Article

Congressional Constraint? The Review of *In Absentia* Immigration Removal Orders in Federal Circuit Courts

Political Research Quarterly
2023, Vol. 76(4) 1674–1690

DOI: 10.1177/10659129231164947
journals.sagepub.com/home/prq
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Abstract

Within the politically charged immigration system in the United States, Congress mandates the entry of *in absentia* removal orders against immigrants who fail to appear for immigration court hearings. Statutory guidance similarly constrains the ability of appellate courts to overturn those *in absentia* orders. In this article, we examine how federal circuit court judges make decisions in the review of *in absentia* orders when faced with discretion-revoking congressional statutory language pitted against a highly politicized area of law where policy preferences sit at the forefront of judges' minds. Using an original dataset of U.S. Courts of Appeals cases decided from 2001 to 2020, we find that pro-immigrant decisions are rare, as intended by the governing statute. We also find, however, that judicial policy preferences predict the degree to which federal judges support the petitioning immigrant through statutory factors related to the adequacy of government notice and the presence of exceptional circumstances to justify nonappearance.

Keywords

courts of appeals, immigration, Congress, president, judicial behavior, in absentia

Immigration in the United States is a hot button political issue—more so today than perhaps ever before. Courts, including immigration courts and federal appellate courts, rest in the center of much of immigration politics today. Immigration courts must decide whether immigrants the government wants to deport are in fact entitled to remain in the country. In their appellate role, federal judges are tasked by Congress with reviewing immigration court decisions—work that can pit the application of strict and discretion-stripping statutory mandates against strong judicial preferences in a highly politicized area of law.

The political battle around immigration law can be potently observed through immigration *in absentia* removal orders issued against noncitizens who do not appear for scheduled immigration court hearings. *In absentia* removal orders are increasingly common in immigration courts today, with more than 100,000 such orders issued yearly in immigration courts in recent years. *In absentia* orders are also controversial since they operate in the shadows of the immigration court system (Koh 2017), imposing a severe sanction—a removal order—on immigrants who have not received notice of their hearing from the government, who had good reasons for nonappearance, who otherwise should have another opportunity to press their case or seek relief from removal, and/or who may have encountered significant government failures in the enforcement of immigration law. Once ordered removed *in absentia*, an immigrant faces an uphill battle to reopen her immigration case that often results in judicial review in the federal courts of appeals.

Unlike in many legal areas, guiding congressional language is unequivocal on the issue of what should happen to noncitizens who fail to appear for immigration court removal hearings: immigrant nonappearance "shall" result in the noncitizen being summarily ordered removed from the United States via an *in absentia* removal order.

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Congress is similarly clear in its guidance over the rare circumstances that *in absentia* removal orders can be reopened on appeal. In other words, federal law purports to remove judicial discretion over *in absentia*-related immigration law decisions, including how they are reviewed in the federal appellate courts. But despite apparent congressional intent to eliminate discretion, given the heightened politicization of the issue, judicial preferences are likely to be entangled with judicial decision making in these cases.

Through the lens of *in absentia* removal orders, this article seeks to provide empirical clarity into the important issue of how federal appellate court judges make decisions when faced with discretion-revoking congressional statutory language pitted against a highly politicized area of law. Prior work has helped us learn about immigration court decisions in *in absentia* matters (e.g., Eagly and Shafer 2020; Gomez 1993) and other immigration cases (Asad 2019; Eagly and Shafer 2015, 2020; Hamlin 2014; Keith, Holmes, and Miller 2013; Kim and Semet 2020; Miller, Keith, and Holmes 2015a, 2015b; Palmer, Yale-Loehr, and Cronin 2005; Ramji-Nogales, Schoenholtz, and Schrag 2007), detailing with powerful empirical evidence the disparities faced by immigrants within the court system. Far outside of the *in absentia* context, previous research has tackled decision making in the federal courts of appeals in other immigration matters (Gill, Kagan, and Marouf 2019; Hamlin 2014; Law 2010; Law 2005; Palmer, Yale-Loehr, and Cronin 2005; Stobb 2019; Westerland 2009; Williams and Law 2012) and beyond. However, much remains empirically unknown when it comes to federal court judicial review of *in absentia* orders and, more broadly, judicial behavior when unambiguous law and politics are in tension with one another.

To conduct our study, we collect an original dataset of federal circuit court cases decided from 2001–2020. In each of these cases, the reviewing federal panel of circuit judges must determine whether to rule in favor of the immigrant's position and reopen the immigration case following the entry of the *in absentia* order. Our results indicate that pro-immigrant decisions are rare, as intended by the governing statute. We also find that statutory factors guide the judicial review of these cases, but that guidance is more of a convenience than a constraint. Circuit judges' likelihoods of finding problems with government notice or recognizing that exceptional circumstances justify the immigrant's nonappearance are closely linked to whether doing so matches the judges' policy preferences. When viewed as a sum of its parts, this study helps to draw attention to the politics of immigration adjudications, the frequency and power of *in absentia* removal orders, the stringency and constraining effect of congressional mandates in this arena, and the dueling (and sometimes interacting) effects of personal and congressional politics on judicial behavior.

A Quick Primer: *In Absentia* Removal Orders

Each year, removal proceedings commence against thousands of immigrants through federal immigration courts, which are administrative tribunals housed within the Department of Justice's Executive Office for Immigration Review ("EOIR").[1] In 2018 alone, there were over 300,000 new immigration charges brought, with just under 200,000 immigration cases completed and nearly 800,000 additional cases pending in that same year (EOIR Yearbook 2018). Annual *in absentia* removal order rates for non-detained immigrant respondents sit above 20% each year, with some years near 50% (Congressional Research Service 2021). Why is this rate so high? The significant backlog of cases in immigration court means that an immigrant who is not detained by the government may wait well over a year for a hearing on the merits of her case. During this time, she may be required to appear in court multiple times. The dates of these hearings are frequently changed, noncitizens in removal proceedings—particularly recent arrivals—routinely move, and the government may not always issue proper notice of the date and time of a scheduled hearing. Nevertheless, if at any time the immigrant fails to appear as scheduled, she may be ordered removed from the United States because of her absence, without the opportunity to defend her case on the merits or raise grounds for relief such as an asylum claim.[2]

If an immigrant is ordered removed *in absentia*, federal law offers a very narrow and uphill path toward reopening the case for additional proceedings. The immigrant must file a motion to reopen the case and rescind the *in absentia* order with the case's immigration judge. If the immigration judge decides to reopen the case and rescind the *in absentia* order, the case is returned to the docket. However, if the immigration judge denies the motion to reopen the case, the immigrant can then file an appeal with the Board of Immigration Appeals ("BIA").[3] A BIA decision affirming the immigration judge's denial of the motion to reopen the case allows the immigrant to then initiate judicial review by petitioning the U.S. circuit court of appeals.

Statutory Constraint of Circuit Court *In Absentia* Decisions

How do circuit courts tackle their important role in reviewing *in absentia* orders? There is good reason to expect that congressional intentions regarding *in absentia* orders, revealed through immigration legislation, will

constrain the decisions of federal appellate judges. Why might this be the case? Judicial deference to legislators, sometimes termed judicial restraint, is likely to guide judicial behavior and may be particularly attractive in areas of law, like immigration, where saliency, political tension, and policy change are so relevant (Bailey and Maltzman 2008, 2012; Baum 1997; Hinkle 2015). Legislative deference by judges may further rise in likelihood when legislative intent is clear. Statutes are policy "instructions" or "blueprints" (Huber and Shipan 2002, 44; see also Ferejohn and Weingast 1992), and when that legislative guidance is specific, it can "limit the policy-making discretion of other political actors" (Huber and Shipan 2002, 44; see also Johnson 2014, 2017; McCann, Shipan, and Wang ND; Randazzo, Waterman, and Fine 2006; Shipan 1997; Smith 2005, 2006).

For judges, "law serves to structure the judicial decision-making process" (Clark 2018) and set limits on judicial freedom (Bailey and Maltzman 2008, 2011), so the effect of high specificity, low discretion laws is a decrease in room for them to decide cases based on their policy preferences—that is, attitudinally (Randazzo, Waterman, and Fine 2006; Randazzo, Waterman, and Fix 2011). A similar ideological constraining effect stemming from law (either legislative or *stare decisis)* has been observed in a variety of other judging contexts, from opinion or doctrine clarity resulting in more future court compliance (Black et al. 2016; Corley 2009; Smith and Todd 2015; Wahlbeck 1997; Wofford 2019),[4] to legal doctrine-relevant case facts affecting case outcomes (George and Epstein 1992; Segal 1984; Segal and Spaeth 2002), to non-discretionary citation practices (Hinkle 2015), to clear efforts in legislation and from courts, via precedent, to strip discretion from the judicial review of administrative agency decisions and interpretations (Barnett, Boyd, and Walker 2018b).

Modern legislation relating to immigration *in absentia* order entry and *in absentia* order judicial review was passed in 1990 with the Immigration Act. It states that an immigrant who does not attend a scheduled hearing "shall be ordered deported *in absentia*" (Immigration Act of 1990, §242B(c)(1)).[5] The 1990 law that still governs today indicates a high degree of specificity and clear congressional intent: *in absentia* orders must be imposed, without judicial discretion, for any failure to appear once the government has established that notice was provided and the immigrant is removable (Eig 2011). The statutory instructions for the judicial process following the entry of an *in absentia* order are also constraining on judges. The immigration judge can rescind the *in absentia* order for one of only a few reasons (all of which the immigrant holds the burden to demonstrate), including: she did not receive statutorily required hearing notice from the government or her failure to appear was due to "exceptional circumstances." Similarly, the legislation mandates that reviewing circuit courts are "confined to" assessing the validity of the notice provided, the reason for the immigrant's non-appearance, and the immigrant's removability (8 U.S.C. § 1229a(b)(5)(D)). In other words, the congressional message is that so long as an immigration judge's ruling was within the well-defined statutory bounds, her decision ordering the removal of the immigrant *in absentia* should not be overturned by the reviewing circuit court.

As the above discussion previews, pro-immigrant outcomes for these *in absentia*-related circuit court cases will likely be rare since the reviewing federal circuit court must give deference to the denial of relief to the immigrant. The removal of discretion should also dampen opportunities for the exercise of judicial ideology. The narrow road toward pro-immigrant outcomes will be through the presence of case factors enumerated in the governing statute related to the validity of the government's notice and whether the immigrant's non-appearance was justified by "exceptional circumstances."

When it comes to notice-based claims seeking to re-open *in absentia* removal orders, arguments often touch on whether the immigrant received the notice as required by the statute, the government's notice was properly sent, the content of the notice met the statutory requirements, or errors in the information provided to the immigrant prevented notice from being received. In *Patel v. Sessions* (2018), for example, the mailed hearing notices were returned to the government without delivery after immigration officials made a typographical error in the Patels' address. While the immigration judge argued that the Patels "failed to rebut the presumption of effective service by certified mail," the reviewing circuit court disagreed and ruled in favor of the Patels.

An *in absentia* order can also be rescinded if the immigrant demonstrates that her failure to appear was due to exceptional circumstances. There are three common ways for exceptional circumstances arguments to emerge from immigrants in cases. The first involves situations where petitioning immigrants attempt to show exceptional circumstances through the presence of one or more of the factual scenarios explicitly detailed in the statute, like battery, cruelty, or serious illness ("but not including less compelling circumstances") (8 U.S.C. § 1229a(e)(1)). A second category of exceptional circumstances-based claims is immigrant lateness, which appears when an immigrant appears at the correct courthouse on the correct date for her removal hearing but arrives after the immigration judge has already ordered the immigrant to be removed *in absentia*, sometimes by just a few minutes (like in the case of *Patino Carcamo v. Holder* (2009), where Carcamo appeared 15 min late for his hearing). A final category of exceptional circumstances arguments occurs where an immigrant's scheduling error

results in her nonappearance. In these types of cases, the immigrant received the correct information from the government about the time, date, and location of the immigration court hearing but some error (such as a lost hearing notice or a mistake in recording or remembering this information) resulted in non-appearance.

Might Political Immigration Judging Still Emerge?

Despite clear provisions to reduce the role of judicial discretion in deciding and reviewing *in absentia* cases, could it still be that circuit judges' policy preferences affect their decision-making in the review of motions to reopen *in absentia* orders? Empirical evidence of preference-based judging in federal circuit courts abounds across a variety of case types (e.g., Bowie and Songer 2009; Bowie, Songer, and Szmer 2014; Broscheid 2011; George 1998; Haire 2006; Mak and Sidman 2020, 2022; Nelson, Hazelton, and Hinkle 2021; Sunstein et al. 2006). This also holds for judging in the immigration context, both in immigration courts (e.g., Asad 2019; Miller, Keith, and Holmes 2015a; Ramji-Nogales, Schoenholtz, and Schrag 2007; but see, e.g., Kim and Semet 2020) and in circuit courts acting in a judicial review role (e.g., Hamlin 2014; Law 2005; Law 2010; Westerland 2009; Williams and Law 2012; but see Gill, Kagan, and Marouf 2019).

While none of this work has focused specifically on *in absentia* removal orders, the evidence of policy effects on immigration-specific judging is strong and generally indicative of a higher likelihood of pro-immigrant decisions among liberal/Democratic-leaning judges than others. The highly political and volatile nature of judging in this area—where immigration issues regularly collide with politics—may contribute to the influence of judge policy preferences (see Cox and Rodriguez 2020; Layman et al. 2006; Tichenor 2002; Wallace and Zepeda-Millán 2020; Wong 2017). *In absentia* removal orders seem to offer an efficient solution for carrying out the politically-desirable goal of increasing deportation rates. What is more, the review of *in absentia* orders provides a level of clarity on political lines rarely seen in case law: government efforts to uphold an *in absentia* order represent a conservative position and any decision favoring the immigrant's effort to vacate that order is more liberal in nature. We thus expect that as the circuit judges reviewing a petition to reopen an *in absentia* order get more liberal (more conservative), there will be an increase (decrease) in the chances of immigrant success before the court.

In aid of the strong pull of politics for circuit judging in immigration *in absentia* cases, some may argue that the governing statute leaves openings for judicial preferences to thrive in decision-making. Even in the face of court or legislative intentions to the contrary, scholars have long posited that the law is, by its nature, ambiguous, and indeterminate (Baum 1997; Baum 2018; Hettinger, Lindquist, and Martinek 2006). Inherent discretion also attaches to fact-finding and the application of law to facts in a case; with each, judges have "significant leeway"—from the interpretation of evidence to whether to "disregard some inconvenient truths" in a case (Gennaioli and Shleifer 2008, 2; see also Buchman 2007; Law 2010).

Indeterminacy in law and facts means that judges have "more than one legitimate legal basis for arriving at a decision" (Hettinger, Lindquist, and Martinek 2006, 31). And with multiple potential paths for how to proceed comes freedom for judges' attitudes and values to affect their behavior (Epstein, Landes, and Posner 2013; Hansford and Spriggs 2006; Segal and Spaeth 2002). Judicial (directional) policy preferences are powerful—so much so that judges, via motivated reasoning or confirmation bias, may not even consciously realize that their choices regarding the law or applications of law to facts are tinged by them (Baum 1997; Braman 2009; Braman and Nelson 2007; Epstein, Landes, and Posner 2013; Miller, Keith, and Holmes 2015a). In many cases, so long as the judge can provide legal justification, she'll feel free to make "whatever decision best accords with [her] policy views" (Baum 1997, 66). As Hansford and Spriggs (2006) argue, when this happens, rather than being a constraint on them, the law provides judges with an opportunity—one that can help to maximize the degree to which opinions reflect their policy preferences, legitimize their policy choices, and build more societal influence for their decisions. In the immigration court context, Miller, Keith, and Holmes (2015a) argue that the perfect storm of circumstances allows for policy preferences to guide immigration judge decision making: "[t]he lack of certainty in legal standards, the frequent lack of corroborating evidence, and the complexity of credibility determinations invite the use of motivated reasoning in which directional (or policy-motivated) goals overwhelm accuracy goals" (55).

Prior empirical court research finds evidence of this interactive relationship between judge policy preferences and law. In immigration court cases, while the law can serve somewhat as a constraint, immigration judges evaluate the immigrants' cases before them "using a process that is driven by their policy proclivities" (Miller, Keith, and Holmes 2015a). In administrative law cases, Cross and Tiller (1998) and Barnett, Boyd, and Walker (2018a, 2018b) find that federal circuit panels are more likely to invoke *Chevron* deference and, when doing so, are more deferential to agency interpretations when the panelists agree with the agency's policies than when they do not. At the U.S. Supreme Court, Black and Owens (2009) reveal that justices "take shelter under cover of

the law" to pursue policy maximization during the agenda setting process, while Hansford and Spriggs (2006) find that justices are more likely to positively interpret precedent they agree with. Klein's (2002) study of the development of new law in the circuit courts reveals, quite simply, that "[t]he key lesson of the ideology effects is quite clear: Judges prefer to adopt policies they agree with" (81).

This discussion reveals that circuit judges motivated to enact their preferred positions on immigration law can likely find pathways to do so within the legislative guidance provided to them, even in the most detailed and non-deferential statutory regime. This sentiment echoes what one federal government immigration lawyer revealed to Hamlin (2014): In the circuit courts with ideological or "activist" judges on the bench, "the law is totally debatable" (83). Law (2010) also observed this in her study of immigration appeals in the federal circuit courts, arguing (with the aid of judicial interviews) that just because a statute instructs the circuit judges to defer to the government in immigration cases, judges' hands are not "completely tied" (129); rather, "judges can disregard congressional edicts limiting their scope of review in order to reach a desired result" (139).

An example case helps to further illustrate when and how law and judicial politics intersect in the immigration *in absentia* arena, even in the face of clear congressional efforts to constrain judicial discretion. In *Chavez Torres v. Barr* (2019), Eladio Federico Chavez Torres arrived 53 minutes late for his hearing due to traffic and parking delays. The three Republican-appointed circuit judges reviewing Chavez Torres' case determined that the petitioner's excuse did not amount to "exceptional circumstances" under the law. We suspect that many liberal-leaning circuit court panels would have disagreed with the Chavez Torres panel's interpretation that the facts of the case did not constitute "exceptional circumstances" (in the same way that Law (2010) finds a persistence of judicial discretion when it comes to the interpretation of "extreme hardship" in immigration law).

As our discussion of *Chavez Torres v. Barr* highlights, an interactive relationship between the presence (or lack thereof) of justifications for nonappearance based on statutory factors and judicial ideology may exist. Liberal-leaning circuit judges may, for example, use arguments based on the presence of exceptional circumstances or improper notice to justify ruling in a pro-immigrant direction when they otherwise would not have support to vote in that way. Faced with similar circumstances, however, conservative judges' voting may be wholly unmoved by the presence of statutory-based arguments seeking to justify nonappearance.

Data and Variables

To provide the first empirical study of the factors that affect judicial decision-making in federal circuit court review of denied motions to reopen *in absentia* removal orders, we utilize an original dataset of circuit court cases decided by three-judge panels from 2001 to 2020 in the federal circuit courts.[6] In each of these cases, the petitioning immigrant has received a removal order entered by an immigration judge *in absentia* and is now challenging the validity of the *in absentia* order via a motion to reopen the case. The motion to reopen has been denied by the immigration judge and that denial has been affirmed by the BIA, leading the immigrant to petition the federal circuit court. This new dataset was collected from published and unpublished opinions available on Westlaw based on a search of federal courts of appeals civil case opinions.[7] We coded a random sample of cases, with a stratification strategy based solely on their opinion's publication status. The data include a random selection of 62% of unpublished decisions and 86% of published decisions.[8] All regression modeling reported below includes appropriate sampling weights to account for our publication-specific stratified sampling scheme.

Our dependent variable, *Pro-Immigrant Decision*, captures whether the three-judge circuit court panel ruled in favor of the immigrant in the petition for review of the denied motion to reopen an *in absentia* order.[9] *Pro-Immigrant Decision* is coded as 1 for circuit rulings in favor of the immigrant on *in absentia* grounds. This includes cases where the BIA and immigration judge's denial of the motion to reopen is vacated and those where the case is remanded to the BIA for additional proceedings and potential vacation of the *in absentia* order. Those circuit court decisions upholding the denied motion to reopen an *in absentia* order are coded as 0.

Our independent variables center on the statutory and political-judicial factors we theorize above.[10] For the statutory factors, we begin with *Notice Error Alleged*, which, when coded as 1, captures allegations by the petitioning immigrant that the government erred in providing the required notice in order to issue an *in absentia* order. Cases without an allegation of notice or service error are coded as 0.

We include three dichotomous measures related to immigrant arguments that their nonappearance was justified by exceptional circumstances per the governing statute. *Listed Factual Circumstances* is coded as 1 if the immigrant justifies her nonappearance through grounds explicitly noted in the statute, including illness (self or

family), death in family, and/or battery or extreme cruelty. *Immigrant Lateness* receives a value of 1 if the immigrant arrived late to her hearing at which the judge ordered her removed *in absentia*. *Immigrant Scheduling Error* is coded as 1 for cases where the immigrant received correct information from the government and/or her counsel about the *in absentia* hearing date and location but her own error or confusion resulted in nonappearance. Each of these exceptional circumstances variables is coded as 0 if the listed allegation is not made by the petitioning immigrant.

Panel Ideology is the median ideology score for all circuit judges joining the panel's majority opinion in a case.[11] Individual circuit judges' ideology scores are continuous, ranging from −1 (most liberal) to 1 (most conservative) and are measured utilizing Judicial Common Space scores (Epstein, Martin, Segal, and Westerland 2007). Scores for district judges serving in circuit courts by designation are sourced from Boyd (2015). To account for the potential that the ideology of the circuit judges reviewing an *in absentia* case affects the way they interpret the facts of the case relative to the governing statute, our modeling also includes interactions between each of our four statutory factors and *Panel Ideology*.

In addition to our theory-specific independent variables, we also control for a variety of case-specific factors that may affect how circuit judges evaluate immigration cases or that affect the quality of the petition for review before them. Immigrants may seek to reopen a removal order by claiming "ineffective assistance of counsel" ("IAC"). These claims are rooted in procedural due process and provide a route to set aside a removal order when an immigrant can show that counsel's representation was deficient (that a competent lawyer would have acted in a different manner) and that this prejudiced the immigrant in the removal proceeding (*Matter of Lozada*, 1988; Krishnan 2022). While it is not easy to reopen removal proceedings based on IAC, we anticipate that the presence of an ineffective assistance of legal counsel claim will increase the chances of *in absentia* immigrant success in the courts of appeals. *Ineffective Assistance of Legal Counsel* is coded as 1 when an immigrant explicitly argues that her non-appearance was due, in part or total, to IAC and 0 otherwise.

Motions to reopen are often subject to statutory deadlines. Immigrants seeking to reopen and rescind an *in absentia* order must file their motion to reopen within statutory deadlines (usually 90 or 180 days, although exceptions apply). Confusing statutory deadlines provide the government with frequent opportunities to contest, and courts to ultimately deny, motions to reopen that are not timely. As such, we expect that untimely motions to reopen will decrease the likelihood of the reviewing circuit court vacating the denial of a motion to reopen an *in absentia* removal order. *Untimely Motion* is coded as 1 when the immigrant's motion to reopen the *in absentia* order is considered to be late based on the statutory deadline for the nature of their claimed grounds for reopening and 0 otherwise.

Evidence indicates that in immigration courts, immigrants who are represented by legal counsel are far less likely to be ordered removed *in absentia* than pro se immigrant respondents (Eagly and Shafer 2015, 2020). The broader literature supports this finding on the importance of counsel to litigant success in courts (Dumas 2016; Gunderson 2021, 2022; Miller, Keith, and Holmes 2015a, 2015b; Ramji-Nogales, Schoenholtz, and Schrag 2007; Ryo 2018; Ryo and Peacock 2021). We expect that immigrants represented by an attorney at the circuit court will be more likely to have their BIA loss vacated. *Represented at Circuit Court* is coded as 1 when the immigrant has an attorney representing their case at the circuit court and 0 when they do not.

Our modeling strategy also controls for potential circuit effects and constraints on a panel's decision-making. To capture potential circuit effects driven by the dominance of the U.S. Court of Appeals for the Ninth Circuit (Hamlin 2014; Law 2005), our main text modeling includes a dichotomous variable coded as 1 if the reviewing circuit court is the *Ninth Circuit* Court of Appeals and 0 if it is another circuit.[12] We anticipate that *Ninth Circuit* cases will be more likely to receive pro-immigrant outcomes than cases heard in other circuits. To account for the potential hierarchical constraining effect present within circuit courts, where a panel of judges may be cognizant of their fellow circuit judges' preferences when deciding the case before them (Haire, Lindquist, and Songer 2003; Stobb 2019), we control for the *Circuit Median Ideology* (measured following the ideology measurement outlined above) for the active circuit judges during the year of the case's decision. To help proxy for inter-circuit immigration law workload differences, we also include the variable *Proportion Immigration Cases*. Circuits experiencing higher immigration caseloads may be more likely to develop assembly line-like justice tactics when hearing these cases, with the result being an overall decreased chance of a pro-immigrant outcome. Coded from annual data provided by the Administrative Office of the U.S. Courts, *Proportion Immigration Cases* tracks the proportion of cases decided within circuit-year arising from district courts involving immigration offenses.

Finally, our regression model includes controls for presidential administration and immigrant characteristics. We separately control for the presidential administration at the time of the circuit court decision (dichotomous variables for Trump, W. Bush, and Obama administrations).[13] We also account, with three dichotomous variables, for the potential effect that the characteristics of the immigrant seeking review may have on the outcome. Our

expectation is that variation in judicial empathy combined with differences in views toward groups of immigrants will mean that *Female Immigrants* and *Minor Immigrants* will be more likely to receive a positive outcome than other immigrants and immigrants with a *Mexico/Central America Origin* will be less likely to receive a positive outcome than noncitizens yielding from other parts of the world (Gill, Kagan, and Marouf 2019; Kim and Semet 2020).

Empirical Results

To estimate the effect of our factors of interest on circuit court evaluations of motions to reopen *in absentia* removal orders, we estimate a logistic regression model. The regression results are reported in Table 1, with the online Supplemental Materials providing alternative modeling specifications. As the regression results reveal, multiple primary independent variables have statistically significant effects on the likelihood of a pro-immigrant decision in the circuit court—both in isolation[14] and in interaction. This includes two of these related to the constraining effects of statutory grounds (*Notice Error Alleged* and *Immigrant Lateness*) as well as judicial preferences (*Panel Ideology)*. The interactions between these two statutory grounds and *Panel Ideology* are also statistically significant. To dive more deeply into these relationships and to better assess the substantive effects of the results, we plot the predicted marginal effects for statistically significant variables of interest below.

Subfigure (a) of Figure 1 plots the substantive effects of *Government Notice X Ideology*, which is the interaction of *Government Notice or Service Error Alleged* and *Panel Ideology*, while subfigure (b) plots the difference (and 95% confidence intervals around that difference) in the probability of immigrant success based on whether *Notice Error Alleged* is present or not in a case. Subfigure (a)'s connected dots represent average predicted marginal effects of a pro-immigrant decision based on whether there

Table 1. Logistic Regression Results for the Effects of Statutory and Judicial-Political Factors on a *Pro-Immigrant Decision* in the Federal Circuit Court.

	Coefficient	Robust standard error
Statutory grounds		
Government Notice or Service Error Alleged	0.688*	(0.197)
Factual Circumstances Justify Nonappearance	−0.453	(0.377)
Immigrant Lateness Justifies Nonappearance	1.721*	(0.472)
Immigrant Scheduling Error Justifies Nonappearance	−0.874	(0.754)
Political-judicial		
Panel Ideology	−1.674*	(0.440)
Statutory-political interactions		
Government Notice X Ideology	1.399*	(0.599)
Factual Circumstances X Ideology	−0.735	(1.191)
Immigrant Lateness X Ideology	−3.241*	(1.464)
Scheduling Error X Ideology	2.386	(1.678)
Other case controls		
Ineffective Assistance of Legal Counsel	0.644*	(0.206)
Untimely Motion	−0.889*	(0.216)
Immigrant Represented at Circuit Court	0.889*	(0.308)
Ninth Circuit	1.038*	(0.326)
Circuit Median Ideology	0.032	(0.563)
Proportion Immigration Cases	−7.250*	(3.588)
Obama Administration	−0.863*	(0.198)
Trump Administration	−1.701*	(0.345)
Female Immigrant	0.301	(0.192)
Minor Immigrant	0.046	(0.786)
Mexico/Central America Origin	0.049	(0.201)
Constant	−2.573*	(0.386)
Observations	1095	

Standard errors are robust, and the modeling includes probability weights to account for our publication status sampling scheme. W. Bush is the baseline presidential administration. *$p < 0.05$ (two tailed).

is an allegation of government notice or service error (gray) or not (black) across the range of median panel ideologies. The vertical lines surrounding the dots show the 95% confidence intervals around the predicted effects. Just as would be predicted in an environment of statutory constraint that disfavors overturning *in absentia* removal orders, there is a low baseline predicted likelihood of immigrant success in the circuit courts. However, altering the presence of an allegation of government notice error and the ideological composition of the panel hearing the case can lead to a notable rise in the likelihood of immigrant success in vacating their *in absentia* order. As Figure 1(a) highlights, liberal circuit panels have, on average, a 0.3 probability of ruling in favor of the immigrant—regardless of whether *Notice Error Alleged* is present or not. Interestingly, when a government notice error has been alleged in a case, the likelihood of a pro-immigrant outcome remains equally high no matter the ideological composition of the panel. However, when no such error has been alleged, while liberal panels remain sympathetic to the immigrant's case, other panels' likelihood of ruling for the immigrant drop precipitously as their median ideological positions grow increasingly conservative. Indeed, the most conservative panels in our data have just a 0.07 probability of ruling for the immigrant when there is no *Notice Error Alleged* in the case.

Subfigure (b) in Figure 1 plots the differences in the probability of immigrant success when *Notice Error Alleged* is present in a case versus when it is not, holding all else constant. We plot the mean difference (black dot) and the 95% confidence interval around that difference. Not surprisingly given the large substantive effects in subfigure (a), the differences reported in subfigure (b) are also sizable across much of the span of *Panel Ideology* (when the confidence intervals in Subfigure 1(b) overlap with 0, the differences are not statistically significant). While liberal panels are equally likely to rule for an immigrant regardless of the status of *Notice Error Alleged*, for conservative panels, the difference in a pro-immigrant decision is as high as 0.19 when comparing cases where there is an allegation of government notice error versus those where no such error is present.

We turn next to the substantive effects of our statutory factors capturing exceptional circumstances allegations and their interactions with *Panel Ideology*. Following the same pattern outlined for Figure 1, Figure 2 plots the substantive effects of the interaction of *Factual Circumstances Justify Nonappearance* and *Panel Ideology*. It reveals that while there is an ideological effect—liberal panels are more likely to issue pro-immigrant rulings (0.28 probability) than conservative ones (0.03 probability)—that effect is not conditioned in any way on the presence of an allegation that an immigrant's factual circumstances justified his or her nonappearance before the immigration judge.

For our other two exceptional circumstances-related statutory factors, however, a conditional effect between the factor and ideology is present. Figure 3 plots the substantive effects of the interaction of *Immigrant Lateness Justifies Nonappearance* and *Panel Ideology*. As the figure reveals, conservative panels are unaffected by the presence or lack of presence of immigrant allegations that their lateness justified their nonappearance before the immigration judge and have a very low likelihood of ruling in favor of the immigrant (as low as a 0.05 probability). However, there's a powerful conditional effect here among liberal and moderate panels. While there is always an ideological effect present in the data—with liberal panels being more likely to rule in favor of the immigrant than conservative ones even when there is no allegation of lateness—that effect size grows significantly when an allegation of lateness is present in the case. Among the most liberal panels in the data, for example, there's a 0.30 probability of ruling pro-immigration without a lateness argument in the case and a 0.89 probability when there is such an argument. As Figure 3(b) shows, panels with median ideologies that are liberal, moderate, and even moderately conservative are all more likely, as a matter of statistical significance, to rule in favor of the immigrant when this lateness exceptional circumstance is present in the case before them.

Figure 4 plots the effects of our final statutory factor *Immigrant Scheduling Error Justifies Nonappearance* and its interaction with *Panel Ideology*. It reveals that, once again, conservative panels are equally unlikely to rule for the immigrant based on the presence of or lack of scheduling error-based exceptional circumstances arguments (as Figure 4(b) confirms, this is true for moderate and moderately liberal panels as well). For the most liberal panels in our data, however, the presence of an *Immigrant Scheduling Error* moves the circuit judges hearing the case from being more likely than their conservative colleagues to rule in favor of the immigrant to being equally unlikely to do so. In other words, scheduling error arguments actually *hurt* immigrant's chances before these more empathetic circuit judges, an effect that we suspect is due to circuit judges finding immigrant's scheduling error excuses to be avoidable and not *exceptional circumstances* like the statute demands.[15]

A number of our control variables' substantive effects are also of note. The presence of an *Ineffective Assistance of Legal Counsel* allegation increases the likelihood of a decision favorable to the immigrant by 0.10.[16] *Untimely Motions*, by contrast, result in a −0.09 effect on pro-immigrant decisions. With *Represented at Circuit Court*, the results indicate that the presence of an attorney has a strong, positive effect on the likelihood of a *Pro-Immigrant Decision* in the case (a predicted increase of 0.09). Cases

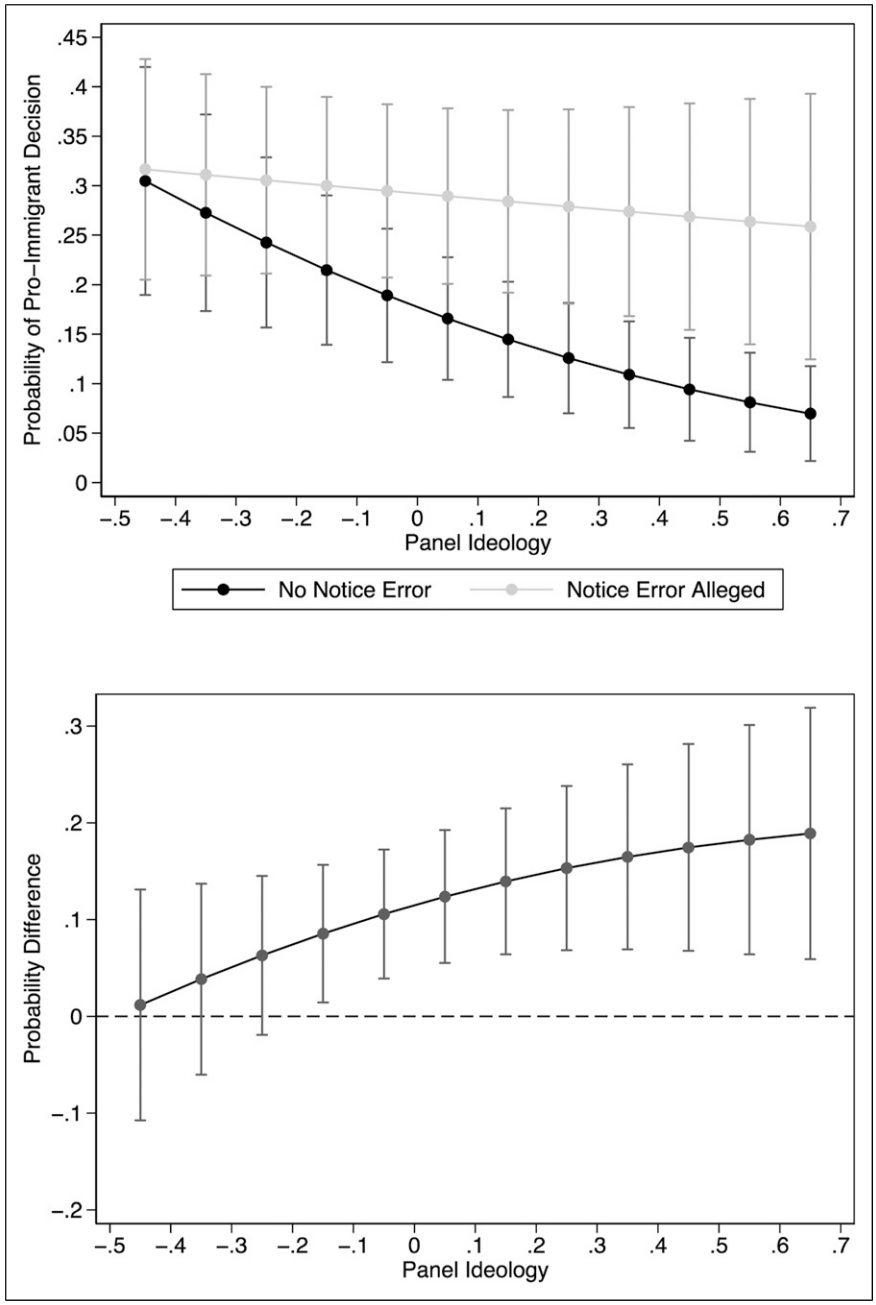

Figure 1. Predicted marginal effects and differences in the probability of a pro-immigrant decision in circuit court cases for the interaction of *Government Notice or Service Error Alleged* with *Panel Ideology*. All other variables are held at their modal and mean values. Vertical lines represent 95% confidence intervals.

heard in the *Ninth Circuit* are nearly 0.10 more likely to receive a pro-immigrant outcome (even after controlling for panel ideology), while cases in circuits that hear a larger number of immigration cases overall are, on average, much more likely to be decided against the *in absentia* immigrant (with values decreasing over 0.16 from the minimum to maximum values of *Proportion Immigration Cases*). We also see that the era in which the case was decided matters, with cases decided during the Bush administration era being more likely to receive a pro-immigrant outcome (average probability of 0.18) than those during the Obama (0.09) or Trump administration (0.04).

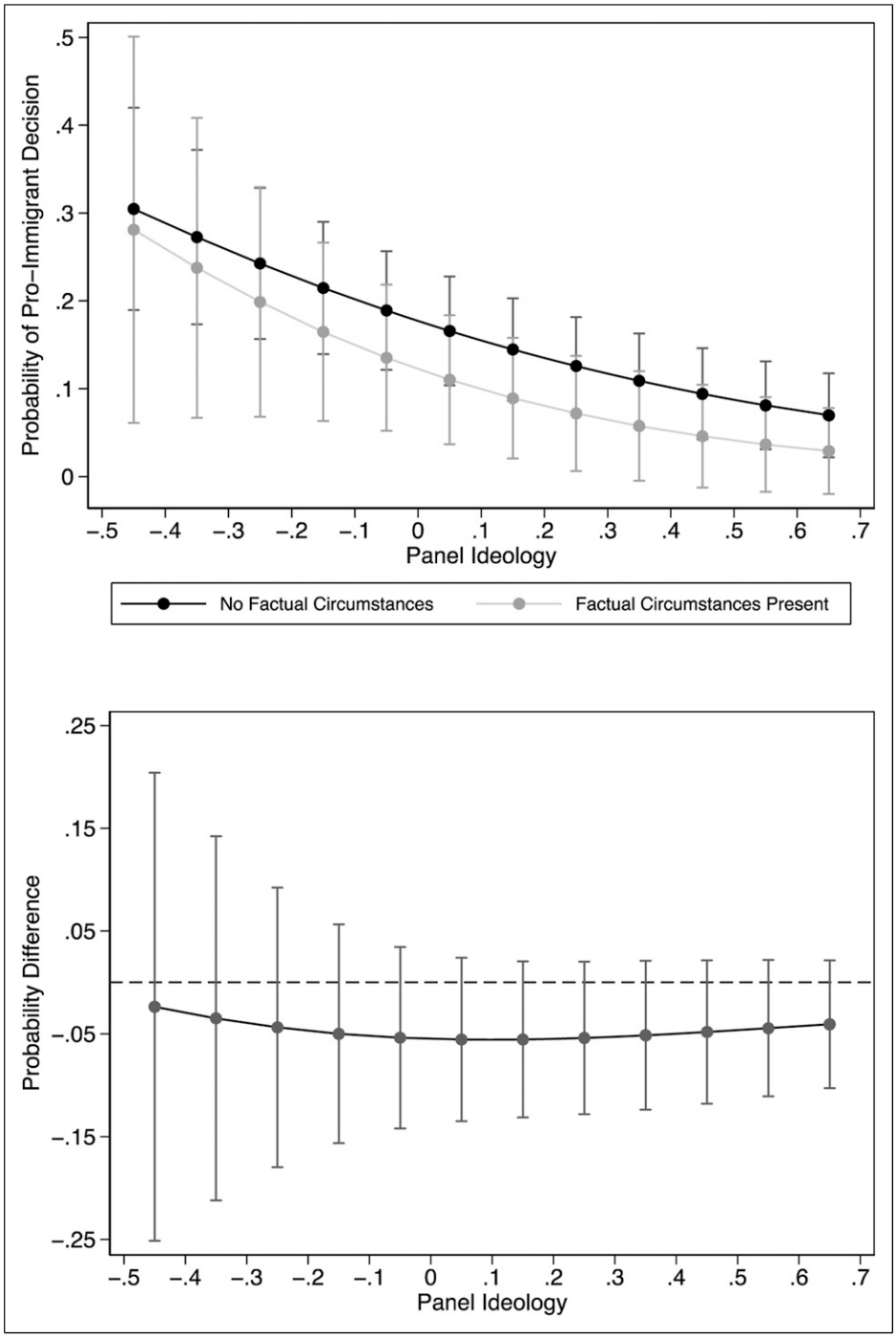

Figure 2. Predicted marginal effects and differences in the probability of a pro-immigrant decision in circuit court cases for the interaction of *Factual Circumstances Justify Nonappearance* with *Panel Ideology*. All other variables are held at their modal and mean values. Vertical lines represent 95% confidence intervals.

Discussion

For years, immigration law and policy in the United States have been under fire due to politicization. Federal courts, tasked with reviewing immigration court decisions, have played a central role in this controversy. Perhaps no immigration issue puts these concerns in focus more than the practice of entering *in absentia* orders against im-

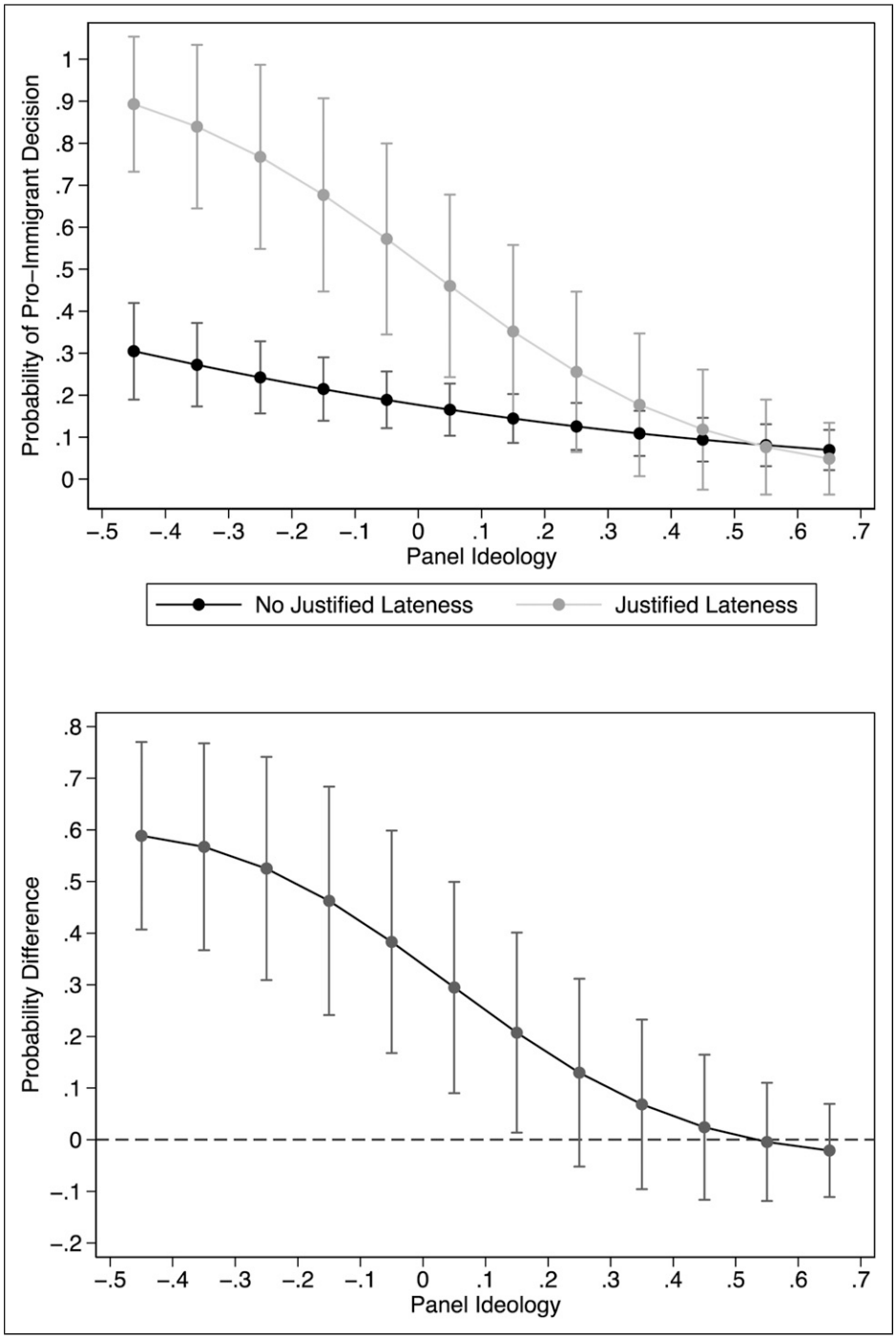

Figure 3. Predicted marginal effects and differences in the probability of a pro-immigrant decision in circuit court cases for the interaction of *Immigrant Lateness Justifies Nonappearance*. All other variables are held at their modal and mean values. Vertical lines represent 95% confidence intervals.

migrants who fail to appear at a hearing. As we have seen, *in absentia* removal orders are common and controversial in immigration courts. And yet they often strike observers as unfair and uncompassionate—imposing, by congressional mandate, a severe sanction without a chance to contest the charges or seek relief from removal—when viewed in light of the circumstances of an individual case.

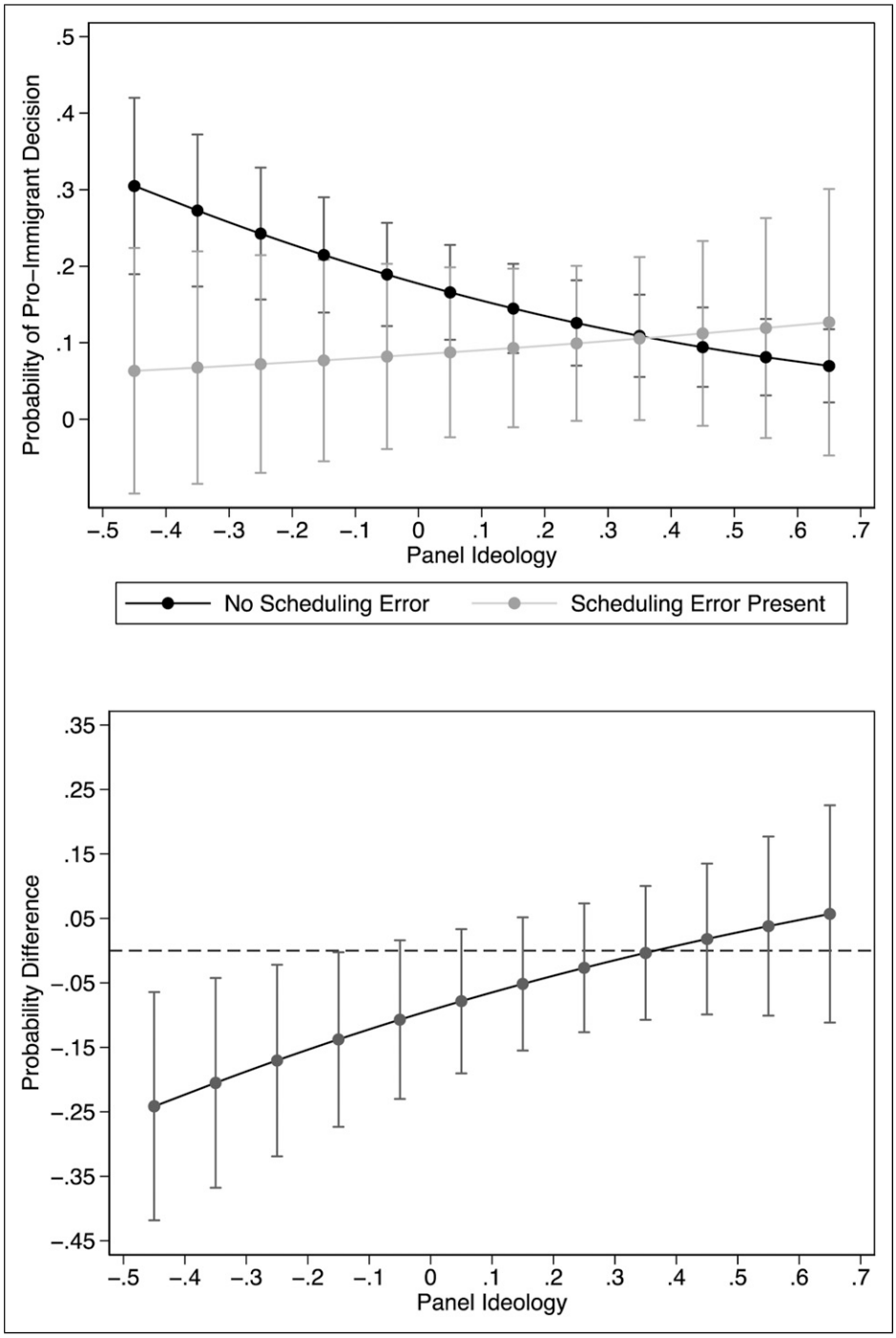

Figure 4. Predicted marginal effects and differences in the probability of a pro-immigrant decision in circuit court cases for the interaction of *Immigrant Scheduling Error*. All other variables are held at their modal and mean values. Vertical lines represent 95% confidence intervals.

This study provided the first large-scale empirical examination of *in absentia* removal orders being reviewed in the federal courts of appeals. Recent research has helped us to understand more about the black box of immigration court proceedings (e.g., Asad 2019; Eagly and Shafer 2015, 2020; Hamlin 2014; Keith, Holmes, and Miller 2013; Kim and Semet 2020; Miller, Keith, and Holmes 2015a, 2015b; Palmer, Yale-Loehr, and Cronin 2005; Ramji-Nogales, Schoenholtz, and Schrag 2007). Our study extends this systematic understanding of

immigration adjudications to circuit court review of *in absentia* removal orders.

Our study reveals important new empirical insights into how politics and law intertwine in salient and political judicial decision making. As we have seen, Congress has aimed to reduce judicial discretion when considering *in absentia* removal orders—from the "shall" remove language present in the governing statute to the limited review role for federal appellate judges. Our empirical analysis demonstrated that, on average, it is rare for the circuit court to rule favorably for *in absentia* immigrants—just as statutory constraint in this area would predict. We also find that the statutory criteria for reopening an *in absentia* order—including whether the government provided notice as required by the statute and whether the immigrant established that exceptional circumstances justified her failure to appear—can impact the decision whether to reopen an order for further consideration by the immigration judge. Still, we find that congressional efforts to constrain appellate judges have not been wholly successful. Judicial politics still emerges in circuit court review, with our findings showing that an unforgiving statute that mandates the entry of an *in absentia* removal order in some circumstances and restricts federal judicial authority to set aside these orders cannot fully eradicate differences in the way that individual judges respond (or do not respond) to sympathetic facts, apply the law, and are governed by directional policy preferences. Our powerful evidence on this interactive relationship of law and politics in judging joins scores of others studying judicial behavior in the immigration context and well beyond.

We believe this study of circuit court review of *in absentia* removal orders is an important addition to the immigration adjudication literature. As with all empirical studies, ours has some limitations. We focus our empirics exclusively on the federal courts of appeals, for reasons already stated, and thus are not able to analyze or reach conclusions about immigration court *in absentia* orders and reopening efforts more broadly. Cases where the immigration judge was authorized by statute to order an immigrant removed *in absentia* but chose instead to reset the hearing to another date to allow the immigrant another opportunity to appear are never counted in any database of *in absentia* orders. Our study also does not include cases where an immigrant successfully argued before the immigration judge or the BIA that an *in absentia* order should be rescinded. All of these scenarios involving *in absentia* orders that never reach the circuit courts are likely easier pro-immigrant decisions—for example, with clear exceptional circumstances to justify nonappearance or a lack of proper government notice—meaning that the decisions that are included in our study may be, on average, less favorable for immigrants. The nature of this filtering of cases that are heard by the circuit courts may make our strong findings all the more noteworthy.

Acknowledgements

We owe a huge debt of gratitude to Kate Irwin-Smiler for her efforts in designing and managing the initial phase of data collection for this project. We are grateful to the following student researchers for their assistance with this project: Aimee Durant, Jordan Dyer, Gillian Gaines, Aidan Gonzalez, Alyson Hendricks-Benton, Hillary Kies, Nathan Kupka, Emma Maddux Kozlowski, Wesley Rainer, and Adam Rutkowski. Project data are available at www.cLboyd.net.

Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

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Supplemental Material

Supplemental materials, marked as such in the text, are available at http://prq.sagepub.com.

Notes

1. See for example Hamlin (2014), Kim and Semet (2020), and Miller, Keith, and Holmes (2015a) for a thorough overview of immigration court processes and factors affecting their decisions.
2. Immigrants who are represented by legal counsel are far less likely to be ordered removed *in absentia* than pro se immigrant respondents, since a lawyer may find room to maneuver to avoid the entry of an *in absentia* order (Eagly and Shafer 2015, 2020).
3. See Palmer, Yale-Loehr, and Cronin (2005) and Westerland (2009) for more on the appeals process and appeal rates from the BIA into the federal courts.
4. For an example of how changes in procedural rules change litigation behavior in federal courts, see Hazelton (2021).
5. Current law maintains this language but substitutes the word "removed" for "deported." The Immigration and Nationality Act of 1952 directed that immigration judges "may proceed" to enter an *in absentia* removal order when an immigrant failed to attend a hearing. This was repealed by the 1990 Act. The 1952 law indicated that *in absentia* orders were not supposed to be used to "capriciously deport an alien solely

on the basis of inconsequential, unwitting infraction[s] of the law" (Immigration and Nationality Act, Conference Report, 1952) but were instead designed to punish immigrants whose intentional failure to appear undermined the integrity of immigration court proceedings and, in effect, obstructed justice (H.R. Rep No. 1365 (1952); *Maldonado-Perez v. INS* (Wald, J., dissenting) 1989).

6. The D.C. circuit court did not decide any relevant cases during the years of our study.
7. Our Westlaw search terms of full federal courts of appeals civil opinions included "immigration" and "in absentia." About 25% of opinions resulting from this search were deemed not relevant. Common exclusion reasons included (1) "in absentia" appeared in prior case history or in the context of describing another case cited, (2) an individual previously ordered removed *in absentia* has now applied for asylum and asserts changed country conditions as the reason for her delayed asylum application, (3) collateral challenges by an individual who was ordered removed in absentia, and then later criminally prosecuted for unlawful re-entry, and (4) the very rare en banc circuit court decisions in our data.
8. While all modern circuit court opinions are electronically available, only a small number are published in the court reports with precedential weight. Research indicates that the decision to publish an opinion is not random and published opinions are not representative of unpublished opinions (e.g., Carlson, Livermore, and Rockmore 2020; Hazelton, Hinkle, and Jeon 2016).
9. In the online Supplemental Materials, we report results from a judge-level model, where every judge vote is the unit of analysis. Since dissents are rare in our data, the results of this individual judge modeling are substantively similar to those we report in the main text.
10. Variable summary statistics are provided in the online Supplemental Materials.
11. In alternative modeling, we utilize mean panel ideology in place of median. Doing so has no effect of note on our empirical results. While per curium opinions (not attributed to a specific author) are common in our data and prevent us from exploring modeling using the majority opinion author's ideology, we suspect that such a strategy would yield similar results.
12. Supplemental Materials modeling substitutes circuit court fixed effects for this dichotomous variable approach.
13. Alternative modeling provided in the Supplemental Materials substitutes year fixed effects for presidential administration.
14. Model A1 of Table 2A in the Supplemental Materials reports the regression results without the interactions. The statistical effects for our non-interacted statutory ground and ideology variables are consistent with expectations as described in the text.
15. For example, in *Singh v. Barr* (2019) the immigrant argued that he missed his hearing because he did not know if it was scheduled for 9:00a.m. or 9:00p.m. on the day listed on the notice.
16. Supplemental modeling interacting the *Ineffective Assistance of Legal Counsel* control variable with *Panel Ideology* indicates that liberal-leaning panels are particularly empathetic toward IAC claims.

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