NO NOTICE, NO PROBLEM? CREDIBLE TESTIMONY AND THE NEED FOR CORROBORATION NOTICE IN THE CONTEXT OF *SARAVIA V. ATTORNEY GENERAL*

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I. INTRODUCTION

In *Saravia v. Attorney General*, a man who had entered the United States illegally was denied the ability to corroborate his credible testimony that he feared for his life after deportation, and his withholding of removal from the

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United States was denied by an Immigration Judge.[1] Though his testimony was credible, the judge found in part that he had not provided corroborating testimony that would further prove his claim.[2] By denying his application on the grounds of failure to corroborate his testimony, the Immigration Judge ignored possible implications of due process and decreased the feasibility of judicial review by limiting the applicant's evidence on the record. On appeal, the U.S. Court of Appeals for the Third Circuit held that requiring Saravia to "provide further corroboration without telling him so and giving him the opportunity either to supply that evidence or to explain why it was not available" would render their review "not meaningful."[3] This decision aligns the Third Circuit with the U.S. Court of Appeals for the Ninth Circuit, but causes irreconcilable conflicts with rulings out of the Seventh, Sixth, and Second Circuits.[4]

Asylum law in the United States places the burden of showing eligibility for refugee status on the applicant.[5] Refugee status is granted when the applicant "is unable or unwilling to return" to their home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[6] There are obvious complications in requiring evidence of an applicant who has fled their home due to persecution.[7] The REAL ID Act therefore permits an Immigration Judge to find that an applicant has sustained their burden of proof through their testimony at a hearing.[8] To sustain their burden through testimony, an applicant must show that their testimony is credible, that it refers to specific facts evidencing refugee status, and the Immigration Judge must find it persuasive.[9] Even though an Immigration Judge may find the testimony of an applicant to be credible and persuasive, the statutory language allows the judge to nevertheless require that the applicant provide "evidence

1. Saravia v. Att'y Gen. U.S., 905 F.3d 729, 734 (3d Cir. 2018) ("Presented with a credible witness, the Immigration Judge found that Saravia failed to sufficiently corroborate his story.").

2. *Id.*

3. *Id.* at 737.

4. *Id.* at 738; *Compare* Gaye v. Lynch, 788 F.3d 519, 528 (6th Cir. 2015) (holding no notice requirement in corroboration cases); Liu v. Holder, 575 F.3d 193, 198 (2d Cir. 2009) (same); Rapheal v. Mukasey, 533 F.3d 521, 530 (7th Cir. 2008) (same), *with* Ren v. Holder, 648 F.3d 1079, 1091 (9th Cir. 2011) (holding that the statute unambiguously requires notice).

5. 8 U.S.C. § 1158(b)(1)(B) ("Burden of proof – In general – The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of [the Act]. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.").

6. 8 U.S.C. § 1101(a)(42)(A).

7. Scott Rempell, *Credibility Assessments and the REAL ID Act's Amendments to Immigration Law*, 44 Tex. Int'l L.J. 185, 190 (2008) (explaining "[i]ndividuals fleeing persecution may lack sufficient time to gather probative evidence either in their possession or otherwise obtainable, or may fear traveling with any documentation adverse to repressive governments.").

8. 8 U.S.C. § 1158(b)(1)(B)(ii) ("The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration.").

9. *Id.* (The testimony of an applicant is sufficient without corroboration if "the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.").

that corroborates otherwise credible testimony."[10] This corroborating evidence then *must* be provided by the applicant, or they must show why they "do not have the evidence and cannot reasonably obtain the evidence."[11]

This Note argues that the proper interpretation of 8 U.S.C. § 1158(b)(1)(B)(ii), based on the canon of constitutional avoidance, requires an Immigration Judge to give notice to an asylum applicant that the applicant must provide corroborating evidence in cases where their testimony is otherwise deemed credible before the application is denied. Part I will highlight the situation of Mr. Saravia in *Saravia v. Attorney General*. Part II will then explore the history of the REAL ID Act and compare the approaches in the Third Circuit, Second Circuit, Seventh Circuit, and Ninth Circuit to interpreting § 1158(b)(1)(B)(ii) with the Board of Immigration Appeals' interpretation. Finally, Part III will argue that the appropriate interpretation of the provision is couched in a need to interpret the statute away from issues of due process and ensure that judicial review is available at later stages of litigation by requiring immigration judges to fully develop the record at the underlying hearings.

II. SARAVIA V. ATTORNEY GENERAL

Alejandro Saravia is a native-born citizen of El Salvador, where he lived until he was around ten years old.[12] From a young age in El Salvador, Saravia was targeted by members of the MS-13 gang who sought to recruit him.[13] The Mara Salvatrucha gang, also called MS-13, is a gang with an "established [] reputation for extreme violence and for killing with machetes."[14] By one account, the gang has revenue up to $31.2 million, and "is one of the largest criminal enterprises in the [United States]," though "[i]t is now larger outside the country."[15] The members of the gang demanded money from Saravia and "issued [him] an ultimatum: either join the gang or pay $15,000."[16] Saravia's father sent him to live in the United States, and he entered the country illegally in 2006.[17] This was not the end of his troubles with the gang. In 2011, Saravia's cousin, a police officer in El Salvador, was murdered by gang members, and another of his cousins was kidnapped and tortured before ultimately being murdered.[18] In 2013, gang members attacked his father. Later, his half-brother, who lives in Boston, received a call from gang members threatening further adverse action against his family and father, specifically if he returned to El Salvador.[19]

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10. *Id.*
11. *Id.*
12. Saravia v. U.S. Att'y Gen., 905 F.3d 729, 731 (3d Cir. 2018).
13. *Id.*
14. *MS-13 gang: The story behind one of the world's most brutal street gangs*, BBC NEWS (Apr. 19, 2017), https://www.bbc.com/news/world-us-canada-39645640.
15. *Id.*
16. *Saravia*, 905 F.3d at 731.
17. *Id.*
18. *Id.*
19. Saravia v. U.S. Att'y Gen., 905 F.3d 729, 732-33 (3d Cir. 2018).

Saravia was arrested in April 2015 for assault and weapons related charges.[20] The charges were dismissed, and he was placed on probation. While on probation, he was arrested for driving under the influence and the Department of Homeland Security initiated removal proceedings under the Immigration and Nationality Act.[21] In this removal proceeding, Saravia sought asylum, withholding of removal, and relief under the Convention Against Torture ("CAT").

Asylum is entirely discretionary under United States law.[22] There are two ways an applicant may qualify as a refugee and receive asylum: by showing past persecution or by showing a well-founded fear of persecution.[23] If an applicant has been found to have suffered past persecution, the applicant is presumed to have "a well-founded fear of persecution on the basis of the original claim."[24] If an applicant cannot show past persecution, they may still receive refugee status by showing a "well-founded fear of future persecution, which requires credible testimony of a subjective fear that is also objectively reasonable."[25] Immigration courts hear claims from parties, like Saravia, who "raise an asylum claim after being placed in removal proceedings."[26] Immigration courts assign cases to immigration judges who then hear the case in essentially two hearings: a master calendar hearing and a merits hearing.[27]

Saravia testified before an Immigration Judge in support of his claim for asylum and withholding of removal.[28] Saravia stated that he feared returning to El Salvador because the gang had threatened to kill him if he returned, because he had been a target of the gang in the past, and because he feared that the government would think that he was affiliated with the gang.[29] At the hearing, the judge asked why his mother did not testify about the threats against him, to which Saravia responded, "my mom is in the waiting area.

20. *Id.* at 732.
21. *Id.*
22. *See* Rempell, *supra* note 7, at 190.
23. *See* 8 C.F.R. § 1208.13(b)(1)-(2).
24. § 1208.13(b)(1).
25. *See* Rempell, *supra* note 7, at 190.
26. Jaya Ramji-Nogales, et al., *Refugee Roulette*, 60 STAN. L. REV. 295, 326 (2007).
27. Matter of L-A-C-, Applicant, 26 I. & N. Dec. 516, 521 (B.I.A. 2015).
28. The provision at issue in this Note additionally applies to the Convention Against Torture and removal proceedings under the Convention Against Torture. *See Saravia v. Att'y Gen. U.S.*, 905 F.3d 729, 736 (3d Cir. 2018) ("[§ 1158 (b)(2)(B)(ii))] applies to withholding of removal and relief under the Convention Against Torture."). In *Saravia*, the applicant's withholding of removal was denied as time-barred and he subsequently sought review of the denial of "his application for withholding of removal and the denial of his application for relief under the Convention Against Torture." *Id.* at 735. "To obtain relief under the Convention Against Torture, the applicant must show that it is more likely than not that he would be tortured upon return to his country." *Id.* (internal citations omitted). The difference between the two provisions for purposes of this Note's argument is irrelevant. *See id.* (stating "[t]he role of corroboration in sustaining an applicant's burden is identical in asylum, withholding of removal, and relief under the Convention Against Torture.").
29. *Saravia*, 905 F.3d at 731-32. Saravia's mother owns property in El Salvador. She rented the property to a woman who is allegedly affiliated with the gang and they have begun to use the property as a location to torture victims and as a meeting place. *Id.*

They never told us that they needed her to do that type of declaration."[30] The judge subsequently asked about his half-brother, who additionally had not provided a corroborating statement.[31] Finally, the judge asked if "there [is] any reason why no corroboration was offered from these two fact witnesses," to which Saravia's counsel answered, "there isn't."[32]

After adjourning the proceedings, the Immigration Judge found that Saravia was a credible witness but that he did not corroborate his claims with sufficient evidence. The Immigration Judge issued a written decision denying Saravia's application.[33] Specifically, the Immigration Judge found that Saravia had not corroborated his credible testimony and met his burden for withholding of removal because he failed to establish "a particular social group" that he was a member of and, by being associated, would subject him to harm if he was made to return to El Salvador.[34]

Central to this decision, the judge found that although Saravia was credible, he "failed to corroborate [] critical aspects of his claim, including the alleged threats against him personally" and thus his application could be denied under § 1158(b)(1)(B)(ii).[35] The Immigration Judge ruled that under binding Board of Immigration Appeals precedent, "he was not required to give Saravia 'advance notice of the specific corroborating evidence necessary to meet [his] burden of proof.'"[36] Saravia appealed to the Board of Immigration Appeals which affirmed the Immigration Judge and denied his application for asylum, withholding of removal, and relief under the Convention Against Torture.[37]

III. THE IMMIGRATION AND NATIONALITY ACT AND § 1158(B)(2)

The need to provide corroborating evidence upon request from an Immigration Judge is mandated by the REAL ID Act, which modified the Immigration and Nationality Act. Congress signed the Immigration and Nationality Act ("INA") into law in 1952.[38] The Act was first amended by

30. *Id.* at 732.
31. *Id.* at 733.
32. *Id.*
33. *Id.*
34. Saravia v. Att'y Gen. U.S., 905 F.3d 729, 734 (3d Cir. 2018). The applicant is required to show, under an asylum application, that he has a well -founded fear of persecution. "To obtain relief in the form of withholding of removal, the applicant must prove that there is a clear probability that the applicant will be subject to persecution if forced to return to the country of removal, a more stringent showing than what is required in an asylum proceeding." *Gaye v. Lynch*, 788 F.3d 519, 533 (6th Cir. 2015) (White, J., dissenting). Under the CAT, "the applicant has the burden of showing that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." *Id.* (internal citations omitted).
35. *Saravia*, 905 F.3d at 733 (alterations in original) (quotations omitted).
36. *Id.* (citing *Matter of L-A-C-*) (alterations-, *Applicant*, 26 I. & N. Dec. 516, 524 (B.I.A. 2015)) (alteration in original).
37. *Saravia*, 905 F.3d at 733-34.
38. *See generally* Olivia Waxman, *What to Know About the 1952 Law Invoked by President Trump's Immigration Order*, TIME (Feb. 6, 2017), http://time.com/4656940/donald-trump-immigration-order-1952/.

President Lyndon B. Johnson.[39] By signing the bill, President Johnson "abolished the National Origins formula that had been in place in the United States since the Emergency Quota Act of 1921."[40] The United States in 1968 then signed, with reservations, the 1967 United Nations Protocol Relating to the Status of Refugees.[41] In 1980, the United States implemented its obligations under the Protocol by passing the Refugee Act of 1980, which further modified the INA.[42] The Refugee Act revised the procedures for admission of refugees.[43] In particular, the Act "gave the Attorney General discretion to withhold deportation to a country where an individual would face persecution."[44]

Later, the language of the INA was modified by the REAL ID Act.[45] According to Banks Miller, a professor of political science, there were "myriad concerns motivating the passage of the REAL ID Act, particularly that economic migrants, illegal immigrants, and potential terrorists were abusing the system to avoid deportation."[46] Significantly, in the REAL ID Act Congress amended the language requisite to receive asylum under the INA. Before the amendment of the INA by the REAL ID Act, "[the INA] did not specify the burden of proof to be carried by the applicant, as now codified in § 1158(b)(2)(B)(ii)."[47] Prior to the REAL ID Act, some courts had held that "the [Board of Immigration Appeals] may not require independent corroborative evidence from an asylum applicant who testifies credibly in support of his application."[48] Section 1158(b)(2)(B)(ii) of the INA now states:

> The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.[49]

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39. *See generally* MARGARET SANDS ORCHOWSKI, THE LAW THAT CHANGED THE FACE OF AMERICA (2015).
40. *Id.* at 40.
41. 19 U.S.T. 6223 (1967).
42. Pub. L. No. 96-212, 94 Stat. 102 (1980).
43. *Id.*
44. Jon Bauer, *Multiple Nationality and Refugees*, 47 Vand. J. Transnat'l L. 905, 928 (2014).
45. Real ID Act of 2005, Pub. L. No. 109-13, Div. B, Title I, § 101(a) (modifying conditions for granting asylum under the INA by adding language regarding the burden of proof for an applicant); *See also* Saravia v. Att'y. Gen. U.S., 905 F.3d 729, 736 (3d Cir. 2018).
46. BANKS MILLER, ET AL., IMMIGRATION JUDGES AND U.S. ASYLUM POLICY 166 (2014).
47. *Id.*
48. Ren v. Holder, 648 F.3d 1079, 1090 (9th Cir. 2011).
49. 8 U.S.C. § 1158(b)(2)(B)(ii) (1980).

Adding this language has created tension between the circuits and the Board of Immigration Appeals as to the appropriate interpretation of the third sentence of § 1158(b)(2)(B)(ii).

A. *The Board of Immigration Appeals' Interpretation of § 1158(b)(2)(B)(ii)*

The Board of Immigration Appeals is a body within the Department of Justice that "is directed to exercise its independent judgment in hearing appeals for the Attorney General."[50] Under § 1158(b)(1)(A), the Attorney General, and by extension immigration judges and the Board of Immigration Appeals, "may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by . . . the Attorney General."[51] As an executive agency, the Board is entitled to *Chevron* deference to its interpretation of the INA when it interprets a purportedly ambiguous provision. The Supreme Court has explained that "[j]udicial deference to the Executive Branch is especially appropriate in the immigration context where officials exercise especially sensitive political functions that implicate questions of foreign relations."[52] The agency must first be imbued with the authority to enact rules and procedures before it may receive deference.[53] *Chevron* deference is a judicially created doctrine which performs a two-step analysis. "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[54] The analysis, however, must not end if the language of the provision at issue is deemed ambiguous, "[r]ather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[55]

In the underlying hearings in *Saravia*, the Board of Immigration Appeals relied on its interpretation and procedures outlined in their decision in *Matter of L-A-C-*.[56] In *Matter of L-A-C-*, the Board explained that "[i]ssues regarding whether the language is plain and unambiguous are 'determined by reference to the language itself, the specific context in which that language is used, and

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50. *Board of Immigration Appeals*, JUSTICE.GOV, https://www.justice.gov/eoir/board-of-immigration-appeals (last visited Mar. 26, 2019).

51. 8 U.S.C. § 1158(b)(1)(A) (1980); *see also* 8 U.S.C. § 1158(d)(1) ("Applications. The Attorney General shall establish a procedure for the consideration of asylum applications."); 8 U.S.C.S § 1229(a)(1) (stating "[a]n Immigration Judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.").

52. INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999).

53. *See* United States v. Mead, 533 U.S. 218, 230 (2001) (stating that *Chevron* deference applies where it is clear that Congress delegated authority to the agency to make rules carrying the force of law).

54. Chevron U.S.A. Inc v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

55. *Id.* at 843.

56. Saravia v. Att'y Gen. U.S., 905 F.3d 729, 731, 733, 737 (3d Cir. 2018) (citing Matter of L-A-C-, 26 I. & N. Dec. 516, 518 (B.I.A. 2015)).

the broader context of the statute as a whole.'"[57] The Board determined that "although [§ 1158(b)(2)(B)(ii)] clearly states that an immigration judge may require the submission of corroborating evidence even where an applicant's testimony is credible, it is ambiguous with regard to what steps must be taken when the applicant has not provided such evidence."[58] The Board then turned to the "context of the statute as a whole and the legislative history for guidance,"[59] and determined that "[t]he REAL ID Act [made] it clear that an applicant who seeks asylum or withholding of removal has the burden of demonstrating eligibility for such relief, which may require the submission of corroborative evidence."[60] This burden is placed on the applicant "without advance notice from the immigration judge."[61] Rather than a rule that advance notice need be given to applicants, the Board argued that "[r]equiring advance notice of the need for specific corroborating evidence and an automatic continuance would be inconsistent with the normal procedures for conducting immigration court proceedings."[62]

B. *The Third Circuit Approach to § 1158(b)(2)(B)(ii)*

In *Saravia*, the Third Circuit reviewed the Board's interpretation of § 1158 (b)(2)(B)(ii) and held that it was not reasonable.[63] The panel found that they could not "conclude on review that it was fair to require Saravia to provide further corroboration without telling him so and giving him the opportunity either to supply that evidence or to explain why it was not reasonable," and that "[u]nder any other rule, [the court's review] is not meaningful."[64] Recognizing the difficulties that any other rule would create, the Third Circuit held that "[j]ustice requires that an applicant for asylum be given a meaningful opportunity to establish his or her claim" and that "[t]o decide otherwise is illogical temporally and would allow for 'gotcha' conclusions in Immigration Judges' opinions."[65]

C. *The Ninth Circuit Approach to § 1158(b)(2)(B)(ii)*

The Ninth Circuit reached the same conclusion as the Third Circuit, holding that an Immigration Judge must provide an asylum applicant with notice "and an opportunity to either produce the evidence or explain why it is unavailable before ruling that the applicant has failed in his obligation to provide corroborative evidence and therefore failed to meet his burden of

57. *Matter of L-A-C-*, 26 I. & N. Dec. at 518.
58. *Id.*
59. *Id.*
60. *Id.* at 519.
61. Matter of L-A-C-, 26 I. & N. Dec. 516, 519 (B.I.A. 2015).
62. *Id.* at 520.
63. Saravia v. Att'y Gen. U.S., 905 F.3d 729, 737 (3d Cir. 2018).
64. *Id.*
65. *Id.* at 737-38.

proof."[66] Recognizing the split in the circuits, the Third Circuit stated that their approach differed from the Ninth Circuit as the Third Circuit's rule "derives principally from the fact that [the court] cannot have meaningful review without giving the applicant notice and an opportunity to corroborate."[67] In contrast, the Ninth Circuit found that "[a] plain reading of the statute's text makes clear" the obligation to provide an applicant notice of the need to provide corroborating evidence.[68]

The Ninth Circuit turned first to the statute's language and found that "the Act does not say 'should *have* provided,' but rather 'should provide,' which expresses an imperative that the applicant must provide further corroboration in response to the [Immigration Judge's] determination," and that the "applicant cannot act on [the Immigration Judge's] determination that he 'should provide' corroboration . . . if he is not given notice of that determination until it is too late to do so."[69] The court then looked to the "grammatical structure of the controlling clause" of § 1158(b)(2)(B)(ii), which requires that "corroborating evidence 'must be provided' in the event that the [Immigration Judge] determines that it should be provided."[70] The court found that this language "focuses on conduct that *follows* the [Immigration Judge's] determination, not *precedes* it," and that "the statute's future directed language means that the applicant must be informed of the corroboration that is required."[71] As the court found that the unambiguously expressed intent of Congress was to require that an applicant receive notice from an Immigration Judge of the need to provide corroborating evidence to otherwise credible testimony, the court did not proceed further or defer to the agency's interpretation of the statute.[72]

Though under the doctrine of *Chevron*, if "the intent of Congress is clear, that is the end of the matter,"[73] the Ninth Circuit additionally argued that "the canon of constitutional avoidance requires [the court] to come to [this result]."[74] "Under the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems."[75] Here, the Ninth Circuit considered possible implications of due process that a different rule would implicate,

66. Ren v. Holder, 648 F.3d 1079, 1090 (9th Cir. 2011).
67. *Saravia*, 905 F.3d at 738 (citing *Ren*, 648 F.3d at 1091-92).
68. *Ren*, 648 F.3d at 1090.
69. *Id.* at 1091.
70. *Id.*
71. *Id.*
72. *Id.* at 1092.
73. Chevron U.S.A., Inc. v. NRDC , 467 U.S. 837, 843 (1984); *See* Ren v. Holder, 648 F.3d 1079, 1092 (9th Cir. 2011) (noting the Ninth Circuit in *Ren* did not resolve a pure *Chevron* question, as the controlling case at issue in this Note, *Matter of L-A-C-*, was issued in 2015. The Ninth Circuit, however, did apply the *Chevron* framework in its interpretation of § 1158(b)(1)(B)(ii) (citing *Chevron*, 467 U.S. at 843)).
74. Ren v. Holder, 648 F.3d 1079, 1092 (9th Cir. 2011).
75. Jennings v. Rodriguez, 138 S. Ct. 830, 836 (2018) (Alito, J.).

noting that the "REAL ID Act did not change [the court's] clear caselaw that requires a 'full and fair hearing' in deportation proceedings."[76] The Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."[77] The court concluded that "[a] requirement that something be provided even *before* notice is given would raise [] due process concerns."[78]

D. *The Seventh, Sixth, and Second Circuit Approach to § 1158(b)(2)(B)(ii)*

Prior to the Board's interpretation of the language of § 1158(b)(1)(B)(ii), the Seventh, Sixth, and Second Circuits concluded that there is no notice requirement based on a statutory interpretation of the language.[79] The Seventh Circuit held that "the REAL ID Act clearly states that [] corroborative evidence may be required, placing immigrants on notice of the consequences for failing to provide corroborative evidence."[80] The court further explained that in their eyes, "[t]o hold that a petitioner must receive additional notice from the [Immigration Judge] and then an additional opportunity to provide corroborative evidence before an adverse ruling, would necessitate two hearings,"[81] which "would add to the already overburdened resources of the [Department of Homeland Security]," and that a contrary rule would be "imprudent where the law clearly notifies aliens of the importance of corroborative evidence."[82] In the Sixth Circuit, the court held that "federal law does not entitle illegal aliens to notice from the Immigration Court as to what sort of evidence the alien must produce to carry his burden."[83] The court did acknowledge that the Ninth Circuit had held that the text "unambiguously mandates such notice," but stated that it was "plainly erroneous" to conclude so.[84] Examining § 1158(b)(2)(B)(ii), the Sixth Circuit found that the "text does not suggest that the alien is entitled to notice from the [Immigration Judge] as to what evidence the alien must present" and that such a rule would "create the result 'that a petitioner must receive additional notice from the [Immigration Judge] and then an additional opportunity to provide corroborative evidence before an adverse ruling, [and thus] necessitate two hearings.'"[85] Similar to the holding in the Sixth Circuit, the Second Circuit held that "the alien bears the ultimate burden of introducing [corroborative evidence] without prompting from the [Immigration Judge]."[86]

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76. *Ren*, 648 F.3d at 1092.
77. U.S. CONST. amend. V, cl. 4.
78. *Ren*, 648 F.3d at 1092-93.
79. Liu v. Holder, 575 F.3d 193 (2d Cir. 2009); *accord* Gaye v. Lynch, 788 F.3d 519 (6th Cir. 2015); Raphael v. Mukasey, 533 F.3d 521, 530 (7th Cir. 2008).
80. *Mukasey*, 533 F.3d at 530.
81. *Id.*
82. *Id.*
83. *Gaye*, 788 F.3d at 530.
84. *Id.*
85. *Id.* at 529 (quoting Raphael v. Mukasey, 533 F.3d 521, 530 (7th Cir 2008)).
86. Liu v. Holder, 575 F.3d 193, 198 (2d Cir. 2009).

IV. DISCUSSION

A proper approach to the language of § 1158(b)(2)(B)(ii) must be premised on a satisfactory statutory analysis that results in a reasonable interpretation. The Seventh, Sixth, and Second Circuit seemingly rely on the plain text of the statute to support their interpretation, but still explore and place weight on possible practical results of different interpretations. The Board, on the other hand, argues that the language is ambiguous.[87] Judicial construction of a statute may only apply if that construction is based on unambiguous terms.[88] The Ninth Circuit's approach, therefore, displaces the Board's interpretation of § 1158(b)(2)(B)(ii) because it is premised on the fact that the language is unambiguous.[89] Assuming, *arguendo*, that the language is ambiguous, the approaches taken by the Board and the Second, Sixth, and Seventh Circuits are not reasonable interpretations of the statute because any interpretation which does not provide an alien notice that they must provide corroborating evidence to their otherwise credible testimony causes irreconcilable issues with procedural due process and the adequacy of future judicial review.[90] Therefore, reviewing courts not basing their interpretation on an unambiguous interpretation of the statute must not defer to the Board its interpretation is unreasonable.

A. *The Board of Immigration Appeals' Interpretation Is Not Reasonable*

The Board of Immigration Appeals is only entitled to deference if there is some ambiguity in the language of the statute, and their interpretation of that language is a reasonable one.[91] Whether language is ambiguous is "determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[92] In *Matter of L-A-C-*, the Board argues that the "Act clearly states that an Immigration Judge may require the submission of corroborating evidence even where an applicant's testimony is credible," yet nonetheless concludes that the language of the statute is "ambiguous with regard to *what steps* must

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87. *See* Matter of L-A-C-, Applicant, 26 I. & N. Dec. 516, 518 (B.I.A. 2015).
88. Nat'l Cable & Telecomms. Ass'n v. Brand. X, 545 U.S. 967, 982-83 (2005)
89. Ren v. Holder, 648 F.3d 1079, 1090 (9th Cir. 2011).
90. There is serious question as to whether the language is in fact ambiguous or unambiguous. The Ninth Circuit has found that the language of the statute unambiguously requires notice. *Ren*, 648 F.3d at 1090. Others have similarly argued that the language is unambiguous and requires notice and an opportunity to respond. *See, e.g.*, Reconciling Expectations with Reality: The REAL ID Act's Corroboration Exception for Otherwise Credible Asylum Applicants, 115 Mich. L. Rev. 554, 558 (analyzing the Congressional intent to require notice). In contrast, the Seventh, Sixth, and Second Circuit do not find that the language of the statute unambiguously requires notice. *See supra* note 4. This Note does not advocate for one position or the other on the purported ambiguity of the statute, however, instead contends that where the Board's interpretation has not been displaced by a conflicting Circuit opinion couched in unambiguous language, an interpretation not requiring notice fails because it violates due process.
91. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 843 (1984).
92. Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997).

be taken when the applicant has not provided such evidence."[93] The Board then argues that "[t]he overall purpose of enacting [§ 1158(b)(1)(B)] was to allow Immigration Judges to follow common sense standards in assessing asylum claims without undue restrictions," and that the "intent was not to create additional procedural requirements relating to the submission and evaluation of corroborating evidence."[94]

This approach, though espousing the virtues of "commonsense standards," ignores the real, detrimental implications that such an interpretation would yield as to the procedural due process rights of an applicant. The Supreme Court, in the seminal *Mathews* decision explained that "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."[95] Further, "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by [the Due Process Clause's] protection of liberty and property."[96] This clause applies in the immigration context in "[i]mmigration proceedings, [which] although not subject to the full range of constitutional protections, must conform to the Fifth Amendment's requirement of due process."[97] In this context, "[d]ue process is violated if there is a defect in the proceeding that actually results in prejudice against the petitioner, one that leads to a substantially different outcome from the result he would have obtained absent the violation."[98] The Board's interpretation of the language of § 1158(b)(1)(B)(ii), and the interpretations of the language by the Seventh, Sixth, and Second Circuit, cannot be reasonable because they lead directly to an issue implicating due process: a reasonable doubt that an applicant has been given a full and fair hearing on their claim of asylum. "A full and fair hearing is one of the due process rights afforded to aliens in deportation proceedings."[99] If an applicant is told that they are credible, but simultaneously admonished for not providing additional evidence to further their credibility, even though they were unaware of a need to provide this evidence, it cannot be said with any sincerity that the applicant has enjoyed a full and fair hearing that due process requires. The Seventh, Sixth, and Second Circuit's reasoning is devoid of this consideration, and the Board's approach should lead a reviewing court to refuse to defer to the agency as it raises serious constitutional doubts.[100]

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93. Matter of L-A-C-, 26 I. & N. Dec. 516, 518 (2015) (emphasis added).

94. *Id.*

95. Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

96. Bd. of Regents v. Roth, 408 U.S. 564, 569 (1972).

97. Salgado-Diaz v. Ashcroft, 395 F.3d 1158, 1162 (9th Cir. 2005).

98. Gaye v. Lynch, 788 F.3d 519, 527 (6th Cir. 2015).

99. Gutierrez v. Holder, 662 F.3d 1083, 1091 (9th Cir. 2011); *Lynch*, 788 F.3d at 527 (stating that the due process clause is a "constitutional provision [that] entitles an alien to a full and fair immigration hearing."); *Id.* at 533 (White, J., dissenting) ("The Fifth Amendment's guarantee of due process extends to persons in removal proceedings, entitling them to a full and fair hearing.").

100. A court can refuse to defer to an agency's interpretation where that interpretation raises constitutional questions. *See, e.g.*, Diouf v. Napolitano, 634 F.3d 1081, 1090 (9th Cir. 2011) (holding "[w]e may not defer to [an agency's] regulations . . . if they raise grave constitutional doubts."); Nat'l Mining

When a question of adequate due process is invoked, a court must turn to the *Mathews v. Eldridge* test which requires that the court must balance the private interests affected by the official action with the governmental interests, taking into account the risk of erroneous deprivation of the private interest. The Board essentially states that notice is too burdensome to be provided to an applicant. Yet proceedings are currently separated into "master calendar and merit hearings."[101] "Generally, in master calendar hearings, pleadings are taken, legal and factual issues in dispute are identified and narrowed, and continuances for good cause such as to secure counsel or obtain evidence in preparation for the hearing on the merits of any application for relief from removal."[102] The Board recognizes that at the merit hearings the Immigration Judge may ask for corroborating evidence, and that the applicant should be given an opportunity to explain why he could not reasonably obtain the evidence and "must ensure that the applicant's explanation is included in the record and should clearly state for the record whether the explanation is sufficient."[103]

Even with the current dual-hearing system, an applicant could not know that they are charged with bringing corroborating evidence, or a "sufficient" explanation why that evidence is unavailable to the merit hearing if they are not told to bring this evidence in the first place. The Board relies on the Seventh Circuit case, *Rapheal v. Mukasey*, that states "[t]o hold that a petitioner must receive additional notice from the [Immigration Judge] and then an additional opportunity to provide corroborative evidence before an adverse ruling, would necessitate two hearings," and that "such an approach would seem imprudent where the law clearly notifies aliens of the importance of corroborative evidence."[104] This ignores, as the Board previously explained, the fact that there already are two hearings that must be scheduled. In fact, the Board states that at the master calendar hearings, "parties are given advisals and warnings, including deadlines for submitting evidence."[105] The Board points out in *Matter of L-A-C-* that "the instructions for the Application for Asylum and Withholding of Removal (Form I-589) [which Saravia filled out][106] provide additional notice to an applicant that he 'must submit reasonably available corroborative evidence' relating to . . . the specific facts upon which the claim is based."[107] In addition, "[t]he instructions further warn the applicant that he must provide an explanation if such evidence is not reasonably available or he is not providing corroborating

Ass'n v. Kempthorne, 512 F.3d 702, 711 (D.C. Cir. 2008) (internal quotations omitted) (holding "[the] canon of constitutional avoidance trumps *Chevron* deference, and we will not submit to an agency's interpretation of a statute if it presents serious constitutional difficulties.").

101. Matter of L-A-C-, Applicant, 26 I. & N. Dec. 516, 520-21 (B.I.A. 2015).
102. *Id.* at 521.
103. *Id.* at 521-22.
104. Raphael v. Mukasey, 533 F.3d 521, 530 (7th Cir 2008).
105. *Matter of L-A-C-*, at 520-21.
106. Saravia v. Att'y Gen. U.S., 905 F.3d 729, 732 (3d Cir. 2018).
107. Matter of L-A-C-, Applicant, 26 I. & N. Dec. 516, 520 (B.I.A. 2015).

evidence in support of his application"[108] Yet even though Saravia was represented by counsel and had attended a preliminary master hearing after filling out this form, he was unaware that he may be asked to provide corroborating evidence for his otherwise credible testimony. The argument that notice of the need to provide corroborating evidence does not be given an applicant is particularly troubling in the context of asylum applicants who appear *pro se*, may be unfamiliar with the legal process in general, and may have spent only a minimal amount of time in the United States and would therefore be unfamiliar with any of its laws or procedures.

Applying the *Mathews* test, the result must be that any rule which states that an applicant need not be given notice is not tenable because any governmental burden is outweighed by the applicant's private interest in a full and fair hearing. In a removal proceeding, an applicant's ability to stay in the United States is at risk. Saravia, at the time of his removal hearing, had already stayed in the United States for almost half of his life.[109] By staying in the United States for such a protracted period of time, Saravia formed the majority of his life in the United States and has a significant personal interest in staying. *Mathews* requires that this private interest be balanced against the governmental interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[110] The Board, invoking the coquettish reasoning of the Seventh Circuit, has made clear that additional notice would necessitate two hearings which would be "imprudent" and "burdensome." Indeed, immigration courts are generally overwhelmed with the number of cases.[111] Notwithstanding the already overburdened immigration system, this argument must fail as the master calendar-merit hearing scheme already requires, without issue, two hearings for any individual applicant.[112] *Mathews* directs a court to consider the risk of erroneous deprivation and the value of additional procedure.[113] There can be no doubt that the risk Saravia faced was the threat of serious harm upon his return to El Salvador as the Immigration Judge found him to be credible.[114] Saravia could not benefit from a post deprivation

108. *Id.*

109. *Saravia*, 905 F.3d at 731-32.

110. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

111. See *infra* note 143 (explaining that the number of immigration judges and staff would have to be doubled before there was an impact on the volume of cases that the system hears).

112. Even though requiring more than the scheduled master scheduling and merits hearing would additionally not outbalance the private interest in the applicant's rights to a full and fair hearing, there is the possibility that the notice issue may be resolved in the current scheme. *See* Ren v. Holder, 648 F.3d 1079, 1092 n. 12 (9th Cir. 2014). The applicant may be asked about any corroborating evidence at the calendar hearing, and if he states that he does not have any or cannot reasonably obtain it, the judge would be able to determine if that were the case before proceeding to the merit hearing. Subsequently, at the merits hearing, the applicant would have been given notice of the need to provide corroborating evidence and be prepared to do so. Regardless of this possibility, a court must still require notice before the final hearing under the *Mathews* test, even if that result requires multiple "merit" hearings.

113. *Id.*

114. Saravia v. Att'y Gen. U.S., 905 F.3d 729, 733 (3d Cir. 2018).

hearing, as he would already have been returned to El Salvador. Indeed, any applicant facing removal would not benefit from a post deprivation hearing for the same reason that they would have already been forced to leave the United States.

The result of this balancing test is that the applicant must be given notice, prior to his hearing, that he may need to provide corroborating evidence. This rule must apply even if this would require multiple hearings. Any other rule that would place the notice to provide evidence after the hearing "is illogical temporally."[115] The applicant will not have an opportunity to corroborate his testimony, already found to be credible, as an Immigration Judge may deny his application on the grounds of failure to provide evidence under § 1158(b)(1)(B)(ii) before he even knows he was expected to provide this evidence. In essence, the applicant would be required to corroborate, if at all possible, his testimony on the same day as his hearing. The Ninth Circuit underscored the difficulties resulting from this approach, noting that where an applicant cannot explain inconsistencies perceived by the fact-finder, the applicant's Fifth Amendment guarantee of a "full and fair hearing[]" would be defeated.[116] The Board subsequently does not have the ability to receive any evidence on appeal, even though the applicant may have otherwise had access to it. The government's interest in reducing the number of hearings that any individual applicant may be afforded cannot outweigh the private interest of an applicant remaining in a country, where the alternative may be severe harm, and where there already exists a scheme of multiple hearings.[117] Because the interpretation of the Board leads directly to this conflict, even if the Board should be afforded *Chevron* deference, the canon of constitutional avoidance dictates that notice must be provided and trumps any other construction of the statute.[118]

A framework requiring notice additionally does not remove an Immigration Judge's ability to faithfully exercise their duties under the INA

115. *Id.* at 738.

116. Ren v. Holder, 648 F.3d 1079, 1092 (9th Cir. 2011).

117. Saravia had the opportunity at his hearing to be represented by counsel. *See Saravia*, 905 F.3d at 732. This does not diminish the fact that the applicant must be given notice. Approximately one-third of applicants seeking asylum appear *pro-se*. *Supra* note 26 (stating "approximately one-third of asylum seekers in immigration court are unrepresented."). "When an applicant has no representative, the Immigration Judge must play a particularly active role in questioning the applicant and building the factual record." *Id.* Though some applicants have the luxury of being aided by counsel, an Immigration Judge's role must be to provide a level playing field for all applicants, especially where the applicant is seeking asylum in removal proceedings, like Saravia. *Id.* (arguing "[i]t is . . . of the utmost importance that immigration court proceedings be fair and predictable, as a loss in immigration court will probably result in an order of removal – a possible death sentence for some asylum seekers whose cases are wrongly denied."). *If* a *pro-se* applicant, or even an applicant represented by counsel, does not know of the need to provide corroborating evidence, the judge will have failed to provide a full and fair hearing in violation of the Fifth Amendment. In addition, particularly in the case of *pro se* applicants, they will not have the opportunity to rely on the factual record on review because the underlying judge has failed to develop it by requesting the information.

118. Hernandez-Carrera v. Carlson, 547 F.3d 1237, 1249 (10th Cir. 2008) ("It is well established that the canon of constitutional avoidance does constrain an agency's discretion to interpret statutory ambiguities, even when *Chevron* deference would otherwise be due.").

to determine whether the applicant has sustained their burden of proof to show that they are credible and eligible for asylum. Under § 1158(b)(1)(B)(iii), an Immigration Judge is permitted to "base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness" including the plausibility of the statement and the consistency between the statements.[119] If an applicant's testimony is "not sufficient by itself, then the [Immigration Judge] may require corroborative evidence" under current law.[120] This "sequential analysis"[121] does not preclude a judge's ability to determine that the applicant in question is not "credible, [] persuasive, and [has not] refer[red] to specific facts sufficient to demonstrate that [the applicant] is a refugee" in the first instance.[122] In that case, the judge may then proceed, without the need to give notice to provide corroborating evidence, to deny an alien's application. The rule of notice for corroboration does not aggrandize the power of the applicant to get *extra* chances, it only serves to ensure that the applicant receive a *fair* chance.

B. *The Board of Immigration Appeals' Interpretation Also Frustrates Judicial Review*

In creating this illogical approach to immigration hearings, the Board places emphasis that the applicant's explanation as to why corroborating evidence may not be available must be included in the record,[123] which recognizes the need to preserve this information for use in later proceedings. The Board's interpretation of § 1158(b)(1)(B)(ii)—and any other court adopting a similar interpretation—is not reasonable if it both places an emphasis on the need to develop a full record and simultaneously limits the ability of an applicant to develop that record. Beyond the fact that this interpretation would not be reasonable because of the need to develop the record, it again raises questions of adequate due process for the applicant. The court in *Saravia* recognized the importance of the relationship between a fully developed record at the immigration judge level and the feasibility of its review in a later proceeding. The court held that the "opportunity to supply evidence or explain why it is not available can only occur before the Immigration Judge rules on the applicant's position," and that "[t]o decide otherwise is illogical temporally and would allow for 'gotcha' conclusions in Immigration Judges' opinions."[124] A correct interpretation of § 1158(b)(1)(b)(ii) must consider the implications of an incomplete record in the context of the due process requirement for a full and fair hearing as the court in *Saravia* did.

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119. 8 U.S.C. § 1158(b)(1)(B)(iii) (2012).
120. Wang v. Sessions, 861 F.3d 1003, 1009 (9th Cir. 2017).
121. *Id.*
122. *Id.* (quoting 8 U.S.C. § 1158(b)(1)(B)(ii)).
123. Matter of L-A-C-, Applicant, 26 I. & N. Dec. 516, 521 (B.I.A. 2015).
124. Saravia v. Att'y Gen. U.S., 905 F.3d 729, 737-38 (3d Cir. 2018).

A Board of Immigration Appeals order is a final order within the meaning of the Administrative Procedures Act.[125] A federal court's scope of review is limited to certain standards that must be used when reviewing agency action. The APA states that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence . . . or otherwise reviewed on the record of an agency hearing provided by statute."[126] In particular, "in dealing with a determination or judgment which an administrative agency alone is authorized to make, [a reviewing court] must judge the propriety of such action solely by the grounds invoked by the agency."[127] A reviewing court, therefore, "may only consider the reasons provided by the Board" and where the Board adopts the Immigration Judge's findings a court may also consider the Immigration Judge's decision.[128] Within the INA, the Act provides that "the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,"[129] and that "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary."[130]

An Immigration Judge therefore has an obligation to develop the record so a reviewing court may decide what a reasonable adjudicator would conclude.[131] The Board itself recognizes the importance of developing the full record, stating that "all evidence which is pertinent to determinations made during deportation proceedings, such as the determination of the respondent's eligibility for suspension of deportation, must be adduced in the hearing before the Immigration Judge."[132] The judge's role is paramount because "[t]he Board is an appellate body, whose function is to review, not to create a record."[133] Even if an applicant procures corroborating evidence after his hearing before the Immigration Judge, specifically when he was otherwise unaware that he needed to provide this evidence, he will be unable to proffer this evidence to the Board or to a reviewing court of appeals. The language of

125. As an administrative agency, the Board of Immigration Appeals is subject to the Administrative Procedure Act ("APA"). Under 5 U.S.C. § 702, "[A] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Within this grant of judicial reviewability, the APA dictates that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. The INA additionally describes the timing of appeal for an applicant. 8 U.S.C.S § 1252(d) ("Review of final orders. A court may review a final order of removal only if – (1) the alien has exhausted all administrative remedies available to the alien as of right.").

126. 5 U.S.C. § 706(2)(E) (2012).

127. Sec. &. Exch. Comm'n v. Chenery Corp., 332 U.S. 194, 196 (1947).

128. *Saravia*, 905 F.3d at 734; Gaye v. Lynch, 788 F.3d 525, 526 (6th Cir. 2015); Mulayni v. Holder, 771 F.3d 190, 196 (4th Cir. 2014); Thu v. Holder, 596 F.3d 994, 998 (8th Cir. 2010). *Accord* Ren v. Holder, 648 F.3d 1079, 1083 (9th Cir. 2014).

129. 8 U.S.C.S. § 1252(b)(4)(A) (2005).

130. § 1252(b)(4)(B).

131. Saravia v. Att'y Gen. U.S., 905 F.3d 729, 736 (3d Cir. 2018).

132. Matter of Fedorenko, 19 I. & N. Dec. 57, 74 (B.I.A. 1984).

133. *Id.*

the INA itself contemplates the later importance of judicial review[134] and must be considered when analyzing a potential constitutional issue under *Mathews*. Though a reviewing court is imbued with the authority to review administrative findings of fact, they are held to be conclusive unless "any reasonable adjudicator would be compelled to conclude to the contrary."[135] A court, however is unable to determine what a reasonable adjudicator would have determined in the case of an applicant where the record has not been developed. An interpretation of § 1158(b)(1)(B)(ii) leading to this situation is especially egregious where it is not the applicant's fault that the record is not developed. For example, in the context of *Saravia*, it was evident that the applicant not only had access to corroborating evidence, his mother was sitting outside the courtroom. The judge simply never made clear the applicant's obligation to supply this evidence.[136] Though an applicant may have additional corroborating evidence, the Immigration Judge at the underlying hearing can essentially choose not to hear all possible evidence and testimony because of a failure to ask the applicant to provide such evidence. Subsequently, an applicant's ability to seek further review will have been frustrated.

The INA further states that "no court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence . . . unless the court finds . . . that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable."[137] The Board's current interpretation frustrates the Immigration Judge's obligation to develop the record with respect to the availability of corroborating evidence. If an applicant is not given notice that they must provide corroborating testimony or explain its unavailability, until after the judge has made a credibility determination and final ruling, their ability to provide this information for the record is defeated. A court reviewing a matter may not decide to hear additional evidence as their scope of review in § 1252(b)(4) makes clear that if the record is absent any evidence from the applicant, because they did not know they had to provide any until it was too late, they are unable to disagree with the underlying decision as to whether the corroborating evidence may actually exist or not. The reviewing court may not depart from the record and hear this additional evidence as they are limited to the "substantial evidence" on the record and the basis for determination given in the final agency action under the APA. An applicant, suffering in any circuit that may apply a no-notice rule, is left without the availability of judicial review of his claim, even though he may statutorily have grounds for this judicial review.

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134. § 1252(b)(4) ("Scope and standard for review. Except as provided in paragraph (5)(B)—(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based, (B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.").

135. *Id.*

136. Saravia v. Att'y Gen. U.S., 905 F.3d 729, 733 (3d Cir. 2018).

137. 8 U.S.C.S. § 1252(b)(4) (2005).

This lack of judicial review necessarily implicates questions of due process. If an applicant is subject to a hearing where they are not given the notice of the need to corroborate their testimony, and such failure to give notice additionally precludes judicial review, the applicant will have been deprived of his opportunity to represent any evidence on his behalf in contravention of the Fifth Amendment.[138] In *Saravia*, the applicant subsequently sought to introduce the necessary evidence at his appeal with the Board, however his ability to do so was precluded by the Board's procedures.[139] Even though Saravia had the requisite evidence to receive relief under asylum laws, he was unable to produce this evidence because of the current scheme which places emphasis on the importance of developing a full record, but provides no recourse for an applicant whose Immigration Judge fails to do so.[140] The Board's interpretation exacerbates this issue, as judges may simply decide that because the applicant need not be told about the need to provide more evidence, they may decide without it. The Third Circuit in *Saravia* explained that this approach would leave an appeals court review "not meaningful."[141] As the Board's current construction leads directly to this constitutional difficulty, the statute must be interpreted away from this conflict.[142]

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138. *See* Salgado-Diaz v. Ashcroft, 395 F.3d 1158, 1162 (9th Cir. 2005); Ren v. Holder, 648 F.3d 1079, 1092 (9th Cir. 2011) (arguing that depriving a person of "his guarantee of a reasonable opportunity to present evidence on his behalf" violates Fifth Amendment caselaw); *see also* Colmenar v INS, 210 F.3d 967, 971 (9th Cir. 2000) (explaining that "an alien who faces deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf."). The court in *Colmenar* explained that "claims of due process in deportation proceedings are" reviewed under a *de novo* standard, and reversal is permitted where the Board's decision was "so fundamentally unfair that the alien was prevented from reasonably presenting his case." *Id*. This must additionally be the case where the applicant has not been given notice at the immigration judge level of a need to provide corroborating evidence, and the availability of review of that evidence is then necessarily precluded at the later stages of judicial review, as the applicant will have similarly been unable to present his evidence and reasonably present his case.

139. *See Saravia*, 905 F.3d at 734 (explaining that "[t]he Board, ignoring supplemental evidence provided by Saravia on appeal (as required by law), affirmed."); *See also* Matter of Fedorenko, 19 I. & N. Dec. 57, 73-74 (B.I.A. 1984) ("[A]ll evidence which is pertinent to determinations made during deportation proceedings, such as the determination of the respondent's eligibility for suspension of deportation, must be adduced in the hearing before the Immigration Judge.").

140. *Saravia* recognized this difficulty, holding that the notice requirement "derive[d] principally from the fact that [the reviewing court] cannot have meaningful judicial review without giving the applicant notice and an opportunity to corroborate." 905 F.3d at 738. Though the Court in *Saravia* was careful to point out that their result differed from the result in the Ninth Circuit because of the emphasis on judicial review, the argument that preclusion of judicial review implicates due process is inherent in that analysis because it would be impossible for [the Court] to determine whether a reasonable trier of fact would be compelled to conclude" the same as the Immigration Judge if the Immigration Judge does not give the applicant the opportunity to present their evidence. *Toure v. Att'y Gen. U.S.*, 443 F.3d 310, 325 (3rd Cir. 2006). This then raises the question as to whether an applicant has received a full and fair hearing. *See supra Salgado-Diaz* note 138.

141. *See* Saravia v. Att'y Gen. U.S., 905 F.3d 729, 737 (3d Cir. 2018) (explaining that "[u]nder any other rule, [the court's review] is not meaningful.").

142. *See* Nadrajah v. Gonzales, F.3d 1069, 1076 (9th Cir. 2006) (explaining that the canon of constitutional avoidance "requires a statute to be construed so as to avoid serious doubts as to the constitutionality of an alternate construction.").

V. CONCLUSION

Immigration courts are undeniably overburdened.[143] This, however, is no excuse to deprive applicants of their constitutional rights. The most workable approach to interpreting § 1158(b)(1)(B)(ii) is one that requires sufficient and appropriate notice to an applicant that they must provide corroborating evidence before their application is denied. This notice may be provided at the already scheduled master calendar hearing, through which an applicant receives other information about the subsequent merits hearing. By providing the notice at a master hearing, the burden on the government is reduced, though, on balance, no burden on the government outweighs the applicant's interest in receiving this notice. A scheme requiring multiple "merit" hearings would also be appropriate. Though the Third Circuit and the Ninth Circuit approaches to § 1158(b)(1)(B)(ii) ultimately reach the same, correct, conclusion, a joint approach applying the reasoning from both Circuits encapsulates the importance of both the adequacy of the record for judicial review and ensures that the procedural rights of the applicant are protected. The Board's interpretation of §1158(b)(1)(B)(ii) violates the Fifth Amendment and is not a tenable construction of the statute, even if the language is ambiguous and a court should otherwise defer to the agency. The Seventh, Sixth, and Second Circuits do not place enough weight on the implications of their interpretation–that leaving an applicant without notice that they must provide corroborating evidence to their credible testimony forecloses their ability to seek judicial review of the agency's action and infringes on their procedural due process rights guaranteed under the Constitution.

143. *See* Judge Paul Grussendorf, My Trials: Inside America's Deportation Factories 12 (2d ed. 2011) (stating "the number of judges and court staff would [] have to be doubled to have any meaningful impact on the overall quality of justice that is meted-out in these deportation factories.").