YOUR MARRIAGE DIDN'T LAST, BUT YOUR OBLIGATIONS WILL: WHY NUPTIAL AGREEMENTS SHOULD BE ENFORCEABLE AGAINST SPONSORED IMMIGRANT SPOUSES UNDER THE I-864 AFFIDAVIT OF SUPPORT

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I. INTRODUCTION

Alexia has lived her entire life in rural Southern Illinois, in a town so small that its post office is inside a trailer, and the biggest local attraction is the newly built Dollar General.[2] Alexia has always been a romantic and was thrilled when she had the opportunity to spend the summer of her junior year of college studying abroad in Madrid, Spain. There, she met Anton, a native of Madrid. The young lovers stayed in touch after she returned to Illinois, and they married soon after in 2004. Alexia's friend, Mikayla, who grew up in the small town with Alexia, also married that year.

Alexia ultimately decided that the quickest way to bring Anton to the United States was by filing Form I-130 Petition for Alien Relative, which requires the completion of Form I-864 Affidavit of Support.[3] Alexia was hesitant to commit to the financial support obligation under the Affidavit because she had only known Anton for a few years. However, she assured herself that, even if her marriage ended in divorce someday, her support obligations could not last more than ten years. Unfortunately, she thought she was an immigration law expert because she was a dedicated fan of the show "90 Day Fiancé."[4]

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[2] The hypothetical of Anton and Alexia used throughout this Note is fictitiously created to illustrate the potential problem with the I-864 Affidavit of Support obligations that this Note will address.

[3] *Family of U.S. Citizens*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 23, 2018), https://www.uscis.gov/family/family-of-us-citizens. Form I-130 is used to establish the qualifying relationship between the petitioning U.S. citizen or lawful permanent resident and the eligible relative seeking admission to the United States. *See I-130, Petition for Alien Relative*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 23, 2021), https://www.uscis.gov/i-130. Form I-864 Affidavit of Support is necessary to prove that a sponsored relative will have financial support and not become a public charge. *See* U.S. DEP'T OF HOMELAND SEC., AFFIDAVIT OF SUPPORT UNDER SECTION 213A OF THE INA 6 (2021), https://www.uscis.gov/sites/default/files/document/forms/i-864.pdf.

[4] *90 Day Fiancé* (Sharp Entertainment 2014-21). "90 Day Fiancé" is a program documenting the experiences of U.S. citizens as they bring their immigrant fiancés to the United States through the K-1 fiancé visa process. *About this Show, 90 Day Fiancé*, TLC, https://go.tlc.com/show/90-day-

It is now 2019; more than ten years have passed since Anton received his Green Card, and Alexia receives a notice to appear in court. After only four years of married life together in the United States, Anton divorced Alexia to be with another woman, and he is currently in his second marriage. Because Anton waived any right to receive continuing support from Alexia in their divorce agreement, Alexia is confused that Anton is now suing for reimbursement under her I-864 obligations eleven years after finalizing the divorce agreement. She promptly goes to an immigration attorney for advice.

The attorney explains that, despite their divorce agreement, Anton may attempt to seek legal enforcement of the I-864 Affidavit Alexia filed over a decade ago. The attorney explains that Alexia may have a contractual obligation to the U.S. government to keep Anton above the poverty line.[5] The attorney tells Alexia that several federal courts have found that terms in nuptial agreements[6] limiting the I-864 obligations are unenforceable.[7] He goes on to say that, because federal courts have ruled that nuptial agreements are not binding against the Affidavit of Support, any rights Anton has waived under state divorce law are irrelevant to his rights under the I-864 Affidavit.[8] Alexia leaves the meeting in shock and anxiety, and she reaches out to Mikayla, who is also divorced, to confide in her.

Mikayla is also shocked; she cannot understand how Alexia's divorce agreement could be potentially unenforceable. When Mikayla and her ex-husband divorced, they were completely barred from obtaining financial support from each other. Mikayla and Alexia used the same divorce attorney

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fiance-tlc-atve-us (last visited Jan. 27, 2022). During the course of each season of the show, the couples have ninety days together in the United States to decide if they will wed. *Id.*

5 8 U.S.C. § 1183a(a)(1).

6 A nuptial agreement is a type of contract entered into by the parties to a marriage. Elaine M. Butcher, *Relationship Dissolution Planning Part 1: Nuptial Agreements*, FLA. B.J., Nov. 2006, at 43, 43. There are two types of nuptial agreements: prenuptial agreements entered into before a marriage is transacted, and postnuptial agreements entered into after marriage. *Id.*

7 *See* Cyrousi v. Kashyap, 386 F. Supp. 3d 1278 (C.D. Cal. 2019) (holding that the nuptial agreement between the wife and immigrant was unenforceable); *see also* Toure-Davis v. Davis, No. WGC-13-916, 2014 WL 1292228 (D. Md. Mar. 28, 2014) (holding that the defendant sponsor waived his right to enforce the prenuptial agreement by signing the I-864 Affidavit of Support).

8 Wenfang Liu v. Mund, 686 F.3d 418, 419-20 (7th Cir. 2012) ("The right of support conferred by federal law exists apart from whatever rights Liu might or might not have under Wisconsin divorce law."); Golipour v. Moghaddam, 438 F. Supp. 3d 1290, 1299 (D. Utah 2020) ("The express language of the Form I-864 demonstrates that divorce and nuptial agreements will not terminate a sponsor's financial support obligation. . . . The right of support conferred by the Form I-864 is separate from the rights a party has under divorce law."); *Toure-Davis*, 2014 WL 1292228, at *8. Further, the court in *Toure-Davis* stated:

> This obligation of support, imposed by federal law, is separate and apart from any obligation of support imposed under Maryland law or right to support waived by the parties via an ante-nuptial agreement . . . Defendant therefore cannot absolve himself of his contractual obligation with the U.S. Government by Plaintiff purportedly waiving any right to alimony or support via the ante-nuptial agreement.

Id.

to draft their postnuptial agreements, and Mikayla was appalled that Alexia's agreement may be invalid. Alexia was equally confused; yet, whether these ladies believe it, Anton can sue Alexia for payment, and feasibly win, under current federal law.[9] The majority approach taken by the courts addressing this issue is to void any waiver of support under Form I-864 made by sponsored immigrant spouses in nuptial agreements, rendering those agreements unenforceable.[10]

This Note will address the issue of the continued enforceability of the I-864 Affidavit of Support in relation to nuptial agreements that would otherwise eliminate a sponsoring spouse's financial obligations. Section II(A) discusses how the support obligation is created, followed by Section II(B) which explains that the burden of the current law is felt most by those who have been married between two and ten years. After an examination of the current case law in Section III, Sections IV and V argue that the unenforceability of prenuptial and postnuptial agreements with respect to immigration obligations is burdensome and conflicts with immigration law policies. An examination of contract law in Section VI argues that sponsored immigrant spouses, as third-party beneficiaries to the I-864 Affidavit, should be able to waive their rights under the contract. Section VII proposes that courts should find these waivers binding against the sponsored immigrant spouses. Overall, this Note contends that recognizing the enforceability of nuptial agreements against sponsored immigrant spouses will reduce their ability to exploit their sponsors' contracts with the U.S. government and will better harmonize immigration laws regulating marriage and naturalization of immigrants.

II. AFFIDAVIT OF SUPPORT

A. Creation of Obligation

Before discussing the flaws with the current application of the Affidavit, it is important to understand why and how a U.S. sponsor enters into this contract with the U.S. government. Like all avenues of immigration, the federal government requires a plethora of forms and commitments when a U.S. citizen or lawful permanent resident[11] wishes to bring an immediate

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9 *See generally* 8 U.S.C. § 1183a (providing that immigrants can directly sue sponsors for financial support); *Cyrousi*, 386 F. Supp. 3d. 1278.

10 *See* cases discussed *infra* Part III(A).

11 The Department of Homeland Security defines the term "lawful permanent residents" as "non-citizens who are lawfully authorized to live permanently within the United States." *Lawful Permanent Residents (LPR)*, U.S. DEP'T OF HOMELAND SEC. (Nov. 19, 2021), https://www.dhs.gov/immigration-statistics/lawful-permanent-residents.

relative to the United States.[12] A married U.S. citizen such as Alexia may begin this process by conducting an internet search to learn the proper procedure for bringing her immigrant spouse stateside. While doing so, she will likely come across the Department of Homeland Security's official website, which provides a table specifying the required forms she must fill out to obtain a green card for her foreign spouse.[13] Listed on this table are the "Form I-130 Petition for Alien Relative" and "I-864 Affidavit of Support."[14] The I-130 Form must first be completed to demonstrate the existence of a qualifying spousal relationship.[15] In most cases, after a qualifying spousal relationship is established, the immigrant spouse will then receive lawful permanent resident status, which may be conditional depending on the length of the marriage.[16]

Additionally, the petitioning spouse is required by law to submit Form I-864.[17] This form creates a binding contract between the immigrant's sponsor and the U.S. government[18] which becomes enforceable once the immigrant becomes a lawful permanent resident.[19] Under the contract terms, both the supported immigrant and any government entity that provides qualifying public benefits to the immigrant may sue the sponsor for reimbursement for failing to fulfil the financial obligations under the Affidavit.[20]

Unfortunately, this language is buried in the middle of a ten-page document, which is itself buried in the middle of a multi-step, tedious immigration process.[21] Furthermore, the instruction sheet for the Affidavit of

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12 *See generally Forms*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/forms/forms (last visited Jan. 27, 2022) (listing and explaining the various forms required in different immigration cases).

13 *Family of U.S. Citizens*, *supra* note 3.

14 *Id.*

15 *I-130, Petition for Alien Relative*, *supra* note 3.

16 8 U.S.C. § 1186a(b). Immigrant spouses living in the United States next apply to obtain lawful permanent resident status using Form I-485. *I-130, Petition for Alien Relative*, *supra* note 3. For those living abroad, once the I-130 petition is approved, an interview is scheduled at their country's U.S. consulate office. *Consular Processing*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 4, 2018), https://www.uscis.gov/green-card/green-card-processes-and-procedures/consular-processing. If, after a detailed interview asking about the spouse's relationship, the consulate officer determines that the marriage is bona fide and not a sham, the immigrant receives a Visa Packet that is processed with the United States so that the immigrant can come to the United States and later receive their green card in the mail. *Id.*

17 *I-134, Affidavit of Support*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Feb. 19, 2021), https://www.uscis.gov/i-134.

18 *See generally* U.S. DEP'T OF HOMELAND SEC., *supra* note 3.

19 *I-134, Affidavit of Support*, *supra* note 17.

20 U.S. DEP'T OF HOMELAND SEC., *supra* note 3; Veronica Tobar Thronson, *'Til Death Do Us Part: Affidavits of Support and Obligations to Immigrant Spouses*, FAM. CT. REV., Oct. 2012, at 594, 596.

21 U.S. DEP'T OF HOMELAND SEC., *supra* note 3.

Support is almost twice as long as the form itself.[22] Due to the complexity of the forms and application process, oftentimes sponsors do not understand the full repercussions of the obligations they have created by agreeing to sponsor their spouses as lawful permanent residents.[23]

Through this process of bringing a spouse to the United States and ultimately obtaining lawful permanent resident status for the spouse, the Form I-864 financial support obligation is created. The complexity and expense of the immigration process can be overwhelming, often creating an emotional environment in which it is difficult to grasp the permanency of the obligations created. As discussed next, application of this body of procedure and law creates an obligation that is acutely burdensome for those in marriages lasting between two and ten years.

B. Acute Impact Felt by those Married Between Two and Ten Years

An understanding of the specific grounds for terminating the sponsor's obligations reveals that the burden of the Affidavit is, in practical effect, most often suffered by sponsors of marriages lasting between two and ten years.[24] The guiding language in the Code of Federal Regulations, later incorporated into the Immigration Nationality Act ("INA") and Form I-864, provides five specific situations that will terminate the sponsor's obligation to provide financial support to their spouse:

> [t]he supporting obligation . . . terminate[s] by operation of law when the sponsored immigrant:
> (A) Becomes a citizen of the United States;
> (B) Has worked, or can be credited with, 40 qualifying quarters of coverage under title II of the Social Security Act . . . ;
> (C) Ceases to hold the status of an alien lawfully admitted for permanent residence and departs the United States . . . ;
> (D) Obtains in a removal proceedings a new grant of adjustment of status as relief from removal . . . ; or
> (E) Dies . . .

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22 *Compare* U.S. DEP'T OF HOMELAND SEC., INSTRUCTIONS FOR AFFIDAVIT OF SUPPORT UNDER SECTION 213A OF THE INA (2021), https://www.uscis.gov/sites/default/files/document/forms/i-864instr.pdf, *with* U.S. DEP'T OF HOMELAND SEC., *supra* note 3.

23 Thronson, *supra* note 20, at 595 ("[I]t is likely that . . . people who sign [A]ffidavits of [S]upport themselves do not understand the full range of legal responsibilities that arise by signing the [A]ffidavit of [S]upport.").

24 "Approximately 24.7% of immigrants coming to America through marriage get divorced within 15 years of married life. Of these, 19% get divorced in the first two years, and 42% – in the next 5-6 years of residence." Press Release, Prodigy News, Immigration Policy and Green Card Issues After Divorce (Jan. 30, 2021) (on file at https://apnews.com/article/joe-biden-north-america-government-and-politics-divorce-rates-social-affairs-5d67bfb8b1c09233a8be2aa69912b327).

> The support obligation under an affidavit of support also terminates if the sponsor . . . dies.[25]

It is important to consider these statutory grounds for termination alongside the other federal laws that they trigger. The I-864 Affidavit coincides with general naturalization processes, which are also enumerated in the INA,[26] and the Affidavit expressly references Title II of the Social Security Act.[27] Upon examination of these parallel laws, it can generally be assumed that a marriage lasting less than two years or more than ten years,[28] will not result in a continuing obligation on the part of the supporting spouse.[29] In contrast, in marriages lasting between two and ten years, it is more likely that the sponsor's obligations under the Affidavit will continue after divorce.[30]

The termination of lawful permanent resident status and subsequent departure or deportation of the immigrant spouse is a triggering event that terminates the sponsoring spouse's I-864 contractual obligations.[31] When an immigrant spouse is in a marriage for less than two years, their lawful admission status is conditional and only valid for two years from the date of the immigrant's admission into the United States.[32] This conditional status is nonrenewable and terminable if the couple divorces within these two years.[33] Termination of this conditional status precipitates removal proceedings.[34] To ensure that the immigrant spouse's conditional status is not terminated, both spouses must jointly file a petition to make the immigrant spouse's status permanent within ninety days of its expiration.[35]

If the couple is divorced when it is time for the immigrant spouse to petition for permanent status, the immigrant spouse can attempt to file a waiver of the joint filing requirement, but this demands a showing of good faith, extreme hardship, or domestic violence.[36] The immigrant spouse must provide evidence that one of these conditions for obtaining the waiver has

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25 8 C.F.R. § 213a.2(e)(2)-(3) (2022); *see also* 8 U.S.C. § 1183a; U.S. DEP'T OF HOMELAND SEC., *supra* note 3, at 7.

26 *See generally* 8 U.S.C. §§ 1101-1537 (enumerating the various naturalization processes).

27 8 C.F.R. § 213a.2(e)(2)(B).

28 Ten years is roughly how long it will take someone to complete forty qualifying work quarters under the Social Security Act. 42 U.S.C. § 413(a)(1).

29 *Compare id.*, *with* 8 U.S.C. §§ 1101-1537.

30 *See* discussion *infra* Part II(B).

31 8 C.F.R. § 213a.2(e)(2).

32 *Chapter 2 —Lawful Permanent Resident Admission for Naturalization*, *Policy Manual*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/policy-manual/volume-12-part-d-chapter-2 (Feb. 23, 2022).

33 8 U.S.C. § 1186a(b).

34 *Id.* § 1186a(b)(1)(B).

35 Susan A. Roche, *Maneuvering Immigration Pitfalls in Family Court: What Family Law Attorneys Should Know in Cases with Noncitizen Parties*, 26 J. AM. ACAD. MATRIM. LAWS. 79, 93 (2013).

36 *Id.*

been met and that the marriage was not entered into fraudulently.[37] Furthermore, the Secretary of Homeland Security can terminate the immigrant spouse's conditional status at any time within those two years if it is determined that the marriage was fraudulently entered to evade immigration laws or that the marriage has been "judicially annulled or terminated."[38] Therefore, unless the immigrant spouse can establish proof of hardship, divorce within two years of marriage will likely result in the termination of a supporting spouse's financial obligations under the Affidavit. The terminating event in these short marriages is the removal of the immigrant spouse's lawful permanent resident status.[39]

Another event that terminates the sponsor's I-864 obligation is the immigrant spouse's accrual of forty qualifying work quarters under Title II of the Social Security Act.[40] There are two ways in which the sponsored immigrant can be credited with qualifying work quarters: working personally[41] or sharing the work quarters of their sponsoring spouse while their marriage is legally intact.[42] If the marriage is not legally dissolved within ten years, then the forty quarters accrued by the sponsoring spouse throughout that time are credited to the sponsored immigrant spouse, and the I-864 obligation terminates.[43] Under Title II of the Social Security Act, a person's income during a quarter must meet the minimum requirements published annually by the Commissioner of the Social Security Act to be credited as a "work quarter."[44] Since the sponsoring spouse must demonstrate a steady income through which they are able to support their spouse, it is likely that the immigrant spouse will accrue forty qualifying quarters of work through their U.S. citizen spouse's work during a ten-year marriage.[45]

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37 8 C.F.R. § 1216.5(a)(1) (2022); Jill S. Bloom & Ronald M. Bookholder, *What Every Family Law Attorney Needs to Know About Immigration Law and its Impact on Divorce and Related Matters*, MICH. B.J., July 2003, at 34, 34.

38 8 U.S.C. § 1186a(b).

39 *Id.* § 1186a; 8 C.F.R. § 213a.2(e) (2022).

40 8 C.F.R. § 213a.2(e)(2). A "work quarter" is a unit of time used to calculate eligibility for certain government benefits. MaryAnn De Pietro, *Medicare: What are 40 Quarters?*, MEDICALNEWSTODAY (June 24, 2020), https://www.medicalnewstoday.com/articles/40-quarters. An individual must make the minimum required earnings amount during the quarter for that quarter to be counted for government benefit calculations. *Quarter of Coverage*, SOC. SEC. ADMIN., https://www.ssa.gov/OACT/COLA/QC.html (last visited Jan. 22, 2022).

41 8 C.F.R. § 213a.2(e)(2)(i)(B). The code uses the language "[h]as worked, or can be credited with" working forty quarters. *Id.* The sponsored immigrant's own employment satisfies "[h]as worked" while the sponsoring citizen spouse's employment satisfies "credited with" working. *Id.*; *see also* Thronson, *supra* note 20, at 601.

42 Thronson, *supra* note 20, at 601.

43 8 U.S.C. § 1186a(a)(3)(B); Gary Singh & Usha Pillai, *Form I-864 (Affidavit of Support) and Its Effect on Divorce: What Every Family Law Attorney Needs to Know About Immigration Law*, HAW. B.J., Nov. 2015, at 4, 9.

44 42 U.S.C. § 413(a)(1), (d)(2) (defining the term "quarter" to mean "a period of three calendar months ending on March 31, June 30, September 30, or December 31").

45 8 U.S.C. § 1186a(f)(6).

Many, like Alexia, incorrectly believe that this statutory terminating event places a firm, ten-year limit on the sponsor's obligations.[46] This confusion likely arises because forty qualifying quarters adds up to ten years.[47] In practical effect, however, there is "no guarantee that someone will achieve forty quarters in her *lifetime*."[48] Even if the sponsored immigrant is working, any quarter in which they receive federal means-tested public benefits will not be credited.[49] Additionally, quarters earned by the sponsor only count for the immigrant spouse while they are legally married, such that the immigrant spouse would not accrue forty quarters from the sponsor if there was a divorce within ten years. [50]

There are several cases in which the courts have found that support obligations can extend beyond ten years from the time the Affidavit was signed even though the marriages themselves were very short. For example, in *Chang v. Crabill*, the couple married in 1998, and the petitioning spouse signed the I-864 Affidavit in 1999.[51] They divorced in 2000, after just twenty-six months of marriage.[52] The immigrant spouse filed suit in 2010, eleven years after the Affidavit was signed, and the court found that the plaintiff's claim for support was plausible.[53] In *Cyrousi v. Kashyup*, the marriage and Affidavit of Support both took effect in 2006; however, the court remanded this case for a determination on the merits of whether the defendant's support obligations had been breached in 2017 and 2018, more than ten years after the Affidavit was signed.[54]

When considering the enumerated grounds for termination of support in the context of the federal laws with which they function, it is evident that the hardships of the I-864 obligations are, in practical effect, felt most by sponsors from marriages that lasted between two and ten years. These ex-spouses are often in court presenting their defenses against their obligations of support,[55] and it is their burden that this Note primarily addresses. As the

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46 The author, like Alexia, is a dedicated fan of the television show "90 Day Fiancé." The author has observed that some participants of the show appear to believe that their financial obligations can only last ten years.

47 42 U.S.C. § 413(a).

48 Thronson, *supra* note 20, at 601 (emphasis added).

49 8 C.F.R. § 213a.2(e)(2)(i)(B) (2022); *see* ALEX NOWRASETH & ROBERT ORR, IMMIGRATION AND THE WELFARE STATE (2018), https://www.immigrationresearch.org/system/files/Immigration_and_the_Welfare_State.pdf (providing a statistical comparison of the use rates of public welfare benefits between native U.S. citizens and immigrants).

50 8 U.S.C. § 1183a(a)(3)(B)(ii); Thronson, *supra* note 20, at 601.

51 Chang v. Crabill, No. 1:10 CV 78, 2011 WL 2471745, at *1 (N.D. Ind. June 21, 2011).

52 *Id.*

53 *Id.* at *5.

54 Cyrousi v. Kashyap, 386 F. Supp. 3d 1278, 1280-81, 89 (C.D. Cal. 2019).

55 *See, e.g.*, *Cyrousi*, 386 F. Supp. 3d 1278; Erler v. Erler, 824 F.3d 1173 (9th Cir. 2016); *Chang*, 2011 WL 2471745 (hearing cases brought by ex-spouses of marriages lasting between two and ten years).

case survey below demonstrates, the majority of courts examining this issue have not provided any relief to the sponsoring U.S. citizen spouses.[56]

III. CASE SURVEY

What makes the Affidavit most burdensome to these sponsors are not the situations enumerated in the statute's listed grounds for termination. Rather, they are the situations that are missing from the statute's exhaustive list. The obligations of support become acutely oppressive when the marital relationship between the sponsor and immigrant spouse terminates under unhappy circumstances. These circumstances, namely divorce, likely were not contemplated by newlywed couples such as Alexia and Anton. Form I-864 specifically states that "divorce *does not* terminate [the sponsoring spouse's] support obligations."[57] The obligations will continue after divorce unless one of the previously listed terminating events has occurred.[58]

Under the terms of the I-864 Form, a sponsor's obligations have the potential to be indefinitely enforceable by the sponsored immigrant spouse.[59] Many state and federal courts considering the I-864 Affidavit have found that nuptial agreements attempting to limit sponsors' I-864 financial obligations upon dissolution of marriage are unenforceable.[60]

A. Cases Finding Waiver of Support Unenforceable

Several state courts have found that the I-864 Form can be enforced by an ex-spouse even after that spouse has entered a legal agreement with the sponsor to waive any right to further support.[61] In the case of *Marriage of Tamboura*, the appellate court in California refused to give credence to the sponsor's defense of recission.[62] The sponsor argued that his ex-wife had waived her right of support from the defendant in a later agreement the parties

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56 *Cyrousi*, 386 F. Supp. 3d at 1283; *Erler*, 824 F.3d 1173; Golipour v. Moghaddam, 438 F. Supp. 3d 1290, 1299 (D. Utah 2020); Toure-Davis v. Davis, No. WGC-13-916, 2014 WL 1292228, at *5 (D. Md. Mar. 28, 2014); Marriage of Tamboura v. Tamboura, No. A151889, 2019 WL 2206197, at *5 (Cal. Ct. App. May 22, 2019); Villars v. Villars, 363 P.3d 701, 706 (Alaska 2014); Shah v. Shah, No. 12-464, 2014 WL 185914, at *4 (D.N.J. Jan. 14, 2014).

57 U.S. DEP'T OF HOMELAND SEC., *supra* note 3, at 7; Thronson, *supra* note 20, at 601.

58 *Supra* text accompanying note 25.

59 Stephanie L. Tang, *Arguing Affidavits of Support*, ILL. B.J., Aug. 2017, at 34, 35; John T. Burger, *Contract Rights Under the I-864 Affidavit of Support: Seventh Circuit's Reasoning Binds Courts' Hands in a Shifting Landscape for Public Charge Doctrine*, 93 SAINT JOHN'S L. REV. 509, 509 (2019); Greg McLawsen, *The I-864 Affidavit of Support: An Intro to the Immigration Form You Must Learn to Love/Hate*, 48 FAM. L.Q. 581, 584 (2015); Thronson, *supra* note 20.

60 *See* cases discussed *infra* Part III(A).

61 *See* cases discussed *infra* Part III(A).

62 *Marriage of Tamboura*, 2019 WL 2206197, at *5.

entered after the Affidavit was signed.[63] The court rejected this argument because the I-864 Affidavit "does not include a 'later agreement between the parties' among the specified events that terminate an I-864 Affidavit support obligation."[64] Similarly, in *Villars v. Villars*, the Supreme Court of Alaska affirmed the superior court's finding that the parties' prenuptial agreement did not preempt the I-864 contract.[65] The court reasoned that, because Form I-864 created a contract between the sponsor and the U.S. government, the defendant's wife had no legal authority to release her husband from his contractual obligations.[66]

Federal courts have also rejected the notion that nuptial agreements between spouses can preclude the sponsored spouse from personally enforcing the I-864 Affidavit against the sponsor in court.[67] In *Cyrousi v. Kashyap*, the sponsor and the sponsored spouse were married in 2006.[68] One month later, the wife signed the I-864 Affidavit, along with her father as a joint sponsor, so her husband could immigrate to the United States.[69] When the couple later separated in 2010, they signed a marital settlement agreement.[70] According to its terms, the agreement was meant "to be a final and complete settlement of all of their rights and obligations as between them, including . . . the right of either Wife or Husband to spousal support."[71]

Nine years after the divorce, when the sponsored immigrant was in his third marriage,[72] he sued his ex-wife sponsor and her father for payments to him in accordance with the I-864 Affidavit.[73] The sponsor argued that her obligations to her husband under the Affidavit were terminated when her ex-husband signed the marital settlement agreement.[74] Citing a Ninth Circuit case that voided a prenuptial agreement as contrary to the Affidavit's purpose, the court found that "notwithstanding the language in the Marital Settlement Agreement, the Court concludes that the I-864 Affidavit remains enforceable."[75] The court also rejected the sponsor's argument that her ex-husband had agreed to settle his right to *privately* enforce the agreement,

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63 *Id.*

64 *Id.*

65 *Villars*, 363 P.3d at 706.

66 *Id.*

67 *See* cases discussed *infra* Part III(A).

68 Cyrousi v. Kashyap, 386 F. Supp. 3d 1278, 1280 (C.D. Cal. 2019).

69 *Id.* at 1281.

70 *Id.*

71 *Id.*

72 To the author, this fact poignantly displays the potential injustice of the prolonged support obligations under the Affidavit after divorce.

73 *Cyrousi*, 386 F. Supp. 3d at 1281.

74 *Id.*

75 *Id.* at 1283 (citing Erler v. Erler, 824 F.3d 1173, 1177 (9th Cir. 2016)).

which the sponsor argued was distinguishable from the issue of his continuing obligations to the *government*.[76]

In *Shah v. Shah*, the parties signed a prenuptial agreement before the sponsor signed the Affidavit of Support.[77] Two years after the couple married, divorce proceedings were initiated, and the immigrant spouse sued in federal court for reimbursement due to the sponsor's failure to provide her with financial support.[78] One of the sponsor's defenses was the prenuptial agreement, but the court found the agreement did not remove his obligations to pay the immigrant spouse an annual amount of at least 125% of the federal poverty line under the Affidavit.[79] The court first reasoned that, since the terms of the prenuptial agreement only applied to support incidental to divorce, the agreement did not include the I-864 obligations.[80] The court further elaborated that, even if the agreement purported to waive the immigrant spouse's claims for support specifically under the Affidavit, this too would be unenforceable because the Affidavit creates a binding contract between the sponsor and the U.S. government.[81] The court determined that a sponsor "cannot unilaterally absolve himself of his contractual obligation by entering into a prenuptial agreement."[82] In response to the defendant's argument that the I-864 support obligation could be prospectively waived by a nuptial agreement, the court elaborated on the purpose of the Affidavit:

> [T]his Court finds that it would undermine the purpose of the statute to allow sponsors to present an I-864 to immigration authorities that can never be enforced by the sponsored alien due to a prenuptial agreement that is not disclosed to immigration authorities. Congress determined that[,] for an I-864 to be valid at all, the sponsored alien must be able to enforce it at the time when it is submitted to the United States.[83]

The Ninth Circuit court in *Erler v. Erler* followed the same logic in reaching its decision.[84] In that case, the court affirmed the district court's judgment that the prenuptial agreement signed by the parties did not terminate the sponsor's obligation to provide financial support directly to his ex-wife.[85] Referencing the enumerated grounds for termination of the obligation within Form I-864, the court reiterated that "neither a divorce

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76 *Id.*
77 Shah v. Shah, No. 12-464, 2014 WL 185914, at *1 (D.N.J. Jan. 14, 2014).
78 *Id.*
79 *Id.* at *1, *3.
80 *Id.* at *3.
81 *Id.* at *4.
82 *Id.*
83 *Shah*, 2014 WL 185914, at *4.
84 Erler v. Erler, 824 F.3d 1173, 1177 (9th Cir. 2016).
85 *Id.*

judgment nor a premarital agreement may terminate an obligation of support."[86]

In *Toure-Davis v. Davis*, the parties married in 1998 and signed an ante-nuptial agreement that same day, which released each party from any claims for alimony or support for the rest of their lives.[87] As part of the process to obtain lawful permanent resident status for the non-citizen wife, the defendant sponsor signed Form I-864 just over a year later.[88] In 2001, the wife obtained her lawful permanent resident status, and she entered a separation agreement with her husband on the same day.[89] In 2013, the now ex-wife filed an amended complaint seeking reimbursement from her ex-husband for his failure to make financial payments to her to maintain her at no less than 125% of the federal poverty line.[90]

The sponsor's defense was similar to that raised in *Cyrousi*.[91] He argued that his spouse could waive her right to *privately* seek financial reimbursement without eliminating the defendant's contractual obligations with the *government*.[92] While the ex-wife could no longer seek financial support payments directly under the ante-nuptial agreement, the sponsor would still be obligated to reimburse a government or public agency directly for any support it provided to his ex-wife.[93] The court rejected the distinction between obligations owed to the sponsored immigrant spouse and to the government, finding that "Form I–864 waived that portion of the ante-nuptial agreement concerning spousal support."[94] According to the court, by signing the I-864 Affidavit after signing the ante-nuptial agreement, the defendant waived his right to enforce the ante-nuptial agreement.[95]

In *Golipour v. Moghaddam*, the parties signed a postnuptial agreement when they dissolved their marriage.[96] Although the defendant cited the official commentary to the legislation that created the Affidavit in arguing that an immigrant spouse can waive their right to directly sue, the court found this to be unpersuasive and nonconclusive of the issue.[97] Rather, the court followed the Ninth Circuit's decision in *Erler*, holding that allowing nuptial agreements to terminate the sponsor's obligation to provide support to the

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86 *Id.*

87 Toure-Davis v. Davis, No. WGC-13-916, 2014 WL 1292228, at *1 (D. Md. Mar. 28, 2014).

88 *Id.*

89 *Id.* This is another instance that the author believes highlights the potential for exploitation of sponsoring spouses under the current case law.

90 *Id.* at *2.

91 Cyrousi v. Kashyap, 386 F. Supp. 3d 1278, 1283 (C.D. Cal. 2019); *Toure-Davis*, 2014 WL 1292228, at *5.

92 *Toure-Davis*, 2014 WL 1292228, at *5.

93 *Id.*

94 *Id.*

95 *Id.* at *5-6.

96 Golipour v. Moghaddam, 438 F. Supp. 3d 1290, 1294 (D. Utah 2020).

97 *Id.* at 1298-99.

spouse "would ignore the interests of the U.S. Government and . . . would also defeat the Form I-864's purpose of preventing admission of an immigrant that is likely to become a public charge at any time."[98] In nullifying the postnuptial agreement, the court reiterated that the I-864 Affidavit creates an obligation under federal law that is wholly distinct from the sponsor's rights under divorce law, and that a state-authorized postnuptial agreement cannot interfere with a federal contract.[99]

While this line of cases has established a strong precedent, there is at least one court that has rejected the conclusion that an immigrant spouse cannot waive their right to sue under the Affidavit.[100] Presently, *Blain v. Herrell* is the only federal court decision enforcing a nuptial agreement against I-864 obligations.[101] In this case, discussed below, the court reaches a bold conclusion that an immigrant spouse can waive their right to sue under the Affidavit by signing a legally binding nuptial agreement.

B. *Blain v. Herrell*: A Contrary Conclusion

Unlike the cases previously examined, the district court in *Blain v. Herrell* took an approach to nuptials that permits the third-party beneficiary to waive the personal right to sue for direct financial support.[102] In this case, Laurie Herrell, a U.S. citizen, married Peter Blain, a citizen of Australia, in 2007.[103] Three days before their marriage, they entered into a prenuptial agreement with the marriage as consideration.[104] The relevant language of this contract stated:

> Husband and Wife, by this Agreement, *permanently waive* the right to seek support in any form [from] the other in the event of a separation or the termination of the marriage . . . . If the marriage should terminate . . . each party agrees to be solely responsible for his or her own future support after separation, regardless of any unforseen change in circumstances . . . . [T]he parties intend to *permanently waive* all right to alimony . . . spousal support, or post-divorce payments of any kind from one party to the other.[105]

Eleven months after their marriage, Herrell signed an I-864 Affidavit of Support so that Blain could become a lawful permanent resident in the

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98 *Id.* at 1299.

99 *Id.*

100 Blain v. Herrell, No. 10-00072, 2010 WL 2900432 (D. Haw. July 21, 2010) (holding that the nuptial agreement in dispute was a waiver of the sponsored immigrant spouse's right to sue the sponsor).

101 *Id.* at *8.

102 *Id.*

103 *Id.* at *1.

104 *Id.*

105 *Id.* (emphasis added).

United States.[106] They separated a year and one day after Herrell signed the Affidavit.[107]

During the divorce proceedings, Blain moved to dismiss the prenuptial contract he had signed, but the Hawaii Family Court ordered that the contract was legally binding, such that neither party was obligated to pay any form of alimony support, notwithstanding the I-864 Form that was presented by Blain as an exhibit.[108] After this judgment was entered against Blain, he filed a complaint in the United States District Court for the District of Hawaii, "alleging that [Herrell] ha[d] failed to meet her contractual obligation to support [Blain] pursuant to Form I-864 [A]ffidavit of [S]upport."[109]

Although the complaint was dismissed for a procedural error,[110] the court provided an alternative legal discussion "[f]or completeness of the record," explaining that Blain had waived his right to support under the Affidavit by signing the prenuptial agreement with Herrell.[111] The Hawaii District Court acknowledged federal cases establishing that sponsored immigrant spouses have a contractual right to sue for enforcement of the Affidavit;[112] however, the court also referred to the "basic principle of contract law" that a party to a contract may legally choose to waive any rights it may have been entitled to exercise under a contract.[113]

The court found that Blain willingly signed the prenuptial agreement with Herrell, under which he voluntarily agreed to waive his right to support from Herrell after termination of the marriage.[114] The court reasoned that this prenuptial agreement, signed a year before Herrell completed the Affidavit of Support, precluded Blain from directly enforcing Herrell's financial support obligations and from seeking any financial support from her.[115] Because Blain waived his right to any form of support from Herrell in the

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106 *Blain*, 2010 WL 2900432, at *1.

107 *Id.*

108 *Id.* at *2.

109 *Id.*

110 *Id.* at *5, *7. Because of the Rooker-Feldman Doctrine, the Hawaii District Court could not overrule the Hawaii Family Court's order that the I-864 Affidavit was not binding on the defendant. *Id.* at *3. Under the Rooker-Feldman Doctrine, federal courts are prohibited from hearing cases brought by parties that have already litigated and lost an issue in state court who are simply seeking to have the issue relitigated in federal court for a favorable outcome overruling the state court decision. *See* Rooker v. Fid. Tr. Co., 263 U.S. 413 (1923); *see also* D.C. Ct. of Appeals v. Feldman, 460 U.S. 462 (1983) (establishing the procedural framework known as the "Rooker-Feldman" doctrine); Thronson, *supra* note 20, at 598.

111 *Blain*, 2010 WL 2900432, at *7.

112 *Id.* at *8 (citing Skorychenko v. Tompkins, No. 08-CV-626-SLC, 2009 WL 129977, at *1 (W.D. Wis. Jan. 20, 2009)).

113 *Id.*

114 *Id.*

115 *Id.*

event of a divorce, the court held that Blain could not legally assert the I-864 contract against Herrell for reimbursement of funds.[116]

General principles of contract law support the conclusion reached in *Blain v. Herrell* rather than those reached in the preceding line of cases rejecting the waiver defense. Because Form I-864 is a contract,[117] the doctrines of contract law should guide courts when they reconcile the Affidavit with separate nuptial agreements.

IV. GENERAL PRINCIPLES OF CONTRACT LAW AND THE FLAW IN THE COURTS' REASONING

The I-864 Affidavit of Support creates a contract between the sponsoring spouse and the U.S. government; the sponsor promises that the immigrant will not become a financial burden on public funds, and in exchange, the government gives the immigrant conditional permanent resident status as consideration.[118] Because the Affidavit is a contract, general principles of contract law should be applied to an immigrant spouse's waiver of support.[119] Considering the legal effect of a spouse's waiver of the right to directly sue for reimbursement under contract law, the conclusion reached by the court in *Blain v. Herrell*[120] is more apposite than the decisions previously examined that held that a sponsored immigrant spouse cannot waive their right to enforce the I-864 Affidavit of Support against the sponsoring spouse.[121]

A. Sponsored Immigrants as Third-Party Beneficiaries to the I-864 Affidavit

The section of the Code of Federal Regulations promulgating the I-864 Affidavit of Support states: "[t]he intending immigrants . . . are third[-]party beneficiaries of the contract."[122] Additionally, courts hearing disputes brought by sponsored immigrant spouses under the Affidavit have

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116 *Id.*

117 *See* discussion *infra* Part IV.

118 U.S. DEP'T OF HOMELAND SEC., *supra* note 3, at 6 ("[T]hese actions create a contract between [the sponsor] and the US government. The intending immigrant becoming a lawful permanent resident is the consideration for the contract.").

119 It is noteworthy that the court in *Toure-Davis* found that, by signing the I-864 Affidavit after signing the ante-nuptial agreement with his wife, the sponsor had contractually waived his right to enforce the terms of the ante-nuptial agreement. *See supra* notes 92-95 and accompanying text. Yet, when the circumstances are reversed, the courts refuse to apply the same waiver defense when a sponsored immigrant enters into a nuptial agreement signed after the I-864 Affidavit became effective. *See, e.g.*, *supra* notes 67-76 and accompanying text.

120 *See* discussion *supra* Part III(B).

121 *See* cases discussed *supra* Part III(A).

122 8 C.F.R. § 213a.2(c)(2)(i)(C)(2) (2022).

consistently treated them as a type of "third-party beneficiary" to the I-864 contract between the sponsor and the U.S. government.[123] Because the sponsored immigrant spouse is a third-party beneficiary to the contract, the treatment of third-party beneficiaries under general contract laws must be considered. Under these general principles, third-party beneficiaries can waive their contractual rights.[124]

B. Waiver as a Defense

Under general principles of contract law, a party to a contract can enforce any viable contract defenses against a third-party beneficiary.[125] According to the Restatement Second of Contracts, "[t]he conduct of the beneficiary . . . may give rise to claims and defenses which may be asserted against him by the obligor, and his right may be affected by the terms of an agreement made by him."[126] Under this principle, the sponsor, as a party to the Form I-864 contract,[127] could assert any contract defenses against the immigrant spouse, as a third-party beneficiary,[128] that have arisen under the terms of a nuptial agreement.

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123 Wenfang Liu v. Mund, 686 F.3d 418, 421 (7th Cir. 2012) ("The duty to mitigate is a conventional part of the common law of contracts and can be enforced against a third-party beneficiary . . . because a third-party beneficiary has the duties as well as the rights of a signatory to the contract."); Marriage of Kumar v. Kumar, 220 Cal. Rptr. 3d, 863, 867 (Cal. Ct. App. 2017); Toure-Davis v. Davis, No. WGC-13-916, 2014 WL 1292228, at *6 (D. Md. Mar. 28, 2014) ("By signing that contract, he granted Plaintiff, as a third-party beneficiary to the contract, a right to bring suit in any federal or state court to enforce the contract."); Marriage of Khan v. Khan, 332 P.3d 1016, 1018 (Wash. Ct. App. 2014) ("The [A]ffidavit of [S]upport creates a binding contract between the sponsor and the federal government, with the intended immigrant as the *third-party beneficiary*. The sponsored immigrant can enforce the support obligation against the sponsor.") (emphasis added).

124 RESTATEMENT (SECOND) OF CONTRACTS § 309 (AM. L. INST. 1981); 17 Am. Jur. 2D *Contracts* § 438 (2020); *see* Cyrousi v. Kashyap, 386 F. Supp. 3d 1278 (C.D. Cal. 2019); *see also Toure-Davis*, 2014 WL 1292228.

125 RESTATEMENT (SECOND) OF CONTRACTS § 309 (AM. L. INST. 1981); 17 Am. Jur. 2D *Contracts*, *supra* note 124 ("The beneficiary is subject to all the equities and defenses that would be available against the promisee."); Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 COLUM. L. REV. 1358, 1413, 1428-29 (1992) ("[T]he promisor can raise against the beneficiary any defense that could have been raised against the promisee under the contract. . . . The promisor can also raise a defense the promisee would have had against the third[-]party.").

126 RESTATEMENT (SECOND) OF CONTRACTS § 309 (AM. L. INST. 1981).

127 U.S. DEP'T OF HOMELAND SEC., *supra* note 3, at 6. ("[T]hese actions create a contract between [the sponsor] and the U.S. Government.").

128 8 C.F.R. § 213a.2(c)(2)(i)(C)(2) (2022). However, several courts have held that certain common law contract defenses raised by sponsors, such as failure to mitigate damages and fraud in the inducement, are unenforceable when applied to the I-864 Affidavit. *See, e.g.*, *Wenfang*, 686 F.3d at 422-23 (holding that the immigrant did not have a duty to mitigate her need for financial support by actively seeking employment); Dorsaneo v. Dorsaneo, 261 F. Supp. 3d 1052, 1054 (N.D. Cal. 2017) (holding that "[f]raud in the inducement cannot be a defense to an I–864 enforcement action").

One such general contract defense is waiver of contractual rights,[129] which has been defined as "an intentional relinquishment of a known right."[130] Under the doctrine of waiver, a party may waive a contract term or right that was intended to benefit that party.[131] Because this defense can be asserted against parties to a contract,[132] under the rules governing third-party beneficiaries,[133] this defense can also be asserted against the sponsored immigrant spouse in a case for enforcement of the I-864 Affidavit of Support where the immigrant spouse has chosen to waive their third-party right to enforcement.[134] By way of illustration, Anton would be considered a third-party beneficiary of the I-864 Affidavit Alexia signed. Consequently, their divorce agreement would have the legal effect of Anton waiving his right to sue Alexia for financial support under the Affidavit. This result is contrary to the arguably flawed reasoning made by many courts addressing this issue.[135]

While the waiver defense should be available to sponsors, there may be a legitimate societal concern about the sponsor's ability to exercise extreme control and financial manipulation in these marriages. It is important to note that a nuptial agreement between a sponsor and an immigrant spouse would itself be an independent contract,[136] protecting immigrants under contract theories such as misrepresentation, duress, threat, and undue influence.[137] Therefore, if a sponsor engaged in coercion or forced an immigrant spouse to sign a prenuptial agreement, the immigrant spouse would still be protected

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129 Westfed Holdings, Inc. v. United States, 407 F.3d 1352, 1360 (Fed. Cir. 2005) ("Waiver is an affirmative defense, as to which the breaching party bears the burden of proof."); Blain v. Herrell, No. 10-00072, 2010 WL 2900432, at *8 (D. Haw. July 21, 2010) (citing Navellier v. Sletten, 262 F.3d 923 (9th Cir. 2001)); 8 TIMOTHY MURRAY, CORBIN ON CONTRACTS § 40 (rev. ed. 2020).

130 A Olympic Forwarder, Inc. v. United States, 33 Fed. Cl. 514, 521 (Fed. Cl. 1995).

131 Shutte v. Thompson, 82 U.S. 151, 159 (1872) ("A party may waive any provision, either of a contract or of a statute, intended for his benefit."); U.S. Dep't of Labor v. Preston, 873 F.3d 877, 884 (11th Cir. 2017) (holding that, because the defendant entered a series of contracts "knowingly, willingly, and voluntarily[,]" he renounced his rights under a federal statute).

132 *Shutte*, 82 U.S. at 159; *Westfed Holdings, Inc.*, 407 F.3d at 1360; Matter of Garfinkle v. Weil, 672 F.2d 1340, 1347 (11th Cir. 1982); Youngdale & Sons Const. Co. v. United States, 22 Cl. Ct. 345, 347 (Fed. Cl. 1991).

133 RESTATEMENT (SECOND) OF CONTRACTS § 309 (AM. L. INST. 1981); 17 Am. Jur. 2D *Contracts*, *supra* note 124; Eisenberg, *supra* note 125.

134 *See* Cyrousi v. Kashyap, 386 F. Supp. 3d 1278 (C.D. Cal. 2019); Toure-Davis v. Davis, No. WGC-13-916, 2014 WL 1292228 (D. Md. Mar. 28, 2014); Shah v. Shah, No. 12-464, 2014 WL 185914 (D.N.J. Jan. 14, 2014) (discussing whether defendants' arguments that the sponsored immigrants had waived their right to sue were with merit under federal law).

135 *Shah*, 2014 WL 185914, at *4; Erler v. Erler, 824 F.3d 1173, 1177 (9th Cir. 2016); Golipour v. Moghaddam, 438 F. Supp. 3d 1290, 1299 (D. Utah 2020); *see supra* note 119.

136 5 WILLISTON ON CONTRACTS § 11:8 (4th ed. 2020). To be a validly enforceable contract, prenuptial agreements between sponsors and immigrant spouses must meet the essential elements of a contract, specifically that an offer was made, that the offer was accepted, and that there was consideration for the agreement. 17 Am. Jur. 2D *Contracts*, *supra* note 124, § 18.

137 RESTATEMENT (SECOND) OF CONTRACTS § 164, 174-75 (AM. L. INST. 1981); 17 Am. Jur. 2D *Contracts*, *supra* note 124.

by the defenses available to void those agreements.[138] While it is true that sponsors exercise much control and discretion in whether an immigrant spouse can come to the United States,[139] the sponsors are ultimately the people taking the financial risks and investments to bring their immigrant spouses to the United States. Permitting waivers while also protecting immigrant spouses against duress, fraud, or other unlawful inducements to sign nuptial agreements strikes an appropriate balance between the financial risks that sponsors take and the special needs of immigrant spouses in vulnerable situations.

C. Identifying the Flaw in the Courts' Reasoning

The waiver defense was presented by the sponsors in *Toure-Davis v. Davis*, *Cyrousi v. Kashyap*, and *Shah v. Shah*.[140] However, the courts in these cases rejected this defense, deciding that sponsors could not unilaterally alter their obligations under the contract without the consent of the U.S. government.[141] As these cases enumerate, the courts' reasoning generally rested on the fact that the Affidavit is a contract entered into between the sponsor and the U.S. government rather than between the sponsor and the immigrant spouse.[142] The sponsored immigrants are considered third-party beneficiaries;[143] therefore, courts have found that the sponsors cannot unilaterally modify or eliminate their obligations to the government through a nuptial agreement with a third-party beneficiary to the I-864 contract.[144]

Many courts have interpreted the purpose of the Affidavit as protecting the public from financially supporting immigrants.[145] These courts have found that nuptial agreements preventing a sponsored immigrant spouse from suing for financial support contradict and undermine the statutory purpose of

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138 RESTATEMENT (SECOND) OF CONTRACTS § 164, 174-75 (AM. L. INST. 1981); 17 Am. Jur. 2D *Contracts*, *supra* note 124.

139 *See generally Family of U.S. Citizens*, *supra* note 3 (explaining that the U.S. sponsors must initiate most stages of the immigration process on behalf of the sponsored immigrant spouse).

140 *Supra* Part III(A).

141 *See* discussion *supra* Part III(A).

142 DEP'T OF HOMELAND SEC., *supra* note 3; Villars v. Villars, 363 P.3d 701, 706 (Alaska 2014) ("[T]he affidavit created a contract between [the sponsor] and the federal government, from which [the sponsored immigrant] was not empowered to release [the sponsor]."); Shah v. Shah, No. 12-464, 2014 WL 185914, at *4 (D.N.J. Jan. 14, 2014); Toure-Davis v. Davis, No. WGC-13-916, 2014 WL 1292228, at *8 (D. Md. Mar. 28, 2014).

143 *Toure-Davis*, 2014 WL 1292228, at *6; Burger, *supra* note 59, at 512; John Patrick Pratt & Ira J. Kurzban, *The Affidavit of Support Creates a Legally Enforceable Contract by the Sponsored Foreign National: Efforts to Collect Damages as Support Obligations Against Divorced Spouses*, FED. LAW., Nov./Dec. 2010, at 44, 45; McLawsen, *supra* note 59, at 587.

144 *See* discussion *supra* Part III(A).

145 *E.g.*, Wenfang Liu v. Mund, 686 F.3d 418, 421-23 (7th Cir. 2012).

the Affidavit,[146] permitting the sponsor to unilaterally alter their obligations without the consent of the U.S. government.[147] This reasoning is narrow in scope, inflating the consequences of a sponsored immigrant's waiver of the right to personally enforce the Affidavit against a sponsor.

The flaw in this reasoning is that it equates the personal third-party waiver with a complete release of liability on the part of the sponsor,[148] which would not be the actual consequence if nuptial agreements were given effect. Sponsors who have raised the waiver defense against their sponsored immigrant spouses have conceded that enforcing a prenuptial agreement would *not* eliminate their direct liability to any government agency.[149] Under the I-864 contract, there are two ways for a sponsor to be sued if they breach their financial support obligations.[150] First, the sponsored immigrant can sue directly.[151] Second, agencies that provided "any means-tested public benefit" can sue the sponsor for reimbursement.[152] Therefore, a release of the sponsor's liability to the third-party immigrant spouse alone would not alter the sponsor's separate obligations to government agencies.[153] Rather, it would eliminate the *immigrant's* ability to directly sue for personal payments.[154] The nuptial agreements at issue in the preceding cases sought to legally release the sponsors from obligations to their spouses, but they did not seek to extend the defense against any *entities* that may sue under the I-864 contract for reimbursement.[155]

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146 *Id.* ("[T]he stated statutory goal, remember, is to prevent the admission to the United States of any alien who 'is likely at any time to become a public charge.'"); *Toure-Davis*, 2014 WL 1292228, at *8 (finding that the purpose of the Affidavit is to benefit taxpayers and others who fund the organizations that ultimately provide public aid to unsupported immigrants).

147 *Shah*, 2014 WL 185914, at *4 (finding that, because the sponsor entered a contract with the U.S. government as a party, the sponsor could not unilaterally eliminate his support obligations by entering a separate agreement with the sponsored immigrant, who was merely a third-party beneficiary to Form I-864); *Toure-Davis*, 2014 WL 1292228, at *8 (finding that the obligation of support is imposed by federal law and is "separate and apart" from any waiver of alimony under state law); *Villars*, 363 P.3d at 706.

148 *Shah*, 2014 WL 185914, at *4 (finding that a prenuptial agreement is not a listed statutory ground for *termination* of a sponsor's obligation and that an agreement to waive does not *terminate* a sponsor's obligation) (emphasis added); *Toure-Davis*, 2014 WL 1292228, at *8 ("Defendant therefore cannot *absolve* himself of his contractual obligation with the U.S. Government by Plaintiff purportedly waiving any right to alimony or support via the ante-nuptial . . . .") (emphasis added).

149 Cyrousi v. Kashyap, 386 F. Supp. 3d 1278, 1283 (C.D. Cal. 2019); *Toure-Davis*, 2014 WL 1292228, at *5 ("Defendant acknowledges the Form I-864 remains in force but contends Plaintiff waived her ability to seek support from Defendant in the ante-nuptial agreement . . . . Defendant concedes however that a public agency may seek reimbursement from him for any means-tested benefits provided to Plaintiff.").

150 DEP'T OF HOMELAND SEC., *supra* note 3, at 6-7.

151 *Id.* at 6.

152 *Id.* at 7.

153 *Cyrousi*, 386 F. Supp. 3d at 1278; *Toure-Davis*, 2014 WL 1292228.

154 *Cyrousi*, 386 F. Supp. 3d at 1278; *Toure-Davis*, 2014 WL 1292228.

155 *See* discussion *supra* Part III(A); Erler v. Erler, 824 F.3d 1173, 1175 (9th Cir. 2016); Golipour v. Moghaddam, 438 F. Supp. 3d 1290, 1294 (D. Utah 2020); *Cyrousi*, 386 F. Supp. 3d at 1281; Shah

These courts rested their conclusions on the fact that sponsors cannot unilaterally alter their contractual obligations without the consent of the U.S. government as the other party to the contract.[156] But in actuality, all the prenuptial agreements do is waive the third-party beneficiaries' legal right to personally sue under the contract.[157] These agreements would still maintain all obligations to the public entities that are owed reimbursement for the sponsor's breach of the I-864 financial support obligations.[158] For example, the divorce agreement between Alexia and Anton would preclude Anton from suing Alexia for direct payments, but it would not prevent an action by a local government agency that provided public benefits to Anton while Alexia was not supporting him above the poverty line. While it is true that government agencies may have to expend resources to provide for the immigrant spouse if the sponsor breaches the I-864 financial support obligations, these resources would be reimbursed because the sponsor remains liable to the government under the I-864 contract.[159]

In fact, the government itself has acknowledged the possibility that an adult sponsored immigrant could, in theory, agree to waive their right to sue under the I-864 Affidavit, and that this waiver would "not . . . alter the sponsor's obligations to [the Department of Homeland Security [("]DHS["")] and to benefit-granting agencies."[160] The official commentary to the section of the Code of Federal Regulations that creates the I-864 Affidavit states: "[i]f the sponsored immigrant is an adult, he or she probably can, in a divorce settlement, surrender his or her right to sue the sponsor to enforce an [A]ffidavit of [S]upport."[161] In *Golipour v. Moghaddam*, the court directly addressed this quote from the official commentary to the Code.[162] Yet, the court decided this case contrary to the commentary of the government entity that created the I-864 Affidavit, rejecting this concept and finding the prenuptial agreement unenforceable for conflicting with the statutory goal of the Affidavit.[163] Not only is this reasoning flawed when considering the

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v. Shah, No. 12-464, 2014 WL 185914, *at 1 (D.N.J. Jan. 14, 2014); Villars v. Villars, 363 P.3d 701, 710 (Alaska 2014); *Toure-Davis*, 2014 WL 1292228, at *1; Blain v. Herrell, No. 10-00072ACK-KSC, 2010 WL 290043, at *1 (D. Haw. July 21, 2010).

156 *Erler*, 824 F.3d at 1177; *Golipour*, 438 F. Supp. 3d at 1299; *Shah*, 2014 WL 185914, at *4.

157 Affidavits of Support on Behalf of Immigrants, 71 Fed. Reg. 35,732, 35,752 (June 21, 2006) (to be codified at 8 C.F.R. pt. 213a); *Cyrousi*, 386 F. Supp. 3d 1278; *Toure-Davis*, 2014 WL 1292228.

158 Affidavits of Support on Behalf of Immigrants, 71 Fed. Reg. at 35,752.

159 U.S. DEP'T OF HOMELAND SEC., *supra* note 3, at 6-7 ("If [the sponsor] do[es] not make the reimbursement, the agency may sue [the sponsor] for the amount that the agency believes [the sponsor] owe[s].").

160 Affidavits of Support on Behalf of Immigrants, 71 Fed. Reg. at 35,740.

161 *Id.*

162 Golipour v. Moghaddam, 438 F. Supp. 3d 1290, 1298 (D. Utah 2020).

163 *Id.* at 1298-99. The court held that the legislative commentary "ha[d] no persuasive value in resolving whether a nuptial agreement will waive a sponsor's financial support obligation under the Form I-864," emphasizing the equivocality of the government's use of the word "probably." *Id.* The court chose instead to rely on decisions of the Ninth and Seventh Circuit Courts of Appeals.

contractual defense of waiver, but, as enumerated below, it is also contrary to several immigration laws and policies.

V. IMMIGRATION LAWS AND POLICIES

A. The Illegal Immigration Reform and Immigrant Responsibility Act and Personal Responsibility and Work Opportunity Reconciliation Act Make the Affidavit a Legally Binding Contract

While some form of the Affidavit of Support has been used throughout U.S. immigration history,[164] it was not until the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") and The Personal Responsibility and Work Opportunity and Reconciliation Act of 1996 ("PROWRA") were passed that the Affidavit became a legally enforceable contract.[165] Prior to these Acts, I-134 Affidavits were signed by U.S. sponsors;[166] however, they were interpreted by courts to be only "moral but not legal commitments"[167] and were nonbinding.[168] In response to criticism

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Id. (first citing Erler v. Erler, 824 F.3d 1173, 1177 (9th Cir. 2016); then citing Wenfang Liu v. Mund, 686 F.3d 418, 419-20 (7th Cir. 2012)).

164 Oksana Holder, *Public Policies Collide: Child Support vs. Immigration Support*, ARIZ. ATT'Y, Apr. 2014, at 18, 23 ("Prior to the 1996 amendments to the immigration laws, the Affidavit of Support was called Form I-134, and, unlike its replacement, it was not a legally binding contract.").

165 *Compare* 8 U.S.C. § 1182(a)(4) (1994) (using the word "excludable" rather than "inadmissible"), *with* 8 U.S.C. § 1182(a)(4) (1996) (adding that, in order for an immigrant to be admissible under this provision, the petitioner must have executed an Affidavit of Support as prescribed by section 213(a)); Burger, *supra* note 59, at 513-14; Julia Field Costich, *Legislating a Public Health Nightmare: The Anti-Immigrant Provisions of the "Contract with America" Congress*, 90 KY. L.J. 1043, 1047 (2002); Charles C. Foster, *1996 Immigration Act: Its Impact on U.S. Legal Residents*, 34 HOUS. L. REV. 28, 38 (1997); John Fredriksson, *Bridging the Gap Between Rights and Responsibilities: Policy Changes Affecting Refugees and Immigrants in the United States Since 1996*, 14 GEO. IMMIGR. L.J. 757, 769 (2000) ("The admission requirements for legal immigrants were tightened substantially in 1996 . . . the [A]ffidavit of [S]upport ensuring that the immigrant will not become a public charge is now binding and enforceable against the sponsor."); Holder, *supra* note 164.

166 Burger, *supra* note 59, at 513; Holder, *supra* note 164; Elizabeth Hull, *The Unkindest Cuts: The 1996 Welfare Reform Act's Impact on Resident Aliens*, 33 GONZ. L. REV. 471, 486 (1998).

167 Costich, *supra* note 165.

168 *Wenfang Liu*, 686 F.3d at 420 ("Sponsors' affidavits had existed earlier—perhaps as early as 1930—but generally had not been understood to impose a legal duty on the sponsor to support the sponsored person.") (citing Robert A. Mautino, *Comment, Sponsor Liability for Alien Immigrants: The Affidavit of Support in Light of Recent Developments*, 7 SAN DIEGO L. REV. 314, 316 (1970)); Burger, *supra* note 59, at 513 ("[C]ase law . . . held that the I-134 was *not* intended to be a judicially enforceable contract, but *merely a moral pledge*.") (emphasis added); Foster, *supra* note 165 ("[A]ffidavits of [S]upport . . . *previously have been deemed to be only a moral but not a legal obligation*. . . . [T]he 1996 Act, for the first time, provides that an [A]ffidavit of [S]upport may not be accepted . . . unless it is *legally enforceable against the person who signs the [A]ffidavit*.") (emphasis added); Fredriksson, *supra* note 165 ("In order to satisfy U.S. officials overseas that a particular immigrant would not become a public charge, sponsors were required to execute *non-binding* [A]ffidavits of [S]upport.") (emphasis added); Hull, *supra* note 166.

of this lack of legal substance,[169] IIRIRA and PROWRA transformed the Affidavits into binding, legal obligations now enforceable in court.[170] When these statutes were enacted in 1996, the U.S. Department of State released an explanation of the new Affidavit of Support emphasizing that "[PROWRA] requires [that] all [A]ffidavits of [S]upport filed pursuant to INA §212(a)(4) public charge provisions must be executed as a contract . . . which is legally enforceable against the sponsor."[171]

The Affidavit was given new legal substance in 1996 because of the disquiet within the immigration law community about immigrants becoming "public charges" in the United States.[172] The main purpose of the I-864 Affidavit is to protect public funds by requiring sponsors, rather than taxpayers, to financially support sponsored immigrants above the poverty line.[173] In the frequently-cited case of *Wenfang Liu v. Mund*, Judge Posner wrote: "the stated statutory goal [of IIRIRA] . . . is to prevent the admission to the United States of any alien who 'is likely at any time to become a public charge.'"[174] If a sponsored immigrant obtains public benefits, the Affidavit protects public funds by obligating the sponsor to reimburse any public organization for the relief that it provides to the immigrant.[175]

While the main motivations behind the passages of IIRIRA, PROWRA, and the new I-864 Affidavit were to protect public funds and shield taxpayers from the burden of supporting new immigrants,[176] another purpose of the Affidavit, and of many immigration laws generally, is to help integrate and assist immigrants in their transition to become productive, independent members of American society.[177] In PROWRA's purpose statements, Congress wrote:

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169 Costich, *supra* note 165, at 1047 n.21.

170 Costich, *supra* note 165; Foster, *supra* note 165; Holder, *supra* note 164.

171 Cable, State Dep't, State Dep't Explains Affidavits of Support Under Welfare Act (Sept. 23, 1996) (on file at 73 No. 40 Interpreter Releases 1463).

172 Holder, *supra* note 164, at 20.

173 Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1704 (2007) ("When Congress instituted the [A]ffidavits of [S]upport, it appears to have been mostly concerned with ensuring that immigrants would not wind up using means-tested benefits, such as welfare, Medicare, or Medicaid.").

174 Wenfang Liu v. Mund, 686 F.3d 418, 422 (7th Cir. 2012) (quoting H.R. CONF. REP. NO. 104–828, § 531 (1996)).

175 U.S. DEP'T OF HOMELAND SEC., *supra* note 3, at 7.

176 *Wenfang Liu*, 686 F.3d at 422 (quoting H.R. REP. NO. 104-828, § 531 (1996) (Conf. Rep.)) ("[T]he stated statutory goal, remember, is to prevent the admission to the United States of any alien who 'is likely at any time to become a public charge.'"); Abrams, *supra* note 173; Costich, *supra* note 165, at 1047 n.21; Holder, *supra* note 164, at 20.

177 Brief of Amicus Curiae United States of America Not in Support of a Particular Party or Outcome at 12-13, Wenfang Liu v. Mund, 686 F.3d 418 (7th Cir. 2012) (No. 11-1453) (quoting H.R. REP. NO. 104-828, § 531 (1996) (Conf. Rep.)); *see also* 8 U.S.C. § 1601(1), (2)(A).

> (1) *Self-sufficiency has been a basic principle of United States immigration law* since this country's earliest immigration statutes.
> (2) It continues to be the immigration policy of the United States that—
> (A) *aliens within the Nation's borders . . . rely on their own capabilities* and the resources of their families, their sponsors, and private organizations, and . . .
> (5) *It is a compelling government interest . . . to assure that aliens be self-reliant* in accordance with national immigration policy.
> (6) It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.
> (7) . . . [A] State that chooses to follow the Federal classification in determining the eligibility of such aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving *the compelling governmental interest of assuring that aliens be self-reliant* in accordance with national immigration policy.[178]

The statutory reform of 1996 was intended to serve a dual purpose of reducing the financial burden of immigrants on the public welfare system and encouraging immigrants to become self-sufficient.[179]

Problematically, in *Wenfang Liu*, no weight was given to this second goal of immigrant self-sufficiency.[180] In this Seventh Circuit case, Judge Posner ruled contrary to the argument raised by the Justice Department in the United States' amicus brief.[181] The Justice Department promoted an immigrant's duty to mitigate their financial damages because this would "encourage immigrants to become self-sufficient."[182] The duty for immigrants to mitigate their reliance on public funds under the Affidavit would reduce the amount they could recover from their sponsors. In its amicus brief, the United States wrote the following:

> [T]he general principle of self-sufficiency underlying the immigration system counsels in favor of a duty to mitigate. In the conference committee report that preceded IIRIRA's passage, Congress specifically stated that the [A]ffidavit of [S]upport provision "is designed to *encourage immigrants to be self-reliant* in accordance with national immigration policy" (citation omitted). Moreover, Congress has observed that "[s]elf-sufficiency has been a basic principle of United States immigration law since the country's earliest immigration statutes" (citation omitted) . . . A duty to mitigate

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178 Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 400, 110 Stat. 2105 (emphasis added); Burger, *supra* note 59, at 513 n.31.

179 Burger, *supra* note 59, at 532 ("The Affidavit serves the dual purposes of (1) protecting taxpayers from immigrants becoming a strain on public resources and (2) encouraging immigrants to seek employment with the goal of becoming self-sufficient.").

180 *Wenfang Liu*, 686 F.3d at 422.

181 *Id.*

182 *Id.*; Brief of Amicus Curiae United States of America Not in Support of a Particular Party or Outcome, *supra* note 177.

> would encourage self-sufficiency among immigrants because *it would preclude an alien who is otherwise capable of supporting herself with reasonable effort from relying solely on her sponsor for suppor*t.[183]

Later in the brief, the United States acknowledged that the duty to mitigate increased the possibility that an immigrant could become a public charge, yet the government still advocated for this position due to the importance of self-sufficiency.[184]

Rather than giving credence to the arguments of the U.S. government, who is a party to that contract,[185] Judge Posner set a federal precedent flatly rejecting self-sufficiency as a goal of the Affidavit.[186] Instead of finding harmony between the statutory goals of protecting public funds and immigrant self-sufficiency, the Seventh Circuit court rejected the duty for immigrant spouses to mitigate their financial damages incurred under the Affidavit.[187] In effect, this encouraged immigrants to remain dependent on their sponsors without requiring them to take any measures to become self-sufficient.[188] Under this opinion, the central goal of the 1996 statutory reform was simply "to prevent the entry of at-risk immigrants altogether by imposing a heavy burden on sponsors."[189]

Since the decision in *Wenfang Liu*, many courts have been presented with the defense of waiver of an immigrant spouse's right to sue under the I-864 Affidavit through the use of a nuptial agreement.[190] These courts have rejected this defense as contrary to the statutory goals of IIRIRA and

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183 Brief of Amicus Curiae United States of America Not in Support of a Particular Party or Outcome, *supra* note 177 (quoting H.R. REP. NO. 104-828, at 241 (1996) (Conf. Rep.)); *see also* 8 U.S.C. § 1601(1), (2)(A).

184 Brief of Amicus Curiae United States of America Not in Support of a Particular Party or Outcome, *supra* note 177, at 15-16 ("[T]he overall effect of the mitigation rule on the number of public charge aliens likely will be minimal. The mitigation rule, therefore, is consistent with federal immigration policy.").

185 U.S. DEP'T OF HOMELAND SEC., *supra* note 3, at 6.

186 Many courts have followed Judge Posner's reasoning, finding that the statutory purpose of the I-864 Affidavit is to protect taxpayers and hold sponsors financially responsible to sponsored immigrants. *See, e.g.*, Golipour v. Moghaddam, 438 F. Supp. 3d 1290, 1298-99 (D. Utah 2020); Li Liu v. Kell, 299 F. Supp. 3d 1128, 1133-34 (W.D. Wash. 2017); Toure-Davis v. Davis, No. WGC-13-916, 2014 WL 1292228, at *8-9 (D. Md. Mar. 28, 2014); Shah v. Shah, No. 12-464, 2014 WL 185914, *at 1 (D.N.J. Jan. 14, 2014); *Wenfang Liu*, 686 F.3d at 422 ("[S]elf-sufficiency, though mentioned briefly in the House Conference Report on the 1996 statute as a goal, is not the goal stated in the statute; the stated statutory goal, remember, is to prevent the admission . . . of any alien who 'is likely at any time to become a public charge.'") (citation omitted) (quoting H.R. REP. NO. 104–828, § 531 (1996) (Conf. Rep.)).

187 *Wenfang Liu*, 686 F.3d at 422.

188 *Id.* at 422-23 (holding that a sponsored immigrant has no duty to take measures to mitigate damages and that the sponsor cannot raise this as a defense against enforcement of the I-864 Affidavit).

189 Burger, *supra* note 59, at 518.

190 *See* discussion *supra* Part III(A).

PROWRA.[191] As Judge Posner did in *Wenfang Liu*, these courts narrowly focused on the statutory goal of reducing the financial burden on public benefit systems and protecting taxpayer funds without attempting to find harmony with other statutory purposes.[192] A better approach would be for the courts to accept the waiver defense brought by sponsors against their immigrant spouses who enter into nuptial agreements, allowing the courts to blend the dual statutory purposes of conserving public resources and promoting immigrant self-sufficiency. The stated statutory purpose in PROWRA and the United States' amicus brief distinctly focus on self-sufficiency.[193] Therefore, the courts should not reject this goal when there is a legal avenue to simultaneously accomplish both goals of self-sufficiency and conservation of public resources.

B. Immigration Marriage Fraud Amendments of 1986

Another major movement in immigration reform occurred in 1986 with the Marriage Fraud Amendments.[194] These Amendments establish another purpose behind the federal immigration statutory scheme: to detect and prevent fraudulent marriages entered to exploit the naturalization process.[195] Because of the beneficial immigration status that comes with marriage to a U.S. citizen, the Immigration and Naturalization Services ("INS") was faced with an unmanageable amount of what it believed were sham marriages that were difficult to detect under the procedures in place before 1986.[196] Federal immigration officers were concerned that many marriages between U.S. citizens and noncitizens served only as façades, and uneasiness spread when several U.S. citizens testified to Congress about their immigrant spouses abandoning their marriages upon receipt of lawful permanent resident status.[197]

INS asked Congress to amend the current INA so that it could better manage this problem,[198] and in 1986, Congress passed several amendments to the United States Code to better detect and reduce fraudulent marriages

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191 *Golipour*, 438 F. Supp. 3d at 1298-99; *Li Liu*, 299 F. Supp. 3d at 1133-34; *Toure-Davis*, 2014 WL 1292228, at *8-9; *Shah*, 2014 WL 185914, at *1.

192 *Golipour*, 438 F. Supp. 3d at 1298-99; *Li Liu*, 299 F. Supp. 3d at 1133-34; *Toure-Davis*, 2014 WL 1292228, at *8-9; *Shah*, 2014 WL 185914, at *1.

193 *Supra* notes 178-84 and accompanying text.

194 U.S. CITIZENSHIP AND IMMIGR. SERVS., ADJUDICATOR'S FIELD MANUAL, ch. 25.1, pt. (a) (2019).

195 Vonnell C. Tingle, *Immigration Marriage Fraud Amendments of 1986: Locking in by Locking Out?*, 2 J. FAM. L. 733, 751 (1981).

196 U.S. CITIZENSHIP AND IMMIGR. SERVS., *supra* note 194; Tingle, *supra* note 195, at 733-35.

197 U.S. CITIZENSHIP AND IMMIGR. SERVS., *supra* note 194, at pt. (a) ("The Marriage Fraud Amendments of 1986 ("IMFA") were enacted in response to a growing concern about aliens seeking permanent residence in the [United States] on the basis of marriage to a citizen . . . for the sole purpose of obtaining permanent residence.").

198 Tingle, *supra* note 195, at 733-35.

between immigrant spouses and U.S. citizens.[199] The 1986 Amendments combat sham marriages by granting only a two-year "conditional" residence status to immigrant spouses who have been married for less than two years at the time they apply for legal residency.[200] Additional safeguards include the previously discussed requirements of filing a petition to remove the conditional status and interviews to detect marriage fraud.[201]

When considering the purpose of the Marriage Fraud Amendments alongside the goals of IIRIRA and PROWRA, it is evident that allowing sponsors to use the waiver defense best harmonizes the goals of prevention of marriage fraud, immigrant self-sufficiency, and protection of public funds. Enforcement of the waiver defense would promote independence and honesty within the immigration process, fulfilling the purposes of multiple immigration law reforms.

VI. HARMONIZING IMMIGRATION LAWS BY PERMITTING NUPTIAL AGREEMENTS TO BE ENFORCED AGAINST SPONSORED IMMIGRANT SPOUSES

After examining these statutes together, three purposes behind their passages are evident: reducing the burden on the public welfare system;[202] encouraging immigrant self-sufficiency;[203] and reducing fraudulent marriages.[204] As discussed, under the current case law, any waiver of an immigrant spouse's third-party right to sue under the Affidavit is void.[205] This not only perpetuates an immigrant spouse's financial dependence on their sponsor, but it also facilitates the abandonment of the marriage without triggering a terminating condition of the ex-spouse's obligation of support under the Affidavit.[206]

If immigrant spouses know that, under current case law, the prenuptials they sign will not be enforced, they have an incentive to lie to their spouses. They can enter into marriages knowing that any prenuptial agreements they sign will not, in effect, preclude them from receiving financial support after divorce. This deceptive behavior is unchecked under the case law previously

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199 Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (codified at 8 U.S.C. § 1186a (2013)); Tingle, *supra* note 195, at 733-35.

200 8 U.S.C. §1186a(a), (h); U.S. CITIZENSHIP AND IMMIGR. SERVS., *supra* note 194; *see also* discussion *supra* notes 32-35 and accompanying text.

201 U.S. CITIZENSHIP AND IMMIGR. SERVS., *supra* note 194, at pt. (c), (i); Tingle, *supra* note 195, at 733-35; *see also* discussion *supra* notes 32-35 and accompanying text.

202 Wenfang Liu v. Mund, 686 F.3d 418, 420 (7th Cir. 2012); Abrams, *supra* note 173.

203 Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 400, 110 Stat. 2105; Burger, *supra* note 59, at 519 n.77.

204 Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (codified at 8 U.S.C. § 1186a); Tingle, *supra* note 195, at 733-35.

205 *See* cases discussed *supra* Part III(A).

206 8 C.F.R. § 213a.2(e)(2)-(3) (2022).

examined,[207] contravening the purposes of the Marriage Fraud Amendments.[208] Further, because the work quarters accumulated by a sponsored spouse during marriage are credited to an immigrant spouse,[209] there is also an incentive to terminate the marriage before forty quarters have accumulated under the statute and the I-864 obligations are terminated. As discussed, immigrant spouses from marriages that last ten years or more have generally lost their right to sue under the Affidavit, assuming the sponsor has worked during the marriage.[210] This provides an incentive to sponsored immigrant spouses to terminate their marriages before these quarters have accumulated, which is generally before ten years of marriage have passed, so that they can sue their sponsors for financial support even after divorce.

The unenforceability of certain nuptial agreements also impedes immigrant self-sufficiency. Because immigrants' work quarters will also terminate sponsors' obligations once sponsored immigrants accumulate forty quarters,[211] the I-864 Affidavit disincentivizes immigrants from working and providing for themselves. When immigrant spouses continually receive money from their sponsors, even after entering into a nuptial agreement, there is a motivation to stay unemployed. Once sponsored immigrant spouses work for themselves and reach forty quarters, they will lose their otherwise unending stream of money from their sponsor.[212]

While allowing nuptial agreements to act as waivers of the right to directly sue under the Affidavit would not eliminate these problems, it would mitigate them without completely undermining the goal of reducing the taxpayer burden. Waivers through nuptial agreements would only apply to the immigrant spouse's right to directly sue the sponsor and would not preclude government agencies from suing for reimbursement.[213] Because an immigrant cannot unilaterally alter the rights of government agencies, these nuptial agreements would not eliminate all avenues of reimbursement of taxpayer funds used to provide for an immigrant spouse.[214]

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207 *See* cases discussed *supra* Part III(A).

208 Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (codified at 8 U.S.C. § 1186a); Tingle, *supra* note 195, at 733-35.

209 8 U.S.C. § 1183(a)(3)(B); Singh & Pillai, *supra* note 43.

210 *See* discussion *supra* notes 43-50 and accompanying text.

211 8 C.F.R. § 213a.2(e)(2)(i)(B).

212 *Id.*

213 Blain v. Herrell, No. 10-00072, 2010 WL 2900432 (D. Haw. July 21, 2010) (finding that the waiver enforced against the immigrant spouse would not protect the sponsor from obligations to the government). Requiring the government, rather than the immigrant spouse, to sue for reimbursement will not necessarily create additional costs for the government because the I-864 form already provides that sponsors "may be required to pay the costs of collection, including attorney fees" if any public agency brings a successful legal action under the contract. U.S. DEP'T OF HOMELAND SEC., *supra* note 3, at 7.

214 *Blain*, 2010 WL 2900432 (discussing the limitations of a waiver by the immigrant spouse).

Enforcing nuptials will not undermine the purpose of the Affidavit; rather, enforcement will facilitate a dual purpose. It will allow agencies to be properly reimbursed while simultaneously prohibiting immigrant spouses from relying on a direct source of personal payment from sponsors rather than becoming self-sufficient.[215] Without the ability to directly collect from sponsors under the Affidavit, immigrant spouses will no longer have an incentive to remain unemployed or terminate their marriages before forty work quarters have accrued.

While it is true that sponsored immigrant spouses could still receive public benefits if they waive their right to sue for direct payments from their sponsors, they would first have to qualify for benefits under PROWRA and successfully traverse the difficulties of that process.[216] Unlike the guarantee of support from a sponsor, immigrant spouses do not have a guarantee that they will consistently qualify for and receive public benefits.[217] For example, Anton may have a greater incentive to become employed if he must first apply for public benefits and wait for government approval to receive any aid as opposed to simply enforcing the I-864 against Alexia. Additionally, immigrant spouses would no longer receive money directly from their sponsors to be spent at the immigrant spouse's discretion. This promotes self-sufficiency. Simultaneously, the Affidavit permits the government to collect money from the sponsor if tax funds have been used to support a sponsored immigrant spouse.

Enforcing nuptial agreements against sponsored immigrant spouses would also reduce marriage fraud at the inception. When immigrant spouses sign nuptial agreements, they will be bound by those agreements, including any terms that waive their private right to collect under the I-864 Affidavit. There will no longer be an avenue to fraudulently enter these agreements. Rather than their nuptial agreements being unenforceable, sponsored immigrant spouses will be legally bound by the contracts they sign with their spouses. This will encourage immigrants to seriously consider the gravity of the contracts they sign, prompting more honesty in marriages between U.S. citizens and immigrants. Simultaneously, common law contract defenses such as fraud and duress will protect sponsored immigrants from manipulation.[218]

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215 *Id*. (explaining the ability of public government agencies to sue despite an enforceable waiver defense by the sponsoring spouse against the sponsored immigrant spouse).

216 Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 411, 110 Stat. 2105.

217 Personal Responsibility and Work Opportunity Reconciliation Act of 1996 §§411-12, 421-22. For example, under section 412, "Notwithstanding any other provision of law . . . a State is authorized to determine the eligibility for any State public benefits of an alien who is a qualified alien." *Id*. §412.

218 RESTATEMENT (SECOND) OF CONTRACTS §§ 164, 174-75 (AM. L. INST. 1981); 17 Am. Jur. 2D *Contracts*, *supra* note 124.

The most effective way to promote multiple statutory goals and maintain the integrity of the immigration system as a whole is to permit nuptial agreements to be enforced against immigrants who agree to waive any right to support after divorce. As discussed, this would be permissible under both general principles of contract law and the precedent set in *Blain v. Herrell*.[219] Instead of offering Alexia no hope, the immigration attorney could utilize Alexia's nuptial agreement to shield her from Anton's claims for financial support without impacting her contractual obligations to the U.S. government under the Affidavit. While waivers do not remove any liability of sponsors to government entities, they increase an immigrant spouse's responsibility to become financially independent and to enter marriages with honesty and commitment. So, while Alexia would be protected from a suit brought by Anton personally, she would be bound by her promise to reimburse the U.S. government for any public benefits Anton received. Overall, enforcing nuptial agreements provides the best harmony between all individual laws that together form the United States' immigration and naturalization system.

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[219] *Blain*, 2010 WL 2900432; Cyrousi v. Kashyap, 386 F. Supp. 3d 1278 (C.D. Cal. 2019); Toure-Davis v. Davis, No. WGC-13-916, 2014 WL 1292228 (D. Md. Mar. 28, 2014); RESTATEMENT (SECOND) OF CONTRACTS § 309 (AM. L. INST. 1981); 17 Am. Jur. 2D *Contracts*, *supra* note 124.