not eligible for Tier III designation.[334] A branch of the American Civil Liberties Union (ACLU) previously obtained a USCIS training manual regarding TRIG which states: "Gangs usually don't qualify as Tier III terrorist organizations because of their criminal focus (i.e., their activities further personal monetary gains)."[335] However, it is important that not only USCIS, but also the Department of Justice accepts this reading, considering immigration judges within the Department of Justice also make case-by-case Tier III determinations.[336] Further, USCIS could at

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331. *See About Violent Gangs*, *supra* note 209 (establishing gangs' violence is typically motivated by a desire to defend the gang's monetary resources or power).

332. *About Violent Gangs*, *supra* note 209.

333. *See* 22 U.S.C. § 2656f(d)(2); 50 U.S.C. § 1801(c); *infra* subsection II.A.2.

334. *See* U.S. Citizenship and Immigr. Servs., *U.S. Citizenship and Immigration Services Basic: Terrorist-Related Inadmissibility Grounds (TRIG) Instructor Guide*, ACLU OF S. CAL., June 2012, https://www.aclusocal.org/sites/default/files/wp-content/uploads/2014/07/USCIS-Officer-Academy-TRIG-Instructor-Guide-Jun.-2012.pdf [https://perma.cc/ K64A-NFHF].

335. *Id.*

336. *See supra* note 105 and accompanying text (noting immigration judges are commonly the adjudicators who apply the Tier III statute).

any time accept a different interpretation of the statute, as this training manual is not binding.[337]

If an adjudicator found there was no political motivation under a narrower reading of the statute, the analysis would end there. However, if there *was* political motivation, the adjudicator would have to consider the statute's implied limitations, including the direct authorization requirement and the limitations on the word subgroup. A transnational gang may be ineligible for Tier III status because of the direct authorization requirement, especially for gangs with a decentralized franchise model. In a franchise model, the local cliques are highly autonomous.[338] The worldwide leaders of the gangs in those models are not authorizing the day-to-day activities such as localized cliques' drug sales or robberies.[339] Instead, the local *palabreros* (or "shot-callers") are making those determinations.[340] While that is sufficient for classification under the REAL ID Act amendment which added language regarding subgroups, the two limitations discussed in Judge Greenaway Jr.'s *Uddin* concurrence further complicate the analysis.[341]

Firstly, only *significant* subgroups should be classified as a subgroup under the INA's terrorist bars.[342] Thus, as the BIA has previously held, "factual determinations concerning . . . significant affiliation will necessarily underlie any legal conclusion regarding [an organization's] status as an undesignated terrorist organization."[343] Therefore, gangs with a franchise model would require immigration officials to determine if a clique (or program or *ranfla*) is a *significant* subgroup of the gang.[344] Absent that finding, common sense, legislative

337. Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1327–28 ("Nonleglislative rules . . . by definition, are not *legally* binding on the courts, the agency, or the public."); *see also* 5 U.S.C. § 553(b) (providing that notice and comment rule making does not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice").

338. Paarlberg, *supra* note 213.

339. *See id.*

340. *Id.*

341. *See* Uddin v. Att'y Gen., 870 F.3d 282, 282–90 (3d Cir. 2017) (Greenaway, Jr., J., concurring).

342. *Supra* Section II.B.

343. *Practice Advisory: Challenging a 'Tier III' Terrorism Determination*, *supra* note 173, at 36.

344. *See supra* Section I.G. (explaining the structure of gangs which use the decentralized franchise model).

history, and BIA precedent prevent a finding that the subgroup qualifies for the reasons addressed above.[345]

There is also an implied limitation that a subgroup must rely on the broader organization for support.[346] However, in many ways, the opposite is true in gangs which use the franchise model.[347] The transnational gangs conduct their own criminal activities to generate money, and then kick back a portion of that income to the local ruling council.[348] Of course, a clique's level of autonomy varies, but a clique could nevertheless continue to conduct its activities without the broader organization's support, while benefiting from the reputation and information sharing of the larger group.[349] Given these two limitations, it appears unlikely that many gangs using a decentralized franchise model could be classified as a subgroup under the INA.

Even if a gang did "engage in terrorist activities" according to the INA, and did so with direct authorization, immigration authorities would need to engage in a case-by-case fact intensive analysis to determine a statutory fit.[350] This analysis would potentially be necessary for both the larger gang and any subgroups. Thus, at a minimum, the direct authorization requirement calls for a more thorough analysis, while in the best case (for the immigrant at least) it would cause some transnational gangs to be unqualified for Tier III status.

CONCLUSION

The Tier III statute, with its breathtaking scope, has had widespread impact on immigrants seeking a new start in America. Many of those immigrants faced hardship and even violence in their past. But the Tier III statute has recast victims as perpetrators. Despite being kidnapped and forced to perform manual labor after witnessing the murder of her boyfriend, the Tier III statute has reframed Ana as a dangerous individual who committed terrorist activity by providing support to terrorists.

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345. *See supra* notes 317–330 and accompanying text (arguing the limitations on the word "subgroup" should be accepted for these reasons).

346. *Supra* Section II.B.

347. *See* Paarlberg, *supra* note 213 (stating cliques provide a portion of their earnings to the *ranfla* they report to).

348. *Id.*

349. *See id.* (noting some of the factors which impact a clique's autonomy).

350. *See* Bell, *supra* note 104, at 2 (discussing how adjudicators make case-by-case determinations in Tier III assessments); Uddin v. Att'y Gen., 870 F.3d 282, 292 (3d Cir. 2017) (same).

The harsh consequences of the Terrorist Inadmissibility Statute will become more severe if the executive branch or adjudicators begin to label transnational gangs as Tier III terrorist organizations. This is especially true now as, in many regions, gangs are growing in prominence. As Ana's story demonstrates, a broad reading of Tier III would not only sweep into its definition the true members and leaders of the gangs, but also their victims.

The currently accepted, broad reading of the terrorism bars has much to gain from the canons of statutory construction. Political motive is central to what it means to be a terrorist group. Further, the broad interpretation of Tier III does not account for the absurd results concerning legitimate violence and foreign policy. Additionally, as some Circuits have correctly noted, there is a direct authorization requirement implied in the statute. But courts should go even further and accept implied restrictions on the types of subgroups which pass muster to be classified as a Tier III subgroup. Taking this narrower reading into account, it becomes clear that transnational gangs are not Tier III terrorist organizations. Gangs traditionally do not have a political motive, but instead are more focused on furthering their monetary gains and reputation. Even more, the structure of most gangs would not fit within the properly implied direct authorization requirement and limitations on the phrase subgroup. Transnational gangs are a poor fit for Tier III terrorist organizations. America owes immigrants better than an overzealous application of an ambiguous statute.