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The Impact of Insulating Immigration Courts from Judicial Review on America's New Generation of Families

Christian Sanchez Leon
Washington and Lee University School of Law, sanchezleon.c24@law.wlu.edu

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Abstract

This Note could be read as another Note addressing Congress's power to strip jurisdiction from Article III courts. Yet, when this power is exercised in the immigration context, its impact extends far beyond the realm of checks and balances. Instead, this Note is about the insulation of the Board of Immigration Appeals ("BIA") and its unfettered ability to create, interpret, and adjudicate its own laws. Not allowing courts to review BIA decisions leaves mixed-status families vulnerable to the harsh consequences of inherently arbitrary decisions made by executive officers.

These practices go against the established common law principles of family unity. For nearly a century, our judiciary has emphasized the importance of maintaining the family nucleus and parental autonomy. The courts have explained that it is central to our nation's history and culture that parents have the right to be present in their child's upbringing, enacting

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safeguards such as procedural protections for parents against the intrusion of the State. However, when it comes to mixed-status families, these judicial protections do not extend to immigration proceedings. When a child is born in the United States to undocumented parents, they are forced to decide between complete family separation and the forced removal of a citizen child from the country.

Stripping jurisdiction from courts to hear immigration proceedings of mixed-status families prevents the courts from addressing the violations of the fundamental right to family unity. While Congress does have the power to limit the jurisdiction of Article III courts, Congress cannot withhold judicial relief from people seeking to protect their rights to life, liberty, or property. Judicial recognition of the fundamental right to family unity, in the context of mixed-status families, would be a first step in enabling federal courts to preserve the constitutionality of our immigration system.

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INTRODUCTION

The United States's rigid and archaic immigration laws have disastrous effects on families across the country and have inspired vivid debates across political divides. Both sides of the political spectrum consider the effect of these laws unfair, especially when those laws strip children from their families.[1] But since the current polarized nature of U.S. politics makes bipartisan cooperation highly unlikely, we must explore other avenues to bring an end to the daily violation of human rights that occurs in our immigration system.[2] Although scholars have proposed major changes to this system,[3] the introduction of more

1. *See* Caitlin Dickerson, *Congress Can't Even Do This One Thing*, ATLANTIC (Oct. 27, 2002), https://perma.cc/26QM-FF4J ("Left and right agreed that migrant children shouldn't be torn away from their parents. But they couldn't be bothered to pass a law.").

2. *See, e.g.*, David Baluarte, *Family in The Balance:* Barton v. Barr *and The Systematic Violation of The Right to Family Life in U.S. Immigration Enforcement*, 27 WM. & MARY J. RACE, GENDER & SOC. JUST. 33, 34 (2020) ("The United States systematically violates the international human right to family life in its system of removal of noncitizens.").

3. *See, e.g.*, Daniel I. Morales, *Transforming Crime-Based Deportation*, 92 N.Y.U. L. REV. 698, 744–45 (2017) (proposing a change to the crime-based deportation system in the United States); Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040, 1042–51 (2021) (explaining that there is

minor changes to particular provisions within the Immigration and Nationality Act[4] ("INA"), especially the ones that create the most evident injustices, is more likely to be successful.[5]

This Note addresses one of the clearest examples of the systematic violations of rights of our immigration system: its treatment of mixed-status immigrant families. A mixed-status family is a family whose members include one or more U.S. citizens or lawful permanent residents and at least one undocumented noncitizen.[6] As of 2020, there were at least 5.5 million U.S. citizens or lawful permanent residents that lived in a mixed-status family, out of which 3.7 million were children that lived with at least one undocumented parent.[7]

Let us explore the injustices mixed-families face in the hands of the U.S. by considering a potential case within the group of 3.7 million children living in mixed-status families.[8] Sara is eight years old and was born in the United States. Sara's mother is a U.S. citizen and Sara's father is an undocumented immigrant. Sara's father works every day to support his family and has never committed a crime. Despite Sara's father's clean record, the U.S. government wanted to deport him. In front of the immigration court, Sara's father raised a non-LPR Cancellation of Removal defense.[9] Although her father met all the requirements under this defense, the court ruled to deport Sara's father after misapplying its own precedent. Sara's father appealed this decision to the Board of Immigration Appeals ("BIA"), which wrongly affirmed the immigration court's decision. After Sara's father went to the federal judiciary to fix this wrong, he encountered an unexpected hurdle. The federal

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an unfought assumption that deportation is an inevitable power of sovereign states and proposing the abolition of our deportation system).

4. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101–1537).

5. *See infra* Part III.B.

6. *Frequently Asked Questions: The Affordable Care Act & Mixed-Status Families*, NAT. IMMIGR. L. CTR., https://perma.cc/5FUB-NHPS (last updated Oct. 2022).

7. *Fact Sheet: Mixed Status Families and COVID-19 Economic Relief*, NAT. IMMIGR. F. (Aug. 12, 2020), https://perma.cc/JM6V-BCT9.

8. This is a hypothetical case given as an illustration of how the current stage of our immigration system impacts the lives of U.S. citizens, lawful permanent residents, and undocumented individuals.

9. *See infra* Part I.C.

judge refused to interfere with the BIA's decision, reading a jurisdiction-stripping statute too broadly in finding that he lacked jurisdiction to hear the case. At this point, the alleged protections offered by both the immigration system and the federal judiciary have blatantly failed Sara's father. Shortly after, Sara's father was deported back to his country of citizenship. This left Sara and her mother, both U.S. citizens, with two options: preserve their family and follow Sara's father to a foreign country or stay, and live without their father and husband. This Note argues that this scenario clearly violates the right to family unity that, in other contexts, this country has recognized from its foundation. It then proceeds to lay out the jurisprudence framework under which courts can formally recognize the right to family unity as a fundamental right protected by the courts to put a stop to the injustice.

This Note focuses on the defense of cancellation of removal for non-permanent residents under INA § 240A(b)(1) ("non-LPR cancellation of removal"), which is a critical defense to deportation available to certain noncitizens with family in the U.S.[10] Strengthening this defense to deportation would improve the lives of millions of undocumented individuals by decreasing the disruption of the family nucleus.[11]

This Note begins by exploring the problematic structure of our immigration system.[12] It continues by evaluating the insulation of the immigration system from Article III review—noting how this violates parents' basic right to the care, custody, and control of their children.[13] This Note goes on to demonstrate that our current regime does not correctly balance the damage that it does to the integrity of families across the country because it does not advance or protect any national security interest.[14] To stop the current trend, this Note proposes

10. Immigration and Nationality Act § 240A(b)(1).

11. *See Family Nucleus*, https://perma.cc/2J55-LG3M (last visited July 25, 2023) ("The idea of the family nucleus responds to a modern conception of the family limited to the closest family relationships (relationships between parents and children).").

12. *See infra* Part I.

13. *See infra* Part II.

14. *See infra* Part III.

that federal courts should recognize the right to family unity as a fundamental right.[15] This right should be balanced in immigration proceedings in which there are no tangible national security concerns.[16] Alternatively, this Note proposes that circuit courts across the country should limit reviewability to only questions of fact rather than mixed questions of fact and law.[17]

I. OUR IMMIGRATION SYSTEM IS PROBLEMATICALLY STRUCTURED AND INFRINGES ON FUNDAMENTAL RIGHTS

When interpreting legislation that openly discriminates against noncitizens, the Supreme Court has stated that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[18] The U.S. government has created a harsh regime that systematically discriminates against noncitizens without providing them judicial relief.[19] This discrimination is felt by both citizens and noncitizens throughout the country.[20] Subpart A introduces the plenary power doctrine, a constitutional dogma created by the Supreme Court in *Chae Chan Ping v. United States*,[21] that establishes an unlimited power by the federal government to regulate immigration and allows Congress to pass discriminatory burdens on noncitizens. Subpart B elaborates on how this doctrine has allowed the political branches of the U.S. government to create an immigration system in which they have insulated immigration judges and officers from meaningful review by Article III courts. Subpart C illustrates the practical effects of this lack of review in the context of non-LPR cancellation of removal, introducing the idea that in any other context, the effects of these policies would fail to pass constitutional muster.

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15. *See infra* Part III.
16. *See infra* Part III.
17. *See infra* Part III.
18. Demore v. Hyung Joon Kim, 538 U.S. 510, 521 (2003).
19. *See infra* Part I.A.
20. *See infra* Part I.C.
21. 130 U.S. 581 (1889).

A. *The Wicked Foundation of the Plenary Power Doctrine*

The U.S. government shields the political branches from constitutional claims that arise out of its discriminatory immigration regime by making these matters immune from Article III judicial review under the plenary power doctrine.[22] This immunity leads to arbitrary practices that affect the lives of noncitizens and their relatives across the country. The Constitution and the United States's sovereign status grants the federal government the power to regulate immigration.[23] This power is held by the political branches of the government.[24] Yet, unlike other powers held by these branches, the natural intersection of the flow of immigrants with national security and international relations has been used to elevate immigration law beyond the reach of restrictions that usually apply to other acts of Congress.[25] The first decision that touched on this distinction was *Chae Chan Ping v. United States*, which

22. *See* Ernesto Hernandez-Lopez, *Sovereignty Migrates in U.S. and Mexican Law: Transnational Influences in Plenary Power and Non-Intervention*, 40 VAND. J. TRANSNAT'L L. 1345, 1347–48 (2007) ("The plenary power doctrine of the United States, on the other hand, labels immigration law as immune from judicial review because the political branches have complete, 'plenary' authority over immigration.").

23. *See* Arizona v. United States, 567 U.S. 387, 394–95 (2012) ("[The] U.S. government has broad, undoubted power over the subject of immigration and the status of aliens. This authority rests, in part, on the National Government's constitutional power to 'establish a uniform Rule of Naturalization' and its inherent power as sovereign to control and conduct relations with foreign nations." (citing U.S. CONST. art. I, § 8, cl. 4)).

24. *See* The Chinese Exclusion Case, 130 U.S. 581, 606–07 (1889) ("The power of the government to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments."); *see also* People v. Jacinto, 231 P.3d 341, 348 (Cal. 2010) ("The federal government's power over immigration issues is supreme.").

25. *See* Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952)

> [A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

involved a Chinese noncitizen U.S. resident who left the states with U.S. issued documents that, in theory, should have allowed him to reenter the country.[26] When he was on the boat back to the U.S., Congress passed legislation restricting the usage of these reentry documents in an undenied effort to restrict Chinese immigration.[27] The Court upheld the constitutionality of Congress's actions, stating that the plenary power of the government to exclude foreigners had never been denied by the executive and legislative departments and that these determinations "were conclusive upon the judiciary."[28]

Two decisions in the next five years would solidify the arguably unchecked power that the political branches have over immigration law. First, in *Ekiu v. United States*,[29] the Supreme Court was asked to determine the constitutionality of an act that allowed executive officers to make a final decision on the admission of foreigners to the United States without the possibility of judicial review.[30] The Court held that Congress could entrust final factual determinations to executive officers and no tribunal had the authority to review these decisions.[31] One year later, the Supreme Court further insulated immigration from constitutionality concerns in *Fong Yue Ting v. United States*.[32] The Court considered the constitutionality of a federal statute that required Chinese noncitizens—but not foreigners of other racial groups—to register on pain of deportation or, as an alternative, have a "white witness" testify

26. *The Chinese Exclusion Case,* 130 U.S. at 598.

27. *See id.* ("[E]very certificate heretofore issued in pursuance thereof is hereby declared void and of no effect, and the Chinese laborer claiming admission by virtue thereof shall not be permitted to enter the United States.").

28. *See id.* at 607; *id.* at 606 ("If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed . . . .").

29. 142 U.S. 651 (1892).

30. *Id.* at 660.

31. *See id.* ("It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile . . . shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches.").

32. 149 U.S. 698 (1893).

on their behalf.[33] The Court held that "the right of a nation to expel or deport foreigners, w*ho have not been naturalized or taken any steps towards becoming citizens of the country* . . . is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."[34]

These cases formed the bedrock of the plenary power doctrine, which leaves the legislative and executive branches of government with unqualified power to determine immigration policy with minimal interference from the judicial branch.[35] Although the cases discussed above were decided at a time when racial discrimination was a valid government goal, they are still cited today by courts and litigants across the country[36] and define the broad scope of the political branches' power over immigration.[37] Even though this doctrine has received extensive criticism, it is unlikely that the Supreme Court would entertain

33. *Id.* at 727.

34. *Id.* at 707 (emphasis added).

35. *See* John Lichtenthal, *The Patriot Act and Bush's Military Tribunals: Effective Enforcement or Attacks on Civil Liberties?*, 10 BUFF. HUM. RTS. L. REV. 399, 404 (2004) ("[T]hanks to the Plenary Power doctrine, the legislative and executive branches would be left to determine immigration policy with minimal interference from the Court.").

36. *See, e.g.*, People v. Arthur, 213 A.D.3d 772, 772 (N.Y. App. Div. 2023) (citing *Fong Yue Ting* when holding that defendant's claim that his sentence imposed cruel and unusual punishment in light of the immigration consequences of his sentence was unpreserved for appellate review and without merit); Rodriguez v. Garland, 31 F.4th 935, 945 (5th Cir. 2022) (citing *Ekiu* when establishing that "[a] sovereign isn't a sovereign if it can't enforce its borders. The power to control the flow of aliens into our country is inherent in our national sovereignty—and in the executive power under our Constitution"); United States v. Barrera-Vasquez, No. 21-cr-98, 2022 U.S. Dist. LEXIS 134692, at *6 (E.D. Va. July 28, 2022) (citing *Ping* as part of the government's argument that "the Court should apply 'ordinary rational basis' review in this context because the plenary power doctrine mandates extreme judicial deference to Congress regarding matters of immigration and naturalization").

37. *See* Gabriel J. Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power*, FOUNDATION PRESS (May 19, 2005), https://perma.cc/2UC9-8QZ6 (analyzing the impact that the Chinese exclusion case and subsequent decisions by the Supreme Court have today when the judiciary is asked to define the scope of the power that the federal political branches over immigration).

a challenge to it in the near future.[38] Furthermore, important historical events in the U.S.—such as the Oklahoma City Bombing and the September 11th attacks—continue to fuel the narrative that the government needs to have this power to protect its citizens.[39]

Although Congress's plenary power is broad, the Supreme Court imposed a few exceptions that limit the otherwise apparent unbridled power.[40] We must understand these few exceptions to succeed in meaningful reform. As explained in the next section, the main judicially recognized limitation to the political branches' plenary power is compliance with the constitutional requirements of due process.[41]

B. *Jurisdiction-Stripping Statutes, Immigration Courts, and Article III Courts*

Under the extensive power provided by the plenary power doctrine, Congress has enacted multiple statutes granting the executive branch most of its power to regulate and enforce immigration law.[42] The executive and legislative branches have repeatedly tried to insulate the decisions of immigration courts from review by federal courts.[43] In 1996, Congress passed two

38. *See* David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 31–32 (2015) (explaining why and how the plenary power doctrine endures despite scholarly condemnation).

39. *See* Michael Ross, *Terror in Oklahoma City: Tougher Immigration Laws Are Expected in Bomb Aftermath: Legislation: Many Measures, Including Anti-Terrorist Proposals, Are Not New. But Now There Is Bipartisan Support. Civil Libertarians Express Constitutional Concerns*, L.A. TIMES (Apr. 21, 1995), https://perma.cc/9NW3-MA7Z ("The bombing of the federal building in Oklahoma City has injected new urgency into the debate over the nation's immigration laws and is expected to lead to swift and significant changes in immigration and counterterrorism policies, according to lawmakers and other legal experts.").

40. *See infra* Part II.A.

41. *See infra* Part I.B.

42. *See* David S. Rubenstein, *Putting the Immigration Rule of Lenity in Its Proper Place: A Tool of Last Resort After Chevron*, 59 ADMIN. L. REV. 479, 485 (2007) ("While the law entrusts Congress with the creation of our country's immigration law in the first instance, Congress has delegated the bulk of the enforcement and administration of that law to department heads within the executive branch.").

43. *See* Shruti Rana, *"Streamlining" The Rule of Law: How the Department of Justice is Undermining Judicial Review of Agency Action*, 2009

amendments to the INA: the Antiterrorism and Effective Death Penalty Act[44] ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act[45] ("IIRIRA").[46] Together the amendments barred judicial review of most discretionary decisions and crime-related removal orders by immigration courts. The efforts by the executive and legislative branches to insulate immigration courts from judicial review were advanced in 2005 with the enactment of the REAL ID Act.[47] The REAL ID Act made significant changes to § 242(a)(2)(B) of the INA, which restricts federal court review of certain discretionary decisions by the executive branch in immigration cases.[48] Specifically, the REAL ID Act broadened the scope of decisions that were not

U. ILL. L. REV. 829, 832 (2009) ("Through its recent efforts to insulate its immigration decisions from public and federal court scrutiny, the DOJ is transforming agency discretion into a form of absolute executive authority free from the traditional restraint of judicial review.").

44. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

45. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.

46. *See, e.g.*, Hamama v. Homan, 912 F.3d 869, 880 (6th Cir. 2018) (concluding that IIRIRA eliminated jurisdiction for the district court to enter its preliminary injunction because it plainly reserved for the Attorney General the authority to execute removal orders and that the lack of habeas corpus review was constitutionally sound). *See generally* STEPHEN H. LEGOMSKY & DAVID B. THRONSON, IMMIGRATION AND REFUGEE LAW AND POLICY 977 (7th ed. 2019) (explaining the enactment of both AEDPA and IIRIRA in 1996 and their impact on INA).

47. Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005) (codified as amended at 49 U.S.C. § 30301).

48. REAL ID Act § 101(f); *see* MARY KENNEY, AM. IMMIGR. COUNCIL, FEDERAL COURT JURISDICTION OVER DISCRETIONARY DECISIONS AFTER REAL ID: MANDAMUS, OTHER AFFIRMATIVE SUITS AND PETITIONS FOR REVIEW 45 (Apr. 5 2006), https://perma.cc/A3NF-R8CN (PDF) (explaining that IIRIRA barred judicial review of whole categories of removal orders, prohibited review of most denials of discretionary relief, made several forms of action and other judicial remedies unavailable, and erected several barriers to judicial review of administrative decisions in removal cases); *see also* Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 704–05 (1997) (noting that 1996 legislation led to "a severe limitation of judicial review" of immigration cases).

subject to review and eliminated habeas corpus review.[49] The plain meaning of these statutes limited Article III courts' appellate jurisdiction over immigration courts' decisions regarding "crime related removal orders, denials of discretionary relief, expedited removal orders, voluntary departure regulation, prosecutorial discretion, and detention decisions."[50]

The statutorily imposed insulation leaves the immigration court system, a system of administrative courts, with an unchecked power to administer consequential proceedings, such as removal cases and asylum claims.[51] The executive branch has the primary control over the administrative court system, which is operated by the Department of Justice's Executive Office for Immigration Review ("EOIR"), under the power of the Attorney General.[52] The fifty-eight immigration courts throughout the United States respond to the BIA, which is the highest administrative body for interpreting and applying immigration laws.[53] Each of the immigration judges is appointed by the Attorney General, without any need of confirmation process by any other branch of government.[54] Furthermore, once these judges are appointed, they are subject to supervision by the Attorney General and are obligated to perform their duties

49. *See* KENNEY, *supra* note 48, at 2 (explaining that the REAL ID Act amended the INA by specifying that the INA phrase "notwithstanding any other provision of law" applied to "statutory and nonstatutory" law, including the restriction to review habeas corpus claims).

50. LEGOMSKY & THRONSON, *supra* note 46, at 986.

51. *See Immigration Courts and Immigration Judges Fact Sheet*, NAT. IMMIGR. F. (2020), https://perma.cc/F5AF-QQQN (providing an overview of the proceedings that are administered by immigration courts).

52. *Id.*

53. *See Board of Immigration Appeals*, DEP'T OF JUST., https://perma.cc/Q3J3-UHZZ (last updated Sept. 14, 2021) ("The BIA has been given nationwide jurisdiction to hear appeals from certain decisions rendered by Immigration Judges and by district directors of the [DHS] in a wide variety of proceedings in which the Government of the United States is one party and the other party is an alien.").

54. *See In re* Al-Nashiri, 921 F.3d 224, 235 (D.C. Cir. 2019) ("[T]he Attorney General himself is directly involved in selecting and supervising immigration judges. Unlike administrative law judges . . . immigration judges . . . are appointed directly by the Attorney General.").

following the rules prescribed by the Attorney General's office.[55] These judges theoretically have similar employment protections to other federal employees and can only be fired for good cause.[56] But the lack of independence from the executive branch, combined with the current climate of political polarization, has raised bipartisan concerns that immigration judges have been removed from their positions solely due to their political beliefs.[57]

The structure of the immigration court system combined with schemes shielding discretionary immigration decisions from Article III appellate review are particularly problematic. First, immigration judges, who are officers of the executive branch subject to heavy political pressures, become less accountable to judicial review while remaining ineligible for protections that Article III judges enjoy.[58] Insulating these

55. *See* 8 U.S.C. § 1101(b)(4) (defining an immigration judge "as an administrative judge . . . qualified to conduct specified classes of proceedings," and who is "subject to . . . supervision and shall perform such duties as the Attorney General shall prescribe").

56. *See Immigration Courts and Immigration Judges Fact Sheet*, *supra* note 51 ("EOIR immigration judges lack the judicial independence and life tenure that federal judges have. Immigration judges are hired and can be fired like other federal employees.").

57. *See* Christina Goldbaum, *Trump Administration Moves to Decertify Outspoken Immigration Judges' Union*, N.Y. TIMES (Aug. 10, 2019), https://perma.cc/DN3E-AVER (explaining how the Trump administration's move to decertify the union of immigration judges had been perceived as a maneuver to threaten the judges that had been openly critical of the Trump administration's immigration enforcement agenda); *see also* Andrew R. Arthur, *Is There an Ideological Purge Going on in the Immigration Courts?*, CTR. FOR IMMIGR. STUD. (June 22, 2022), https://perma.cc/XU9U-YZH8 (reporting that the Biden administration has fired at least six immigration judges who were hired under Trump, that there is evidence that the DOJ is using an ideological litmus test in appointing new judges, and that the Trump administration was under investigation for presumably following similar tactics).

58. *See* Greg Chen, *Why America Needs an Independent Immigration Court System*, AM. IMMIGR. LAWS. ASS'N (2022), https://perma.cc/FB5T-TQUA (PDF) ("A striking example of the harm caused by this structural defect is the lack of judicial independence exercised by immigration judges. Unlike Article III federal judges, immigration judges are government attorneys whose positions are not guaranteed tenure or many of the other protections that insulate judges from outside influence.").

officers from judicial review can lead the executive branch to unduly influence the immigration judges' decisions.[59] Second, and more importantly, the insulation can give to the BIA absolute authority to create binding precedent on both immigration judges and Department of Homeland Security ("DHS") employees.[60] Given the stringent standards provided in our immigration system,[61] limiting reviewability of immigration courts' decisions by Article III courts creates an additional hurdle in an already strict immigration system.[62]

The Supreme Court has been skeptical of the political branches' efforts to grant immigration judges the power to make judicially binding decisions in immigration proceedings that have the potential to violate due process. In *United States v. Mendoza-Lopez*,[63] Congress enacted an immigration system scheme in which the findings of an immigration agency could be used to conclusively establish an element of a crime.[64] The question before the Court was "whether a federal court must *always* accept as conclusive the fact of the deportation order, *even if the deportation proceeding was not conducted in conformity with due process*."[65] The Court found this scheme unconstitutional because the decision of the immigration board

59. *See id.* ("Lacking protection from executive branch interference, immigration judges have been subject to highly intrusive practices that jeopardize the quality and consistency of their decisions, and more fundamentally, their ability to deliver fair results.").

60. *See* 8 C.F.R. § 1003.1(g)(1) (2014) ("Except as Board decisions may be modified or overruled by the Board or the Attorney General, decisions of the Board and decisions of the Attorney General are binding on all officers and employees of DHS or immigration judges in the administration of the immigration laws of the United States."); Mendoza Perez v. Holder, 561 F. App'x 726, 729 (10th Cir. 2014) (explaining that under 8 C.F.R. § 1003.1(g)(1) BIA's decisions are generally binding on the agency across the nation).

61. *See infra* Part I.C.

62. *See, e.g.,* Martinez-Hernandez v. Garland, No. 21-3130, 2021 U.S. App. LEXIS 32177, at *11 (6th Cir. Oct. 25, 2021) ("[While the United States] continue[s] to feign interest in protecting the integrity of families, our elected leaders refuse to take any steps to reform our arcane and draconian immigration laws that continually fracture family units . . . . Unfortunately, however, those are laws that we are bound to interpret.").

63. 481 U.S. 828 (1987).

64. *See id.* at 830–31 (citing 8 U.S.C. § 1326 (1952)).

65. *Id.* at 834 (second emphasis added).

was not subject to judicial review by an Article III court.[66] The Court elaborated that if a judicially unreviewable decision was used to satisfy an element of a crime, the Defendant would be deprived of constitutionally required due process.[67] However, even though *Mendoza-Lopez* remains good law, courts across the country have been hesitant to use the decision when addressing the validity of deportation orders because of the Supreme Court's precedent on protecting Congress's plenary power.[68]

After the major limitation of judicial review by the 1996 legislation, Congress continued to further limit judicial review of immigration courts' decisions.[69] Scholars have examined this insulation.[70] Some experts have argued that although this

66. *Id.* at 837–38.

67. *See id.*

> Our cases establish that where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be some meaningful review of the administrative proceeding. This principle means at the very least that where the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before the administrative order may be used to establish conclusively an element of a criminal offense. . . . Depriving an alien of the right to have the disposition in a deportation hearing reviewed in a judicial forum requires, at a minimum, that review be made available in any subsequent proceeding in which the result of the deportation proceeding is used to establish an element of a criminal offense. (internal quotation omitted).

68. *See e.g.*, United States v. Rivera Lopez, 355 F. Supp. 3d 428, 440 (E.D. Va. 2018) (distinguishing *Mendoza-Lopez* in a cancellation of removal case because the Court had assumed rather than decided the failure of the immigration court to inform petitioner of his right to appeal and this point was in dispute in the present case).

69. *See, e.g.,* Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459, 486–87 (2006) (describing how the REAL ID Act eliminated certain forms of jurisdiction for immigration review).

70. *See, e.g.*, Michael G. Heyman, *Judicial Review of Discretionary Immigration Decisionmaking*, 31 SAN DIEGO L. REV. 861, 862 (1994) ("[J]udicial review has often been impotent to check this process. Through an insidious synergism of doctrines, discretion has often become a mantle insulating immigration decisions from meaningful review."); *see also* Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373, 374 ("Considering federal immigration law from the perspective of citizens, this

insulation is usually excused on an administrative efficiency basis—it is a shield for agencies to issue arbitrary decisions.[71] The disparity in the granting rate of different reliefs across the different immigration courts denotes the arbitrary nature of these agency decisions.[72] This inconsistency is even more clear among the different judges in different immigration courts. For example, the immigration court in Boston has a median grant rate of 28%, with some judges having a grant rate of 6.50% while others having a grant rate of 82%.[73] Experts in the field have studied this inconsistency and have found that, in many cases, the most important thing in an asylum case is the assignment of an application to a particular immigration judge.[74] This phenomenon has been coined as the Refugee Roulette.[75]

With the concerns that these differences raise, we should ask whether immigration courts should have unreviewable discretion to determine whether to grant life-altering relief, such as cancellation of removal under INA § 240A(b)(1).

Article demonstrates that immigration policy, which contemporary constitutional doctrine largely insulates from attack, should not be immune to challenges by citizens.").

71. *See, e.g.*, Heyman, *supra* note 70, at 862 ("However, because of the convergence of several dominant themes, discretion has been used as a catchword that justifies potentially arbitrary immigration decisionmaking.").

72. *See Asylum Decisions*, TRAC IMMIGR., https://perma.cc/U3XG-BWQN (last updated May 2023) (showing a major disparity between the courts with lower asylum application granting rates in New Orleans and Houston with 3% and 6.2% respectively and the courts with the highest granting rates in San Francisco and New York with 48% and 32% respectively).

73. *Id.*; *see also id.* (showing a major disparity in the grant rate of judges with over 100 decisions in the same court, having the lowest granting rate in Houston by a judge at 0% while the highest at 16.7% in a court with a median grant rate of 6.2%).

74. *See generally* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007) (exploring the correlation between sociological characteristics of individual immigration judges and their granting rates and demonstrating substantial variability between the circuits in immigration decisions); Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413 (exploring the relationship between consistency and justice in the context of the adjudication of asylum applications).

75. *See* Ramji-Nogales et al., *supra* note 74, at 295 (coining the term Refugee Roulette in the title of the Article).

C. *INA § 240A(b)(1): Cancellation of Removal*

The U.S.'s immigration laws have become worryingly stringent, especially in removal proceedings. The legislature has continuously implemented tougher standards for immigration defenses, such as non-LPR cancellation of removal.[76] As this subsection shows, the difficulty of proving hardship standards, such as the one required in this defense, combined with a lack of review by federal courts, creates the perfect scenario for arbitrary practices by immigration officials.

Although judges have continued to acknowledge that the U.S. purports to protect the integrity of family units in theory, when it comes to immigrant families, these priorities change.[77] Defenses such as the non-LPR cancellation of removal, which mainly concerns the integrity of mixed-status family units, usually require the showing of an exceptional and extremely unusual hardship—which is incredibly hard to meet.[78] The latest decision by the Supreme Court in *Patel v. Garland*,[79] applied to non-LPR cancellation of removal, supposes a flagrant violation of the rights of U.S. children whose parents are in deportation proceedings.[80] This decision allows immigration

76. *See* Kurtis A. Kemper, *Annotation, Validity, Construction, and Application of Hardship Standard for Cancellation of Removal of Alien Under 8 U.S.C.A. § 1229b(b)(1)(D)*, Including Jurisdictional Issues, 196 A.L.R. FED 337, 338 (2022) ("[T]he courts have construed the 'exceptional and extremely unusual' hardship standard . . . to be more stringent than the 'extreme' hardship standard under a predecessor statute relating to a former statutory procedure for suspension of deportation, or have approved such a construction by the Board of Immigration Appeals.").

77. *See, e.g.*, Martinez-Hernandez v. Garland, No. 21-3130, 2021 U.S. App. LEXIS 32177, at *11 (6th Cir. Oct. 25, 2021) ("[While the United States] continue[s] to feign interest in protecting the integrity of families, our elected leaders refuse to take any steps to reform our arcane and draconian immigration laws that continually fracture family units . . . . Unfortunately, however, those are laws that we are bound to interpret.").

78. *See* Monreal-Aguinaga, 23 I. & N. Dec. 56, 60 (B.I.A. May 4, 2001) ("The legislative history of the 1952 Act reflects that, at the time, Congress intended that the exceptional and extremely unusual hardship standard be a very high one indeed.").

79. 142 S. Ct. 1614 (2022).

80. *See id.*

courts to apply the BIA's precedent in an arbitrary and unjust manner without letting applicants appeal this decision or having the option of obtaining review by federal courts.[81] Furthermore, it also could allow immigration courts to arbitrarily apply a more stringent standard to individual cases. However, if the courts acknowledge that the government's alleged interest in family reunification for U.S. citizens applies to U.S. children in mixed-status families, they may find that a fundamental right of family unity does exist.

Non-LPR cancellation of removal is a critical defense to deportation that is available to certain noncitizens with family in the U.S.[82] Only a person facing removal can apply under this statute.[83] For the Attorney General, who retains ultimate discretion, to be able to cancel the deportation, the individual must meet the following requirements:

> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
> (B) has been a person of good moral character during such period;
> (C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and
> (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.[84]

The first three requirements are objective, but most of the work in obtaining this defense is done on the last requirement, particularly in establishing whether the applicant has met the exceptional and extremely unusual hardship standard.[85] This

81. *See infra* Part II.C.

82. 8 U.S.C. § 1229b(b)(1)

83. *Id.*

84. *Id.*

85. *See, e.g.*, Francisco-Diego v. Garland, No. 21-3870, 2022 U.S. App. LEXIS 15036, at *1 (6th Cir. May 31, 2022) (reviewing only whether the BIA had erred in determining that the applicant had not met the hardship standard); Antonio-Gil v. Garland, No. 21-3354, 2022 U.S. App. LEXIS 8179, at *5 (6th Cir. Mar. 28, 2022) (same); Contreras-Sanchez v. Garland, No. 20-4295, 2021 U.S. App. LEXIS 20836, at *6 (6th Cir. July 12, 2021) (same).

standard was modified by legislation in 1996, requiring a showing of hardship that goes beyond that which was historically required in suspension of deportation cases involving "extreme hardship" standards.[86] The BIA in *In re Monreal-Aguinaga*,[87] explained that "the hardship to an alien's relatives, if the alien is obligated to leave the U.S., must be *substantially beyond* the ordinary hardship that would be expected when a close family member leaves this country."[88]

Furthermore, the BIA has strived to limit the application of this defense. For example, in *Matter of Isidro-Zamorano*,[89] the court narrowed the family members that could apply for the hardship standard. The Board, basing its decision on the plain language of another immigration statute, determined that an applicant for cancellation of removal did not have a qualifying relative, for the purposes of a defense to deportation, if the applicant's child turned twenty-one before the immigration judge adjudicated the application on the merits.[90] Whether an applicant has met this standard requires the immigration judge to first look at the factual record and then apply the legal hardship standard to it.[91] Importantly, when assessing the morality of the applicant, the immigration judge has the discretion to consider past acts that might not render a person

86. *See* Jennifer Lindsley, Comment, *All Relevant Factors: Gender in The Analysis of Exceptional and Extremely Unusual Hardship*, 19 WIS. WOMEN'S L.J. 337, 342 (2004) ("Before the enactment of IIRIRA, [the exceptional and extremely unusual hardship standard] was required of those undocumented immigrants who had been convicted of serious criminal violations. After the enactment of IIRIRA, analy sis [sic] of this higher standard is required in all cases of undocumented immigrants asking for cancellation of removal.").

87. 23 I. & N. Dec. 56 (B.I.A. May 4, 2001).

88. *Id.* at 62 (emphasis added).

89. 25 I. & N. Dec. 829 (B.I.A. June 15, 2012).

90. *See id.* at 833 ("We therefore conclude that the plain language of the [Child Status Protection Act] indicates that Congress intended for it to apply only to those sections of the Act that are specifically mentioned.").

91. *See* Singh v. Rosen, 984 F.3d 1142, 1151–52 (6th Cir 2021) ("Eligibility determinations—both those that we have previously deemed 'discretionary' and those that we have deemed 'non-discretionary'—involve the same decisional process: applying the law to a set of facts.").

deportable when assessing moral character.[92] This makes this inquiry a mixed question of fact and law.[93]

Courts have used different factors when determining hardship, including: length of time in the U.S., acculturation in the U.S., family ties in the U.S., separation of the family, potential economic hardship, medical issues, and possible persecution or discrimination in the country where the person would be potentially removed.[94] To further define potential economic hardship, the BIA has determined that "economic detriment alone is insufficient to support even a finding of extreme hardship."[95] Lastly, the BIA has noted that these factors should be assessed "in their totality, often termed a 'cumulative' analysis."[96]

In cancelation of removal cases, some circuits have considered the separation of family members as a factor in the hardship determination.[97] The matter of *Cerrillo-Perez v. INS*[98] illustrates the most important issues in the application of this hardship standard and the issues that arise when the BIA is not subject to review by federal courts. In this case, the BIA determined that the applicant did not meet the exceptional and extremely unusual hardship standard under INA § 240A(b)(1).[99] In coming to this conclusion, the Board accepted the

92. *See* Turcotte, 12 I. & N. Dec. 206, 208 (B.I.A. 1967) ("We have held that where specific conduct does not preclude a finding of good moral character under the enumerated categories of section 101(f), that same conduct may nevertheless be considered in making a determination on good moral character.").

93. *See* Francisco-Diego v. Garland, No. 21-3870, 2022 U.S. App. LEXIS 15036, at *5 (6th Cir. May 31, 2022) ("[B]ecause the BIA's ultimate hardship conclusion is a 'mixed question' that requires 'application of the pertinent legal standard to the facts,' we have jurisdiction to review it.").

94. *See* LENNY B. BENSOM, IMMIGRATION AND NATIONALITY LAW: PROBLEMS AND STRATEGIES 835 (1st ed. 2013) (listing different factors that have been used by immigration courts through the years to determine whether the applicant fulfilled the hardship standard).

95. Andazola-Rivas, 23 I. & N. Dec. 319, 323 (B.I.A. Apr. 3, 2002).

96. Gonzalez Recinas, 23 I. & N. Dec. 467, 472 (B.I.A. Sept. 19, 2002).

97. *See* Cerrillo-Perez v. INS, 809 F.2d 1419, 1421 (9th Cir. 1987) ("We vacate and remand because the BIA failed to consider the hardship to the three United States citizen children that might result were they to remain in this country following their parents' deportation.").

98. *Id.*

99. *Id.*

government's argument that because "the citizen children [were] of a tender age," there was a presumption that "they would go with the [Cerrillos] upon their return to Mexico."[100] The Ninth Circuit explained that the BIA had erred in applying a presumption, which led the Board to overlook inquiries necessary to a reasoned decision.[101] Hence, the BIA had been setting the wrong precedent, making the hardship standard even more stringent than what Congress required.

The overreaching decisions by immigration courts and the BIA illustrate the importance of having Article III courts review the ways immigration proceeding standards prescribed by Congress are implemented in administrative proceedings. Although in *Cerrillo-Perez* the Ninth Circuit was able to overturn the flagrant violation of the applicant's rights, the continuous insulation of immigration agencies from judicial review may prevent this correction in the future. If the Supreme Court was to recognize the fundamental right to family unity, then the Congressional insulation of immigration agencies from Article III review could be considered a discriminatory and arbitrary use of Congressional power.[102] By contrast, a broad reading of *Patel* would prevent current courts from reversing the same error that the Ninth Circuit identified in *Cerrillo-Perez*.[103] It is thus necessary to understand Congress's power to strip jurisdiction from Article III courts to review BIA decisions and the real effects those decisions, such as the one at issue in *Patel*, could have.

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100. *Id.* at 1426.

101. *See id.* ("The BIA cannot adopt a general presumption that separation of parents and children will not occur and thereby relieve itself of its duty to consider applications on an individual basis. It must consider the specific facts and circumstances of each case."); *see also* Delmundo v. INS, 43 F.3d 436, 442–43 (9th Cir. 1994) ("This court has admonished the INS that in cases involving discretionary waiver of excludability for aliens who entered the country by fraud or misrepresentation, it must 'appraise carefully the effect deportation would have on an alien's children who are United States citizens.'").

102. *See infra* Part III.

103. *See* Patel v. Garland, 142 S. Ct. 1614, 1627 (2022) (holding that federal courts lack jurisdiction to review findings of fact in immigration proceedings that grant discretionary relief).

II. THE JUDICIAL BRANCH ACTS AS AN ACCOMPLICE IN THE VIOLATION OF FAMILY UNITY RIGHTS BY TOLERATING THE RESTRICTION ON JURISDICTION

The foregoing discussion recounted the origins and effects of the plenary power in our immigration system and illustrated that Congress has enacted an arbitrary regime that systematically violates the right to family unity. It further explained how the cancellation of removal defense is applied, and it demonstrated how taking away the jurisdiction of Article III judges to review immigration judges' decisions constitutes an even greater violation to this right. This Part now turns to a discussion of Congress's power to strip Article III courts of jurisdiction and the deferential approach that the Supreme Court has taken on this issue. Subpart A provides a layout of Congressional authority to strip federal courts of jurisdiction to review a case and the external constraints that the Court has found in certain cases on Congress's ability to do so. Subpart B examines *Patel*, the latest problematic decision by the Court on jurisdiction-stripping. Subpart C expands on how the broader interpretation that certain government officials are pushing for in *Patel* could lead to an even greater violation of the right to family unity.

A. *Congress's Authority to Strip Article III Courts' Jurisdiction to Review Immigration Court Decisions*

Congress has stripped away federal courts' jurisdiction to review immigration courts' arbitrary decisions in order to avoid challenges to the constitutionality of immigration policy. This practice has led to the BIA wrongly applying more stringent standards than the ones prescribed by Congress, ultimately leading to the breakdown of the family nucleus through unjust deportation decisions.[104] To understand the ways in which our political branches are getting away with violating Constitutional principles in the immigration context, we must understand the power Congress has over the jurisdiction of Article III courts and the few limitations to this power that have been established by the Supreme Court. Once we understand

104. *See Cerrillo-Perez*, 809 F.2d at 1421 (finding that the BIA failed to consider the hardship standard).

these limitations, we will better understand why establishing the right to family unity is necessary to stop the abuse of Congressional restrictions on courts' abilities to exercise jurisdiction—a recurrent theme in our legal and political system.[105] The cases in the following discussion may seem both ancient and unrelated in their subject matter; yet, they are currently cited by federal courts in instances in which they find that Congress has stripped jurisdiction from them to hear a particular claim.[106]

Congress has broad power to both destroy and alter the jurisdiction of statutorily created Article III courts.[107] This includes the power to stop Article III courts from reviewing decisions made by administrative bodies—such as immigration

105. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 171.204(a), 171.205(a), 171.209(a)–(b) (prohibiting physicians from knowingly performing or inducing an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child and enforcing the law through private civil actions culminating in injunctions and statutory damages awards against those who perform or assist prohibited abortions); *see also* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 538–39 (2021) (affirming the constitutionality of a Texas abortion statute by reasoning that since the enforcement was through private actors, the state of Texas could not be sued for the enforcement of this statute); S.B 1327, Reg. Sess. (Cal. 2022) (authorizing anyone other than a state or local government officials to sue people who violate the state's laws against the manufacture, distribution, or sale of assault weapons, ghost guns, and other banned firearms); S. Bay Rod & Gun Club, Inc. v. Bonta, No. 22cv1461, 2022 U.S. Dist. LEXIS 228195, at *21 (S.D. Cal. Dec. 19, 2022) (enjoining California from enforcing a statute letting private parties sue individuals who violate the state's gun laws).

106. *See, e.g.*, Towet v. U.S. Dep't of Homeland Sec'y, No. 21-cv-2044, 2021 U.S. Dist. LEXIS 159157, at *2 (D. Kan. Aug. 23, 2021) (establishing that "the Constitution limits the subject matter of cases that federal courts may hear" and that "Congress may and has further narrowed federal courts' subject-matter jurisdiction" and finding that "[w]ithout proper subject-matter jurisdiction, the Court must dismiss"); CASA de Md., Inc. v. Trump, 355 F. Supp. 3d 307, 317 (D. Md. 2018) (same); Castro v. U.S. Dep't of Homeland Sec'y, 163 F. Supp. 3d 157, 165 (E.D. Pa. 2016) (same).

107. *See* Sheldon v. Sill, 49 U.S. 441, 449 (1850) ("Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.").

courts.[108] The Court has found that Congress has the power to change the underlying law of a present case,[109] bifurcate civil and criminal proceedings between administrative courts and Article III courts,[110] and deny important Constitutional reliefs, such as the one included in the early Habeas Corpus Act.[111]

However, there are limited external constraints that the Court has found on Congress's power over Article III jurisdiction. First, any limitation on the Supreme Court's appellate jurisdiction is narrowly construed.[112] Second, due to separation of powers, Congress may not retrospectively change courts' previous decisions or change the outcome of a judicial decision.[113] And third, Congress cannot require courts to make a specific finding that would, in essence, prescribe a rule of decision for the courts.[114] Although these restraints do not

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108. *Id.*

109. *See* Pennsylvania v. Wheeling & Belmont Bridge Co., 50 U.S. 647, 657 (1850) (holding that Congress's change of the substantive law in a case that altered its result while the case was being litigated was constitutional).

110. *See* Yakus v. United States, 321 U.S. 414, 447–48 (1944) (holding that a scheme in which there was a bifurcation of the review process of a civil and a criminal case maintained due process because although the defendant had to challenge specific price controls with the agency administrator, this decision could be appealed to Article III judges).

111. *See Ex parte* McCardle, 74 U.S. 506, 514 (1869) ("The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of habeas corpus is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception."). *But see* Boumediene v. Bush, 553 U.S. 723, 796–98 (2008) (finding that, although substitutes for habeas corpus remedy are often permissible, the substitute of the habeas corpus remedy provided by Congress did not pass constitutional muster because of it limited fact finding, ability to call witnesses, deferential scope of review, and lack of lawyers at the hearings).

112. *Compare McCardle*, 74 U.S. at 515 (finding that Congress had repealed the 1867 habeas statute, precluding any petition under this statute), *with Ex parte* Yerger, 75 U.S. 85, 103 (1869) (holding that while the 1867 habeas statute was repealed in *McCardle*, Section 14 of the Judiciary Act was still good law because Congress had not repealed it, allowing those detained by federal authorities to petition the Supreme Court for habeas relief).

113. *See* Plaut v. Spendthrift Farm, 514 U.S. 211, 240 (1995) (holding a law was unconstitutional and violated the separation of powers principles because it required federal courts to reopen petitioner investors' action against respondent even though the action had previously been dismissed with prejudice).

114. *See* United States v. Klein, 80 U.S. 128, 147 (1871) (holding that Congress' redefinition of the interpretation and meaning of a presidential pardon was unconstitutional because "the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is

directly apply to the application of INA § 240(A)(b)(1), they show that the main concern when dealing with jurisdiction-stripping is the separation of powers, which is an underlying theme in the relationship between the political and judicial branches in the immigration context.[115] Hence, in instances when the judiciary has considered whether Congress has used its power to strip away jurisdiction from the courts for an unconstitutional purpose, they have created doctrines to counteract this violation of separation of powers.

In *Battaglia v. General Motors Corp*,[116] the Second Circuit unprecedentedly opened the door for federal courts to inquire into the rationale behind the jurisdiction strip by Congress and analyze the constitutionality of it. In 1947, Congress enacted the Portal-to-Portal Act, which stripped both federal and state courts of jurisdiction to enforce liabilities under prior legislation.[117] The Second Circuit acknowledged that Congress had the power to issue this jurisdiction-stripping statute.[118] However, it then proceeded to explain that Congress may not act under these powers in an unconstitutional manner.[119] Hence, the court examined the motivation behind Congress's jurisdiction strip, and only after finding that it had acted reasonably and that there was no "encroachment upon the

directed to give it an effect precisely contrary"). *But see* Bank Markazi v. Peterson, 578 U.S. 212, 236 (2016) (holding that a statute did not violate the separation of powers because rather than requiring the court to make a specific finding, it only supplied a new law to be applied to undisputed facts and left to the court two final factual determinations to make).

115. *See* David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. LAW & PUB. POL'Y 81, 110–12 (2013) (describing how perceived failings of separation of powers principles in the context of immigration factored into an unprecedented sub-federal response); *see generally* Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009); Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 93 B.U. L. REV 105 (2014).

116. 169 F.2d 254 (2d Cir. 1948).

117. *Id.* at 256.

118. *See id.* at 257 ("Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court . . . .").

119. *See id.* at 261 ("This is not to say, of course, that Congress may exercise its commerce power in a discriminatory or arbitrary manner.").

separate power of the judiciary," held that the statute was constitutional and determined that it did not have jurisdiction to hear the underlying claim.[120]

The extent of this decision is still under debate among legal scholars.[121] Yet, it is undisputed that *Battaglia* is good law and that its precedent extends beyond the Second Circuit.[122] For the purposes of this Note, the most important principle from the case is that:

> While Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.[123]

As the Supreme Court's jurisprudence provides, under the Constitution, Congress has close to full control over the jurisdiction of federal courts created by statute.[124] However, *Battaglia* provides that even this constitutional power is subject to certain limitations, especially when Congress is acting in an arbitrary way to prevent individuals from obtaining judicial relief. As a result, even when Congress has unfettered power to take away jurisdiction, like the broad power it has in the immigration realm, it is subject to review by the court on whether its actions comport with due process.

It is undisputed that that the power to regulate immigration is held by the executive and legislative branches of government.[125] Yet, in theory, it is also a well-established principle that regardless of the general power that these branches have over certain governmental functions, federal courts have the power to review both the legitimacy and constitutionality of the acts made by the other branches of

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120. *Id.* at 262.

121. *See generally* Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1104 (2010) (discussing various views on federal jurisdiction-stripping and how the Supreme Court has not squarely determined the constitutional boundary of congressional power to strip jurisdiction).

122. *See id.* at 1091 (analyzing the effects that the *Battaglia* principle can have in future jurisdiction-stripping cases entertained by the Supreme Court).

123. *Battaglia*, 169 F.2d at 257.

124. *See supra* notes 106–112 and accompanying text.

125. *See supra* Part I.

government.[126] The overbroad manner in which both Congress and the Court are creating and interpreting jurisdiction-stripping statutes respectively shows a desire to avoid constitutional review of some of the effects that our immigration regime has on noncitizens.[127] The U.S. government defers the "judicial adjudication" of this scheme to the BIA and turns a blind eye on the administration of this system, knowing that the Board has misapplied its own precedent before.[128]

Recognizing that this strip of jurisdiction is enacted, in part, to avoid the constitutional questions on fundamental rights, such as the right to family unity, would allow courts to question the constitutionality of such statutes. In the next section, this Note will analyze *Patel v. Garland*, which is the latest decision in which the Supreme Court weighed in on jurisdiction-stripping statutes in the immigration context. This decision shows the Court's predisposition to give as much deference as possible to the executive branch on immigration matters, even if this leads to the violation of fundamental rights, such as the right to family unity.

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126. *See* Alvin B. Rubin, *Judicial Review in the United States*, 40 LA. L. REV. 67, 67 (1979) ("[T]he courts are vested with the authority to determine the legitimacy of the acts of the executive and the legislative branches of the government.").

127. *See* Note, Ali Shan Ali Bhai, *A Border Deferred: Structural Safeguards Against Judicial Deference in Immigration National Security Cases*, 69 DUKE L.J. 1149, 1149 (2020)

> Since the late nineteenth century, the judicial branch has employed [the plenary doctrine] to refuse to review immigration cases it believes bears [sic] on the security of the nation. Even in the modern era, federal courts have invoked the plenary power doctrine to retreat from the immigration debate that looms so large over the nation's conscience, with some "suggest[ing] that the [doctrine] precludes any judicial scrutiny of immigration decisions affecting arriving immigrants."

128. *See* Cerrillo-Perez v. INS, 809 F.2d 1419, 1421 (9th Cir. 1987) (finding that the BIA failed to consider the hardship standard).

B. *Patel v. Garland*

In *Patel*, the Supreme Court considered whether INA § 242(a)(2)(B)(i) barred federal courts from reviewing a nondiscretionary determination that a noncitizen is ineligible for certain types of discretionary relief.[129] In this case, applicant Pankajkumar Patel had lived in the U.S. for more than twenty years, entering the country illegally when he was a young man.[130] He lived with his wife in Georgia and had three sons living in the U.S., two were lawful permanent residents and one was a U.S. citizen.[131] Patel sought an adjustment of status under INA § 245 and received permission to work.[132] While this application was pending and while Patel was renewing his Georgia driver's license, he mistakenly answered affirmatively to the question "Are you a U.S. Citizen?"[133] It is important to note that under state law, he was eligible to receive a driver's license.[134] But due to his mistake, Georgia authorities charged him with falsifying his application.[135] Although the charges were eventually dropped for lack of evidence, the DHS used this charge to deny Patel's adjustment of status, and months after, the government brought removal proceedings against Patel, who raised the non-LPR cancellation of removal defense.[136] Although at his removal proceeding Patel explained that he did not intend to falsify his driver's license application, the immigration judge found that Patel "intentionally deceiv[ed] state officials to obtain a benefit."[137] Based on this finding, the judge denied Patel's defense.[138] This denial was affirmed by the BIA.[139] Patel sought relief in the Eleventh Circuit and the government did not claim that the appellate court lacked

129. Patel v. Garland, 142 S. Ct. 1614, 1614 (2022).
130. *Id.* at 1628.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 1628–29.
137. *Id.*
138. *Id.* at 1629.
139. *Id.*

jurisdiction.[140] However, the Eleventh Circuit unilaterally and against circuit precedent decided that it did not have jurisdiction to hear the case under INA § 245.[141]

In a 5-4 majority decision, the Supreme Court upheld the Eleventh Circuit's decision and found that federal courts lacked jurisdiction to review facts found as part of discretionary relief proceedings under 8 U.S.C. § 1255 and other provisions enumerated in INA § 242 (a)(2)(B)(i).[142] The majority explained that the text of the statute "clearly indicate[d] that judicial review of fact determinations is precluded in the discretionary-relief context."[143]

In his dissenting opinion, Justice Gorsuch elaborated on how this reading of the statute did not follow the Court's jurisprudence and failed to consider the public policy implications.[144] Justice Gorsuch explained that subparagraph (B)(i) of the INA rendered unreviewable only those judgements regarding the granting of relief, meaning judgments that supply redress or benefit.[145] Therefore, because the BIA issued a judgment of an intermediate mixed question of fact and law, without reaching the question of whether to grant relief or supply redress or benefit, the district court should have been able to review the board's decision.[146]

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140. *Id.*

141. *Id.* at 1629–30.

142. *See id.* at 1617 ("Thus, § 1252(a)(2)(B)(i) encompasses not just 'the granting of relief' but also any judgment relating to the granting of relief. Amicus' reading is reinforced by Congress' later addition of § 1252(a)(2)(D), which preserves review of legal and constitutional questions but makes no mention of preserving review of questions of fact.").

143. *Id.* at 1627.

144. *See id.* at 1631–32 (Gorsuch, J., dissenting) ("Altogether, the *majority's novel expansion of a narrow statutory exception* winds up swallowing the law's general rule guaranteeing individuals the chance to seek judicial review to correct obvious bureaucratic missteps." (emphasis added)).

145. *See id.* at 1631 ("Subparagraph (B)(i) renders unreviewable only those judgments 'regarding the granting of relief.' . . . To 'grant relief' is to supply 'redress or benefit.' And where, as here, the BIA issues a judgment only at step one, it never reaches the question whether to grant relief or supply some redress or benefit." (citing United States v. Denedo, 556 U.S. 904, 909 (2009))).

146. *See id.* ("Subparagraph (B)(i) only deprives courts of jurisdiction to review the Attorney General's step-two discretionary decision to grant or deny

The majority's decision has left an ongoing debate in the immigration legal field on how broadly this decision should be interpreted. Although the full extent of *Patel* cannot be addressed until the Court determines how broadly it should be read, lower courts have started to apply this ruling.

C. *The Disastrous Implications of a Broad Interpretation of* Patel

The majority in *Patel* determined that federal courts are stripped of jurisdiction to hear any dispute regarding the factual findings made by immigration courts.[147] However, it is still not certain how far this jurisdiction-stripping extends. Most circuit courts have limited the holding from *Patel*, explaining that while federal courts may not consider the underlying factual findings, they may review mixed questions of facts and law.[148] Nonetheless, other circuits' interpretations of *Patel* are dangerously broad. The Fifth Circuit, when considering their jurisdiction over a non-LPR cancellation of removal case, cited *Patel*, explaining that "the Supreme Court has recently emphasized the 'very limited role' for courts of appeals in reviewing the Attorney General's discretionary-relief decisions."[149] Although stripping Article III courts of jurisdiction regarding factual findings is problematic by itself, expanding this holding to mixed questions of law and facts could be disastrous.

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relief, not the BIA's step-one judgments regarding whether an individual is eligible to be considered for such relief.").

147. *See* Francisco-Diego v. Garland, No. 21-3870, 2022 U.S. App. LEXIS 15036, at *5 (6th Cir. May 31, 2022) ("That being said, we still cannot review any of the factual findings underlying it." (citing *Patel v. Garland*, 142 S. Ct. 1614 (2022))); *see also* Gonzalez v. Garland, No. 21-1606, 2022 U.S. App. LEXIS 21980, at *2 (4th Cir. Aug. 9, 2022) ("But in performing that review, we may not disturb 'the IJ's factual findings related to the hardship determination,' and we assess only whether 'the IJ erred in holding that [the] evidence failed as a matter of law to satisfy the statutory standard of exceptional and extremely unusual hardship.'").

148. *See* Francisco-Diego, 2022 U.S. App. LEXIS 15036, at *5 ("We have jurisdiction to review only the agency's 'application of a legal standard to undisputed or established facts.' As the Supreme Court explained, the application 'of a legal standard to undisputed or established facts is a 'question of law,' that we have jurisdiction to review.").

149. Bertrand v. Garland, 36 F.4th 627, 631 fn.4 (5th Cir. 2022).

After the Court's decision in *Patel*, applicants going through immigration proceedings have started to experience the consequences of lower federal courts' interpretations of the decision.[150] In *De La Rosa-Rodriguez v. Garland*,[151] the Ninth Circuit interpreted the reviewability of mixed questions of fact and law in a non-LPR cancellation of removal case after *Patel*'s decision.[152] De La Rosa had lived in the U.S. since 2005 and had two children that were born in the U.S.[153] He was placed in deportation proceedings and applied for non-LPR cancellation of removal.[154] The immigration court denied his defense and the BIA affirmed, finding that De La Rosa did not meet the standard of exceptional and extremely unusual hardship to a child who is a U.S. citizen.[155] The Ninth Circuit addressed whether it had jurisdiction to review this finding after *Patel*.[156] The government argued that, following the Supreme Court's decision in *Patel*, federal courts cannot review whether the BIA correctly applied its precedent, and they must also apply a heightened hardship standard to the facts of a given case.[157] In other words, the government argued that *Patel* extended to mixed questions of law and fact. Ultimately, the Ninth Circuit found that it had jurisdiction to hear the case.[158]

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150. *See* Badra v. Jaddou, No. 22-cv-22465, 2022 U.S. Dist. LEXIS 171649, at *22 (S.D. Fla. Sep. 14, 2022) ("Accordingly, although Plaintiffs may have alleged meritorious claims, the Patel decision mandates that courts no longer preside over such claims."); *see also* Moreno v. Garland, 51 F.4th 40, 45 (1st Cir. 2022) (citing *Patel* when determining that a federal court did not have jurisdiction to hear the applicant's claims); *see also* Rabinovych v. Mayorkas, No. 21-CV-11785, 2022 U.S. Dist. LEXIS 156966, at *18 (D. Mass. Aug. 31, 2022) (analyzing *Patel* and stating that "[t]his interpretation of the statute will preclude the Plaintiffs in this action from seeking review of USCIS's denial of their adjustment of status applications unless and until they are subjected to final orders of removal").

151. 49 F.4th 1282 (9th Cir. 2022).

152. *Id.* at 1285.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 1287.

The court then delved into the element of hardship under INA § 240A(b).[159] De La Rosa argued that he was entitled to relief because "it is clear that [his] two minor United States citizen children w[ould] experience financial, emotional, and academic hardship that is far beyond what is to be expected when a family member is removed from the country."[160] However, the court, applying the standards settled by the BIA, determined that De La Rosa did not satisfy this element and that his claim that deportation would cause economic hardship to his children was not enough to satisfy the requirement.[161] The court determined that even disregarding the economic factor, "cumulatively, De La Rosa ha[d] not shown that the hardship that [his] . . . children would face if he were removed would amount to suffering substantially beyond the hardship usually associated with a parent's removal."[162]

The decision in *De La Rosa* shows the ill effects of *Patel*. If courts adopt the government's reading of INA § 240A(b), which expands the majority's reading in *Patel*, the hardship standard would be turned into an unreviewable, discretionary decision by the BIA. As noted above, the BIA's jurisprudence on INA § 240A(b)'s exceptional and extremely unusual hardship factor explains that an applicant must demonstrate that "qualifying relatives would suffer hardship that is substantially different from, or beyond, that which would normally be expected from the deportation of an alien with close family members here."[163] The hardship standard is "a higher one than that under the suspension of deportation statute" and is discretionary in nature.[164] Additionally, courts already have plenty of discretion to determine which factors they may consider.[165]

If *Patel* is read broadly, this would give immigration courts and the BIA the discretion to apply this already stringent standard as they deem appropriate without higher review. The application of the "unusual hardship" standard determines

159. *Id.*
160. *Id.* at 1291.
161. *Id.*
162. *Id.* at 1292
163. Monreal-Aguinaga, 23 I. & N. Dec. 56, 65 (B.I.A. May 4, 2001).
164. *Id.* at 59.
165. *Id.* at 63–64.

whether a person who has a family in the U.S, good moral character, and no criminal history may remain in the country with their children. Insulating immigration courts from reviewability will certainly translate into a myriad of arbitrary and unfair decisions, such as the one that took place in *Patel*. However, there are more concerning implications to a broad reading of *Patel*. As the government argued in *De La Rosa*, this decision could mean that federal courts cannot review whether the BIA correctly applied its precedent, including whether the BIA applied a more stringent standard than required by statute.[166] This reading of an already overly broad jurisdiction-stripping statute would lead to the systematic violation of mixed-status families' right to family unity in the U.S.

III. SOLUTION: RECOGNIZING THE RIGHT TO FAMILY UNITY

This Part proposes the judicial recognition of the fundamental right to family unity as a first step to addressing the injustices discussed above. Subpart A provides the foundation of the right to family unity in our common law system and illustrates how this is an idea that is built in the history and tradition of the United States. Subpart B examines the interest in family reunification that the government alleges drives its immigration policy and the legislative intent behind the INA. It goes on to examine an instance in which a federal court acknowledged the fundamental right to family unity. Subpart C shows that the right to family unity of mixed-status families clearly outweighs the usual concerns of national security behind immigration policy. Subpart D shows that international law supports the recognition of a fundamental right to family unity. Lastly, Subpart E shows one potential way in which advocates could use the recognition of this right to redress the injuries that our immigration system causes daily to mixed-status families.

166. *See* De La Rosa-Rodriguez v. Garland, 49 F.4th 1282, 1286 (9th Cir. 2022) ("The Attorney General contends that because the decision to grant cancellation of removal based on hardship is left to his discretion, the Limited Review Provision does not apply.").

A. *The Common Law Principle of the Fundamental Right to Family Unity*

The right to educate and have control over your children is undeniably rooted in the nation's history and tradition and has been one of the general areas of consensus by both sides of the political spectrum.[167] However, under the excuse of regulating the flow of migration, our system does not recognize this right for a certain segment of our population. Although there are competing interests, such as community safety and the functionality of our country's national security, these concerns should not overcome the fundamental right to family unity as easily as they currently do. Recognizing the right to family unity for undocumented individuals and weighing their interest against the important interest of the state to regulate our population would result in more just policies that reflect our respect for the family nucleus.

The Supreme Court and other federal courts have recognized the right of parents to the care, custody, and control of their children is grounded in the Constitution. The earliest case in which the Court touched on these rights was *Meyer v. Nebraska*,[168] in which the Court held that a statute which forbade the teaching of the German language impermissibly encroached on the liberty parents possess.[169] Two years later, relying on *Meyer*, the Court reaffirmed this right in *Pierce v. Society of Sisters*.[170] Through its jurisprudence, the Court has continued to emphasize parents' rights to make decisions

167. *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("[The Due Process Clause] also provides heightened protection against government interference with certain fundamental rights . . . . [T]he 'liberty' specially protected by the Due Process Clause includes the rights to marry; to have children; to direct the education and upbringing of one's children.").

168. 262 U.S. 390 (1923).

169. *See id.* at 399 (holding that the Fourteenth Amendment goes beyond the protection of bodily freedom, but also the right "to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, *establish a home and bring up children*" (emphasis added)).

170. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 535–36 (1925) (holding an Oregon statute that required children to attend public schools was invalid because it interfered with the right of parents to select private or parochial schools for their children).

regarding their children.[171] Furthermore, the Court's jurisprudence emphasizes the importance of parents' to care and custody of their children. For example, different cases show the importance of the rights that parents have over their children trumps similar rights relating to the potential care of other family members.[172] We can find another example in *Stanley v. Illinois*,[173] in which the Court analyzed the constitutionality of an Illinois dependency statute that presumed that an unwed father is unfit to raise his illegitimate children upon their mother's death and could be deprived of custody without a hearing to determine his fitness as a parent.[174] The Court declared this statute to be an unconstitutional deprivation of a father's right to have custody and control over the education of his children.[175]

Although the Court has made clear that parents who expose their children to a threat may be prosecuted for their actions,[176] the Court has gone out of its way to enact safeguards protecting both parents and children from erroneous terminations, including changing the standard of cases regarding termination of parental rights.[177] When doing so, the court explained that a

171. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 230 (1972) (holding that Wisconsin's compulsory education law violated an Amish father's rights to take his 15-year-old children out of school to complete their education in Amish ways at home unduly burdened the free exercise clause of the First Amendment).

172. *See* Troxel v. Granville, 530 U.S. 57, 74 (2000) (holding a Washington law that authorized judges to order parents to permit more visitation between children and their grandparents than the parents desired unconstitutional).

173. 405 U.S. 645 (1972).

174. *Id.* at 647.

175. *Id.*

176. *See* Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944) (holding that states may prosecute parents when they expose their children to serious hazards to their well-being).

177. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 769 (1982) (requiring a clear and convincing evidence standard for termination of parental rights because the parent's interest is fundamental and the State has no legitimate interest in termination unless the parent is unfit); *see also* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 62 (1989) (explaining that the Court has imposed a clear and convincing standard as a constitutional minimum in

preponderance of the evidence standard did not "fairly distribute[] the risk of error between parent and child" and that the use of this standard "reflects the judgment that society is nearly neutral between erroneous termination of parental rights and erroneous failure to terminate those rights."[178] Moreover, even when parents lose custody over their children, the Court has emphasized that this does not sever the legal rights between parents and their children. In *Santosky v. Kramer*,[179] the Supreme Court held that even after parents are found to be judicially unfit in a contested court proceeding, they retain their constitutionally protected parental rights.[180] The Court reasoned that even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.[181]

The rights recognized in the U.S. for both parents and children go beyond the mere holding of these cases, as common law also emphasizes that children have an interest and a right

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parental rights termination cases because, since the parent's interest clearly outweighs the State's interest, the latter should bear the risk of error).

178. *See Santosky*, 455 U.S. at 760–61 ("[U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship. Thus, at the factfinding, the interests of the child and his natural parents coincide to favor use of error-reducing procedures."); *see id.* at 758 ("In parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight. . . . [T]hat use of a 'preponderance of the evidence standard' . . . is inconsistent with due process.").

179. 455 U.S. 745 (1982).

180. *See id.* at 753

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.

181. *See id.* at 753–54. ("When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.").

to preserve family unity.[182] The Supreme Court has reasoned that the relationship between a child and their parents is built by daily association.[183] When applying this principle, federal courts have recognized that children have an inherent right to avoid intrusion from the state that may cause disruption of the intimate, daily association that children have with their parent.[184] More importantly, when discussing the effects of rupturing the family nucleus, the Court has emphasized that even if children are able to adapt their relationships with their parents to new circumstances, the interference by the state would greatly affect the value of this bond.[185] Therefore, according to the Court's jurisprudence on fundamental rights, when governmental action directly and substantially disrupts a child's family structure, it "burdens a fundamental right."[186]

Even though there is a consensus that both parents and children living in the U.S. have the right to not have their family ripped apart by power of the state,[187] the U.S. government does

182. *See* Joseph Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645, 649 (1977) ("[T]he reciprocal liberty interest of parent and child in the familial bond between them, need no greater justification than that they comport with each state's fundamental constitutional commitment to individual freedom and human dignity.").

183. *See* Bowen v. Gilliard, 483 U.S. 587, 623 (1987) (Brennan, J., dissenting) ("The relationship between the child and the custodial parent is a bond forged by intimate daily association, and severing it unalterably transforms the parent-child relationship.").

184. *See, e.g.*, Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 844 (1977) ("Thus the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children."); Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) ("[T]he right of the family to remain together without the coercive interference of the awesome power of the state . . . encompasses the reciprocal rights of both parent and children.").

185. *See Bowen*, 483 U.S. at 623 ("It may be that parent and child will be able to fashion some type of new relationship; even if they do, however, each has lost something of incalculable value.").

186. *Id.* at 624; *see also* Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 758 (1990).

187. *See* Troxel v. Granville, 530 U.S. 57, 68 (2000) ("There is a presumption that fit parents act in the best interests of their children."); *see*

not follow this principle in its immigration system.[188] The U.S. government creates immigration policies that allow for treatment of undocumented individuals in ways that would be intolerable by citizens.[189]

As of 2021, there were approximately 5.8 million U.S. citizen children under the age of eighteen that lived with at least one undocumented parent.[190] Furthermore, from 2011 to 2013, at least 500,000 U.S. citizen children experienced the deportation of at least one of their parents.[191] When undocumented parents of U.S. citizen children face deportation, the U.S. government, shielded behind the plenary power doctrine and national security concerns, finds an alternative path to avoid its fundamental constitutional commitment to individual freedom, human dignity, and the preservation of familial bonds.[192] Instead, Congress creates a system that forces young citizen children with a noncitizen parent to be in a position that would be considered unacceptable by most people in our society were it applied to citizen children with citizen parents. With regard to the deportation of undocumented parents, our system forces young citizens to decide between living in the country where they were born and where they are

also Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.").

188. *See* Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213, 260 (2003) (describing the subordination of "family integrity" in immigration removal considerations).

189. *See* Demore v. Hyung Joon Kim, 538 U.S. 510, 521 (2003) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." (quoting Mathews v. Diaz, 426 U.S. 67, 79–80 (1976))).

190. *Immigration Reform Can Keep Millions of Mixed-Status Families Together*, FWD (Sept. 9, 2021), https://perma.cc/L65K-NHDL; *see also U.S. Citizen Children Impacted by Immigration Enforcement*, AM. IMMIGR. COUNCIL (June 24, 2021), https://perma.cc/P6G5-99LF (finding that as of 2018 there were 4.4 million U.S. citizen children under the age of eighteen that lived at least with one undocumented parent).

191. *U.S. Citizen Children Impacted by Immigration Enforcement*, *supra* note 190.

192. Goldstein, *supra* note 182.

growing up or maintaining their family's unity.[193] A regime that forces a young individual, whose parents have not committed any offense in the U.S., to choose between the disruption of her family nucleus or the forced removal from her home country to stay with her family would fail to pass constitutional muster in any other context outside of the immigration one. Furthermore, after a close analysis of the legislative history of the INA, the jurisprudence of the Supreme Court, lower federal courts, and the BIA, we find that this regime fails to comport to the goals and interest that the U.S. government allegedly stands behind when dealing with the country's immigration.

B. *Federal and Immigration Courts' Recognition of a Duty to Maintain Family Unity*

The U.S. government has an interest in family reunification in support of its citizens.[194] According to legislative history, immigration statutes were enacted to regulate the flow of individuals and their naturalization in the U.S.[195] This further shows the importance of family unity to policymakers in this country.[196] The Supreme Court has held that one of the fundamental tenets of our immigration system is "keeping families of United States citizens and immigrants united."[197] Federal courts across the country have continuously held that

193. *See generally,* Anita Ortiz Maddali, *Left Behind: The Dying Principle of Family Reunification Under Immigration Law*, 50 U. MICH. J.L. REFORM 107 (2016).

194. See Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629, 635 (2014) (arguing that "the interests of individual citizens are also national interests that the federal government should embrace as its own, and that recognition of intentional and functional parentage deserves a more prominent place in the nation's definition of parentage in the immigration and citizenship context").

195. *See* Immigr. & Naturalization Serv. v. Errico, 385 U.S. 214, 220 n.9 (1966) ("The legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united.").

196. *Id.*

197. Fiallo v. Bell, 430 U.S. 787, 806 (1977) (Marshall, J., dissenting) (quoting H.R. REP. No. 85-1199, at 7 (1957)).

this is one of the main purposes of the INA.[198] Furthermore, federal courts in recent years have relied on the "interest in family reunification" in removal proceedings under INA statutes.[199] In *Santos v. Smith*,[200] the court for the Western District of Virginia explained, regarding the interest in family reunification, that a "fundamental right has clearly been impacted here, and for a significant period of time."[201]

Considering the legislative intent behind immigration statutes such as the INA, the government's interest and alleged efforts to keep families of U.S. citizens together, and common law jurisprudence, the Supreme Court should recognize a fundamental right to family unity. In deciding whether a right falls under either the rights guaranteed by the first eight amendments of the Constitution or the fundamental rights not listed in the Constitution, courts ask whether the right is deeply rooted in the nation's history and tradition and whether it is essential to the nation's scheme of ordered liberty.[202] Recent decisions by the Supreme Court have brought into question whether the Court still considers this a valid way to recognize fundamental rights.[203] However, even in *Dobbs v. Jackson*

198. *See, e.g.*, Martinez-Cedillo v. Sessions, 896 F.3d 979, 1002 (9th Cir. 2018) (Wardlaw, J., dissenting) ("The Board's unreasonable sweep turns away from one of the fundamental tenets of our immigration law—'keeping families of United States citizens and immigrants united.'" (quoting Fiallo v. Bell, 430 U.S. 787, 795 n.6 (1977))); Ibarra v. Holder, 736 F.3d 903, 918 n.20 (10th Cir. 2013) ("Importantly, one of the purposes of the INA is 'keeping families of United States citizens and immigrants united.'"(quoting Fiallo v. Bell, 430 U.S. 787, 795 n.6 (1977))).

199. *See* Santos v. Smith, 260 F. Supp. 3d 598, 612 (W.D. Va. 2017) ("Thus, the interest in family reunification remains fundamental, even on these facts, and is deserving of significant due process protections.").

200. 260 F. Supp. 3d 598 (W.D. Va. 2017).

201. *Id.* at 612.

202. *See e.g.*, Obergefell v. Hodges, 576 U.S. 644, 697–98 (2015) (Roberts, J., dissenting) (citing Washington v. Glucksberg, 521 U.S. 702 (1997)) ("Our precedents have required that implied fundamental rights be 'objectively, deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'").

203. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) (arguing that "substantive due process is an oxymoron that lacks any basis in the Constitution" (internal quotation omitted)).

Women's Health Organization,[204] Justices in the majority conceded that there *are* unenumerated rights which are deeply rooted in the country's history.[205] Furthermore, federal judges continue to acknowledge the importance of recognizing certain fundamental rights that are unenumerated in the Constitution.[206]

As this Note illustrates, the rights of parents to raise children as they choose, to have custody over their children, and to make decisions about their children are objectively and deeply rooted in this nation's history and tradition. Even now, when the recognition of certain fundamental rights is under attack, Justices on both sides of the political spectrum still recognize the importance of certain fundamental rights. In keeping with Justice Kavanaugh's concurrence in *Dobbs*, the rights of parents over their children and the rights of children to be raised in a united family nucleus should be considered implicit in the concept of ordered liberty.[207] Indeed, the right of children to be raised by their parents in a unified household has already been touched on by circuit courts.[208] This Note calls for the Supreme Court to recognize a fundamental right to family unity so that children can remain in the same household as their parents without coercive interference by the state.

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204. 142 S. Ct. 2228 (2022).

205. *See id.* at 2304 (Kavanaugh, J., concurring) ("To be sure, this Court has held that the Constitution protects unenumerated rights that are deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty. But a right to abortion is not deeply rooted in American history and tradition.").

206. *See, e.g.*, Nate Raymond, *Trump-Appointed Judge Calls for Recognizing Right to Earn a Living*, REUTERS (Nov. 8, 2022), https://perma.cc/8LNV-WVRA (explaining that a conservative federal appeals court judge from the Fifth Circuit appointed by President Trump argued in a concurrent opinion that the U.S. Supreme Court should recognize a fundamental constitutional right to earn a living).

207. *Cf. Dobbs*, 142 S. Ct. at 2305 (J. Kavanaugh, concurring).

208. *See* Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) (summarizing the importance of maintaining family unity).

C. *Any Potential National Security and Public Interest Concerns Do Not Supersede the Right to Family Unity*

As subsection A of Part I shows, the plenary power doctrine offers the U.S. government broad discretion and power to enact laws regarding the immigration system. One of the main rationales behind this grant of power is that we must provide the political branches the ability to promote public safety and national security.[209] Under this premise, the U.S. government passes laws to detain, exclude, and discriminate against noncitizens who are considered a danger to the community that would be unacceptable if applied to U.S. citizens.[210] Furthermore, examining Congress's legislative history in regard to undocumented immigrants living in the U.S., one of the government's main concerns is whether the applicant would pose a flight risk if detained for criminal behavior.[211] Hence, once a right to family unity is established, the extent of this right would still need to be balanced against the interests of regulating the flow of people and national security in the U.S. This includes the determination that the petitioner "does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight."[212]

Although the tension between promoting public safety and pursuing the preservation of the family unit has been addressed by scholars across the country,[213] when it comes to applications

209. *See* Matthews v. Barr, 927 F.3d 606, 637 (2d Cir. 2019) (Carney, J., dissenting) ("Our country's immigration laws address the tension between promoting public safety by removing non-citizens who have violated our criminal laws in a domestic setting, on one hand, and pursuing the 'underlying intention . . . regarding the preservation of the family unit.'" (citation omitted)).

210. Martin, s*upra* note 38; *see also* Chae Chan Ping v. United States., 130 U.S. 581, 603–04 (1889) ("That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation.").

211. *See* Siniauskas, 27 I. & N. Dec. 207, 209 (BIA 2018) ("[We have] listed a variety of factors to consider in bond redeterminations, some of which generally relate to whether an alien is a flight risk, while others typically concern whether he is a danger to the community.").

212. *Id.* at 207.

213. *See, e.g.*, Natalie Lakosil, *The Flores Settlement: Ripping Families Apart Under the Law*, 48 GOLDEN GATE U. L. REV. 31, 58 (2018) ("The family

under INA § 240A(b)(1), the public safety concerns are minimal. For an alien to be considered for the granting of discretionary relief by immigration courts under this statute, there are four objective requirements that the alien must have met: lived at least ten years in the United States, been a person of *good moral character* during this period of time, not been convicted of any felonies, and is a parent or a spouse of a U.S. citizen.[214] Therefore, at this stage of the proceeding, the applicant would have established that he does not pose any danger to public safety, largely minimizing any governmental concerns regarding national security and public safety.[215] Furthermore, the hardship requirement to a close relative, such as a citizen minor, addresses any concerns the government may have regarding the applicant's flight risk. In multiple cases, the BIA has explained that having family ties, such as a U.S. citizen spouse or child, living with the spouse or child, and being involved in their lives, are all significant mitigating factors in flight risk concerns.[216]

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unit should be released simultaneously unless the government establishes that the parent poses a higher risk to national security than the child. Additionally, the government breaking up a family does not clearly align with protecting the nation's borders."); Carrie F. Cordero et. al., *The Law Against Family Separation*, 51 COLUM. HUM. RTS. L. REV. 430, 450–51 (2020) (discussing the potential limits on the use of pretextual national security justification for family separation and detention and the lack of explicit Congressional authorization allowing separation practices such as separating children from their families at the border); Joshua E. Kastenberg, *The McDade Act as a Means of Enforcing the Norms of Law and Rights of Children in Immigration Proceedings: A Proposed Roadmap to Prevent "Zero-Tolerance" Actions That Result in Child Separation*, 49 CAP. U. L. REV. 211, 228 (2021) ("[T]he practice of law, is left with recognition that family integrity is a due process right subject to limitations such as parental fitness, but in border security decisions, the additional recognition of the needs of national security can unfortunately triumph over the best interest of the child standard.").

214. INA § 240A(b)(1) (emphasis added).

215. *Id.*

216. *See* Siniauskas, 27 I. & N. Dec. 207, 209 (BIA 2018)

> The respondent has significant family ties, including his lawful permanent resident wife and a United States citizen daughter. His daughter has filed a visa petition on his behalf, which has been approved. He also has a fixed address and a long residence in the United States, although he has no legal status. Moreover, the

But while a person that satisfies the first three requirements of INA § 240A(b)(1) is not granted relief under the premise that the massive flow of immigration poses major national security concerns, both legal and undocumented immigrants commit far fewer crimes than native-born Americans.[217] Hence, our immigration system is demanding undocumented immigrants behave in a manner that a large portion of U.S. citizens do not. This is a major discrepancy in our flawed system, and by recognizing this and allowing courts to review immigration courts' decisions on the non-LPR cancellation of removal defense, we would be a step closer to mending the flaws.

D. *Human Rights and International Law Support the Acknowledgement of a Fundamental Right to Family Unity*

As this Note demonstrates, the Supreme Court determined that, under the plenary power doctrine, the judiciary should exercise deference to the political branches when entertaining any constitutional issues in the immigration realm. In establishing this doctrine, the Supreme Court relied on international law to find that the political branches, acting on behalf of the United States, have this power.[218] Hence, when attacking the extent to which the U.S. government can violate constitutional principles when it enforces a discriminatory immigration system against noncitizens under this doctrine, we should also look at whether these practices are followed at the international level.

> respondent has a history of employment including owning a business, has support from his church, and has been involved in charitable activities. . . . [T]hese family and community ties may be significant to whether the respondent is a flight risk.

217. *See* Alex Nowrasteh, *New Research on Illegal Immigration and Crime*, CATO INST. (Oct. 13, 2020), https://perma.cc/D9KE-GQ42 (providing that in Texas, while the undocumented immigrant and legal immigrant criminal conviction rates were 782 per 100,000 and 535 per 100,000, respectively, the criminal conviction rate for native-born Americans was 1,422 per 100,000).

218. *See* Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.").

When we examine the right to family unity abroad, we find that there is a general consensus in support of the recognition of a duty to maintain family units in the international community.[219] Multiple conventions, treatises, and decisions by courts in the U.S. show that there is an international consensus that countries have a duty to maintain family unity.[220] Generally, treatises and conventions which the U.S. has not signed onto do not have an effect on our domestic law.[221] However, at times, the Supreme Court has examined and cited to treaties and international consensus when ruling on social issues.[222] When doing this, the Court emphasized, both, that the U.S. would be the only country not following a practice and that countries like the United Kingdom, which the U.S. has close historic ties to, had followed that specific trend.[223] For example, in *Roper v. Simmons*,[224] the Court took into account the global trend against the juvenile death penalty when holding that the penalty was unconstitutional.[225]

Looking at foreign law and international treatises, it is evident that the U.S. is one of the few countries that has not

219. *See* Beharry v. Reno, 183 F. Supp. 2d 584, 597–99, 601 (E.D.N.Y. 2002) (citing the Convention on the Rights of the Child and the duty to maintain family unity, adopted by 196 countries, including every member of the United Nations, except the United States).

220. *Id.*

221. *See* Medellin v. Texas, 552 U.S. 491, 504 (2008) (explaining that even when the country has signed into an international treaty, its binding obligations do not automatically become federal binding law).

222. *See, e.g.,* Roper v. Simmons, 543 U.S. 551, 566 (2005) (conclude that the juvenile death penalty was unconstitutional by relying on international law and the global trend against the juvenile death penalty).

223. *See id.* at 577 ("[I]t is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty. . . . [I]t is instructive to note that the United Kingdom abolished the juvenile death penalty before these covenants came into being.").

224. 543 U.S. 551 (2005).

225. *See id.* at 578. ("It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty . . . . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.").

recognized a duty to maintain family unity.[226] Based on treaties and international consensus, courts should establish the fundamental right to family unity in order to prevent the U.S. government from continuing flagrant violations of core human rights.[227] Judicial recognition of the right to family unity, especially in adjustment of status applications in which applicants do not threaten public safety, would alter and improve our country's treatment of noncitizens.

E. *Potential Avenues if a Right to Family Unity is Recognized*

If a fundamental right to family unity is recognized, the Court's jurisprudence supports the application of a strict scrutiny test to challenge the hardship standard found in the non-LPR cancellation of removal defense. In *Graham v. Richardson*,[228] the Court analyzed the constitutionality of state statutes in Arizona and Pennsylvania that conditioned welfare benefits upon the beneficiary's status as a U.S. citizen or on their residence in the state for a specified number of years.[229] Both states argued that their restrictions on the availability of public assistance for aliens were based solely on the states' "special public interests" in favoring their own citizens, over aliens, in the distribution of limited resources, such as welfare benefits.[230] Respondents argued that the state's actions should be subject to strict scrutiny because this classification was based on nationality, which was an inherently suspect class subject to close judicial scrutiny.[231]

The lower court in *Graham* applied *Shapiro v. Thompson*,[232] which dealt with the constitutional right to travel from one state

226. *See Beharry*, 183 F. Supp. 2d at 597–99, 601 (critiquing the United States's failure to adopt the International Convention on the Rights of the Child).

227. *See, e.g.*, *Baluarte*, *supra* note 2, at 34 ("The practice of removing noncitizens for criminal conduct without balancing the public safety imperative against the impact of that removal on children . . . violates core human rights obligations.").

228. 403 U.S. 365 (1971).

229. *Id.* at 366–67, 368–69.

230. *Id.* at 372.

231. *Id.* at 371–72.

232. 394 U.S. 618 (1969).

to another.[233] The lower court explained that the Arizona statute's "fifteen-year residency requirement for resident aliens violate[d] the constitutional right to travel."[234] On appeal to the Supreme Court, the states argued that *Shapiro* did not apply to this case because the right to travel extended only to citizens and not to aliens.[235] The Supreme Court found that the classifications involved in this case were "inherently suspect and . . . therefore subject to strict judicial scrutiny *whether or not a fundamental right is impaired.*"[236]

Although the Court did not answer whether the right to travel extended to aliens, it provided the following explanation in its application of *Shapiro*:

> It is enough to say that the classification involved in Shapiro was subjected to strict scrutiny under the compelling state interest test, not because it was based on any suspect criterion such as race, nationality, or alienage, but because it impinged upon the fundamental right of interstate movement. As was said there, "The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." The classifications involved in the instant cases, on the other hand, are inherently suspect and are therefore subject to

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233. *See id.* at 671 (Harlan, J., dissenting)

> The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized . . . [The] right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution. quoting United States v. Guest, 383 U.S. 745, 757–58. (1966)).

234. Richardson v. Graham, 313 F. Supp. 34, 35 (D. Ariz. 1970).

235. *Graham*, 403 U.S. at 375.

236. *Id.* at 376 (emphasis added).

> strict judicial scrutiny whether or not a fundamental right is impaired.[237]

In this analysis, the Court contemplated two avenues in order to apply strict scrutiny: (1) whether the classification created by the state law involved an inherently suspect class, and (2) whether a fundamental right had been impaired by the enactment of this law.

When the complete and irrevocable termination of parents' rights to their child is at stake in our courts, the judiciary should require the law to comport with due process.[238] When dealing with jurisdiction-stripping statutes, the judiciary must not deprive any person of life, liberty, or property without due process of law.[239] Thus, the current hardship standard of the non-LPR cancellation of removal defense and its insulation from judicial review clearly impairs the fundamental right to family unity. Accordingly, based on the Court's jurisprudence, the hardship standard would have to pass strict scrutiny review.[240]

To pass strict scrutiny, the government must first identify the compelling state interest furthered by the problematic hardship standard.[241] Congress issued a declaration of national security concerning welfare and immigration, in which it provided two compelling interests behind its policies: "[T]o enact new rules for eligibility and sponsorship agreements in order to assure that aliens be self-reliant in accordance with national

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237. *Id.* at 375–76 (quoting *Shaprio* , 394 U.S. at 375).

238. *See* Santosky v. Kramer, 455 U.S. 745, 758–59 (1982) (conducting a due process analysis and finding that it is "'plain beyond the need for multiple citation' that a natural parent's 'desire for and right to 'the companionship, care, custody, and management of his or her children' is an interest far more precious than any property right" (quoting Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981)).

239. *See* Battaglia v. Gen. Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948) (providing Congress must comply with the due process clause of the Fifth Amendment when restricting judicial jurisdiction).

240. *See* Sorrell v. Thevenir, 633 N.E.2d 504, 511 (Ohio 1994) ("According to principles of due process, however, governmental action which limits the exercise of fundamental constitutional rights is subject to the highest level of judicial scrutiny.").

241. *See* State v. Lilley, 204 A.3d 198, 205 (N.H. 2019) ("Classifications based upon suspect classes are subject to strict scrutiny: the government must show that the legislation is necessary to achieve a compelling government interest and is narrowly tailored.").

immigration policy" and "to remove the incentive for illegal immigration provided by the availability of public benefits."[242]

Therefore, there are three main potential compelling government interests: (1) a generalized concern for national security, (2) a need to assure that aliens be self-reliant in accordance with national immigration policy, and (3) a need to remove the incentive for illegal immigration provided by the availability of public benefits.

Regarding the national security interest, three of the requirements for establishing the non-LPR cancellation of removal defense address this potential threat. For an applicant to be eligible for this relief, they must have lived in the United States for at least 10 years, been a person of *good moral character* during this time period, and must not have been convicted of any felonies.[243] Hence, these requirements address any potential compelling government interest regarding national security, and the stringent hardship standard does not advance any additional, non-discriminatory policies.

To address the second and third compelling government interests, the government would have to demonstrate that the exceptional and extremely unusual hardship standard that infringes on the applicants' right to family unity is narrowly tailored. Regarding the second interest of aliens being self-reliant, one of the government's main concerns is that aliens will not attend their immigration hearings or will intentionally avoid Immigration and Customs Enforcement requirements.[244] Arguably, the fourth requirement of the non-LPR cancellation of removal defense, which incorporates the extremely stringent hardship standard, addresses this concern since it requires the applicant to either be the spouse or the parent of a U.S. citizen

242. 8 U.S.C § 1601(5)–(6).

243. INA § 240A(b)(1).

244. *See, e.g.,* Demore v Hyung Joon Kim, 538 U.S. 510, 513 (2003) ("We hold that Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as respondent be detained for the brief period necessary for their removal proceedings.").

or a lawful permanent resident.[245] However, following the BIA's precedent in *Siniauskas*,[246] this relationship by itself addresses the concern of the applicant potentially failing to appear at their immigration proceedings or actively avoiding immigration enforcement. Hence, the hardship standard unnecessarily infringes on the fundamental right to family unity in order to satisfy the government's interest in aliens being self-reliant.[247]

Lastly, the government could argue that the hardship standard is needed to disincentivize illegal immigration that might otherwise be incentivized by the availability of public benefits. Even though the fourth requirement of the non-LPR cancellation of removal defense does not explicitly address public benefits and deterrence of illegal immigration, such a severe hardship standard implicitly affects and deters undocumented immigrants from entering the country. However, when infringing on the fundamental right to family unity, this interest would not satisfy the strict scrutiny standard's requirement that the government action be "narrowly tailored." Hence, the lack of specificity would cause the hardship standard to fail constitutional muster.

The application of the due process clause would comport with the jurisprudence of the Court when it has been asked to balance competing interests of the government and families. Like in *Santosky*, when balancing the importance of maintaining family unity with the government's interest, it is clear that the former outweighs the latter. The decision to deport an applicant often leads to a child losing a parent and takes away their right to grow in a cohesive family unit. The government's rationale behind this extremely severe effect, however, is that an applicant who has not committed any crimes, has been deemed to have a good moral character, and has significant ties with U.S. citizens is somehow a threat to the national security and public benefits of this country. Hence, if courts across the country recognize the fundamental right to family unity in the immigration context and determine that the current administration of the non-LPR cancellation of removal

245. INA of 1952 § 240A(b)(1).

246. 27 I. & N. Dec. 207, 209 (BIA 2018).

247. *See* State v. Spell, 339 So. 3d 1125, 1137 (La. 2022) ("To be narrowly tailored, the law must be the least restrictive means available to achieve the compelling state interest.").

defense is infringing on this right, this regime would not pass constitutional muster.

CONCLUSION

Thirty-eight years ago, Senator Charles E. Grassley drafted and passed the Parental Rights and Responsibilities Act of 1995.[248] In this bill, the Senate found that a "tradition of western civilization recognizes that parents have the responsibility to love, nurture, train, and protect their children."[249] The Senate explained that, due to the failure of the judiciary to recognize the rights of parents as a fundamental right, parents had "face[d] increasing intrusions into their legitimate decisions and prerogatives by government agencies."[250] However, the Senate excluded from the text of the statute that, in order for parents to be protected against intrusive governmental forces when nurturing their child, the parents must be U.S. citizens.

We must recognize that the U.S. government believes that undocumented individuals and their families are entitled to fewer protections than U.S. citizens.[251] More flagrantly, our system openly endorses a regime in which U.S. citizen children are given different protections to grow in a cohesive family nucleus depending on the immigration status of their parents. Our courts have the legal tools at their disposal to put a stop to this discriminatory regime. Judicial recognition of the fundamental right to family unity would protect immigrants and their families as they go through immigration proceedings.

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248. Parental Rights and Responsibilities Act of 1995, S. 984, 104th Cong. (1996); *id.* (prohibiting the Federal Government or any State or local government, or any official of such a government, from interfering with or usurping the right of a parent to govern the upbringing of a child of the parent).

249. *Id.*

250. *Id.*

251. *See* Martinez-Hernandez v. Garland, No. 21-3130, 2021 U.S. App. LEXIS 32177, at *11 (6th Cir. Oct. 25, 2021) ("[While the United States] continue[s] to feign interest in protecting the integrity of families, our elected leaders refuse to take any steps to reform our arcane and draconian immigration laws that continually fracture family units . . . . Unfortunately, however, those are laws that we are bound to interpret.").

This is the necessary first step towards a more just immigration system.