

Between A (Limestone) Rock and a Hard Place: Class Certification in Suits Alleging Pattern- Or-Practice FOIA Violations on Immigration Records Requests

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ABSTRACT

An Alien File (“A-File”) contains official government records that document a noncitizen’s immigration history. These records can help verify a noncitizen’s legal status, facilitate an application for immigration benefits, or even support a defense against charges of removability. However, noncitizens in removal proceedings do not have an affirmative right to their A-Files. Because there is no formal right to discovery in U.S. immigration courts, attorneys from the U.S. Department of Homeland Security (“DHS”) are not required to disclose evidence relevant to a noncitizen’s immigration case. Instead, noncitizens are forced to rely on the Freedom of Information Act (“FOIA”) to access their own immigration records.

This Note analyzes the use of pattern-or-practice class actions to challenge systemic FOIA violations by DHS and its components. Specifically, it argues that the class action device offers advantages over individual suits when challenging the agency’s routine failure to issue timely determinations on FOIA requests for A-Files. Even in a post-Wal-Mart Stores, Inc. v. Dukes litigation landscape, recent federal court decisions suggest the growing viability of class actions as a tool to vindicate noncitizens’ FOIA rights against recalcitrant immigration agencies. Accordingly, this Note examines how named plaintiffs and putative classes can satisfy heightened commonality requirements under Wal-Mart. In light of a circuit split on the issue, it also recommends how courts should resolve mootness problems that may arise during the class certification process.

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INTRODUCTION

A sprawling network of old limestone mines near Kansas City, Missouri, could hold crucial documents for noncitizens seeking to adjust their immigration status or fight a removal order.¹ “The Cave,” as it is known, hosts over twenty million Alien Files (“A-Files”) containing immigration-relevant documents for individual noncitizens, including visas, birth certificates, affidavits, criminal arrest records, and internal agency correspondence.² Enough to fill four football fields and growing each day, this assortment of records, which documents an individual’s immigration history up until naturalization, may exist in physical, digital, or hybrid formats.³

Administrative agencies rely on information from A-Files to adjudicate applications for immigration benefits, assess eligibility for federal programs, and formulate removal orders.⁴ In removal proceedings, timely access to A-Files can be life-altering; for some noncitizens, the U.S. government holds evidence that verifies their legal status or otherwise supports removal relief.⁵ However, government attorneys are not required to disclose evidence relevant to a noncitizen’s immigration case because formal discovery rights do not exist in removal proceedings.⁶ Instead, a noncitizen must file a Freedom of Information Act (“FOIA”) request to obtain her A-File.⁷ But FOIA is a poor substitute for discovery. Federal agencies often fail to timely respond, and the U.S. government may deport noncitizens before they

¹ Narintohn Luangrath, *How the Freedom of Information Act Fails Immigrants*, REGUL. REV. (Feb. 19, 2024), <https://www.theregreview.org/2024/02/19/luangrath-how-the-freedom-of-information-act-fails-immigrants/> [<https://perma.cc/2NQV-34YW>].

² *Id.*; see also Dent v. Holder, 627 F.3d 365, 372 (9th Cir. 2010) (noting that the A-File “documents the history of immigrants’ . . . interactions with components of the Department of Homeland Security . . . [and] ‘contains all [of] the individual’s official record material . . . and memoranda on each individual for whom [the legacy Immigration and Naturalization Service] has created a record under the Immigration and Nationality Act’”).

³ Ingrid Eagly, *Access to Public Records in Immigration Law: Reviewing Margaret B. Kwoka’s Saving the Freedom of Information Act*, YALE J. ON REGUL. (Feb. 9, 2022), <https://www.yalejreg.com/nc/symposium-saving-foia-07/> [<https://perma.cc/4PSJ-8V85>]; *Chapter 2 – Record of Proceeding*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-2> [<https://perma.cc/BNY6-R5HA>] (last visited May 22, 2025).

⁴ Stephen Lee, *Administrative Violence in Immigration Law*, 66 ARIZ. L. REV. 739, 751-52, 773-74, 776-77 (2024).

⁵ Margaret B. Kwoka, *First-Person FOIA*, 127 YALE L.J. 2204, 2208 (2018) [hereinafter Kwoka, *First-Person FOIA*].

⁶ See, e.g., Eagly, *supra* note 3 (“Unlike in the criminal system . . . there is no formal right to discovery in immigration proceedings.”); Geoffrey Heeren, *Shattering the One-Way Mirror: Discovery in Immigration Courts*, 79 BROOK. L. REV. 1569, 1573 (2014) (“Immigration courts may be the most massive and massively influential courts to lack discovery in this country. They offer DHS a one-way mirror into the lives of hundreds of thousands of non-citizens.”).

⁷ Kwoka, *First-Person FOIA*, *supra* note 5, at 2208. *But see* 8 C.F.R. §§ 1003.35, 1287.4(a)(2)(ii) (noting that, alternatively, immigration lawyers can ask an immigration judge to issue a subpoena). In practice, however, subpoenas are reportedly rarely used. See discussion *infra* Section II.B.

receive their requested documents. Indeed, noncitizens struggle to defend themselves against deportation charges when the government uses “secret evidence,” or adverse evidence that it declines to disclose.⁸ In effect, government attorneys benefit from a “one-way mirror” into noncitizens’ lives.⁹

Administrative law and immigration law scholars have documented the extreme information asymmetry between the U.S. government and noncitizens in removal proceedings.¹⁰ In doing so, they have contrasted the limited disclosure rights in such proceedings with those available in other agency courts;¹¹ argued that FOIA is “ill-suited” to the task of retrieving A-Files;¹² identified potential barriers noncitizens face when using FOIA;¹³ and explored whether incorporating federal civil procedure rules may improve fairness in immigration proceedings.¹⁴

To date, however, scholars have not analyzed the potential opportunities and challenges in bringing “pattern-or-practice”¹⁵ class actions against federal immigration agencies to vindicate noncitizens’ FOIA rights.¹⁶ In cases of systemic delays in FOIA determinations, a requester alleging a pattern-or-practice claim must show that such delays are not isolated

⁸ See, e.g., Heeren, *supra* note 6, at 1580 (describing the use of “secret evidence” by the U.S. government in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) as “emblematic of the lack of transparency in immigration court.”); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 551 (1950) (Jackson, J., dissenting) (critiquing the U.S. government’s refusal to disclose evidence it used to exclude the wife of a U.S. citizen from entering the United States).

⁹ Heeren, *supra* note 6, at 1573.

¹⁰ See, e.g., Amit Jain, *Bureaucrats in Robes: Immigration “Judges” and the Trappings of “Courts”*, 33 GEO. IMM. L.J. 261, 271-72 (2019) (“Noncitizens lack access to discovery procedures that could uncover favorable evidence: although [immigration judges] technically can order depositions and subpoenas, the only reliable way for a noncitizen to view their own case file is to file a [FOIA] request outside of the removal proceeding, with no guarantee that the results will arrive before the case concludes.”); Kwoka, *First-Person FOIA*, *supra* note 5, at 2259 (“Discovery in immigration court could improve efficiency at the administrative level [because] attorneys are nearly always seeking the very records in the possession of the [DHS] trial attorney at the proceeding.”); Heeren, *supra* note 6, at 1600 (“If the federal government wants to keep non-citizens powerless to prevent their deportation, keeping them in the dark when it comes to discovery is a good way to do so.”).

¹¹ Heeren, *supra* note 6, at 1572.

¹² David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1137-38 (2017); see also Kwoka, *First-Person FOIA*, *supra* note 5, at 2243-44 (arguing that “first-person FOIA” requests, such as requests for A-Files, fail to meet noncitizens’ needs in the context of immigration proceedings and “hamper[] FOIA’s overall efficacy in promoting democratic accountability.”).

¹³ See Tania N. Valdez, *Eliminating the Fugitive Disentitlement Doctrine in Immigration Matters*, 97 NOTRE DAME L. REV. 963, 976 (2022) (noting that the fugitive disentitlement doctrine may prohibit detained noncitizens or those categorized as “fugitives” by Immigration and Customs Enforcement from using FOIA to access their immigration records).

¹⁴ Richard Frankel, *Bringing “Civil”ity into Immigration Law: Using the Federal Rules of Civil Procedure to Fix Immigration Adjudication*, 76 VAND. L. REV. 1379, 1379 (2023).

¹⁵ Sometimes called “policy or practice.”

¹⁶ This Note uses “federal immigration agencies” to refer to the U.S. Department of Homeland Security (“DHS”) and its component agencies collectively: U.S. Citizenship and Immigration Services (“USCIS”), Immigration and Customs Enforcement (“ICE”), and U.S. Customs and Border Protection (“CBP”).

mistakes, but rather, reflect recurring FOIA processing problems within an agency.¹⁷ Accordingly, this Note attempts to fill this literature gap by examining class actions that challenge these agencies' routine failure to issue timely determinations on A-File FOIA requests. For noncitizen litigants in removal proceedings, this Note argues that class actions can confer advantages over individual suits.¹⁸

Part I of this Note discusses barriers that noncitizens face when attempting to access their A-Files during removal proceedings. This Part highlights the U.S. government's informational advantage over noncitizens due to the lack of discovery rights in removal proceedings or a requirement that Department of Homeland Security ("DHS") attorneys disclose adverse evidence they plan to use against noncitizens in immigration courts. Although certain provisions in the Immigration and Nationality Act ("INA") suggest limited rights to evidence disclosure, in practice, noncitizens must request their A-Files through FOIA.¹⁹

Part II examines the role of FOIA in removal proceedings. Even though Congress intended the FOIA statute to improve government transparency and set prompt deadlines for agencies to make "determinations" on FOIA requests, DHS and its components often take months to respond.²⁰ These delays prejudice noncitizens who require timely access to their A-Files to present defenses in removal proceedings.²¹

¹⁷ See 1 CORNISH F. HITCHCOCK, *GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS* § 16:10 (2025 ed.) (updated May 2025) (noting that policy-or-practice claims in the FOIA context require a FOIA requester to allege "more than one instance of unlawful behavior" by the agency processing the request); *Payne Enters., Inc. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988) (noting that as long as "an agency's refusal to supply information evidences a policy or practice of delayed disclosure or some other failure to abide by the terms of the FOIA, and not merely isolated mistakes by agency officials, a party's challenge to the policy or practice cannot be mooted by the release of the specific documents that prompted the suit."); *Khine v. United States Dep't of Homeland Sec.*, 943 F.3d 959, 965 (D.C. Cir. 2019) ("Policy-or-practice claims are an exception to the ordinary rule that disclosure of the requested information will moot a FOIA claim.").

¹⁸ See *Nightingale v. U.S. Citizenship & Immigr. Serv.*, 333 F.R.D. 449, 459 (N.D. Cal. 2019) (asserting that individual pattern-or-practice FOIA claims are "especially susceptible to becoming moot").

¹⁹ See Joshua S. Walden, Note, *A Right to Gather Evidence: Interpreting Statutory Protections for Detained Immigrants Facing Removal Hearings*, 31 *STAN. L. & POL'Y REV.* 103, 141-42 (2020).

²⁰ Melissa Wasser, *Congress Should Act to Improve FOIA*, *PROJ. ON GOV'T OVERSIGHT* (Mar. 29, 2022), <https://www.pogo.org/testimonies/congress-should-act-to-improve-foia> [<https://perma.cc/QU4Y-AV4K>].

²¹ See, e.g., Rose Linton, Note, *A Presumption of Disclosure: Towards Greater Transparency in Asylum Proceedings*, 38 *SEATTLE U. L. REV.* 1069, 1093 (2015) ("[T]he FOIA process increases the burden on immigration courts The [immigration judge] does not have a duty to issue subpoenas for evidence or delay a hearing for an applicant to seek information held by government agencies."); Heeren, *supra* note 6, at 1595 (observing that because a "significant part" of an A-File for a noncitizen in removal proceedings "consists of documents generated by ICE," ICE's FOIA processing delays prevent many of these noncitizens from receiving their requested documents before their final removal hearing).

Part III explores how the heightened commonality requirements established in *Wal-Mart v. Dukes*²² impact class certification in A-File FOIA pattern-or-practice suits. It examines a key case that demonstrates how future putative class actions alleging FOIA pattern-or-practice claims can overcome commonality challenges under *Wal-Mart*.

Part IV examines potential mootness problems that may arise during the class certification process, a circuit split that has emerged on the question of mootness and the adjudication of class certification motions, and concerns about ways DHS and its components can derail an A-File FOIA class action. Accordingly, Part IV also considers whether mootness exceptions for claims deemed inherently transitory or “capable of repetition, yet evading review,” as outlined in *Gerstein v. Pugh*,²³ can apply to the unique class action context examined in this Note. Absent a clear doctrinal answer, this Note argues that several factors make available an exception to the mootness doctrine.

This Note concludes by acknowledging that securing injunctive or declaratory relief through pattern-or-practice suits will not cure systemic FOIA processing issues within DHS. Barring the introduction of discovery rights in immigration proceedings or dramatic changes to DHS’s FOIA operations, however, this Note highlights how the class action device may help noncitizens crack the government’s “one-way mirror.”

I. BARRIERS TO ACCESSING A-FILES IN IMMIGRATION PROCEEDINGS

This Part outlines the information asymmetry that exists between noncitizens and the DHS attorneys they face in immigration court. Several characteristics of immigration courts, including the absence of discovery rights, place noncitizens at a significant disadvantage to DHS attorneys, who often arrive at immigration hearings with a noncitizen’s complete immigration record. Although the Ninth Circuit’s holding in *Dent v. Holder* suggests that certain provisions of the INA could provide an affirmative right to A-File access in removal proceedings, lower courts in that Circuit have largely construed *Dent*’s holding narrowly to apply to only those individuals with “a basis” to contest removal, such as defensive citizenship claims.²⁴ For all its shortcomings, FOIA remains the primary tool for noncitizens to request their A-Files.

²² 564 U.S. 338 (2011).

²³ 420 U.S. 103 (1975).

²⁴ Heeren, *supra* note 6, at 1586-87; *see also Dent*, 627 F.3d at 374 (holding that the government’s failure to provide a purportedly removable noncitizen with copies of his A-File so he could use that evidence in immigration court to support his defensive citizenship claim violated his Fifth Amendment due process rights because it denied him the opportunity to fully and fairly litigate his removal and claim of defensive citizenship).

A. *The U.S. Government's Informational Advantage Over Noncitizens*

After the September 11th attacks, Congress created DHS by combining “the functions of 22 previously existing agencies into a new cabinet-level agency.”²⁵ In doing so, it sought to break down “ossified bureaucratic structures” that impeded the federal government’s intelligence gathering efforts.²⁶ DHS also increased information-sharing with state and local police departments, using those officers as “frontline workers for the national security state.”²⁷ By moving most immigration functions from the U.S. Department of Justice (“DOJ”) to DHS, these reforms merged immigration policy with national security and created a new domestic intelligence agency designed to “gather and act on information” about noncitizens.²⁸

Noncitizens are among the most documented populations in the United States. When they submit visa applications to enter the country, noncitizens provide the federal government with biometric and biographical information.²⁹ DHS and its component agencies add information to noncitizens’ A-Files whenever they apply for removal relief, adjust their immigration status, interview with immigration officers, or submit documentation concerning their finances, criminal records, and medical history for immigration benefits.³⁰ In particular, interviews with USCIS officers can be so lengthy and detailed that they amount to depositions that DHS attorneys can use in immigration court proceedings years later.³¹

DHS may also place information into an individual’s A-File without her knowledge.³² As with modern policing, ICE has turned immigration enforcement into a “technology-driven enterprise that incorporates vast amounts of information, machine learning algorithms, and artificial intelligence to identify and track” noncitizens, including undocumented immigrants.³³ Companies within the legal industry have also become data

²⁵ Heeren, *supra* note 6, at 1604.

²⁶ *Id.*

²⁷ Christina Koningsisor, *Police Secrecy Exceptionalism*, 123 COLUM. L. REV. 615, 681 (2023).

²⁸ See Heeren, *supra* note 6, at 1603-04.

²⁹ See *id.* at 1604-05.

³⁰ See *id.*

³¹ See *id.*

³² See *Alien Files (A-Files)*, U.S. NAT’L ARCHIVES & RECS. ADMIN. (Aug. 19, 2025), <https://www.archives.gov/research/immigration/aliens> [<https://perma.cc/8PEW-NBAB>] (“A-Files contain all records of *any active case of an alien not yet naturalized* as they passed through the United States immigration and inspection process,” and “[a]n A-File might also be created without any action taken by the alien; for example, if [DHS] initiated a law enforcement action against or involving the alien.”) (emphasis added).

³³ See Sarah Landan, *When Westlaw Fuels ICE Surveillance: Legal Ethics in the Era of Big Data Policing*, 43 N.Y.U. REV. L. & SOC. CHANGE 255, 256-57 (2019) (“U.S. immigration authorities rely on big data technology to employ increasingly cruel and invasive techniques as they accelerate arrests, detentions, and deportations of immigrants without legal status.”).

brokers for ICE.³⁴ DHS has contracts with Thomson Reuters and RELX Group, whose subsidiaries include Westlaw and Lexis, respectively.³⁵ Both companies build and maintain “surveillance tools for local, state, and federal law enforcement entities.”³⁶ For example, by selling location data secured through street-level surveillance to ICE, these companies help the agency track the home addresses, employment, and vehicle information of undocumented individuals.³⁷ ICE has also used this data to classify noncitizens caught in its surveillance dragnet as suspected gang members or drug traffickers—often inaccurately.³⁸ Moreover, noncitizens cannot challenge their inclusion in these stigmatizing databases and may only become aware of them when they become targets of law enforcement investigations or removal orders.³⁹

If ICE previously arrested a noncitizen, the DHS attorney will also have access to that individual’s Form I-213, a document prepared by the ICE officer who interrogated the individual during the arrest.⁴⁰ The Form I-213 contains information about the noncitizen’s country of birth and citizenship, her date and manner of entry into the United States, and her criminal history.⁴¹ It may also include statements from third parties, such as friends or coworkers, about the noncitizen.⁴² Immigration courts and the Board of Immigration Appeals (“BIA”) consider the Form I-213 inherently trustworthy evidence of an individual’s alienage and removability, despite containing mostly hearsay.⁴³ Because a government official prepared the document, the Form I-213

³⁴ See *id.* at 257.

³⁵ See, e.g., USASPENDING.GOV, https://www.usaspending.gov/award/CONT_AWD_70CMSD21C00000002_7012_-NONE_-NONE- [https://perma.cc/Y7JH-DFQ7] (last visited Oct. 4, 2025) (detailing contract award and duration for a subscription to a law enforcement investigation database); USASPENDING.GOV, https://www.usaspending.gov/award/CONT_AWD_70CMSD21C00000001_7012_-NONE_-NONE- [https://perma.cc/3VPG-JLJK] (last visited Oct. 4, 2025) (detailing same).

³⁶ Lamdan, *supra* note 33, at 257-58.

³⁷ See *id.* at 259-60.

³⁸ See *id.* at 266 (noting also that these databases are often “riddled with errors that result in law enforcement targeting and criminalizing people with no gang” or criminal affiliations).

³⁹ See *id.* at 266, 268.

⁴⁰ See Kathleen H. Pierre, Jennifer Aronsohn, Brandon Slotkin & John Doley, *The ICE Trap: Deportation Without Due Process*, 70 UCLA L. REV. DISC. 136, 161 (2022).

⁴¹ See ARUNA SURY, IMMIGRANT LEGAL RES. CTR., WHAT TO DO WHEN ICE SUBMITS AN I-213 IN IMMIGRATION COURT (Sept. 2022), https://www.ilrc.org/sites/default/files/resources/i-213_practice_advisory_final.pdf [https://perma.cc/L659-TALR]. Cf. Erica D. Rosenbaum, Note, *Relying on the Unreliable: Challenging USCIS’s Use of Police Reports and Arrest Records in Affirmative Immigration Proceedings*, 96 N.Y.U. L. REV. 256, 270-71 (2021) (arguing that the use of police reports in affirmative immigration proceedings should be prohibited because they are often “based on unverified, third-party hearsay: statements ‘given by a witness who relates not what he or she knows personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness’”) (internal citations omitted).

⁴² See Sury, *supra* note 41, at 2.

⁴³ See, e.g., Matter of W-E-R-B, 27 I. & N. Dec. 795, 800 (BIA 2020) (stating that “information on the Form I-213 is presumptively trustworthy”).

is considered presumptively reliable unless evidence suggests that the information recorded is incorrect or was obtained under duress or coercion.⁴⁴ However, it is difficult for noncitizens to challenge errors in the Form I-213. For instance, immigration courts do not require ICE officers to testify in court or to undergo cross-examination.⁴⁵ Moreover, because DHS does not typically include the Form I-213 in a noncitizen's A-File, a noncitizen or her attorney must request that document separately.⁴⁶

Likewise, immigration judges and the BIA often fail to identify errors in the government's Form I-213 and other adverse evidence. These adjudicators frequently make factual and legal mistakes when deciding cases. In 2005, Judge Richard Posner famously highlighted dozens of BIA decisions that the Seventh Circuit reversed in a single year.⁴⁷ He criticized the BIA and immigration judges for decisions that fell "below the minimum standards of legal justice."⁴⁸ And because there is no constitutional right to counsel in immigration proceedings, the likelihood that evidentiary errors are noticed and rectified early is slim.⁴⁹

By the time DHS initiates removal proceedings against a noncitizen by filing a Notice to Appear ("NTA")—a charging document detailing the grounds for removal—with the immigration court, the agency is armed with a "massive file" containing years of information about a noncitizen's life in the United States.⁵⁰ Removal proceedings begin when noncitizen "respondents" attend a master calendar hearing, where a DHS attorney presents

⁴⁴ See Sury, *supra* note 41, at 8-9; see also *Matter of Mejia*, 16 I. & N. Dec. 6, 8 (BIA 1976) (concluding that the Form I-213 was "inherently trustworthy" because the report bore the signature of the government official who investigated the deportable alien, there was no evidence offered suggesting any "impropriety" during the alien's arrest, detention, or interrogation, and there was no proof that the Form I-213 contained incorrect information or information obtained through coercion, and noting that the Form I-213 "would be admissible even in court as an exception to the hearsay rule as a public record and report" (citing FED. R. EVID. 803(8))).

⁴⁵ Sury, *supra* note 41, at 9.

⁴⁶ E-mail from Jonah Eaton, Supervising Litig. Att'y, Nat'ys Serv. Ctr., to author (Apr. 4, 2025, 12:03 ET) (on file with author).

⁴⁷ See *Benslimane v. Gonzales*, 430 F.3d 828, 829-30 (7th Cir. 2005).

⁴⁸ *Id.*

⁴⁹ See generally Barbara L. Rodriguez, Note, *In the Interest of Justice: Presuming Prejudice When the Right to Counsel in Removal Proceedings is Denied*, 107 IOWA L. REV. 1833, 1840 (2022) (noting that although the Sixth Amendment guarantees the right to counsel for criminal defendants, this right does not extend to individuals in removal proceedings because those proceedings are considered "civil in nature," not criminal); Dree K. Collopy, Melissa Crow & Rebecca Sharpless, *Challenges and Strategies Beyond Relief*, AM. IMM. LAWS. ASSOC. 523-25 (Dec. 29, 2015), <https://www.aila.org/files/o-files/view-file/FCCD96B4-E2C3-4138-81A8-3CE271883626> [<https://perma.cc/W553-FCYZ>] (summarizing information typically contained in the Form I-213 and relevant case law regarding the presumptive reliability of this document, and giving practice pointers to immigration attorneys on how to challenge errors and potentially damaging information that could be contained in the Form I-213); Pierre et al., *supra* note 40, at 161 (discussing errors that Michelle Méndez, Director of Defending Vulnerable Populations (DVP) program at Catholic Legal Immigration Network, Inc. (CLINIC), has identified in DHS interview notes and Form I-213s prepared for clients in removal proceedings).

⁵⁰ See Heeren, *supra* note 6, at 1569-70.

the government's reasons for seeking a respondent's removal by submitting documents that support its charges and factual allegations about her alienage and removability.⁵¹ The judge allows the respondent to admit or deny the charges, identify defenses against removal, or submit applications for removal relief, before setting a hearing schedule to address any contested issues or applications for relief.⁵² A respondent may have several master calendar hearings before presenting her full case at a merits hearing, an evidentiary hearing on contested issues.⁵³ During master calendar hearings, respondents may also request a continuance if they need more time to prepare an application for removal relief or to confer with an attorney.⁵⁴

The government's information advantage is especially pronounced at merits hearings, where respondents may challenge their removability or seek removal relief.⁵⁵ Before these hearings, respondents typically submit a witness list, a pre-hearing statement, and any evidence they plan to use to support their claims.⁵⁶ By contrast, because no formal discovery rights exist in removal proceedings for government-held records, the DHS attorney can wait and see "what statements the respondent will make at the hearing, and then selectively choose documents to enter into the record for impeachment purposes."⁵⁷ Thus, when DHS attorneys cross-examine respondents, they can draw from what amounts to "substantial discovery materials," including

⁵¹ IMMIGRANT LEGAL RES. CTR., REPRESENTING CLIENTS AT THE MASTER CALENDAR HEARING: HOW TO PREPARE FOR AN INITIAL HEARING WITH QUICK-REFERENCE CHECKLIST (Dec. 2018), https://www.ilrc.org/sites/default/files/resources/rep_clnts_mstr_cal_hearing-20181220.pdf [<https://perma.cc/PQK2-YHBH>]; see also U.S. DEP'T OF JUST., EXEC. OFF. OF IMMIGR. REV., IMMIGR. CT. PRAC. MANUAL, <https://www.justice.gov/eoir/reference-materials/ic/chapter-4/15> [<https://perma.cc/6A59-8XGX>] (last visited Oct. 4, 2025) (noting that the DHS attorney should be prepared "to state DHS's position on all legal and factual issues," "designate a country of removal," and provide documentation supporting the removal charges and factual allegations in the NTA).

⁵² EXEC. OFF. OF IMMIGR. REV., *supra* note 51; see also IMMIGRANT LEGAL RES. CTR., *supra* note 51, at 1 (noting that immigration judges will typically decide three questions at a master calendar hearing: (1) Whether DHS properly served the respondent with a legally sufficient NTA and filed it with the immigration court; (2) Whether the respondent is removable as charged on the NTA (i.e., whether the respondent conceded removability or whether the evidence proves that the respondent is removable as charged); and (3) If the respondent is removable, whether the respondent is eligible for some form of relief such as adjustment of status, cancellation of removal, or asylum).

⁵³ IMMIGRANT LEGAL RES. CTR., *supra* note 51, at 1-2 (noting that an immigration judge may use the master calendar hearing to manage the court's docket, schedule a status conference on a case, or set a deadline to submit documents before the individual calendar, or merits, hearing).

⁵⁴ ROCKY MOUNTAIN IMM. ADVOCACY NETWORK, TYPES OF HEARINGS IN IMMIGRATION COURT, <https://static1.squarespace.com/static/57f6bd842e69cf55d8158641/t/5efe5abe396e36705dadb283/1593727678906/RMIAN+Handout+-+Types+of+Immigration+Court+Hearings+-+Updated+7.2.2020+ENG.pdf> [<https://perma.cc/C9QH-B9CX>] (last accessed May 22, 2025) [hereinafter *Types of Hearings*].

⁵⁵ EXEC. OFF. OF IMMIGR. REV., IMMIGRATION COURT PRACTICE MANUAL (2018), <https://www.justice.gov/eoir/reference-materials/ic/chapter-4/16> [<https://perma.cc/6PB6-DRLH>].

⁵⁶ Heeren, *supra* note 6, at 1569.

⁵⁷ *Id.* at 1570.

respondents' past oral and written statements to USCIS officers, financial and medical data submitted for visa and immigration benefits applications, and records involving any local, state, or federal criminal investigations.⁵⁸

B. The Immigration and Nationality Act and Access to Evidence

The INA of 1952, later amended in 1965, implies limited discovery rights in removal proceedings.⁵⁹ For example, Section 1229a(b)(4)(B) establishes the respondent's rights in removal proceedings and notes that a noncitizen "shall have a reasonable opportunity to examine the evidence against [her], to present evidence on [her] own behalf, and to cross-examine witnesses presented by the government."⁶⁰ This provision, however, exempts from disclosure "such national security information as the government may proffer in opposition to the alien's admission to the United States" or her application for discretionary relief from deportation.⁶¹ Section 1229(b)(1) governs the authority of immigration judges during removal proceedings and permits them to "issue subpoenas for the attendance of witnesses and presentation of evidence."⁶² But immigration scholars have noted that the subpoena power is "rarely used" and "difficult to enforce."⁶³ Indeed, BIA decisions related to depositions and subpoenas reveal "virtually no mention of cases" where noncitizens have used them successfully.⁶⁴ Moreover, the subpoena power has an exhaustion requirement. The party applying for a subpoena must "show affirmatively that he or she has made [a] diligent effort, without success," to produce witnesses or documents.⁶⁵

Even when courts construe INA provisions to grant limited evidence disclosure, they typically do so only in a narrow set of circumstances—namely, when an individual presents an affirmative defense against removal, such as a claim of defensive citizenship. The Ninth Circuit's 2010 decision

⁵⁸ *Id.* at 1607.

⁵⁹ 8 U.S.C. § 1229a(b)(4)(B); *see also* Walden, *supra* note 19, at 141-42 (arguing that the right to a "reasonable opportunity to present evidence" under 8 U.S.C. § 1229a(b)(4)(B) and the Fifth Amendment Due Process Clause should be read broadly to guarantee noncitizens the right to gather evidence *before* their removal hearings and to *bring* that evidence to immigration court to show the immigration judge, rather than narrowly to contemplate only when a noncitizen appears in immigration court to testify).

⁶⁰ 8 U.S.C. § 1229a(b)(4)(B).

⁶¹ *Id.*

⁶² 8 U.S.C. § 1229a(b)(1).

⁶³ Heeren, *supra* note 6, at 1571. *Cf.* E-mail from Jonah Eaton, *supra* note 46 (noting that although the subpoena is reportedly rarely used, "if the [immigration judge] tells [ICE's Office of the Principal Legal Advisor] to produce something, they will produce it," but also acknowledging that he has only used subpoenas "a handful of times"); E-mail from Kate Evans, Clinical Professor of L., Duke Univ. Sch. of L. (Apr. 17, 2025, at 12:38 ET) (on file with author) (noting that, in a case litigated by the Duke Law Immigrant Rights Clinic, the immigration judge assigned to her case granted her motion for the issuance of a document subpoena).

⁶⁴ Heeren, *supra* note 6, at 1582-83.

⁶⁵ *Id.* at 1582 (quoting 8 C.F.R. § 1003.35(b)(2)).

in *Dent v. Holder* is illustrative.⁶⁶ There, the court considered whether an alleged noncitizen had the right to review his A-File during removal proceedings against him. It held that the government's refusal to provide the A-File denied him the opportunity to fully and fairly litigate his removal and claim of defensive citizenship and thus violated his Fifth Amendment due process rights.⁶⁷ Immigrants' rights advocates initially celebrated this "groundbreaking" decision, concluding that it *required* the government to "routinely produce A-Files in removal proceedings," independent of whether the respondent had filed a FOIA request.⁶⁸ However, the BIA has construed *Dent* more narrowly, even in the Ninth Circuit.⁶⁹

The circumstances giving rise to *Dent v. Holder* are unusual as to the facts, the government's charging document, and the procedural history. DHS initiated removal proceedings against Sazar Dent after he pleaded guilty to state criminal escape and controlled substance possession charges.⁷⁰ DHS argued that these crimes constituted aggravated felony convictions that rendered Dent deportable, given his status as a Honduran citizen and U.S. lawful permanent resident ("LPR").⁷¹ Dent contested the deportability charge *pro se* in immigration court, arguing that he had acquired citizenship when his U.S. citizen mother adopted him in 1981, while he was still a minor. However, Dent was unable to produce documentation to prove this.⁷² In 2005, an immigration judge ordered Dent removed, and the BIA affirmed the order.⁷³ But Dent never received the removal order because the BIA sent his notice of removal to the wrong address.⁷⁴

Unaware that the BIA had affirmed the removal order, Dent was arrested in 2008 for the criminal offense of illegal reentry.⁷⁵ During his criminal proceeding, Dent's attorney discovered that the government had documents in his A-File related to his U.S. citizenship claim, including two applications for citizenship: a naturalization application his adoptive mother filed on his behalf in 1982 when he was fourteen years old, and one that he filed himself as an eighteen-year-old in 1986.⁷⁶ Although the A-File did not indicate

⁶⁶ 627 F.3d 365 (9th Cir. 2010).

⁶⁷ *Id.* at 374.

⁶⁸ AM. IMMIGR. COUNCIL, PRACTICE ADVISORY: *DENT V. HOLDER* AND STRATEGIES FOR OBTAINING DOCUMENTS FROM THE GOVERNMENT DURING REMOVAL PROCEEDINGS, (June 12, 2012), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/dent_practice_advisory_6-8-12.pdf [<https://perma.cc/2MP6-JQ28>].

⁶⁹ Heeren, *supra* note 6, at 1586-87.

⁷⁰ AM. IMMIGR. COUNCIL, *supra* note 68.

⁷¹ *Id.*

⁷² *Dent*, 627 F.3d at 368 (noting that Dent also argued that his criminal convictions "did not suffice to make him an aggravated felon" under the INA).

⁷³ *Dent v. Barr*, No. 3:18-CV-822, 2020 WL 1958417, at * 1 (N.D. Ohio, Apr. 3, 2020).

⁷⁴ *Dent*, 627 F.3d at 370.

⁷⁵ *Id.*

⁷⁶ *Id.*

whether the government had adjudicated either application, DHS attorneys neglected to share this information with adjudicators and Dent at each stage of his case, even though the documents did not implicate disclosure exemptions under the INA.⁷⁷ Ultimately, the court dismissed Dent's illegal reentry case because the BIA mailed the notice of removal to the wrong address.⁷⁸ After the BIA reissued its prior removal decision, Dent sought review in the Ninth Circuit.⁷⁹

The *Dent* court analyzed Section 1229a(c)(2)(B) of the INA, which requires noncitizens seeking to challenge the government's charge that they are "inadmissible" to prove admissibility by providing a valid visa, entry document, or other records that establish their lawful admission or presence in the United States.⁸⁰ Dent argued that the government's failure to provide him copies of his A-File violated his Fifth Amendment due process right to a "full and fair hearing in a deportation proceeding."⁸¹ The government maintained that accessing his A-file required submitting a FOIA request.⁸² The Ninth Circuit agreed with Dent, holding that the INA provision at issue obliged the government to provide the documents in Dent's A-File.⁸³ Failing to do so in a removal proceeding would violate Dent's Fifth Amendment due process rights because it would deny him the opportunity to fully and fairly litigate his removal and claim of defensive citizenship.⁸⁴

Despite the court's seemingly definitive holding, *Dent* has not ushered in widespread change in the status quo.⁸⁵ And even when the government follows *Dent* within the Ninth Circuit, it insists that *Dent* be construed narrowly and only apply to noncitizens with "a basis" to contest an inadmissibility charge, such as those with defensive citizenship claims.⁸⁶ Furthermore, the BIA has largely agreed with the government's position that "a showing of prejudice is required" to make a claim under *Dent* that "the government has an obligation to provide helpful information" from a noncitizen's

⁷⁷ *Id.* at 371-73 ("No justification has been offered for the failure to furnish Dent, the [immigration judge], the BIA, and [the 9th Cir.] with the documents in the A-File.").

⁷⁸ Heeren, *supra* note 6, at 1585.

⁷⁹ *Dent*, 627 F.3d at 370.

⁸⁰ 8 U.S.C. § 1229a(c)(2)(B); *see also* Heeren, *supra* note 6, at 1586 (observing that grounds for inadmissibility typically apply to noncitizens who are deemed, for various reasons, to be seeking admission to the United States; in this case, Dent appears to have been charged with a ground of deportability instead, but the Ninth Circuit did not address this discrepancy).

⁸¹ *Dent*, 627 F.3d at 373-74 (citation omitted).

⁸² *Id.* at 374.

⁸³ *Id.* at 374-75.

⁸⁴ *Id.*; *see also* Heeren, *supra* note 6, at 1585 (noting that the Ninth Circuit "applied the doctrine of constitutional avoidance to read a provision of the [INA] as setting out a general rule entitling non-citizens in removal proceedings to access their A-File absent unusual circumstances").

⁸⁵ *See* Heeren, *supra* note 6, at 1586.

⁸⁶ *Id.* at 1586-87.

A-File during removal proceedings.⁸⁷ Because it is unclear how frequently immigration judges issue subpoenas in immigration proceedings, FOIA remains the primary tool for noncitizens to access their A-Files.⁸⁸

Immigration courts are out of step with other Article I courts on discovery rights. In contrast to immigration courts, other agencies and administrative courts have adopted discovery rules similar to those found in the Federal Rules of Civil Procedure.⁸⁹ For instance, Rule 70(b) in the U.S. Tax Court’s Rules of Practice and Procedure permits discovery through the same means set out in the Federal Rules—interrogatories, requests to admit, document productions, and depositions—on non-privileged matters “relevant to the subject matter involved in the pending case.”⁹⁰

Although some agencies ultimately take a narrow approach to discovery, their justifications for doing so are absent in the immigration context. For example, the National Labor Relations Board (“NLRB”) applies a narrower approach to discovery out of concern that employers may use it to intimidate employees and inhibit their exercise of statutory rights under the National Labor Relations Act.⁹¹ Even so, the NLRB affords broader discovery rights than immigration courts because it permits depositions “upon good cause” and subpoenas for witnesses or documents.⁹² By contrast, the BIA has not published a decision that addresses the appropriate use of depositions or subpoenas, suggesting to some immigration scholars that litigants “may have tired of making these requests after the [BIA] issued a flurry of decisions in the 1960s and 1970s denying discovery requests.”⁹³

The government has argued, and the Supreme Court has held, that evidentiary rules should be relaxed in immigration proceedings because immigration falls under the federal plenary power of the political branches and implicates national security concerns.⁹⁴ Indeed, jurists and legal scholars tend to accept the standard account of “immigration exceptionalism,”

⁸⁷ Kwoka, *First-Person FOIA*, *supra* note 5, at 2204.

⁸⁸ See, e.g., E-mail from Geoffrey Heeren, Professor of L., U. of Idaho Coll. of L. (Apr. 7, 2025, at 10:46 ET) (on file with author) (noting that he was “not aware of any published BIA decisions addressing subpoenas or depositions since the publication” of his 2014 law review article, *Shattering the One-Way Mirror: Discovery in Immigration Courts*, but also sharing anecdotally that he knew some immigration attorneys “have tried to seek subpoenas” for documents and other evidence in the years since the article’s publication).

⁸⁹ Heeren, *supra* note 6, at 1578-79.

⁹⁰ FED. R. CIV. P. 26(a)-(b).

⁹¹ Heeren, *supra* note 6, at 1579.

⁹² *Id.* at 1579, 1612-13.

⁹³ *Id.* at 1582-83.

⁹⁴ See, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 217 (1953) (Douglas, J., dissenting) (noting that the government attorney in the case refused to disclose any evidence justifying Mezei’s exclusion, stating only that doing so would “jeopardize the safety of the Nation”); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) to support the assertion that the “exclusion of aliens is a fundamental act of sovereignty” because “the right to do so . . . is inherent in the executive power to control foreign affairs”).

usually drawing from a trio of “foundational” cases⁹⁵ from the late nineteenth century to justify reduced constitutional scrutiny in immigration proceedings.⁹⁶ There are reasons to reject that narrative,⁹⁷ most of which are beyond the scope of this Note, including NYU Law professor Adam Cox’s argument that jurists and scholars have fundamentally misunderstood the “foundational” cases because they have failed to understand “that nineteenth-century immigration law was ordinary public law,” and not a “special sphere” of law shielded from constitutional scrutiny.⁹⁸

Without meaningful discovery and evidence-disclosure rules in immigration proceedings, DHS attorneys often resort to surprise tactics to win.⁹⁹ In a 2002 Stanford Law Review article, civil rights attorney David Cole recounts defending thirteen noncitizen clients in removal proceedings between 1987 and 2002.¹⁰⁰ The federal government uniformly advanced “national security” concerns against each of Cole’s clients to justify its refusal to disclose evidence it planned to use in court.¹⁰¹ Yet in each case, federal courts invariably ordered his clients released from detention and canceled their removal orders.¹⁰² In doing so, they either “concluded that reliance on classified evidence was unconstitutional,” or once they forced the government to disclose some of its “classified” evidence, Cole’s clients managed to rebut the removal charges.¹⁰³ A healthy adversarial system should not reward gamesmanship, especially since removal proceedings involve the life-altering consequence of deportation.¹⁰⁴

⁹⁵ See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (upholding race-based exclusion); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892) (upholding race-based exclusion for foreigners deemed likely to become a public charge); *Fong Yue Ting v. United States*, 149 U.S. 698, 735 (1893) (holding that Chinese laborers residing in the United States had not taken steps to become citizens because they were forbidden under contemporary law to do so, thus remaining “citizens of the country of their domicile,” and were subject to the power of Congress to order their expulsion or deportation or to place conditions on their ability to remain in the country, as Congress saw fit to prescribe).

⁹⁶ See Adam B. Cox, *The Invention of Immigration Exceptionalism*, 134 YALE L.J. 329, 335, 345-46 (2024).

⁹⁷ See, e.g., Nikolas Bowie & Norah Rast, *The Imaginary Immigration Clause*, 120 MICH. L. REV. 1419, 1427-28 (2022) (rejecting the “traditional reading” of the Chinese Exclusion Case as establishing Congress’s inherent “sovereign” immigration power, immune to normal constitutional constraints, and instead, returning the immigration power to Congress’s Commerce Clause and Necessary and Proper Clause powers).

⁹⁸ Cox, *supra* note 96, at 333, 410.

⁹⁹ Heeren, *supra* note 6, at 1627.

¹⁰⁰ David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 1002 (2002).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See Heeren, *supra* note 6, at 1608 (“Some individuals in removal cases have lived for many years in the United States, establishing homes, families, property, professional connections, and friends. Their country of origin may be a place they barely know, or it could be a place where they risk persecution or torture. If non-citizens lose their immigration court cases, they may be barred from returning to the United States.”). Indeed, a retired immigration judge once described immigration proceedings as “death penalty cases heard in traffic court settings.”

II. THE ROLE OF FOIA IN IMMIGRATION PROCEEDINGS

Although FOIA requests are the primary means by which noncitizens obtain their A-Files, Congress did not draft the FOIA statute for that purpose. This Part provides a brief history of this law, which Congress passed to improve transparency in federal agency operations. Given FOIA's history, this Part explains why FOIA requests are a poor mechanism for accessing personal immigration records. Delays in processing FOIA requests can put noncitizens at risk of deportation or force them to miss application deadlines for immigration benefits, among other adverse consequences. FOIA disclosure exemptions for "sensitive" records, such as those implicating agency communications, national security, or law enforcement matters, often yield overly broad redactions in document productions, even when that information is vital to a noncitizen's removal defense. In addition, federal courts have not resolved whether the criminal law doctrine of fugitive disentitlement, which permits courts to dismiss a pending appeal if a defendant escapes custody and becomes a fugitive, applies in the context of removal proceedings to prevent noncitizens from filing A-File FOIA requests or appealing FOIA determinations.

Finally, this Part introduces the three-pronged test from *Hajro v. U.S. Citizenship and Immigration Services*, which can help noncitizens and immigration attorneys establish injury-in-fact in A-File pattern-or-practice FOIA suits. Broadly, individual plaintiffs alleging pattern-or-practice violations of FOIA determination deadlines must show an agency policy or practice of "prolonged, unexplained delays" in issuing determinations on FOIA requests.¹⁰⁵ Although *Hajro* involved an individual A-File pattern-or-practice FOIA suit, immigration attorneys and their clients have since used the test to establish commonality and secure class certification.¹⁰⁶

A. *FOIA and the Right to Non-Exempt Government Records*

The Freedom of Information Act established a judicially enforceable right for the public to request records from federal agencies.¹⁰⁷ Congress passed the statute in 1966 to address problems with Section 3 of the Administrative Procedure Act ("APA"), whose public disclosure section featured overly broad and ill-defined disclosure exemptions, including for records detailing "any function" of the U.S. government "requiring secrecy

Dana Leigh Marks, *Immigration Judge: Death Penalty Cases in a Traffic Court Setting*, CNN (June 26, 2014), <https://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/index.html> [<https://perma.cc/4SE5-WSRV>].

¹⁰⁵ *Judicial Watch v. U.S. Dep't of Homeland Sec.*, 895 F.3d 770, 780 (D.C. Cir. 2018).

¹⁰⁶ *See Nightingale v. U.S. Citizenship & Immigr. Servs.*, 333 F.R.D. 449 (N.D. Cal. 2019).

¹⁰⁷ 5 U.S.C. § 552.

in the public interest.”¹⁰⁸ The exemptions also restricted the disclosure of records to only those individuals “properly and directly concerned” with the information requested.¹⁰⁹ FOIA’s revision reflects a “general philosophy of full agency disclosure” and Congress’s desire to “pierce the veil of administrative secrecy” by exposing agency actions to public scrutiny.¹¹⁰ However, the law exempts from disclosure records reflecting ongoing law enforcement operations, trade secrets, and privileged communications within or between agencies, such as draft documents, among other content.¹¹¹

FOIA requires agencies to “act in good faith and exercise due diligence to make records available as quickly as possible, or invoke an exception, and to improve their records management systems to enable prompt responses without routine judicial involvement.”¹¹² To that end, agencies must make a determination on a FOIA request within twenty business days,¹¹³ which can be extended by ten business days if “unusual circumstances” warrant it.¹¹⁴ An agency that makes a timely “determination” under FOIA need not produce the requested documents right away. However, the agency must indicate the “scope of documents it will produce and exemptions it will claim” as to any withholdings.¹¹⁵ If an agency communicates its determination within the statutory timeframe and the requester wishes to appeal any withholdings or redactions, she must administratively appeal said determination before filing suit in an Article III court.¹¹⁶ But if the agency fails to issue a timely determination, the “requester ‘shall be deemed to have exhausted her administrative remedies’” and thus permitted to bring suit in federal court.¹¹⁷

Absent discovery rights, immigration attorneys rely on FOIA requests to secure documents in their clients’ A-Files—such as prior statements made to immigration officers or records documenting their clients’ visa histories—to help them avoid inconsistencies in their statements during cross-examination.¹¹⁸ In addition, if a DHS officer’s NTA or Form I-213 contains errors, A-Files can help immigration attorneys establish a client’s

¹⁰⁸ See *Env’t Prot. Agency v. Mink*, 410 U.S. 73, 79 (1973).

¹⁰⁹ *Id.*

¹¹⁰ See *Dep’t of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976); see also *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (“The basic purpose of FOIA is to ensure an informed citizenry . . .”).

¹¹¹ U.S. Dep’t of Just., What are the 9 FOIA exemptions?, https://www.justice.gov/d9/what_are_the_9_foia_exemptions.pdf [<https://perma.cc/6VJQ-PXZD>] (last visited Sept. 28, 2025).

¹¹² See *Judicial Watch*, 895 F.3d at 783.

¹¹³ 5 U.S.C. § 552(a)(6)(A)(i).

¹¹⁴ 5 U.S.C. § 552(a)(6)(B)(i).

¹¹⁵ See *Citizens for Resp. & Ethics in Washington v. Fed. Election Comm’n*, 711 F.3d 180, 182-83 (D.C. Cir. 2013).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 184 (quoting 5 U.S.C. § 552(a)(6)(C)(i)).

¹¹⁸ See Kwoka, *First-Person FOIA*, *supra* note 5, at 2228.

lawful presence in the United States or eligibility for discretionary relief from deportation.¹¹⁹

B. Barriers to FOIA for Noncitizens in Removal Proceedings

1. Delays in FOIA Processing

Delays in FOIA processing can put noncitizens in removal proceedings at risk of deportation, among other adverse consequences.¹²⁰ In 2020, federal agencies averaged over three months to process FOIA requests; for more “complex” or detailed requests, they averaged six months.¹²¹ Even before the COVID-19 pandemic slowed FOIA response times across the federal government, agencies often failed to comply with FOIA determination deadlines.¹²² These problems are particularly acute within DHS, which receives the most FOIA requests of any agency.¹²³ Noncitizens interact with several administrative agencies whenever they visit the United States, apply for immigration benefits, or enter removal proceedings. As a result, FOIA inefficiencies burden noncitizens trying to determine which agency possesses records relevant to their immigration case.¹²⁴ At least three separate categories of documents held by three different government agencies contain records relevant to removal proceedings: the A-File maintained by USCIS, the immigration “court file” maintained by the Executive Office of Immigration Review (“EOIR”) within the DOJ, and visa application records held by the U.S. Department of State.¹²⁵

Requests for immigration records comprise the bulk of FOIA requests made to DHS. Yet, the Government Accountability Office (“GAO”) found that DHS lacks “documented, comprehensive plans” to coordinate and streamline FOIA processing among its component agencies to meet demand.¹²⁶ Although all three DHS components generate most of the documents included in A-Files, USCIS serves as the “custodian” of A-Files

¹¹⁹ *Id.*; see also Heeren, *supra* note 6, at 1584 (“Although in theory the government has the burden of proof” to establish a respondent’s “alienage” when charging her with deportation, in practice, “the burden shifts in most removal cases to the non-citizen once she concedes some immigration violation and requests discretionary relief.”).

¹²⁰ See, e.g., *Nightingale*, 333 F.R.D. at 454-55 (“A-Files also contain reasons why previous applications were denied, and such information is crucial in determining eligibility for future benefits or relief from deportation.”).

¹²¹ Wasser, *supra* note 20.

¹²² *Id.*

¹²³ See Luangrath, *supra* note 1; U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-209T, FREEDOM OF INFORMATION ACT: DHS NEEDS TO REDUCE BACKLOGGED REQUESTS AND ELIMINATE DUPLICATE PROCESSING (2019).

¹²⁴ See Luangrath, *supra* note 1.

¹²⁵ Heeren, *supra* note 6, at 1593.

¹²⁶ U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 123, at 9.

within the agency.¹²⁷ Accordingly, *all* A-File FOIA requests must be initiated with, or referred to, USCIS for processing.¹²⁸ USCIS has resisted calls to fully digitize A-Files for greater searchability and access, opting instead to maintain paper files in off-site storage facilities, such as the Cave.¹²⁹ The agency also resisted calls to centralize its A-File storage, which worsens FOIA processing delays.¹³⁰ Thus, processing A-File FOIA requests requires USCIS staff to create a record of the request by entering the requester's name and address into the agency's FOIA system, manually retrieving and scanning the documents responsive to the request, and then making any necessary redactions before mailing them to the requester.¹³¹

Duplication in USCIS and ICE FOIA processing worsens response delays. Although USCIS can identify ICE-generated documents, such as records of past border crossings, arrests, and law enforcement investigations involving the requester, USCIS cannot process and release them because it lacks an agreement with ICE to do so.¹³² Accordingly, USCIS must refer the request to ICE for separate processing.¹³³ This prompts ICE staff to re-enter the requester's data into the system as a "new" FOIA request and process it as their USCIS colleagues did, thereby duplicating document productions and worsening already poor FOIA response times.¹³⁴ These delays have become so frequent that noncitizens have sued USCIS for "routinely failing" to comply with FOIA's statutory time limit.¹³⁵

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *See, e.g.,* Luangrath, *supra* note 1 ("USCIS's longtime reliance on paper files exacerbates its FOIA backlog and undermines immigrants' due process rights. For example, an immigrants' rights group sued USCIS because the agency failed to retrieve their clients' requested A-Files—housed in one of the Missouri limestone mines—for over two years.")

¹³⁰ *Id.*; *see also* Margaret B. Kwoka, *An Information Commission*, 112 *GEO. L.J.* 841, 856 (2024) (quoting from the district court's opinion in *Nightingale* to describe USCIS's and ICE's FOIA backlogs).

¹³¹ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 123, at 9-10.

¹³² *Id.* at 10-11.

¹³³ *Id.* at 10.

¹³⁴ *Id.* at 10, 12.

¹³⁵ *See, e.g.,* Hajro v. U.S. Citizenship & Immigr. Servs., 811 F.3d 1086 (9th Cir. 2016) (providing a three-pronged test to establish injury-in-fact in pattern-or-practice claims under FOIA in a suit by a noncitizen facing repeated delays in receiving timely A-File productions from USCIS); *Nightingale v. U.S. Citizenship & Immigr. Servs.*, 333 F.R.D. 449 (N.D. Cal. 2019) (granting plaintiffs' motion for class certification because a single injunction or declaratory judgment would provide relief to each member of proposed classes, USCIS requesters and ICE referral requesters—namely, the timely determination of their A-File FOIA requests); *Nightingale v. U.S. Citizenship & Immigr. Servs.*, 507 F. Supp. 3d 1193 (N.D. Cal. 2020) ("*Nightingale II*") (granting plaintiffs' motion for summary judgment after classes were certified in 333 F.R.D. 449 and holding that DHS, USCIS, and ICE had a pattern of unreasonable delay in FOIA responses for A-Files and that plaintiffs were entitled to declaratory and injunctive relief requiring government defendants to provide timely responses to their requests); *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010) (holding that a provision of the INA required the government to provide noncitizen plaintiff documents from his A-File and that its failure to do so in a deportation proceeding violated plaintiff's Fifth Amendment due process rights by denying him the opportunity to fully and fairly litigate his removal and claim of defensive citizenship).

A noncitizen in removal proceedings can request a continuance from an immigration judge while she awaits a response to her A-File FOIA request. Immigration regulations give immigration judges broad discretion to grant continuances “for good cause shown,”¹³⁶ such as when a pending immigration benefit adjudication from USCIS could impact a noncitizen’s removal case.¹³⁷ In a continuance motion involving a respondent’s pending visa adjudication with USCIS, the BIA in *Matter of Hashmi* held that immigration judges must use a five-factor balancing test to determine whether “good cause” exists to grant a continuance motion, and consider: (1) the DHS attorney’s response to the motion; (2) whether the respondent’s underlying visa petition was *prima facie* approvable; (3) the respondent’s statutory eligibility for adjustment of status; (4) whether a respondent’s application merited a favorable exercise of discretion; and (5) any other relevant procedural factors or reasons that favor granting a continuance.¹³⁸ The BIA has also extended the *Hashmi* test to continuance requests involving collateral proceedings beyond visa adjudications.¹³⁹ Although some immigration judges have expressed concern that continuances unduly burden an already backlogged and overstretched immigration court system,¹⁴⁰ *Hashmi* requires immigration judges to consider and balance a variety of factors when assessing “good cause.”¹⁴¹

During the first Trump Administration, however, then-Attorney General Jeff Sessions altered the test. In *Matter of L-A-B-R*,¹⁴² Sessions determined that immigration judges evaluating “good cause” should prioritize other concerns, such as administrative efficiency, the respondent’s likelihood of success in the collateral matter, and whether success would materially affect the outcome of her removal proceeding.¹⁴³ *L-A-B-R* neither overruled *Hashmi*¹⁴⁴ nor addressed whether collateral FOIA proceedings could constitute “good cause.” Nevertheless, the decision heightens evidentiary burdens on noncitizens who already struggle to determine *what* documents their A-Files contain, let alone *whether* those records will secure them deportation relief.

¹³⁶ 8 C.F.R. § 1003.29 (2021).

¹³⁷ *In re Ajmal Hussain Shah Hashmi*, 24 I. & N. Dec. 785, 788 (DOJ, Bd. Immigr. Appeals Apr. 22, 2009).

¹³⁸ *Id.* at 785.

¹³⁹ *See, e.g., In re Mohamed Rajah*, 25 I. & N. Dec. 127 (DOJ, Bd. Immigr. Appeals Nov. 12, 2009) (extending *Hashmi* to employment-based immigration petitions); *In re Cezareo Sanchez Sosa*, 25 I. & N. Dec. 807 (DOJ, Bd. Immigr. Appeals June 7, 2012) (establishing a similar test for U-visas).

¹⁴⁰ *See Kwoka, First-Person FOIA, supra* note 5, at 2252.

¹⁴¹ *Hashmi*, 24 I. & N. Dec. at 785.

¹⁴² *In re L-A-B-R*, 27 I. & N. Dec. 405 (DOJ, Off. Att’y Gen. Aug. 16, 2018).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 405, 414.

2. Disclosure Exemptions

Even when agencies timely produce documents, FOIA's disclosure exemptions present additional barriers to A-File access. Among the many exemptions that could apply to A-File records, deliberative process privilege—referred to as a (b)(5) exemption—is perhaps most commonly invoked, and captures the traditional discovery exemptions of work product doctrine, attorney-client privilege, and draft documents.¹⁴⁵ This exemption may shield, for example, a USCIS officer's interview notes recorded during an immigration benefits interview from disclosure.¹⁴⁶ During removal proceedings, DHS attorneys often draw from these interview notes to impeach the credibility of noncitizen respondents by identifying discrepancies, however minor, between the noncitizen's immigration court testimony and prior statements given to USCIS officers. In response, FOIA litigants have sought to narrow DHS's application of (b)(5) exemptions, arguing that an agency officer's analysis of an immigration interview may be exempt, but "factual material," such as an applicant's statements during asylum or adjustment of status interviews, should be disclosed.¹⁴⁷

3. Fugitive Disentitlement Doctrine

In addition to established redactions and withholdings under FOIA, the fugitive disentitlement doctrine may further limit the FOIA rights of certain noncitizens. Fugitive disentitlement is a criminal law doctrine that allows courts to dismiss a pending criminal appeal if the defendant escapes custody and becomes a fugitive.¹⁴⁸ The doctrine has traditionally "been used to divest courts from hearing the appeals or other legal claims of criminal defendants deemed to be evading the law or running away from their criminal sentences."¹⁴⁹ However, some Article III courts have also applied the doctrine in civil immigration appeals, often to dismiss petitions for review of BIA decisions filed by LPRs, asylum seekers, and the parents of U.S. citizens.¹⁵⁰ Immigration scholars have expressed concern over fugitive

¹⁴⁵ Heeren, *supra* note 6, at 1598.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Valdez, *supra* note 13, at 963.

¹⁴⁹ Geoffrey A. Hoffman & Susham M. Modi, *The War on Terror as a Metaphor for Immigration Regulation: A Critical View of a Distorted Debate*, 15 J. GENDER, RACE & JUST. 449, 457 (2012).

¹⁵⁰ See Valdez, *supra* note 13, at 965 (noting that the Fifth Circuit held in *Bright v. Holder*, 649 F.3d 397 (5th Cir. 2011) that the fugitive disentitlement doctrine applies in the immigration context and dismissed an alien's appeal of a BIA decision to deny the alien's motion to reopen his removal proceedings and his motion to reconsider; that the Second Circuit dismissed a petition to reopen an alien's asylum application pursuant to the fugitive disentitlement doctrine in *Gao v. Gonzales*, 481 F.3d 173 (2d Cir. 2007); and that the Second Circuit invoked the fugitive disentitlement doctrine when it dismissed a noncitizen's petition for review of a BIA order

disentitlement's "doctrinal creep" from criminal cases to immigration because the "rationales provided in criminal cases do not naturally extend to civil immigration cases."¹⁵¹

When applying the doctrine to petitions for review, Article III courts must determine whether a noncitizen is a "fugitive," which often requires assessing whether she "fled" custody.¹⁵² In *Giri v. Keisler*, the Fifth Circuit applied the fugitive disentitlement doctrine to dismiss a petition for review by a Nepalese family seeking asylum.¹⁵³ The BIA had affirmed an immigration judge's decision to deny the Giri family's claims for asylum, withholding of removal, and Convention Against Torture ("CAT") relief.¹⁵⁴ The Fifth Circuit dismissed the family's petition for review after concluding that overstaying their nonimmigrant visas and failing to comply with ICE reporting requirements made them "fugitives" under the doctrine.¹⁵⁵

Immigration scholars have observed that the doctrine's framework has led federal courts to awkwardly equate a failure to report to immigration authorities with criminal escape.¹⁵⁶ Because the Giri family was never "in custody," the family never absconded; indeed, they conceded their removability but timely applied for removal relief, asylum, and CAT protection.¹⁵⁷ Moreover, federal authorities never charged them with crimes that would trigger deportation.¹⁵⁸ Despite this, the Fifth Circuit held that the family's failure to report rendered them fugitives who evaded custody, and applied the fugitive disentitlement doctrine to deny their petitions for review.¹⁵⁹

Immigration agencies have also used the fugitive disentitlement doctrine to restrict noncitizens' FOIA rights. In fiscal year 2015, ICE denied FOIA requests based on the fugitive disentitlement doctrine 4,053 times.¹⁶⁰ In 2017, ICE announced that it would stop processing FOIA requests from noncitizens it considered "fugitives."¹⁶¹ According to the agency, a "fugitive"

denying his motion to reopen his exclusion proceedings based on his marriage and the birth of his two U.S. citizen children in *Chang Bin Guo v. U.S. Dep't of Just.*, 276 F. App'x 27 (2d Cir. 2008), and that Guo neither denied receiving the government's letter ordering him to report for deportation nor explained his failure to comply with it.

¹⁵¹ *Id.* at 967-68.

¹⁵² Hoffman & Modi, *supra* note 149, at 482.

¹⁵³ *Giri v. Keisler*, 507 F.3d 833, 834-35 (5th Cir. 2007) (per curiam).

¹⁵⁴ *Id.* at 834.

¹⁵⁵ *Id.* at 834-36; *see also* Hoffman & Modi, *supra* note 149, at 483 (noting that the INA contains no express "duty to surrender.").

¹⁵⁶ Hoffman & Modi, *supra* note 149, at 482.

¹⁵⁷ *Giri*, 507 F.3d at 834; *see also* Hoffman & Modi, *supra* note 149, at 482 ("*Giri* illustrates the flaws in applying the [fugitive disentitlement] doctrine to immigration cases, especially those related to asylum. The petitioners . . . did not 'abscond' but rather failed to report.").

¹⁵⁸ Hoffman & Modi, *supra* note 149, at 482.

¹⁵⁹ *Giri*, 507 F.3d at 835.

¹⁶⁰ 5U.S. DEP'T OF HOMELAND SEC., 2015 FREEDOM OF INFORMATION ACT REPORT TO THE ATTORNEY GENERAL OF THE UNITED STATES 7 (Feb. 2016), <https://www.dhs.gov/sites/default/files/publications/dhs-foia-annual-report-fy-2015.pdf> [<https://perma.cc/Y5MC-K2RC>].

¹⁶¹ Valdez, *supra* note 13, at 975-76.

included any noncitizen who has committed a crime, failed to leave the United States when required to do so, or failed to comply with ICE reporting requirements.¹⁶² Although a district court declared this blanket withholding of government records improper under FOIA, it left unresolved whether the fugitive disentitlement doctrine could *ever* apply to noncitizens' FOIA requests or appeals.¹⁶³ However, because FOIA denials are reportedly rarely appealed, DHS's interpretation of the doctrine could practically bar certain noncitizen requesters from accessing their immigration records.¹⁶⁴

C. *Individual Pattern-or-Practice A-File FOIA Suits: Hajro and the Risk of Collateral Agency Proceedings Mooting Individual FOIA Claims*

Repeated delays in receiving timely A-File productions have led individual plaintiffs to file pattern-or-practice claims against DHS and its components. Broadly, a pattern-or-practice claim in the FOIA context alleges that an agency's policy, custom, or practice of violating FOIA requirements will impair a requester's lawful access to government-held information in the future.¹⁶⁵ Where agencies violate FOIA determination deadlines, individual plaintiffs alleging pattern-or-practice claims must show an agency policy or practice of "prolonged, unexplained delays" in issuing determinations.¹⁶⁶ Courts must then determine whether the agency's conduct "demonstrates a lack of due diligence" that is "so delinquent or recalcitrant as to warrant injunctive relief because ordinary remedies, such as a production order . . . would be inadequate to overcome an agency policy or practice."¹⁶⁷ Thus, injunctive relief in this context seeks to address "some cognizable danger of recurrent violation," rather than simply compel an agency to produce documents responsive to a specific FOIA request.¹⁶⁸ Under this theory of relief, a requester must demonstrate that receiving records responsive to her immediate request will not moot her claim that the defendant agency's policy or practice of FOIA violations will impair her lawful access to government-held documents in the future.¹⁶⁹

¹⁶² *Id.*

¹⁶³ *Smith v. U.S. Immigr. & Customs Enf't*, 429 F. Supp. 3d 742, 763 (D. Colo. 2019) (determining that "the fugitive disentitlement doctrine is presently irrelevant" in this case).

¹⁶⁴ Kwoka, *First-Person FOIA*, *supra* note 5, at 2248.

¹⁶⁵ *Payne Enters., Inc. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988).

¹⁶⁶ *Judicial Watch v. U.S. Dep't of Homeland Sec.*, 895 F.3d 770, 780 (D.C. Cir. 2018).

¹⁶⁷ *Id.* at 783.

¹⁶⁸ *Id.* (noting that when requesters seek injunctive relief, courts should consider "the *bona fides* of [the agency's] expressed intent to comply, the effectiveness of the discontinuance [of the violation] and, in some cases, the character of the past violations," and that courts' "prime consideration should be the effect on the public of disclosure or non-disclosure") (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) and *Long v. U.S. I.R.S.*, 693 F.2d 907, 909 (9th Cir. 1982)).

¹⁶⁹ *Payne*, 837 F.2d at 491.

The Ninth Circuit, in *Hajro*, set forth a three-pronged test for establishing injury-in-fact in individual FOIA pattern-or-practice claims. To prevail, a plaintiff must demonstrate (1) that the agency's FOIA violation was not an isolated incident, (2) that the alleged policy or practice personally harmed her, and (3) that a sufficient likelihood of *future* harm from the policy or practice exists.¹⁷⁰ Although *Hajro* involved an individual suit filed by Mirsad Hajro and his immigration attorney, James Mayock, the Ninth Circuit has since applied the *Hajro* prongs to a class action against USCIS and ICE for their pattern or practice of violating FOIA determination deadlines on A-File requests.¹⁷¹

A plaintiff satisfies the first prong if she “has been subjected to a FOIA violation more than once” or produces “affidavits of people similarly situated to [her] who were also harmed by the pattern or practice.”¹⁷² In *Hajro*, the plaintiffs met the first prong by providing twenty-six declarations from immigration attorneys detailing USCIS's FOIA delays.¹⁷³

Next, a plaintiff satisfies the second prong by showing that she filed a FOIA request and that the agency's delay violates statutory requirements.¹⁷⁴ Here, Hajro met the second prong because USCIS responded to his FOIA request almost four months after he submitted it, “well beyond” the twenty-day limit and without “unusual circumstances” justifying a deadline extension.¹⁷⁵ Although the delay itself constituted an injury under FOIA, it also forced Hajro to administratively appeal USCIS's denial of his naturalization application.

Lastly, a plaintiff satisfies the third prong if she demonstrates “continuing, present adverse effects” from the agency's policy or practice.¹⁷⁶ The court determined that Hajro failed to meet this prong. Securing injunctive relief on a pattern-or-practice claim required Hajro to show that he would “likely suffer future injury” from USCIS's FOIA delays or that his injury fell under the mootness exception of being “capable of repetition, yet evading review.”¹⁷⁷ While his FOIA suit was pending, Hajro successfully appealed USCIS's decision to deny him citizenship. With citizenship secured, the court reasoned that USCIS was unlikely to “impair [Hajro's] lawful access to information in the future” because, as a naturalized citizen, he would never have to file another A-File FOIA request with the agency.¹⁷⁸ Thus, in

¹⁷⁰ *Hajro v. U.S. Citizenship & Immigr. Servs.*, 811 F.3d 1086, 1103 (9th Cir. 2016).

¹⁷¹ See discussion *infra* Section III.B.

¹⁷² *Hajro*, 811 F.3d at 1104.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 1106.

¹⁷⁶ *Id.* at 1107 (quoting *City of L.A. v. Lyons*, 461 U.S. 95, 102-03 (1983)).

¹⁷⁷ *Id.*; see also *infra* Sections IV.B.-C. (discussing available exceptions to the mootness doctrine).

¹⁷⁸ *Hajro*, 811 F.3d at 1107 (quoting *Payne Enters., Inc. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988)); see also NAT'L ARCHIVES, *supra* note 32 (“A-Files contain all records of any

addition to presenting an Article III standing problem for Hajro, the court determined that USCIS's collateral benefits adjudication mooted his claim under the FOIA statute.¹⁷⁹

A few years after *Hajro*, a California district court heard *Nightingale*—the first pattern-or-practice class action alleging a “systematic failure” by USCIS and ICE to make timely determinations on A-File FOIA requests.¹⁸⁰ The *Hajro* prongs helped the named plaintiffs and putative class members in *Nightingale* establish common injury and, in turn, meet heightened commonality requirements under *Wal-Mart v. Dukes*.¹⁸¹

III. WAL-MART AND BARRIERS TO CLASS CERTIFICATION IN FOIA PATTERN-OR-PRACTICE CHALLENGES AGAINST DHS

This Part introduces class actions in the context of A-File FOIA pattern-or-practice claims. Class actions are suits where one or more class representatives—named plaintiffs—represent a class whose members have been harmed in the same way by the same defendant. This Part discusses how the Supreme Court's decision in *Wal-Mart* heightened the evidentiary requirements for pattern-or-practice claims at the class certification stage under Federal Rule of Civil Procedure 23 (“Rule 23”). Under Rule 23(a)(2), *Wal-Mart* required named plaintiffs and putative class members in pattern-or-practice suits to show that they shared a common injury wherein a single injunction or declaratory judgment would provide relief to each member of the class.¹⁸²

This Part explains how the three-pronged *Hajro* test helped the *Nightingale* plaintiffs establish standing and commonality of injury, and meet heightened commonality requirements under *Wal-Mart* and Rule 23. To establish standing, courts typically require individual plaintiffs seeking injunctive or declaratory relief to show that they are “suffering an ongoing injury or facing an immediate threat of [future] injury,” not merely that they have suffered past harm.¹⁸³ In the class action context, however, some dispute exists as to whether that requirement is less stringent.¹⁸⁴

active case of an alien not yet naturalized as they passed through the United States immigration and inspection process.” (emphasis added).

¹⁷⁹ See *Hajro*, 811 F.3d at 1102 (“Hajro . . . has lost standing to bring a pattern or practice claim during the pendency of this appeal when he was granted his citizenship, because the probability that USCIS's delays ‘will impair [Hajro's] lawful access to information in the future’ is now remote. Therefore, we . . . dismiss Hajro's claim as moot.” (internal citation omitted)).

¹⁸⁰ *Nightingale v. U.S. Citizenship & Immigr. Servs.*, 333 F.R.D. 449, 453 (N.D. Cal. 2019).

¹⁸¹ *Id.* at 458. See *infra* Section III.B. (discussing how the district court in *Nightingale* applied heightened *Wal-Mart* commonality requirements when certifying the two proposed classes).

¹⁸² *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-50, 360 (2011).

¹⁸³ See, e.g., *Nat'l Sec. Couns. v. C.I.A.*, 931 F. Supp. 2d 77, 91 (D.D.C. 2013) (quoting *City of L.A. v. Lyons*, 461 U.S. 95, 105 (1983)).

¹⁸⁴ See *Brown v. U.S. Customs & Border Prot.*, 132 F. Supp. 3d 1170, 1174 (N.D. Cal. 2015) (finding that CBP's argument that standing in pattern-or-practice claims requires “specific

Using the *Hajro* prongs, the named plaintiffs and putative class members in *Nightingale* established their common injury by demonstrating that USCIS and ICE routinely failed to respond to each of their A-File FOIA requests for over thirty days.

Finally, this Part nuances the *Nightingale* court's position that FOIA pattern-or-practice class actions for A-Files are inherently less vulnerable to mootness than individual suits. Although class actions may have advantages over individual suits, the threat of mootness remains present until the class is certified. In most circuits, a district court must dismiss a class action altogether if a named plaintiff's previously live claim became moot *before* the court could adjudicate the class certification motion.¹⁸⁵

A. Wal-Mart and Heightened Class Certification Requirements

In *Wal-Mart*, the Supreme Court held that Rule 23, which governs class actions, did not set forth a mere pleading standard. Rather, it required plaintiffs seeking class certification to prove that there were “*in fact* sufficiently numerous parties [and] common questions of law or fact.”¹⁸⁶ In that case, current and former female employees of Wal-Mart alleged that the company violated Title VII of the Civil Rights Act of 1964 by denying them equal pay or promotions based on their sex.¹⁸⁷ The plaintiffs claimed that Wal-Mart allowed local store managers to apply “subjective criteria” when making pay and promotion decisions.¹⁸⁸ These managers allegedly exercised discretion in ways that unfairly favored male employees.¹⁸⁹ The plaintiffs argued that Wal-Mart's awareness of this practice and refusal to “cabin its managers' authority” amounted to disparate treatment.¹⁹⁰ They claimed that the discrimination they suffered was common to all female employees at Wal-Mart and sought injunctive and declaratory relief, punitive damages, and backpay on behalf of themselves and a nationwide class of approximately 1.5 million female employees.¹⁹¹

allegations of future harm” was “bereft of support,” and noting instead that “several cases have allowed pattern or practice claims for unreasonable delay—and recognized a plaintiff's standing to bring them—even where the plaintiff's FOIA request had already been resolved.”) (quoting *Gilmore v. U.S. Dep't of Energy*, 33 F. Supp. 2d 1184, 1186 (N.D. Cal. 1998)). *But see* *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974) (“Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing, present adverse effects.”).

¹⁸⁵ *E.g.*, *Clark v. State Farm Mut. Auto. Ins. Co.*, 590 F.3d 1134, 1138 (10th Cir. 2009); *Cruz v. Farquharson*, 252 F.3d 530, 533-34 (1st Cir. 2001) (stating that a proposed class action “ordinarily must be dismissed as moot if no decision on class certification has occurred by the time that the individual claims of all named plaintiffs have been fully resolved.”).

¹⁸⁶ *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

¹⁸⁷ *Id.* at 343.

¹⁸⁸ *Id.* (e.g., identifying candidates for management training).

¹⁸⁹ *Id.* at 344.

¹⁹⁰ *Id.* at 345.

¹⁹¹ *Id.*

The district court certified the proposed class. A divided *en banc* Ninth Circuit affirmed, agreeing that the plaintiffs' alleged injury sufficed to "raise the common question [of] whether Wal-Mart's female employees nationwide were subjected to a single set of corporate policies (not merely a number of independent discriminatory acts) that may have worked to unlawfully discriminate against them in violation of Title VII."¹⁹² The Ninth Circuit also found that the plaintiffs' backpay claims could be certified because "they did not 'predominat[e]' over the requests for declaratory and injunctive relief . . ."¹⁹³ The Supreme Court reversed. In decertifying the class, the Court explained that the plaintiffs failed to establish that Wal-Mart managers exercised discretion in the same or similar way, such that a uniform grant of relief would "produce a common answer" to why the class members were disfavored in pay or promotion decisions.¹⁹⁴

Wal-Mart narrowed how lower federal courts construe the commonality standard. Rule 23(a) requires a party seeking class certification to demonstrate that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.¹⁹⁵ Then, the party seeking certification must establish that one of the Rule 23(b) grounds applies. Rule 23(b) details requirements necessary to maintain a class action. Before *Wal-Mart*, courts tended to assume that classes meeting the Rule 23(b)(3) requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members" would also meet Rule 23(a)(2)'s requirement that there be "questions of law or fact common to the class."¹⁹⁶ In most cases, courts perceived commonality as a "low hurdle" to meet, and would find the requirement satisfied even when "only one common question of law or fact was present within the class" and where diverse factual circumstances underlaid individual class members' claims.¹⁹⁷ Because of this, class action litigators have remarked that, before *Wal-Mart*, Rule 23(a)'s criteria were "not strongly contested."¹⁹⁸

¹⁹² *Id.* at 347 (internal citation omitted).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 352 (noting that the plaintiffs' evidence included expert testimony on statistically significant disparities in pay and advancement between men and women and anecdotal accounts of discrimination from female employees).

¹⁹⁵ Fed. R. Civ. P. 23(a)(1) (numerosity); 23(a)(2) (commonality); 23(a)(3) (typicality); 23(a)(4) (adequacy).

¹⁹⁶ Sheryl E. Clegg, Comment, *Employment Discrimination Class Actions: Why Plaintiffs Must Cover All Their Bases After the Supreme Court's Interpretation of Federal Rule of Civil Procedure 23(A)(2) in Wal-Mart v. Dukes*, 44 TEX. TECH. L. REV. 1087, 1103 (2012).

¹⁹⁷ Erin Shaughnessy, Note, *Too Big to Be Sued?: Class Actions and the Commonality Requirement After Wal-Mart v. Dukes*, 57 U. LOUISVILLE L. REV. 125, 128-29 (2018).

¹⁹⁸ J. Douglas Richards & Benjamin D. Brown, *Predominance of Common Questions—Common Mistakes in Applying the Class Action Standard*, 41 RUTGERS L.J. 163 (2010).

Now, district courts must undertake what the Court called a “rigorous analysis” to see that plaintiffs meet Rule 23(a)’s requirements.¹⁹⁹ The Court in *Wal-Mart* emphasized that, where multiple decisionmakers had discretion to implement a policy or practice, plaintiffs must identify a “common mode” for exercising that discretion.²⁰⁰ The Court interpreted Rule 23(a)(2) to require a putative class to show that they suffered the same injury such that their claims hinged on a “common contention” capable of class-wide resolution.²⁰¹ Establishing that contention’s truth or falsity would resolve an issue “central to the validity” of each claim “in one stroke.”²⁰²

Wal-Mart also appeared to heighten evidentiary requirements. After *Wal-Mart*, lower federal courts have rejected the idea that they need only look for “some showing”²⁰³ of compliance with Rule 23’s requirements.²⁰⁴ Instead, plaintiffs would have to “establish by a preponderance of the evidence” that the illegal pattern or practice was the defendant’s “standard operating procedure,” rather than an “unusual practice.”²⁰⁵ Justice Ruth Bader Ginsburg criticized the *Wal-Mart* majority’s interpretation of Rule 23(a)(2), arguing that the Court imported a heightened implied predominance standard from Rule 23(b)(3) into Rule 23(a)(2).²⁰⁶

Shortly after the Court decided *Wal-Mart*, critics of the ruling anticipated that heightened class certification standards would present “serious

¹⁹⁹ *Wal-Mart*, 564 U.S. at 351.

²⁰⁰ *Id.* at 356-57.

²⁰¹ *Id.* at 350.

²⁰² *Id.*; see also Anne E. Ralph, *The Story of a Class: Uses of Narrative in Public Interest Class Actions Before Certification*, 95 WASH. L. REV. 259, 287 (2020) (noting that commonality now requires “something more” from named plaintiffs and proposed classes than demonstrating “merely that they have all suffered a violation of the same provision of law.”).

²⁰³ See, e.g., Sarah Rajski, Comment, *In re Hydrogen Peroxide: Reinforcing Rigorous Analysis for Class Action Certification*, 34 SEATTLE U. L. REV. 577, 585 (2011) (describing courts’ pre-*Wal-Mart* application of a “low threshold requirement” for plaintiffs’ presentation of evidence, including expert opinions, affidavits, or live testimony).

²⁰⁴ See, e.g., Shaughnessy, *supra* note 197, at 128-29. *But see* Richard A. Nagareda, *Common Answers for Class Certification*, 63 VAND. L. REV. EN BANC 149, 150 (2010) (observing as early as 2010 that lower federal courts were starting to reject the idea that they need only look for “some showing” of compliance with Rule 23, and instead, “affirmatively determine that those requirements [were] indeed satisfied.”); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 327 (3d Cir. 2008), *as amended* (Jan. 16, 2009) (holding, in an antitrust class action case predating *Wal-Mart*, that a district court erred in granting class certification because it applied an overly lenient standard of proof when it determined that the putative class met the predominance requirement in Rule 23, and concluding instead that Rule 23 requires a “definitive assessment” as to predominance).

²⁰⁵ *Wal-Mart*, 564 U.S. at 352 n.7 (citing *Teamsters v. United States*, 431 U.S. 324, 336 (1977)).

²⁰⁶ Clegg, *supra* note 196, at 1105; see also *Wal-Mart*, 564 U.S. at 376-77 (Ginsburg, J., concurring in part and dissenting in part) (noting that the Rule 23(b)(3) predominance inquiry is “meant to test whether proposed classes are sufficiently cohesive to warrant adjudication by representation,” and stating that “each individual employee’s unique circumstances . . . ultimately determin[ing] whether she is entitled to backpay or damages[] should not factor into the Rule 23(a)(2) determination.”) (internal citations omitted).

setbacks to women and minorities, especially in employment discrimination cases brought under Title VII of the Civil Rights Act of 1964” and in “public interest class actions” more broadly.²⁰⁷ Moreover, nothing in the Court’s interpretations of Rule 23’s commonality requirement or injunctive relief provisions suggested they would be limited to employment discrimination cases.²⁰⁸ Shortly after *Wal-Mart*, government defendants successfully moved to decertify classes for failing to meet heightened commonality requirements, including in class actions challenging the adequacy of education given to children with disabilities in Wisconsin²⁰⁹ and Washington, D.C.²¹⁰ In Texas, government defendants succeeded in decertifying a class in a lawsuit where plaintiffs claimed that the state agency overseeing the long-term foster care system failed to protect children in that system from abuse and neglect.²¹¹

Few disagree that *Wal-Mart* heightened class certification requirements. However, some legal scholars have argued that concerns *Wal-Mart* would trigger a “hard pro-defendant turn” in class certification decisions, especially in cases involving injunctive relief claims against government defendants, have largely not materialized.²¹² Because A-File FOIA requesters in removal proceedings typically seek injunctive relief in the form of timely and responsive FOIA productions, rather than monetary damages,²¹³ immigrants’ rights advocates should be cautiously optimistic about the class action device’s potential to vindicate noncitizens’ FOIA rights, even after *Wal-Mart*. UCLA Law professor David Marcus found that *Wal-Mart* did not reduce the number of class actions “challenging customs, practices, and patterns of conduct that add up to the systemic maladministration of government agencies or programs.”²¹⁴

Even though *Wal-Mart* has not “derailed” public interest class actions in the way some legal scholars feared, it has nevertheless turned the class certification process into a “full-fledged merits inquiry” rather than “a quick check to determine that the plaintiffs [pleaded] claims that the underlying

²⁰⁷ Nina Martin, *The Impact and Echoes of the Wal-Mart Discrimination Case*, PRO PUBLICA (Sept. 27, 2013), <https://www.propublica.org/article/the-impact-and-echoes-of-the-wal-mart-discrimination-case> [<https://perma.cc/C38K-6PU4>]; see also David Marcus, *The Persistence and Uncertain Future of the Public Interest Class Action*, 24 LEWIS & CLARK L. REV. 395, 397 (2020) (“Federal courts soon began to treat this ‘watershed’ decision as a mandate for greater scrutiny of public interest classes.”) [hereinafter Marcus, *Uncertain Future*].

²⁰⁸ Marcus, *Uncertain Future*, *supra* note 207, at 397.

²⁰⁹ *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 486 (7th Cir. 2012).

²¹⁰ *DL v. D.C.*, 713 F.3d 120, 126 (D.C. Cir. 2013).

²¹¹ *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 838 (5th Cir. 2012); see also David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 793-94 (2016) [hereinafter Marcus, *Public Interest Class Action*] (identifying and briefly describing the aforementioned cases).

²¹² Marcus, *Uncertain Future*, *supra* note 207, at 409.

²¹³ David Marcus, *The Class Action After Trump v. CASA*, 73 UCLA L. REV. DISCOURSE 2, 8-9 (2025) [hereinafter Marcus, *After CASA*].

²¹⁴ Marcus, *Uncertain Future*, *supra* note 207, at 398-99.

substantive law recognizes as common.”²¹⁵ After reviewing every reported decision from June 21, 2011, to March 31, 2020, involving class certification in cases for injunctive relief brought against federal government defendants—or about 400 decisions—Marcus acknowledges that class certification now requires “more significant litigation investments by plaintiffs.”²¹⁶ Specifically, they must convince district courts that the substantive law implicated in their suits “treats people not as distinct individuals but as undifferentiated members of groups suffering from a government-created risk of harm.”²¹⁷ Nevertheless, Marcus asserts that putative classes alleging unlawful government policies and practices are no less likely to achieve certification today than before *Wal-Mart*.²¹⁸ Indeed, he found that courts have “overwhelmingly” certified classes where plaintiffs sought injunctive relief against government defendants.²¹⁹

To prevail under Rule 23 after *Wal-Mart*, litigants in A-File FOIA pattern-or-practice suits must define the shared injury among their named plaintiffs and putative class with sufficient precision. In these suits, plaintiffs seeking class certification typically request injunctive or declaratory relief, such as compelling DHS to comply with FOIA determination deadlines or change improper agency practices governing withholdings and exemptions. Accordingly, they should seek certification under Rule 23(b)(2), which requires them to establish that “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”²²⁰ Establishing common injury using the *Hajro* prongs could help litigants prevail in future FOIA pattern-or-practice suits in a post-*Wal-Mart* litigation landscape.

B. Applying *Wal-Mart* to Class Certification in *Nightingale*

So far, few litigants have filed class actions alleging pattern-or-practice claims against DHS for failing to issue timely determinations on A-File FOIA requests.²²¹ There may be several reasons for this. For instance, even

²¹⁵ *Id.*; see also *Wal-Mart*, 564 U.S. at 351 (2011) (“Frequently[,] that ‘rigorous analysis’ will entail some overlap with the merits of the plaintiff’s underlying claim. That cannot be helped.”).

²¹⁶ Marcus, *Uncertain Future*, *supra* note 207, at 398-99.

²¹⁷ *Id.*

²¹⁸ *Id.* at 409.

²¹⁹ Marcus, *After CASA*, *supra* note 213, at 9.

²²⁰ *Wal-Mart*, 564 U.S. at 360 (quoting Fed. R. Civ. P. 23(b)(2)).

²²¹ *Brown v. U.S. Customs & Border Prot.*, 132 F. Supp. 3d 1170, 1171 (N.D. Cal. 2015) featured a pattern-or-practice claim alleging that CBP and DHS failed to respond to FOIA requests for immigration records reflecting whether the named plaintiffs and the putative class were “inspected and admitted or paroled” into the United States at a port of entry. These records are “often the only evidence noncitizens have to show that they entered legally and may be eligible for lawful residency status or other immigration relief.” *Id.* The court found that the

in individual suits, some immigration lawyers have reported that they seldom pursue administrative appeals or challenge FOIA delays, improper denials, or withholdings because they lack the resources and time to litigate them.²²² This Note acknowledges the limited resources of the immigration bar, but contends that class actions could help preserve litigation resources and bolster judicial economy: one class action could eliminate the need for numerous similarly situated plaintiffs to file individual FOIA lawsuits.²²³

Nightingale provides insight into what noncitizens and immigration attorneys must show to secure class certification in A-File FOIA suits alleging pattern-or-practice claims after *Wal-Mart*. The *Nightingale* plaintiffs claimed that the defendants' pattern or practice of failing to meet FOIA determination deadlines for their A-File requests violated the law.²²⁴ They sought declaratory relief and a nationwide injunction to require the defendants to make timely determinations on their requests.²²⁵ The District Court for the Northern District of California granted the plaintiffs' class certification motion after determining that a single injunction or declaratory judgment would provide relief to each member of the two proposed classes. The "USCIS Class" included "individuals who have filed, or will file, A-File FOIA requests with USCIS that have been pending, or will be pending, with USCIS for more than 30 business days without a determination."²²⁶ The "ICE Referral Class" included "[a]ll individuals who filed, or will file, A-File FOIA requests with USCIS that USCIS has referred, or will refer, to ICE and which have been pending, or will be pending, for more than 30 business days from the date of the initial filing with USCIS without a determination."²²⁷

The *Nightingale* defendants argued that the plaintiffs failed to meet Rule 23(a)'s commonality and typicality requirements and "the necessary requirements for a Rule 23(b)(2) type of class."²²⁸ Even though the defendants conceded numerosity and adequacy, the court analyzed each of Rule 23(a)'s requirements as part of the "rigorous analysis" required under *Wal-Mart*.²²⁹

plaintiffs adequately alleged a FOIA violation. *Id.* at 1174. However, *Brown* "settled after CBP decreased its [FOIA] backlog significantly" and before the court could rule on class certification. *Nightingale v. U.S. Citizenship & Immigr. Serv.*, 333 F.R.D. 449, 455-56 (N.D. Cal. 2019).

²²² See Kwoka, *First-Person FOIA*, *supra* note 5, at 2247 ("[E]very lawyer interviewed agreed that it was either never or hardly ever worth fighting the denial of information under FOIA . . . [t]he clients or the law firms simply didn't have the resources for a collateral proceeding about information access . . . lawyers can't afford to take the time and energy to litigate those issues." (internal quotations marks omitted)).

²²³ Email from Jonah Eaton, *supra* note 46.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Nightingale*, 333 F.R.D. at 456.

²²⁷ *Id.*

²²⁸ *Id.* at 457.

²²⁹ *Id.*; see also Marcus, *Uncertain Future*, *supra* note 207, at 408 (noting that plaintiffs must now "show how they can 'bridge' the 'conceptual gap' between each class member's

First, the court found that the proposed classes met the numerosity requirement because “they reasonably estimate[d] hundreds, if not thousands, of attorneys and noncitizens constitute[d] members of the USCIS Class and at least several hundred members of the ICE Referral Class.”²³⁰ For support, the plaintiffs provided declarations from immigration attorneys showing “at least 173 A-File FOIA requests filed on behalf of noncitizens that have been pending with USCIS for more than 30 business days without a determination, and at least 139 A-File FOIA requests that USCIS has referred to ICE that have been pending for more than 30 business days.”²³¹

Second, using the *Hajro* prongs, the plaintiffs met the commonality requirement because the named plaintiffs’ and proposed class members’ shared injury was the delayed determinations on their A-File FOIA requests with USCIS and/or ICE.²³² The court noted that the “defendants’ alleged pattern and practice of failing to make determinations in A-File FOIA cases within the statutorily mandated time frame” constituted the shared injury—“making it the common contention, or the ‘glue’”—that held the unnamed class members and the named plaintiffs together.²³³

Notably, the court rejected the government’s characterization of the plaintiffs’ injury as “an aggregation of many claims individuals have about the delays associated with their respective A-File FOIA requests.”²³⁴ The defendants argued that the plaintiffs did not share a common injury.²³⁵ Because “no two A-Files are the same,” they contended, delays in FOIA responses could stem from different reasons.²³⁶ The court responded that the defendants misunderstood the plaintiffs’ claims, which “do not relate to the delay in any particular A-File FOIA request but instead to defendants’ ‘widespread practice of failing to make [a] determination within FOIA’s statutory time frame,’”²³⁷ an injury that could be resolved in a “single stroke”²³⁸ through a nationwide injunction.

Third, the court determined that the named plaintiffs met the typicality requirement because they sought the same relief as the putative class members: timely determinations on their A-File FOIA requests.²³⁹ The test for typicality centers on whether (1) the proposed class has the same or similar injury, (2) the action is based on conduct that is not unique to the

individual experience with the defendant and the defendant’s general conduct, an obligation that can require evidence.”).

²³⁰ *Nightingale*, 333 F.R.D. at 457.

²³¹ *Id.*

²³² *Id.* at 459.

²³³ *Id.* (quoting *Wal-Mart, Inc. v. Dukes*, 564 U.S. 338, 352 (2011)).

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* (quoting Mot. for Class Certification at 1, *Nightingale v. U.S. Citizenship & Immigr. Servs.*, 333 F.R.D. 449, 453 (N.D. Cal. 2019), (No. 28)).

²³⁸ *Parsons v. Ryan*, 754 F.3d 657, 679 (9th Cir. 2014).

²³⁹ *Nightingale*, 333 F.R.D. at 460.

named plaintiffs, and (3) the same course of conduct has injured other class members.²⁴⁰ Here, the named plaintiffs alleged that they suffered injuries “similar to those of the proposed class members, result[ing] from the same, injurious course of conduct.”²⁴¹ The defendants reiterated that the “individualized nature” of each A-File created “factual disparities between the proposed class members,” precluding class certification.²⁴² The defendants also argued that the proposed class members did not face the “same unlawful practice” because USCIS and ICE did not have “a policy of intentionally violating FOIA for any reason,” including “to delay determination on A-File FOIA requests.”²⁴³ The court again rejected the defendants’ “misguided” focus on the individualized nature of A-Files, noting that the FOIA statute required the defendants to issue a determination within twenty business days or, with an “unusual circumstances” exception, thirty business days.²⁴⁴ Moreover, a pattern-or-practice claim did not require showing “egregious” agency action at the level suggested by the defendants; an agency “may engage in ‘some other failure to abide by the terms of the FOIA’ that could be the basis for finding the agency has an unlawful policy or practice.”²⁴⁵

Fourth, the court found that the named plaintiffs satisfied the adequacy requirement because they shared a “mutual goal” with the putative class members—challenging the defendants’ FOIA practices.²⁴⁶

Finally, the court held that the plaintiffs met Rule 23(b)(2) requirements after concluding that “‘a single injunction or declaratory judgment would provide relief to each member of the class.’”²⁴⁷ Under *Wal-Mart*, meeting Rule 23(b)(2) required the plaintiffs to demonstrate the “indivisible nature of the injunctive or declaratory remedy” sought.²⁴⁸ Put another way, it required showing that the government’s conduct could “be enjoined or declared unlawful only as to all of the class members or as to none of them.”²⁴⁹ The *Nightingale* plaintiffs and putative classes also satisfied Rule 23(b)(2) by demonstrating that they had “‘pending FOIA requests that

²⁴⁰ *Id.* at 459.

²⁴¹ *Id.* at 460 (citations omitted).

²⁴² *Id.*

²⁴³ *Id.* at 460.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 460 (quoting *Payne*, 837 F.2d at 491); *see also* *Nightingale v. U.S. Citizenship & Immigr. Servs. (Nightingale II)*, 507 F. Supp. 3d 1193, 1201, 1207 (N.D. Cal. 2020) (finding that, even absent an “egregious policy” to violate FOIA statutory deadlines, informal conduct from DHS, USCIS, and ICE illustrated an “unmistakable history” of FOIA practices resulting in long delays that could serve as a basis for a pattern-or-practice claim).

²⁴⁶ *Nightingale*, 333 F.R.D. at 462.

²⁴⁷ *Id.* at 462 (quoting *Wal-Mart v. Dukes*, 564 U.S. 338, 360 (2011)).

²⁴⁸ *Id.* (quoting *Wal-Mart v. Dukes*, 564 U.S. 338, 360 (2011)).

²⁴⁹ *Id.*; *see also* *Parsons v. Ryan*, 754 F.3d 657, 688 (9th Cir. 2014) (noting that Rule 23(b)(2) “applies only when a single injunction or declaratory judgment would provide relief to each member of the class”).

[were] likely to implicate the policy or practice” alleged or a “clear intent to continue filing FOIA requests” with the defendants.²⁵⁰

The court disagreed with the defendants’ claims that the plaintiffs must “make individualized factual arguments . . . as to the unlawfulness of an agency delay related to that plaintiff’s own unique A-File” and that class-wide injunctive relief would be inappropriate.²⁵¹ Circuit precedent dictated that Rule 23(b)(2) did not require all class members to suffer an identical injury in that sense.²⁵² Indeed, the *Nightingale* plaintiffs did not seek relief with respect to any individual FOIA determination. Instead, they challenged the government’s pattern or practice of failing to make such determinations in a timely manner.²⁵³ After granting class certification, the same court subsequently granted the plaintiffs’ summary judgment motion after finding a pattern of unreasonable delay in the defendants’ responses to A-File FOIA requests.²⁵⁴ The court granted the plaintiffs declaratory and injunctive relief and ordered the defendants to issue timely determinations on their requests.²⁵⁵

C. Nuancing the *Nightingale* Court’s View That Individual Pattern-or-Practice Claims Are More Vulnerable to Mootness Than Class Actions

In a post-*Wal-Mart* era, *Nightingale* may inform how plaintiffs seeking to challenge DHS’s frequent violations of FOIA deadlines can prevail at the class certification stage. That the *Hajro* prongs helped establish commonality of injury among the named plaintiffs and putative classes in *Nightingale*, which in turn helped establish standing and justiciability, may be particularly instructive. *Wal-Mart* has turned class certification into a merits inquiry. District courts will expect litigants to present evidence showing that both the named plaintiffs and putative class members experience persistent delays in receiving determinations on their A-File FOIA requests. Litigants will also need to demonstrate that receiving document productions responsive to individual requests will not cure their injuries, as they will continue to file FOIA requests with the same agencies in the future.

The *Nightingale* court also asserted that because the likelihood of future harm was the most difficult of the three prongs to meet, individual pattern-or-practice claims were “especially susceptible” to mootness.²⁵⁶

²⁵⁰ *Nightingale*, 333 F.R.D. at 462 (quoting *Gatore v. U.S. Dep’t of Homeland Sec.*, 327 F. Supp. 3d 76, 104 (D.D.C. 2018), *aff’d*, No. 21-5148, 2023 WL 2576176 (D.C. Cir. Mar. 21, 2023)).

²⁵¹ *Id.* at 463.

²⁵² *Id.* (citing *Parsons*, 754 F.3d at 688).

²⁵³ *Id.*

²⁵⁴ *Nightingale II*, 507 F. Supp. 3d at 1207.

²⁵⁵ *Id.*

²⁵⁶ *Nightingale*, 333 F.R.D. at 458-59; *see also Hajro*, 811 F.3d at 1105 n.15 (“Mayock is the model plaintiff to assert a pattern or practice claim because his legal practice depends upon

Agency actions, including those orthogonal to FOIA processing, could moot the threat of an adverse immigration consequence for an individual plaintiff.²⁵⁷ The *Nightingale* court suggested that an individual could escape the threat of future injury posed by an agency's FOIA violations by receiving a desired immigration benefit in a collateral proceeding, as Hajro did when USCIS granted him citizenship while he was litigating his FOIA suit, or by successfully defending against a removal order.²⁵⁸ Moreover, in individual FOIA suits, document production typically terminates the requester's legally cognizable interest in the litigation.²⁵⁹ This is the case even when agencies "voluntarily" produce those documents during litigation. To the *Nightingale* court, individual pattern-or-practice FOIA suits therefore fail to address USCIS's and ICE's "systematic failure" to comply with FOIA's timeframe.²⁶⁰ By contrast, once a district court certifies a class, the mootness of the named plaintiff's claims will not moot the class action because the class acquires a legal status separate from the class representative.²⁶¹

Although the class action device may have advantages over individual suits, the threat of mootness remains present pending class certification. Even if a named plaintiff had a live claim when she moved for class certification, a district court may dismiss the class action altogether if that person's claim became moot *before* the court could rule on the motion.²⁶² Certainly, exceptions to the mootness doctrine exist. For instance, the Third and Fifth Circuits have recognized an exception in situations where defendants attempt to moot a class action by "buying off" or awarding money damages to named plaintiffs under Rule 68²⁶³ before a class certification

the recurring delayed FOIA requests—whereas immigrants, like Hajro, run the risk of mootness if they no longer have a need to file a FOIA request from USCIS after the production of documents.”).

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 458-59; see also *Hajro v. U.S. Citizenship & Immigr. Servs.*, 743 F. App'x 148, 150 (9th Cir. 2018) (rejecting the *Hajro* plaintiffs' attempt to invoke *Sosna v. Iowa*, 419 U.S. 393, 402 (1975)—that “an Article III case or controversy ‘may exist . . . between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot’”—because they did not bring their case as a class action).

²⁵⁹ See *Nightingale*, 333 F.R.D. at 458 (reasoning that individual challenges to USCIS's and ICE's FOIA violations become moot when requesters successfully defend against removal or receive a desired immigration benefit because they are no longer under threat of “future harm” from defendant agencies' FOIA practices).

²⁶⁰ *Id.*

²⁶¹ 1 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 2:11 (6th ed. 2025) (noting that after certification, an Article III controversy now exists between the named defendant(s) and members of the certified class).

²⁶² See *Clark v. State Farm Mut. Auto. Ins. Co.*, 590 F.3d 1134, 1138 (10th Cir. 2009); see also, *inter alia*, *Cruz v. Farquharson*, 252 F.3d 530, 533-34 (1st Cir. 2001) (stating that a proposed class action “ordinarily must be dismissed as moot if no decision on class certification has occurred by the time that the individual claims of all named plaintiffs have been fully resolved”).

²⁶³ See FED. R. CIV. P. 68(a) (noting that accepting an offer of judgment from the opposing party before trial ends the litigation).

ruling.²⁶⁴ When a named plaintiff's claim becomes moot under those circumstances, courts have allowed class certification to relate back to the filing of the initial complaint when the plaintiff's claim was still live.²⁶⁵ In a decision that further curbed the ability of defendants to "buy off" named plaintiffs before class certification, the Supreme Court held that *unaccepted* offers of judgment under Rule 68 do not moot a named plaintiff's claim or deprive federal courts of Article III jurisdiction over those cases, either.²⁶⁶

However, this particular exception to the mootness doctrine may not apply cleanly to the class action FOIA context. A Rule 68 offer terminates the litigation only if the receiving party formally accepts the offer.²⁶⁷ By contrast, for a defendant agency to moot a named plaintiff's FOIA claim, that plaintiff need not "accept" the government's production of responsive records; rather, an agency defendant can simply "pick off" a named plaintiff by producing such records *at any point* before a district court rules on the class certification motion.²⁶⁸ Indeed, whether in a class action or an individual suit, federal agencies often respond to FOIA requests only after requesters sue them for violating FOIA's determination deadline.²⁶⁹

²⁶⁴ See, e.g., *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1045 (5th Cir. 1981) (holding that when "plaintiffs have filed a timely motion for class certification and have diligently pursued it, the defendants should not be allowed to prevent consideration of that motion by tendering to the named plaintiffs their personal claims before the district court reasonably can be expected to rule on the issue."); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 920-21 (5th Cir. 2008) (extending *Zeidman* and holding "that when a [Fair Labor Standards Act] plaintiff files a timely motion for certification of a collective action, that motion relates back to the date the plaintiff filed the initial complaint, particularly when one of the defendant's first actions is to make a Rule 68 offer of judgment."); *Weiss v. Regal Collections*, 385 F.3d 337, 347 (3d Cir. 2004) (finding a mootness exception if a court determines that a named plaintiff's claim is "acutely susceptible to mootness," by a defendant's ability to "pick off" or "buy off" the named plaintiff (quoting *Comer v. Cisneros*, 37 F.3d 775, 797 (2d Cir. 1994))).

²⁶⁵ See, e.g., *Zeidman*, 651 F.2d at 1050 (observing that "[b]y tendering to the named plaintiffs the full amount of their personal claims each time a suit is brought as a class action, the defendants in each successive case moot the named plaintiffs' claims before a decision on certification is reached[.]" thereby necessitating an exception to the mootness doctrine identical to that afforded to claims considered inherently transitory).

²⁶⁶ *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 162-63 (2016); see also *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 81 (2013) (Kagan, J., dissenting) ("[A]n unaccepted offer of judgment cannot moot a case[.]" because in rejecting that offer—"however good the terms"—the plaintiff retains her interest in the lawsuit and the court retains its ability to grant her relief).

²⁶⁷ See FED. R. CIV. P. 68(a) ("If, within 14 days after being served [an offer of judgment], the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment."); 68(b) ("An unaccepted offer is considered withdrawn[.]").

²⁶⁸ See *infra* Section IV.A. (discussing *Gatore v. U.S. Dep't of Homeland Security*, 327 F. Supp. 3d 76 (D.D.C. 2018)).

²⁶⁹ See, e.g., *Seven Reforms to FOIA and Record-Keeping to Improve Transparency and Accountability*, AM. OVERSIGHT (Mar. 17, 2021), <https://americanoversight.org/seven-reforms-to-foia-and-record-keeping-to-improve-transparency-and-accountability/> [<https://perma.cc/4YNT-EL6S>] (noting that many agencies take years to produce requested documents and often do so "only after being sued to comply" with FOIA laws) [hereinafter Am. Oversight, *Seven Reforms*]; *The Public Shouldn't Have to Sue to Get Public Information*, THE SEATTLE

IV. ADDRESSING POTENTIAL MOOTNESS HURDLES AT THE CLASS CERTIFICATION STAGE IN FOIA PATTERN-OR-PRACTICE SUITS AGAINST DHS

This Part introduces mootness problems that may arise before a district court can adjudicate a class certification motion. It begins by discussing *Gatore v. U.S. Department of Homeland Security*, where DHS produced records responsive to the named plaintiffs' individual requests after litigation commenced but *before* class certification.²⁷⁰ Relatedly, *Gatore* suggests that a "completed" or "past" injury, such as an alleged FOIA violation, may be insufficient to meet standing requirements. Furthermore, litigants who do not demonstrate plans to continue filing FOIA requests with DHS may struggle to establish that their injury is ongoing or imminent as to warrant prospective relief.²⁷¹

Next, this Part considers whether exceptions to the mootness doctrine examined by the Supreme Court in *Gerstein v. Pugh*,²⁷² for claims considered inherently transitory or "capable of repetition, yet evading review," could apply to the unique class action context detailed in this Note. This Note argues that if a named plaintiff's claim is live when the complaint is filed but becomes moot *before* a court can adjudicate the class certification motion, then the mootness exception from *Gerstein* should apply to preserve the claim for judicial review.

Finally, this Part concludes by addressing potential counterarguments to this Note's proposal, including that it runs afoul of Rule 23(a)(4)'s requirement that a named plaintiff fairly and adequately protect the interests of the class, and that FOIA violations are not "inherently transitory."

A. *Class Certification Denied in Gatore*

Gatore demonstrates that pattern-or-practice class actions in the A-File FOIA context remain vulnerable to mootness pending class certification. Before the district court could rule on class certification in that case, DHS produced documents partially responsive to the named plaintiffs' individual

TIMES (Oct. 3, 2022), <https://www.seattletimes.com/opinion/editorials/the-public-shouldnt-have-to-sue-to-get-public-information/> [<https://perma.cc/559N-QKRU>] (noting that the Center for Human Rights at the University of Washington sued DHS and ICE after the agencies "summarily closed" and failed to respond to more than a dozen of the Center's FOIA requests, including requests for information about ICE's detention centers and immigration enforcement operations in Washington State). *Cf.* Raul Pinto, *Lawsuits Prompt Immigration Agencies to Publish Critical Documents in Their FOIA Libraries*, IMMIGR. IMPACT (Dec. 1, 2023), <https://immigrationimpact.com/2023/12/01/lawsuits-agencies-publish-documents-foia-libraries/> [<https://perma.cc/4MJH-AX27>] (noting that ICE agreed to publish "FOIA logs" containing a list of "all the FOIA requests that have been filed during a specific time period" in its virtual reading room only after immigrants' rights organizations sued to make that information publicly available, even though ICE and other agencies have a duty to publish these records proactively).

²⁷⁰ *Gatore*, 327 F. Supp. 3d at 104.

²⁷¹ *Id.*

²⁷² 420 U.S. 103 (1975).

FOIA requests, thereby destroying the common injury between the named plaintiffs and putative class members.²⁷³ The D.C. district court then denied class certification to plaintiffs seeking to represent a class of FOIA requesters who alleged that USCIS fully withheld asylum assessments prepared by the agency's asylum officers.²⁷⁴

The case began as an individual suit. Catholic Charities filed FOIA requests on behalf of eight noncitizen plaintiffs requesting, *inter alia*, "assessments to refer" ("assessments") prepared by USCIS asylum officers concerning their asylum applications, for use in their immigration court proceedings.²⁷⁵ Initially, these individuals submitted affirmative asylum applications with USCIS, so the agency's asylum officers interviewed them about their claims.²⁷⁶ After those interviews, the officers referred their cases to immigration judges for removal proceedings.²⁷⁷ At issue in *Gatore* was DHS's decision to withhold in full the assessments prepared for each plaintiff.²⁷⁸ Specifically, the plaintiffs and Catholic Charities argued that the first several paragraphs of each assessment, which included the applicants' biographical information, their stated grounds for asylum, and their testimonies to the asylum officers, constituted non-exempt factual information under FOIA.²⁷⁹ The agency also had a blanket policy of withholding assessments from disclosure and declined to determine whether any "reasonably segregable portions" of these assessments could have been provided to the plaintiffs in preparation for their immigration court proceedings.²⁸⁰ The individual plaintiffs thereafter moved for class certification, seeking to represent a class of at least 40 members they defined as "all persons who, since March 30, 2009, have made, or will make during the pendency of th[e] lawsuit, a FOIA request for the [a]ssessment of their asylum officer, but were provided *no portion* of the [a]ssessment."²⁸¹

The court determined that the plaintiffs succeeded in showing that DHS violated FOIA requirements by having a policy or practice of withholding these assessments, including non-exempt portions, and by refusing to

²⁷³ *Gatore*, 327 F. Supp. 3d at 103-04.

²⁷⁴ *Id.* at 80-81.

²⁷⁵ *Id.*

²⁷⁶ *Id.*; see also ANDORRA BRUNO, CONG. RSCH. SERV., R48249, WHAT IS AFFIRMATIVE ASYLUM? 2, 7 (2024) (detailing the affirmative asylum process, which is available to foreign nationals in the United States who are not in removal proceedings and which involve "nonadversarial" interviews, 11 8 C.F.R. § 208.9(b), conducted by USCIS asylum officers, and noting that after those interviews, asylum officers may refer cases to immigration courts for adjudication when they determine that an applicant is ineligible for asylum and inadmissible or removable under the INA).

²⁷⁷ *Gatore*, 327 F. Supp. 3d at 80-81.

²⁷⁸ *Id.* at 82.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.* (emphasis added).

determine whether they contained any “reasonably segregable portions.”²⁸² Indeed, DHS had issued a “FOIA Processing Guide” instructing the agency’s FOIA officers to withhold in full all assessments detailing decisions to grant, deny, or refer asylum claims to immigration courts.²⁸³

However, the district court denied the motion for class certification.²⁸⁴ Between March and June 2017, while the litigation was ongoing, DHS produced “between one and three paragraphs” of the named plaintiffs’ individual assessments.²⁸⁵ Because they sought to represent class members who were provided “no portion” of their assessments, the court denied their class certification motion for failing to satisfy Rule 23(a).²⁸⁶ After declining to certify the class, the court *sua sponte* ordered USCIS to release “the first several paragraphs” of the putative class members’ assessments.²⁸⁷

In addition to mootness and typicality hurdles that may arise before class certification, *Gatore* illustrates the potential challenges of meeting standing requirements when litigants fail to demonstrate that they intend to continue filing FOIA requests with the same defendant. Because they asserted only that DHS denied requests for their assessments, the court determined that the named plaintiffs alleged a past, completed harm, insufficient to warrant prospective relief.²⁸⁸ They had neither pending FOIA requests beyond their individual requests at issue nor “concrete plans to continue filing FOIA requests with the defendants.”²⁸⁹ Thus, the court determined that the named plaintiffs failed to show an ongoing injury or an imminent threat of injury.²⁹⁰

B. *How a Lopsided Circuit Split Could Impact the Application of the Mootness Doctrine and Its Exceptions*

Gatore illustrates how government defendants in FOIA pattern-or-practice suits can derail class actions by delaying records disclosures until litigation and then mooting the named plaintiffs’ claims by producing responsive records before class certification.²⁹¹ The importance of A-Files in time-sensitive removal proceedings, combined with the frequency with which agencies violate FOIA deadlines, raises government transparency and procedural due process concerns. Thus, theorizing the factual and procedural circumstances in which a mootness exception could apply is a worthwhile inquiry.

²⁸² *Id.* at 92.

²⁸³ *Id.* at 95.

²⁸⁴ *Id.* at 103.

²⁸⁵ *Gatore*, 327 F. Supp. 3d at 81, 103. The plaintiffs filed their original complaint against DHS on March 31, 2015. *Id.* at 82.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 105.

²⁸⁸ *Id.* at 104.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.* at 90, 103-05.

A named plaintiff must have a live claim when she files the complaint and motion for class certification.²⁹² The Supreme Court has held that once a district court certifies a class, the mootness of the named plaintiff's claims will not moot the class action because the class acquires a legal status separate from the class representative's interest.²⁹³ However, the Court declined to state how lower courts should treat cases in which a named plaintiff's claim was live when the complaint was filed, but became moot *before* a court could adjudicate the class certification motion.²⁹⁴ This lacuna has led to disagreement among circuit courts over the limits that Article III's "case or controversy" requirement places on federal court jurisdiction at different stages of class action litigation.²⁹⁵

The Court has suggested two scenarios where a district court may certify a class *even if* a named plaintiff's claim becomes moot before class certification: (1) if the plaintiff's claim is "capable of repetition, yet evading review," a mootness exception that can also apply to individual suits, and (2) if the plaintiff's claim is "inherently transitory [such] that the trial court will not have . . . enough time to rule on a motion for class certification before the proposed representative's individual interest expires."²⁹⁶

The exceptions operate similarly. A claim is considered "capable of repetition, yet evading review" if the duration of a challenged action is "by nature" too temporary to be litigated before it expires—namely, a reasonable expectation exists that the same complaining party could face repeated deprivations, and that another party will certainly face a similar deprivation.²⁹⁷ Sometimes called a "strain" of the "capable of repetition, yet evading review" exception, the inherently transitory exception applies only

²⁹² *Id.* at 104.

²⁹³ *See, e.g.*, *Sosna v. Iowa*, 419 U.S. 393, 401 (1975) ("Although the controversy is no longer alive as to appellant Sosna, it remains very much alive for the class of persons she has been certified to represent.").

²⁹⁴ *See, e.g.*, *Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 340 n.12 (1980) (holding that named plaintiffs whose claims became moot after a full tender of settlement nevertheless possessed a sufficient personal stake in the litigation to appeal the district court's denial of class certification, but acknowledging that "[d]ifficult questions arise as to what, if any, are the named plaintiffs' responsibilities to the putative class *prior* to certification[.]" and concluding that "this case does not require us to reach these questions.").

²⁹⁵ NEWBERG AND RUBENSTEIN, *supra* note 261 § 2:11 (quoting Daniel A. Zariski, Leonard J. Feldman, Malaika M. Eaton & Darin M. Sands, *Mootness in the Class Action Context: Court-Created Exceptions to the "Case or Controversy" Requirement of Article III*, 26 REV. LITIG. 77, 85 (2007)).

²⁹⁶ *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 398-400 (1980) (quoting *Gerstein v. Pugh*, 420 U.S. 103, 110 n. 11 (1975)); *see also* *Patton v. Fitzhugh*, 131 F.4th 383, 395-96 (6th Cir. 2025) (calling the "inherently transitory" exception the "capable of repetition, yet evading review" exception within the class action context).

²⁹⁷ *Gerstein*, 420 U.S. at 110 n.11; *see also* *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (noting that the "capable of repetition, yet evading review" exception to the mootness doctrine applies only where "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again").

in the class action context and addresses circumstances in which challenged conduct becomes effectively unreviewable if no named plaintiff possesses a personal stake in the suit long enough for the litigation to run its course.²⁹⁸ However, unlike in an individual suit, the named plaintiff's own claim need not be "capable of repetition" because her claim presents two distinct issues for judicial resolution: a claim on the merits and a claim that she is entitled to represent a class.²⁹⁹ Thus, even when the named plaintiff no longer has a legally cognizable interest in her claim on the merits after moving for class certification, the similarly situated class members could still face the original deprivation.³⁰⁰

Gerstein presents the paradigmatic example of inherently transitory claims—those of pretrial detainees. In that case, Florida prisoners initiated a class action challenging the constitutionality of a Florida law that allowed individuals arrested without a warrant to be detained pending trial without the opportunity for a probable cause hearing.³⁰¹ Although the named plaintiffs had live claims when they filed their complaint, the Court noted that by the time the district court certified the class, it was unclear whether any of them remained in custody.³⁰² Because pretrial detention is "by nature temporary," the Court determined that mootness of a named plaintiff's claim through release should not *also* moot the claims of the unnamed class members who would still have a live interest in the litigation.³⁰³

Circuit courts have extended the inherently transitory principle to other contexts. For example, the D.C. Circuit in *J.D. v. Azar* held that the inherently transitory exception allowed pregnant unaccompanied alien minors in Office of Refugee Resettlement ("ORR") custody to "relate back" their injunctive class claims against ORR to the date they filed their initial complaint.³⁰⁴ The named plaintiffs and the putative class challenged an ORR policy that effectively precluded unaccompanied alien minors in custody from obtaining abortions.³⁰⁵ The court determined that the "ostensibly short-lived duration" of the named plaintiffs' claims reinforced the importance of certifying the class to ensure justiciability, even though the named plaintiffs were no longer pregnant by the time the district court certified the class.³⁰⁶ The court reasoned that the class members would have "live claims

²⁹⁸ *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 76 (2013).

²⁹⁹ *Geraghty*, 445 U.S. at 402.

³⁰⁰ *Id.* at 394-95.

³⁰¹ *Gerstein*, 420 U.S. at 116.

³⁰² *Id.* at 110 n.11 (noting that "[s]uch a showing ordinarily would be required to avoid mootness under *Sosna*").

³⁰³ *Id.*

³⁰⁴ *J.D. v. Azar*, 925 F.3d 1291, 1308 (D.C. Cir. 2019).

³⁰⁵ *Id.*; see also *Genesis Healthcare*, 569 U.S. at 71 n.2 ("[W]here a named plaintiff's claim is 'inherently transitory,' and becomes moot prior to certification, a motion for certification may 'relate back' to the filing of the complaint.").

³⁰⁶ *Azar*, 925 F.3d at 1313 (citing *Gratz v. Bollinger*, 539 U.S. 244, 268 (2003)).

at every stage of litigation” because ORR continually kept pregnant minors in custody.³⁰⁷

Recognizing the established mootness exceptions, the “general rule” described by the Tenth Circuit and followed by most circuits is that a district court must dismiss a class action for mootness if the named plaintiffs’ claims are satisfied before the court can adjudicate the class certification motion.³⁰⁸ In *Clark v. State Farm*, the Tenth Circuit affirmed a district court’s decision to deny class certification to a proposed class of pedestrians seeking to recover extended personal injury protection benefits from defendant State Farm after suffering injuries in car accidents involving cars insured by the defendant.³⁰⁹ The court denied certification because the named plaintiff’s personal claims were satisfied before the class could be certified.³¹⁰

The Fifth Circuit has affirmed this majority approach, but identified an additional mootness exception in circumstances where a named plaintiff had a live claim when she filed the class certification motion, but the defendant “pick[ed] off” the claim by “tendering the amount claimed individually” by that plaintiff.³¹¹ This exception seeks to address situations where defendants effectively prevent the “original plaintiffs from amending a complaint to add other plaintiffs who better represent the interests of the putative class.”³¹²

An outlier among its sister circuits, the Third Circuit maintains that if a named plaintiff in a proposed class had a live claim when she moved for class certification, a district court need not dismiss the proposed class *even if* her claim becomes moot before class certification.³¹³ Of course, if the proposed class representative’s claim became moot *before* she moved for class certification, any subsequent motion would be denied, and the class action would be dismissed.³¹⁴

³⁰⁷ *Id.* at 1312.

³⁰⁸ *Clark v. State Farm Mut. Auto. Ins. Co.*, 590 F.3d 1134, 1138 (10th Cir. 2009); *see also Cruz v. Farquharson*, 252 F.3d 530, 533-34 (1st Cir. 2001) (stating that a putative class action “ordinarily must be dismissed as moot if no decision on class certification has occurred by the time that the individual claims of all named plaintiffs have been fully resolved.”).

³⁰⁹ *Id.* at 1136.

³¹⁰ *Id.* at 1138.

³¹¹ *Murray v. Fid. Nat’l. Fin., Inc.*, 594 F.3d 419, 421 (5th Cir. 2010) (internal citations omitted); *see also* David H. Koysza, Note, *Preventing Defendants from Mooting Class Actions by Picking Off Named Plaintiffs*, 53 DUKE L.J. 781, 804 (2003) (distinguishing between claims that are transitory “only by virtue of the calculated actions of the defendants,” such as full offers of judgment to “pick off” named plaintiffs, and claims that “expire so quickly” that a court would not have sufficient time to rule on a class certification motion).

³¹² *Murray*, 594 F.3d, at 421.

³¹³ *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 135-36 (3d Cir. 2000); *see also Lusardi v. Xerox Corp.*, 975 F.2d 964, 983 (3d Cir. 2003) (noting an exception to the general mootness rule where the district court did not have a reasonable opportunity to adjudicate a class certification motion before the named plaintiff’s claim expired).

³¹⁴ *Id.* *But see Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004), *abrogated by*, *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153 (2016) (abrogating *Weiss* in part; differentiating the instant case on Rule 68 grounds and declining to affirm the lower court’s dismissal of class certification under *Holmes* and *Lusardi* even though the class representative had not filed the class certification motion before his claims went moot).

Thus, whether and when a named plaintiff's claim becomes moot, how that may impact the litigation, and whether a mootness exception should apply, could depend on the circuit in which the named plaintiffs and putative class litigate. Even though the "general rule" suggests that most circuits will dismiss a class action if a named plaintiff's claim becomes moot before class certification, parties seeking to certify a class should identify relevant facts or circumstances in a circuit's precedential cases that may nuance that circuit's application of the "general rule." For example, even though the Second Circuit follows the "general rule," the court acknowledged in a class action alleging discrimination in the administration of Section 8 housing that "the transitory nature of the public housing market," combined with the district court's failure to adjudicate the named plaintiff's class certification motion "for over two years," could permit class certification to "relate back" to the filing of the complaint in that case.³¹⁵ Indeed, the Supreme Court has applied the "relation back" theory to inherently transitory claims and adjudicated class certification as if the named plaintiff's claim were still live.³¹⁶

Supreme Court and circuit court case law comprising the dominant and minority approaches to mootness and mootness exceptions emerge from diverse factual circumstances and statutory violations, including delayed adjudications of immigration petitions,³¹⁷ child abuse at a juvenile boys' school,³¹⁸ and delayed retirement benefit payments.³¹⁹ Accordingly, class certification outcomes may vary if a putative class seeks monetary damages against private litigants, rather than injunctive or declaratory relief against government defendants.³²⁰ Because courts have not applied *Gerstein's* inherently transitory exception to the unique class action context addressed in this Note, it is unclear as a doctrinal matter whether the exception could apply to class certification in A-File FOIA pattern-or-practice claims.³²¹

³¹⁵ *Comer v. Cisneros*, 37 F.3d 775, 798-99 (2d Cir. 1994).

³¹⁶ See *infra* Sections IV.C., IV.D. (discussing *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991)).

³¹⁷ See *generally* *Cruz v. Farquharson*, 252 F.3d 530, 530 (1st Cir. 2001).

³¹⁸ See *Milonas v. Williams*, 691 F.2d 931, 937-38 (10th Cir. 1982) (applying the "capable of repetition, yet evading review" exception to allow a class action to proceed in a case involving alleged abuse at a juvenile boys' school despite the named plaintiffs having been temporarily removed from the school after filing the complaint, and rejecting the school's argument that the named plaintiffs lost membership in the putative class by the time the district court granted class certification).

³¹⁹ See *generally* *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124 (3d Cir. 2000).

³²⁰ See, e.g., *Clark v. State Farm Mut. Auto. Ins. Co.*, 590 F.3d 1134, 1136 (10th Cir. 2009) (seeking to recover under State Farm's Personal Injury Protection coverage).

³²¹ See Email from Katherine Anthony, Deputy Chief Couns., American Oversight, to author (Dec. 5, 2024 at 17:43 ET) (on file with author). I also consulted Westlaw's citing references for *Gerstein* and *Geraghty*, referenced treatises and American Law Reports (ALR) annotations, and used Lexis's AI Assistant tool. I then consulted a research librarian to review my Westlaw searches to ensure I captured all relevant case law and secondary sources. See Email from Mary Shelly, Reference Librarian, Biddle L. Libr., Univ. of Penn. Carey L. Sch., to author (Dec. 5, 2024 at 15:01 ET) (on file with author).

C. *A Mootness Exception Should Apply If a Named Plaintiff's Claim Was Live at Filing but Became Moot Before a Class Certification Ruling*

Within the A-File FOIA context, this Note argues that if a named plaintiff's individual claim in a pattern-or-practice class suit was live when she filed her complaint and motion for class certification, but became moot before a district court could decide on class certification, then that court should apply an exception to the mootness doctrine and allow class certification to "relate back" to the filing of the complaint.

Applying a mootness exception can help hold agencies accountable for repeat FOIA violations that would otherwise escape judicial review. As *Gatore* shows, agencies have employed delay tactics against requesters by improperly withholding records, disclosing only a partial cache, or producing records only when under the threat of litigation.³²² These failures to comply with FOIA are not isolated incidents.³²³ The *Nightingale* court concluded that USCIS's and ICE's routine and prolonged delays responding to A-File FOIA requests constituted a "systematic failure," and that the putative classes in that case would likely be harmed by the defendants' FOIA delays in the future.³²⁴ Accordingly, curing persistent A-File FOIA violations, like those in *Gatore* and *Nightingale*, requires courts to do more than direct agencies to produce documents responsive to individual requests. Rather, addressing this problem requires granting class-wide injunctive relief.³²⁵

³²² *Gatore v. U.S. Dep't of Homeland Sec.*, 327 F. Supp. 3d 76, 90, 103-05 (D.D.C. 2018), *aff'd*, No. 21-5148, 2023 WL 2576176 (D.C. Cir. Mar. 21, 2023); *see also* Am. Oversight, *Seven Reforms*, *supra* note 269 (noting that many agencies take years to produce requested documents and often do so "only after being sued to comply" with FOIA laws); *Council Sues Immigration Agencies for Records of Enforcement Databases*, AM. IMM. COUNCIL (June 21, 2021), <https://www.americanimmigrationcouncil.org/litigation/council-sues-immigration-agencies-records-enforcement-databases> [<https://perma.cc/AAQ7-6XQP>] (suing DHS, CBP, ICE for failing to timely respond to a FOIA request for information from certain immigration enforcement databases); *The Increase in FOIA Lawsuits Isn't the Problem – It's Agencies Underfunding Their Transparency Obligations*, AM. OVERSIGHT (Mar. 17, 2020), <https://americanoversight.org/the-increase-in-foia-lawsuits-isnt-the-problem-its-agencies-underfunding-their-transparency-obligations/> [<https://perma.cc/Q6QY-CN9X>] ("If litigation is the only way to get a timely response, requesters have little choice but to sue more. And if requesters were able to trust that agencies would respond on a reasonable timetable without litigation, they would have little incentive to sue.").

³²³ *Nightingale v. U.S. Citizenship & Immigr. Serv.*, 333 F.R.D. 449, 459 (N.D. Cal. 2019).

³²⁴ *Id.*

³²⁵ *See Nightingale II*, 507 F. Supp. 3d at 1213-14 (granting plaintiffs injunctive relief after certifying the class in 333 F.R.D. 449; defendant agencies were "permanently enjoined from further failing to adhere to the statutory deadlines for adjudicating A-File FOIA requests"; ordered to "make determinations on all A-File FOIA requests in USCIS's and ICE's backlogs" within 60 days of the order; and required to provide quarterly compliance reports "containing information regarding the number and percentage of A-File FOIA requests that were filed and timely completed as well as the number and percentage of cases that remain pending beyond the twenty or thirty-day statutory periods[.]").

D. Addressing Counterarguments

Critics may argue that this Note's proposal runs afoul of Rule 23(a)(4)'s requirement that a named plaintiff "fairly and adequately protect the interests of the class."³²⁶ Once a named plaintiff secures her requested records, or even the removal relief or immigration benefit that drove her to request her A-File in the first place, the theory goes, she will "lack the motivation to represent the class vigorously during the remainder of the litigation."³²⁷

This Note suggests that even if a named plaintiff secures her requested records or the immigration relief or benefit she sought, she may nevertheless retain a sufficient interest in A-File access, depending on the circumstances of her case.³²⁸ The "capable of repetition, yet evading review" exception applies where a named plaintiff "can make a reasonable showing that [she] will again be subjected to the alleged illegality."³²⁹ In some circumstances, a noncitizen serving as a named plaintiff may retain a sufficient interest in class certification even after receiving responsive FOIA productions or removal relief because A-Files are not static records. They capture changes to a noncitizen's immigration record each time that individual interacts with government agencies.³³⁰ This practice will persist until—and if—the noncitizen naturalizes.³³¹ Except for a grant of citizenship, immigration agencies will update a noncitizen's A-File whenever she seeks adjustment of status with USCIS, exits and re-enters the United States, applies for public benefits, encounters ICE, seeks cancellation of removal, or is convicted of certain crimes, among other actions.³³² Thus, it is foreseeable that future FOIA disclosure delays by one agency could hurt a noncitizen's immigration proceedings with ICE or immigration benefits adjudication with USCIS, leaving her in "legal limbo" because she cannot meet various agency filing deadlines.³³³

³²⁶ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (quoting Fed. R. Civ. P. 23(a)(4)).

³²⁷ *Koysza*, *supra* note 311, at 805; *see also Amchem*, 521 U.S. at 625 (observing that Rule 23(a)(4) "serves to uncover conflicts of interest between named parties and the class they seek to represent.").

³²⁸ *Koysza*, *supra* note 311, at 805-06.

³²⁹ *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980); *City of L.A. v. Lyons*, 461 U.S. 95, 109 (1983) (holding that the "capable of repetition, yet evading review" exception applies "only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality.").

³³⁰ *See supra* Section I.A.

³³¹ *Lee*, *supra* note 4, at 776-77.

³³² *Id.* at 751-52, 773-74; *see also NAT'L ARCHIVES*, *supra* note 32 ("An A-File might also be created without any action taken by the alien; for example, if the INS initiated a law enforcement action against or involving the alien."); Email from Jonah Eaton, *supra* note 46 (noting that a noncitizen's A-File may also document ICE encounters that *did not* lead to immigration court proceedings).

³³³ *Lee*, *supra* note 4, 750-51.

Moreover, contrary to the Ninth Circuit's reasoning in *Hajro*, this Note argues that even naturalized citizens may still need to file A-File FOIA requests. When petitioning family members, a naturalized citizen may need documents from her A-File to verify her immigration status, prove her relationship to the relative she seeks to sponsor, or assure immigration officials that she has sufficient income or assets to support family members so they do not become a "public charge."³³⁴

Even when a named plaintiff's claim becomes moot before class certification, an agency's violation of FOIA determination deadlines could still be considered capable of repetition, yet evading review if an attorney-plaintiff or an organizational plaintiff in the same suit proves they have "concrete plans" to submit FOIA requests with the same agency for their clients' A-Files in the future.³³⁵ For example, after USCIS provided the named plaintiffs in *Gatore* with portions of their asylum assessments, the court determined that they could not demonstrate an ongoing or imminent injury because they did not have pending FOIA requests or plans to continue filing FOIA requests with the defendants.³³⁶ By contrast, the court determined that Catholic Charities would remain subject to DHS's policy or practice of FOIA delays because the organization had concrete plans to continue filing FOIA requests for other clients' asylum assessments.³³⁷

As to the inherently transitory exception, critics of this Note's proposal might suggest that FOIA claims are not inherently transitory in the same way that the pre-trial detention at issue in *Gerstein* is.³³⁸ They may argue that when a federal agency bypasses the statutory twenty-day deadline, the FOIA response timeline is largely indeterminate: an agency might

³³⁴ Cf. U.S. CITIZENSHIP & IMMIGR. SERVS., *I-130, Petition for Alien Relative*, <https://www.uscis.gov/i-130> [<https://perma.cc/U9CV-ZYUT>] (last updated Sept. 24, 2025) (detailing the documents and forms required for U.S. citizens, lawful permanent residents, and U.S. nationals to file when seeking to establish a "qualifying relationship" with an eligible relative applying for lawful permanent residence); IMMIGR. LEGAL RES. CTR., *How US Citizens Can Petition Their Parents for Permanent Residence* (Mar. 31, 2023), <https://www.ilrc.org/community-resources/how-us-citizens-can-petition-their-parents-permanent-residence> [<https://perma.cc/RE79-DSJA>] (addressing frequently asked questions about family-based petitions for U.S. citizenship by children petitioning parents for lawful permanent residence); NAT'L IMM. F., *Fact Sheet: Family-Based Immigration* (Feb. 14, 2018), https://immigrationforum.org/article/fact-sheet-family-based-immigration/?gad_source=1&gad_campaignid=777449260&gbraid=0AAAAAD-kQHSckHPBrTdjTkaEC2CkwESN&gclid=CjwKCAjwruXBBhArEiwACBRtHVktb-W5GeSD099LX_EPooyvmdpSOxBsx-WL5qIJHefFN268kn71hoCZ4cQAvD_BwE [<https://perma.cc/PK9D-HYLA>] (noting that in their family petitions, sponsors "must prove the legitimacy of their relationship [with the relative they seek to sponsor] and that they meet income requirements" to show that their relative is unlikely to "become a public charge who will need public assistance.").

³³⁵ *Gatore v. U.S. Dep't of Homeland Sec.*, 327 F. Supp. 3d 76, 104 (D.D.C. 2018), *aff'd*, No. 21-5148, 2023 WL 2576176 (D.C. Cir. Mar. 21, 2023)).

³³⁶ *Id.*

³³⁷ *Id.* at 94.

³³⁸ See *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975) ("It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class.").

never respond to a request, or produce responsive records months or years later. Thus, deeming a named plaintiff's FOIA claim "inherently transitory" would seem too speculative. By contrast, a court could "safely assume" that the public defender who represented the named plaintiffs in *Gerstein* would continue to represent "a class of persons suffering the deprivation" alleged in the class complaint because the public defender's *other clients* would still have a live interest in the case after the named plaintiffs' release.³³⁹

This Note contends instead that the constitutional claims and time-limited imprisonment of the pre-trial detainees in *Gerstein* can be analogized to the A-File FOIA pattern-or-practice context. A pre-trial detainee's constitutional claim surrounding her imprisonment is no more inherently transitory than a noncitizen's claim under FOIA. Even though pre-trial detention is "by nature temporary,"³⁴⁰ its duration can vary widely.³⁴¹ FOIA response timelines are similarly unpredictable. Given DHS's well-documented record of violating FOIA determination deadlines and its ability to satisfy a named plaintiff's A-File FOIA claim before class certification, district courts should allow class certification to "relate back" to the filing of the complaint and class certification motion.³⁴²

Moreover, the Supreme Court and federal circuit courts have recognized the "relation back" doctrine in various factual circumstances. The Fifth Circuit has endorsed the doctrine in a putative Fair Labor Standards Act ("FLSA") collective action where a defendant-employer attempted to "pick off" a named plaintiff's FLSA minimum wage claim.³⁴³ When pension

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ See, e.g., Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, 81 FED. PROBATION 52, 53 (Sept. 2017) ("As of 2016, the average period of detention for a pretrial defendant had reached 255 days, although several districts averaged over 400 days in pretrial detention."); Mike D'Onofrio, *Long Stays in Pre-Trial Detention Strain Philadelphia Prisons*, AXIOS (July 21, 2023), <https://www.axios.com/local/philadelphia/2023/07/21/philadelphia-prisons-pre-trial-detention> [<https://perma.cc/4CRY-CVYX>] (reporting on an inmate held in a Philadelphia jail for more than five years while awaiting trial on a murder charge and noting that long stays in pre-trial detention in the city's prison system were common and attributable to staffing shortages and other factors); *United States v. Salerno*, 481 U.S. 739, 740 (1987) (rejecting Fifth Amendment Due Process Clause and Eighth Amendment Excessive Bail Clause challenges to the Bail Reform Act of 1984 and holding that federal courts can detain an individual before trial if the government demonstrates by "clear and convincing evidence" that "no release conditions" for the individual will ensure community safety).

³⁴² See NEWBERG AND RUBENSTEIN, *supra* note 261 § 2:13 ("Since it is given that the moot- ing of the named plaintiff's claim *after* class certification will not moot the class action, the class certification decision in inherently transitory settings is simply 'related back' to the time of the filing of the complaint with class allegations, at which point the named plaintiff's claims were live. The fiction of 'relating back' puts the case . . . within the familiar doctrinal setting that enables the mooted named plaintiff to continue pursuing the class's claims.").

³⁴³ See *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 919-21 (5th Cir. 2008) (holding that "when a FLSA plaintiff files a timely motion for certification of a collective action, that motion relates back to the date the plaintiff filed the initial complaint, particularly when one of the defendant's first actions is to make a Rule 68 offer of judgment[,] and recognizing more generally that "'the relation back' principle ensures that plaintiffs can reach the [class or collective]

plan participants brought a class action against their company's plan administrator, claiming wrongfully delayed benefits, the Third Circuit reiterated its longstanding rule: if a named plaintiff's claim was live *when she moved for class certification*, district courts need not dismiss the pending class certification motion even if the plaintiff's individual claim becomes moot.³⁴⁴

"Relation back" is not limited to putative class actions involving requests for monetary relief. The Supreme Court has endorsed the doctrine in class actions against government defendants seeking injunctive or declaratory relief.³⁴⁵ Indeed, the doctrine may apply "to any situation where composition of the claimant population is fluid, but the population as a whole retains a continuing live claim."³⁴⁶ In a ruling affirming *Gerstein*, the Court in *County of Riverside v. McLaughlin* applied the "relation back" doctrine to certify a class whose members alleged that a California county violated the Fourth Amendment by failing to provide timely probable cause hearings after the members' warrantless arrests.³⁴⁷ Even though the named plaintiffs' claims became moot before class certification when they either received their probable cause determinations or were released, the Court invoked the "relation back" principle to preserve these claims because they were so inherently transitory that a trial court would not have had enough time to adjudicate the class certification motion before any individual named plaintiff's interest expired.³⁴⁸

Thus, proceeding under the "relation back" principle helps achieve two central purposes of the class action device: preserving transitory claims for judicial review and furthering judicial economy. By discouraging agencies from gaming document production, this principle better preserves the merits of FOIA pattern-or-practice claims for judicial review. Doing so as a class action better upholds judicial economy, as courts can provide injunctive relief for numerous similarly situated plaintiffs "in one stroke."³⁴⁹ More fundamentally, applying *Gerstein's* inherently transitory exception in this context can better ensure that courts address the underlying FOIA violations that persist even when agencies satisfy individual plaintiffs' FOIA requests.

certification stage."). The Fifth Circuit in *Sandoz* acknowledged differences between Rule 23 class actions and FLSA collective actions, but determined that because "each type of action would be rendered a nullity if defendants could simply moot the claims as soon as the representative plaintiff files suit[,] . . . the policies behind applying the 'relation back' principle for Rule 23 class actions apply with equal force to FLSA § 216(b) collective actions." *Id.* at 920.

³⁴⁴ *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 135 (3d Cir. 2000).

³⁴⁵ *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991).

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Wal-Mart, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

CONCLUSION

To date, immigration advocates have rarely used class actions to challenge DHS's frequent FOIA violations. This may change, however, after *Trump v. CASA, Inc.*³⁵⁰ There, the Supreme Court determined that district courts had exceeded their equitable powers by issuing universal injunctions against President Donald Trump's executive order on birthright citizenship.³⁵¹ Specifically, by enjoining the executive order, the lower federal courts provided "complete relief" to nonparties, rather than restricting relief to parties in the suit.³⁵² In turn, the Court endorsed the viability of class-wide injunctive relief through a "properly conducted class action" constrained by *Wal-Mart*.³⁵³ Consistent with *CASA*, a named plaintiff in an A-File FOIA pattern-or-practice class suit could establish common injury through the *Hajro* prongs and seek class-wide injunctive relief to compel DHS's compliance with FOIA response requirements.

This Note identified doctrinal and literature gaps surrounding the potential advantages and limitations of filing FOIA pattern-or-practice class action suits against DHS for failing to timely process A-File requests. This Note examined how the *Nightingale* court applied the rigorous class certification analysis outlined in *Wal-Mart*. It suggested that establishing the common injury of the named plaintiffs and proposed classes using the *Hajro* prongs could help immigration lawyers establish commonality in future FOIA pattern-or-practice suits.

Pointing to *Gatore*, however, this Note declined to endorse fully the *Nightingale* court's view that class actions are inherently less vulnerable to mootness compared to individual pattern-or-practice FOIA suits. Doctrinal gaps limit understanding of how the dominant and minority approaches to mootness and mootness exceptions across circuits might apply in the unique class-action context discussed in this Note. Without a clear doctrinal answer, this Note advanced a theory grounded in government accountability and immigrant justice concerns: If a proposed class representative's claim is live when a complaint is filed, but becomes moot before a court can adjudicate the class certification motion, then an exception to the mootness doctrine should apply. Given how frequently DHS and its components violate FOIA requirements, and the fact that agencies can derail class certification by "picking off" named plaintiffs, this Note proposes that courts apply the "relation back" doctrine to preserve the merits of inherently transitory claims for judicial resolution.³⁵⁴

³⁵⁰ *Trump v. CASA, Inc.*, 606 U.S. 831 (2025).

³⁵¹ *Id.* at 837-38.

³⁵² *Id.* at 852.

³⁵³ *Id.* at 849.

³⁵⁴ *See* *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991) ("That the class was not certified until after the named plaintiffs' claims had become moot does not deprive us of

Regardless of how courts adjudicate this issue in the future, FOIA is a poor substitute for discovery and worsens immigration court backlogs. Using FOIA to secure personal immigration records does not align with Congress's intent for FOIA, which was to promote public oversight of government activities.³⁵⁵ While litigants can bring discovery disputes to a trial judge, who serves as a neutral arbiter, requesters must first appeal FOIA determinations to the very agency that denied their request or withheld their records before they can seek review in federal circuit courts.³⁵⁶ This administrative exhaustion requirement highlights a principal difference between discovery and FOIA. Judges evaluate privilege claims in discovery according to criteria designed for litigation, whereas Congress developed FOIA exemptions "with the needs of government secrecy and individual privacy in mind."³⁵⁷ Thus, shoehorning A-File requests into FOIA diverts agency resources to these "unintended uses," worsening backlogged FOIA offices and preventing personnel from addressing requests for information that better align with Congress's vision for FOIA.³⁵⁸

Requiring A-File FOIA requesters to initiate a lengthy collateral proceeding to obtain evidence that the government holds but refuses to disclose suggests that, absent an affirmative right to A-Files, securing injunctive relief through class actions remains a band-aid remedy for a fundamentally unfair system.³⁵⁹ Accordingly, Congress should direct immigration agencies to remove A-File requests from the FOIA process.³⁶⁰ The Project on Government Oversight, a government transparency organization, has recommended that DHS create an entirely separate system to respond to A-File requests and has asked Congress to provide the agency with sufficient resources to do so.³⁶¹ The American Immigration Council, an immigrants' rights advocacy organization, has made similar recommendations.³⁶²

jurisdiction [because this Court] recognized in *Gerstein* that '[s]ome claims are so inherently transitory that the trial court will not have enough time to rule on a motion for class certification before the proposed representative's individual interest expires.' In such cases, the 'relation back' doctrine is properly invoked to preserve the merits of the case for judicial resolution.'").

³⁵⁵ See Kwoka, *First-Person FOIA*, *supra* note 5, at 2209 (identifying the "mismatch between FOIA's design" and its "unintended uses," including requests for "first-person information" such as A-Files).

³⁵⁶ Heeren, *supra* note 6, at 1599.

³⁵⁷ *Id.* at 1597.

³⁵⁸ Kwoka, *First-Person FOIA*, *supra* note 5, at 2209; Wasser, *supra* note 20.

³⁵⁹ Lee, *supra* note 4, at 752.

³⁶⁰ Wasser, *supra* note 20.

³⁶¹ *Id.*

³⁶² See Emily Creighton, *Immigration Agencies Violate FOIA, Harming Immigrants and Government Transparency Alike*, AM. IMMIGR. COUNCIL (Mar. 17, 2023), <https://immigrationimpact.com/2023/03/17/immigration-agencies-violate-foia/> [<https://perma.cc/JXT5-P4BR>] ("To improve [immigration] agencies' compliance with FOIA and ensure individuals have timely access to their [A-Files], immigration agencies should remove requests for copies of individual immigration files from the FOIA queue.").

Given the information asymmetry government attorneys already enjoy in immigration proceedings, making A-Files readily accessible to noncitizens should be uncontroversial as a matter of procedural due process.³⁶³ Even those who oppose improving access to evidence in removal proceedings should also oppose keeping A-File requests within the FOIA process because doing so makes DHS and immigration courts less efficient.³⁶⁴ Making A-Files more accessible would likely reduce continuance requests, improve immigration advocacy, facilitate fairer immigration court proceedings, and enable immigration judges to make more accurate factual and legal determinations. It would also free immigration lawyers from having to choose between delaying their clients' immigration court hearings and benefit applications while waiting for FOIA responses or proceeding without sufficient records. Barring such dramatic changes, however, this Note opens a new inquiry into the potential strengths and limitations of the class action device in helping immigrants mitigate the government's information advantage.

³⁶³ Heeren, *supra* note 6, at 1573.

³⁶⁴ See Creighton, *supra* note 362 (observing that "DHS FOIA processing challenges undermine the purpose of FOIA and have resulted in, among other things, FOIA litigation against DHS and a general sense that immigration agencies are not transparent" and that "removing thousands of [A-File] records from the FOIA queue [would] allow immigration agencies to timely provide information to the public [that] benefits us all.>").