CURTAILING THE DEPORTATION OF UNDOCUMENTED PARENTS IN THE BEST INTEREST OF THE CHILD

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ABSTRACT

Undocumented noncitizens facing deportation who have resided in the United States for at least ten years often seek cancellation of removal—a form of relief that requires evidence that removal would result in "exceptional and extremely unusual hardship" to a citizen or lawful permanent resident spouse, parent, or child. This article examines cancellation of removal for noncitizens whose children are U.S. citizens. Along with strict border enforcement, the Trump administration has increased interior arrests at workplaces and homes. Often, victims of interior arrests have children who are U.S. citizens. If the Administration is successful in terminating the Deferred Action for Childhood Arrivals program (DACA) and Temporary Protected Status (TPS), more individuals will apply for cancellation relief. For example, the estimated 200,000 TPS holders from El Salvador are parents to an estimated 192,000 U.S. citizens. Additionally, about 250,000 U.S. citizens are children of DACA recipients.

The application for cancellation of removal is critical for these individuals who face deportation, and thus, it is imperative that parents in these situations satisfy the "exceptional and extremely unusual hardship" requirement as it pertains to their children. However, the Board of Immigration Appeals' approach to the hardship requirement makes cancellation relief difficult to attain for the vast majority of applicants.

This article argues that the BIA approach to assessing the hardship requirement is ripe for reconsideration based on two related new arguments. First, neurologic/toxic stress factors faced by U.S. citizen children—particularly those who will be separated from a deported parent—should be sufficient to satisfy the exceptional and extremely unusual hardship requirement. Children exposed to repeated adverse childhood events (ACEs), including deportation of a parent, experience an escalation in levels of stress hormones that have devastating long-term health, educational, and economic effects.

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Second, the rights of children should be given particular consideration in the adjudication of cancellation of removal claims. To be consistent with international legal norms, in particular Article 3 of the United Nations Convention on the Rights of the Child (CRC), the duty to consider the "best interests" of the child in every decision that affects children must be fulfilled. Because the CRC is customary international law, and ambiguous statutes like the cancellation provision must be interpreted in a way that complies with international law, the hardship standard must be re-interpreted so that it incorporates a "best interests" assessment in parental deportation cases involving citizen children.

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I. INTRODUCTION

Undocumented noncitizens who are facing deportation, but have resided in the United States for at least ten years, often seek cancellation of removal—a form of relief under section 240A(b) of the Immigration and Nationality Act (INA). Under that provision, an applicant must provide evidence regarding four requirements: (A) a ten-year period of continuous physical presence, (B) good moral character during that period, (C) no convictions of certain specified criminal offenses, and (D) removal would result in "exceptional and extremely unusual hardship" to a citizen or lawful permanent resident (LPR) spouse, parent or child.[1] Thus, a relationship with a citizen or LPR spouse, parent, or child is a prerequisite to relief.

This article examines cancellation of removal for noncitizens who have U.S. citizen children. Many victims of interior arrests are parents of U.S. citizen children. With immigration enforcement being a hallmark of the Trump

1. *See* Immigration and Nationality Act § 240A(b), 8 U.S.C. § 1229b (2018) (cancellation of removal for non-permanent residents).

administration, interior arrests of allegedly removable aliens at workplace raids, homes, and even at state courthouses are common. Two other notable actions taken by the Trump administration could result in even greater interior enforcement numbers—the termination of the Deferred Action for Childhood Arrivals program (DACA) and Temporary Protected Status (TPS). Terminating DACA would directly affect over 600,000 individuals and would by default impact the approximately 250,000 U.S. citizens who are children of those same DACA recipients. [2] Similarly, about 320,000 individuals currently have TPS, many of whom also have U.S. citizens children. For example, the estimated 200,000 TPS holders from El Salvador are parents to an estimated 192,000 citizen children.[3]

Cancellation of removal relief is critical for these individuals who face deportation; and thus, the "exceptional and extremely unusual hardship" requirement pertaining to citizen children is the focus of this article. Many undocumented immigrants meet the physical presence and non-criminality/moral character requirements; however, the hardship requirement makes cancellation relief difficult to attain for those applicants.

This article argues that the Board of Immigration Appeals (BIA) approach to assessing the hardship requirement is ripe for reconsideration based on two new related arguments. First, neurologic/toxic stress factors faced by U.S. citizen children—particularly those who will be separated from a deported parent—should be sufficient to satisfy the exceptional and extremely unusual hardship requirement. Second, the rights of children should be given particular consideration in the adjudication of non-LPR cancellation of removal claims. To be consistent with international legal norms, in particular Article 3 of the United Nations Convention on the Rights of the Child (CRC), the duty to consider the "best interests" of the child in every decision that affects children must be fulfilled.[4]

II. "EXCEPTIONAL AND EXTREMELY UNUSUAL HARDSHIP" BACKGROUND

The deportation of one or both undocumented parents of U.S. citizen children is common. For example, in *Matter of Monreal,*[5] a 34-year-old male citizen of Mexico was removed even though he had two U.S. citizen children, aged 8 and 12. In *Matter of Andazola,*[6] a 30-year-old Mexican single mother of two U.S. citizen children, who had lived and worked in the United States

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2. Zaidee Stavely, *US Citizen Children of DACA Recipients Await Supreme Court Ruling on Program,* PRI THE WORLD (Mar. 12, 2020), https://www.pri.org/stories/2020-03-12/us-citizen-children-daca-recipients-await-supreme-court-ruling-program.

3. Bishop Mark Seitz, *But What About the Children? What Happens to the 192,000 US Citizen Children of Salvadoran TPS Parents?,* HILL (Jan. 12, 2018, 12:00 PM), https://thehill.com/opinion/immigration/366777-but-what-about-the-children-what-happens-to-the-192000-us-citizen.

4. United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 11. [hereinafter CRC]

5. *In re* Monreal-Aguinaga, 23 I. & N. Dec. 56, 57 (B.I.A. 2001).

6. *In re* Andazola-Rivas, 23 I. & N. Dec. 319, 319 (B.I.A. 2002).

for seventeen years, was ordered removed. Sometimes, circumstances force the citizen children to leave the United States with the parents, while in other situations the parents are deported and separated from their children who remain in the United States. For example, in *Monreal* and *Andazola,* the children planned to travel to and live in Mexico if their parents were deported.[7] However, in *Cabrera-Alvarez v. Gonzales,*[8] and in *Noriega de Pomar v. Holder*,[9] the children planned to remain in the United States with other relatives instead of following their parents, who were deported to Mexico and Peru.

In *Matter of Monreal* and *Matter of Andazola*, the BIA established administrative guidelines for satisfying the "exceptional and extremely unusual hardship" requirement for non-LPR cancellation of removal. In *Monreal,* the respondent was a 34-year-old citizen of Mexico who had lived in the United States for twenty years. He argued that his 8 and 12-year-old children would suffer exceptional and extremely unusual hardship if he was removed because they would have to accompany him to Mexico.[10] The children would have to leave their school, friends, and other relatives behind—forcing them to settle in an unfamiliar country, with fewer education opportunities and poorer economic prospects. But, the BIA ruled that the hardship requirement was not met.[11] In the BIA's view, analysis of the exceptional and extremely unusual hardship requirement requires consideration of the "age, health, and circumstances of" the qualifying family members, including how a lower standard of living or adverse country conditions in the country of return might affect those relatives.[12] However, according to the BIA, the respondent must demonstrate that his or her spouse, parent, or child would suffer hardship that is "substantially beyond that which would ordinarily be expected" to result from the person's departure.[13]

In *Andazola,* the BIA ruled against a 30-year-old Mexican single mother of two U.S. citizen children, who had lived and worked in the United States for seventeen years.[14] All of the respondent's siblings were living in the United States but were without documentation. The Immigration Judge (IJ) granted cancellation, ruling that that the children, aged 6 and 11, would face "complete upheaval in their lives and hardship that could conceivably ruin their lives."[15] On appeal, the BIA reversed the IJ's decision, concluding that even though the children had lived in the United States for their entire lives, they would "likely be able to make the necessary adjustments" to their future

7. *In re Monreal-Aguinaga*, 23 I. & N. Dec. at 64; *In re Andazola-Rivas*, 23 I. & N. Dec. at 321.
8. Cabrera-Alvarez v. Gonzales, 423 F.3d 1006, 1007–08 (9th Cir. 2005).
9. Noriega de Pomar v. Holder, 449 Fed. App'x 72, 73 (2d Cir. 2011).
10. *In re Monreal-Aguinaga*, 23 I. & N. Dec. at 63–65.
11. *Id*. at 65.
12. *Id*. at 63.
13. *Id*. at 69.
14. *In re* Andazola-Rivas, 23 I. & N. Dec. 319, 322 (B.I.A. 2002).
15. *Id*. at 321.

lives in Mexico.[16] The BIA held that the respondent had not shown that her U.S. citizen children would be deprived of all schooling in Mexico. In denying relief, the BIA considered it "significant" that the respondent had accumulated assets, including seven thousand dollars in savings and a retirement fund, and owned a home and two vehicles.[17] Those assets were deemed available to help "ease" the family's transition to Mexico, and the case presented a common fact pattern that was insufficient to satisfy the exceptional and extremely unusual hardship standard.[18]

The BIA did find sufficient hardship in *Matter of Recinas,*[19] a case that nonetheless demonstrates the high standards for hardship. The case involved a 39-year-old citizen of Mexico, who was a single mother of four U.S. citizen children (aged 5, 8, 11, and 12) and two noncitizen children (aged 15 and 16). Her four youngest children were entirely dependent upon her, had never been to Mexico, and did not speak Spanish. As the daughter of two LPRs and sister of five U.S. citizens, the respondent had no relatives in Mexico who might be able to assist with return, and her family would face significant upheaval. The respondent lived five minutes away from her mother, who served as the children's caretaker while the respondent managed her own business. The respondent's former husband was not actively involved with the family and provided no support.[20] The BIA pointed out that compared to the children in *Monreal and Andazola,* the four citizen children of Recinas were entirely dependent on her support.[21] All the factors increased "the hardship the children would face upon return to Mexico."[22] Still, the case presented "a close question," and represented the "outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met."[23]

Most families are not like the family in *Recinas.* Because of the high hardship standard, thousands of children face de facto deportation or separation from their parents.[24] In 2016, approximately 18 million children under the age of eighteen lived with at least one immigrant parent—accounting for twenty-six percent of the population of children in the United States.[25] Of these children, 15.9 million, or eighty-eight percent,

16. *Id.* at 324.
17. *Id.*
18. *Id.*
19. *In re* Gonzales-Recinas, 23 I. & N. Dec. 467, 473 (B.I.A. 2002).
20. *Id.* at 470.
21. *Id.* at 471.
22. *Id.*
23. *Id.* at 470.
24. *See* Lucy Twimasi, *Hardship Reconstructed: Developing Comprehensive Legal Interpretation and Policy Congruence in INA Sec. 240A(b)'s Exceptional and Extremely Unusual Hardship Standard*, CHICANO-LATINO L. REV. 34, 36 (2016); Debbie Nathan, *When De Facto Americans Are Deported*, REASON (Nov. 2019), https://reason.com/2019/10/13/when-de-facto-americans-are-deported/.
25. Jie Zong, Jeanne Batalova & Jeffrey Hallock, *Frequently Requested Statistics on Immigrants and Immigration in the United States in 2016*, MIGRATION POL'Y INSTIT. (Feb. 8, 2018), https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states-2016.

were born in the United States.[26] Between 2011 and 2013, half a million U.S. citizen children experienced the apprehension, detention, and deportation of at least one parent.[27] In just the first six months of 2011, the government removed over 46,000 mothers and fathers of U.S. citizen children.[28]

The problem of parental deportation has existed for years, but worsened after the introduction of the current hardship standard under the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). This issue is reflected in federal court decisions after the BIA's decisions in *Monreal* and *Andazola*. For example, in *Alvarado v. Holder,*[29] the fact that a gifted U.S. citizen son would be forced to leave was not deemed sufficient hardship. In *Ayeni v. Holder,*[30] asthma and other problems suffered by U.S. citizen children was not found to be exceptional hardship. In *Lojano v. Holder,*[31] negative impacts on a son's education, illness, and obesity were found to be insufficient. In *Mendez-Moranchel v. Ashcroft,*[32] a son's language learning disabilities were similarly insufficient. And in *Noriega de Pomar v. Holder,*[33] a U.S. citizen daughter who would simply be "emotionally distracted" by her father's removal while she remained in the United States was insufficient to meet the hardship requirement.

A recent BIA decision illustrates the continued high bar on hardship established in *Monreal* and *Andazola*. In *Matter of J-J-G-,*[34] the respondent was a male from Guatemala who had five U.S. citizen children with their mother, a lawful permanent resident. His four oldest children were 12, 11, 8, and 5 years old, while his youngest was 2 months old.[35] It was unclear whether the children would remain in the United States or go with the respondent if he was ordered removed. The respondent testified that his children would remain in the United States if he was removed. However, his partner, the mother of his children, testified that the children would relocate to Guatemala and indicated that she would also accompany the respondent. [36]

The respondent's 8-year-old daughter was diagnosed with hypothyroidism, a condition she had since birth.[37] She required regular medication to treat the condition, and without treatment, she had problems regulating metabolic

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26. *Id.*
27. AM. IMMIGR. COUNCIL, U.S. CITIZEN CHILDREN IMPACTED BY IMMIGRATION ENFORCEMENT 1 (2019), https://americanimmigrationcouncil.org/research/us-citizen-children-impacted-immigration-enforcement.
28. SETH FREED WESSLER, SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM, APPLIED RSCH. CTR., (2011), http://www.asph.sc.edu/cli/word_pdf/ARC_Report_Nov2011.pdf.
29. Alvarado v. Holder, 743 F.3d 271, 277 (1st Cir. 2014).
30. Ayeni v. Holder, 617 F.3d 67, 73 (1st Cir. 2016).
31. Lojano v. Holder, 594 Fed. App'x 13, 15 (2d Cir. 2014).
32. Mendez-Moranchel v. Ashcroft, 338 F.3d 176, 177 (3d Cir. 2003).
33. Noriega de Pomar v. Holder, 449 Fed. App'x 72, 73–74 (2d Cir. 2011).
34. *In re* J-J-G-, 27 I. & N. Dec. 808, 809 (B.I.A. 2020).
35. *Id.* at 809.
36. *Id.*
37. *Id.*

functions, like the temperature of her body. State benefits covered the medical costs for the respondent's children. The respondent claimed he would be unable to afford medication to treat his daughter's hypothyroidism in Guatemala. His partner stated that the medication would cost $1,100 in Guatemala—information she obtained from the internet.[38] However, the respondent's mother testified that she had received medical care in Guatemala free of charge and believed that medical care is still provided for free there.[39] Based on that discrepancy and the lack of other corroborating evidence, the BIA affirmed the IJ's rejection of the respondent's assertion on the cost of medical treatment in Guatemala.[40] Furthermore, although the respondent submitted evidence reflecting that medical facilities in Guatemala provide a lower standard of medical care than facilities in the United States, the evidence did not show that treatment for hypothyroidism was not reasonably available in Guatemala.[41]

The respondent's oldest child went to counseling for about three months for "aggressive and defiant behavior[]," but there was no indication that he was diagnosed with any mental health or behavioral issues.[42] The respondent's 11-year-old son attended the same counseling service for about five months and was diagnosed with "Anxiety Disorder, unspecified" and "Attention-deficit hyperactivity disorder, unspecified." After the counselors provided the child with coping strategies to alleviate his anxiety, including watching fewer "scary movies" with his older brother, they concluded that the relevant treatment goals had been met and that he had "[s]uccessful[ly] complet[ed] therapy."[43] Based on this information, the BIA held that the IJ's findings that there were no serious ongoing medical conditions was not clearly erroneous.[44] Thus, relying on the standards established by *Monreal* and *Andazola*, the BIA found that the cumulative evaluation of the proffered hardships was insufficient and was not "substantially different from, or beyond, that which would normally be expected from the deportation of an alien with close family members here."[45]

In fact, despite the BIA's holding in *Matter of J-J-G-* and many other cases, there is clear evidence that parental deportation has incredibly traumatic effects on children.[46] This is true whether the child remains in the U.S.

38. *Id*. at 812.
39. *Id*.
40. *Id*.
41. *Id*.
42. *Id*. at 809.
43. *Id*.
44. *Id*. at 813.
45. *Id*. at 814 (citing *In re* Monreal-Aguinaga, 23 I. & N. Dec. 56, 65 (B.I.A. 2001)).
46. *See* Lisseth Rojas-Flores et al., *Trauma and Psychological Distress in Latino Citizen Children Following Parental Detention and Deportation*, 9 PSYCHOL. TRAUMA: RSCH., PRAC., & POL'Y 352 (2017); Press Release, AAP Statement on Protecting Immigrant Children (Jan. 25, 2017), https://www.amren.com/news/2017/01/american-academy-pediatrics-statement-protecting-immigrant-children/; Ajay Chaudry et al., *Facing Our Future: Children in the Aftermath of Immigration Enforcement*, URBAN INSTIT. (Feb. 2010), https://www.urban.org/sites/default/files/publication/28331/412020-Facing-Our-Future.PDF.

or accompanies their parent(s)—a statistic the government does not track.[47] The group of children most likely to face parental deportation is already at much higher risk for poor health outcomes, in part due to the constant fear of apprehension by immigration authorities.[48] When children are exposed to adverse events such as parental deportation, their neurobiology is significantly altered, precisely at the age when brain development is critical in determining future health.[49] Parental deportation causes toxic stress accumulation, which can lead to long-lasting, irreversible health impacts on children.[50] This stress affects a child's mental health—increasing risk of depression, anxiety, isolation, self-stigma, withdrawal, and behavioral problems. Stress can also alter a child's biology, causing changes at the DNA level which increase the risk of inflammatory diseases such as cancer.[51] The broader economic consequences of deportation also impact health outcomes: deportation causes significant loss in median household income, which results in decreased educational opportunities and healthcare options.[52] With the Trump administration's ongoing expansion of immigration enforcement, the well-being of more and more children is at stake.[53]

III. RESEARCH ON THE CUMULATIVE BIOCHEMICAL CONSEQUENCES OF ADVERSE CHILDHOOD EVENTS SHOULD INFORM THE BIA'S ANALYSIS OF HARDSHIP

A. *Adverse Childhood Events Research*

Research has shown that the deportation or detention of a caregiver can negatively impact a child in a number of ways, particularly their physical and mental health. At the time of the BIA's decisions in *Monreal, Andazola,* and *Gonzales Recinas* almost twenty years ago in 2001 and 2002, research was emerging on the effects of adverse childhood events ("ACEs"). Such research is quite relevant to the effects of separation from a parent, yet, neither the BIA nor federal courts appear to have been presented with this research. As

47. American Immigration Council, *Citizen Children, supra* note 27.

48. *Id.*; Randy Capps et al., *Implications of Immigration Enforcement Activities for the Well-Being of Children in Immigrant Families*, MIGRATION POL'Y INSTIT., URBAN INSTIT. (Sept. 2015), https://www.urban.org/sites/default/files/alfresco/publication-exhibits/2000405/2000405-Implications-of-Immigration-Enforcement-Activities-for-the-Well-Being-of-Children-in-Immigrant-Families.pdf; Lizzie Bird, *The Best Interests of the Child or the State? The Rights of the Child in Non-LPR Cancellation of Removal* (Dec. 14, 2018) (unpublished Master's Thesis, University of San Francisco) (on file with Gleeson Library, University of San Francisco).

49. Bird, *supra* note 48, at 4.

50. *Id.;* American Academy of Pediatrics, *Toxic Stress on Children: Evidence of Consequences,* http://www.aappublications.org/toxic-stress (last accessed Jan. 17, 2019); Samantha Artiga & Petry Ubri, *Living in an Immigrant Family in America: How Fear and Toxic Stress Are Affecting Daily Life, Well-Being, & Health*, HENRY J. KAISER FAMILY FOUNDATION (Dec. 13, 2017).

51. Bird, *supra* note 48, at 4.

52. *Id.*

53. Randy Capps et al., *Revving Up The Deportation Machinery: Enforcement and Pushback Under Trump*, MIGRATION POL'Y INSTIT. (May 2018), https://www.migrationpolicy.org/research/revving-deportation-machinery-under-trump-and-pushback.

such, the ACEs research is ripe for consideration in the assessment of cancellation hardship pertaining to citizen children.

An influential study done by the Center for Disease Control ("CDC Study") evaluated the short and long term effects of adverse childhood events ("ACEs") on children's physical and mental health by measuring the chemical changes in a child's body that cause an accumulation of toxic stress.[54] The study followed approximately twenty thousand children through adulthood and found that there are "biochemical changes that seem irreplaceable well into adulthood, causing biological diseases such as heart disease, heart attacks, hypertension, lung disease, in addition to all the other mental health issues."[55]

"The other key finding [was] that the greater the recurrence of the trauma or the more episodes, the higher the risk of developing these adulthood diseases."[56] The study found "a strong, dose-response relationship between the number of childhood exposures and each of the 10 risk factors for the leading causes of death."[57] Thus, the greater the number of ACEs, the greater the accumulation of irreversible toxic stress in the body and irreparable biochemical changes in the child's DNA, making them vulnerable to serious health risks later on.

The CDC study also supports a finding that children are most vulnerable to the negative effects of biochemical changes due to toxic stress when "children [are] exposed to repeated 'adverse childhood events' (such as abuse, domestic violence, limited social connectedness, parental mental health illnesses or substance use, caregiver incarceration/deportation, and neglect)."[58] These events can "significantly alter their neurobiology – precisely at the age when brain development is critical in determining future health."[59] Similarly, a study in 2017 found that the loss of a father was associated with shorter telomere length, a biological phenomenon linked to a wide range of diseases.[60]

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54. Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTIVE MED. 250 (1998).

55. *Id.*

56. *Id.*

57. *Id.* (summarizing the study by the CDC to which Dr. Chung referred).

58. Children's Health Center of Zuckerberg San Francisco, Confidential Medical Evaluation for "Adrian [M]," General Hospital 2 (2018) (on file with author) [hereinafter EC].

59. *Id.*

60. Colter Mitchell et al., *Father Loss and Child Telomere Length*, 140 PEDIATRICS 1 (2017). Telomeres are an essential part of human cells that affect how cells age. Telomeres are the caps at the end of each strand of DNA that protect chromosomes, like the plastic tips at the end of shoelaces. Without the coating, shoelaces become frayed until they can no longer do their job, just as without telomeres, DNA strands become damaged and cells cannot do their job. Telomere shortening is involved in all aspects of the aging process on a cellular level. Telomere length represents biological age as opposed to chronological age. Many scientific studies have shown a strong connection between short telomeres and cellular aging. *What is a Telomere*, T.A. SCIENCES (2020), https://www.tasciences.com/what-is-a-telomere.html (last accessed Oct. 19, 2020).

> [N]ot only does recurrent exposure to trauma impair healthy brain development in a child and young adult, but also leads to a lifelong increased risk for serious chronic diseases in adulthood: cardiovascular disease, chronic lung disease, hypertension, suicide, substance abuse, and other illnesses. Many of these health consequences are otherwise preventable.[61]

Research has also concluded that children with caregivers "who are at risk for detention or deportation are already at much higher risk for poor health outcomes than those with documented parents" because "[t]he daily fear of deportation can become so severe that it can have resoundingly negative health impacts."[62] Along with the physical and mental health consequences of ACEs and toxic stress accumulation, the deportation or detention of a parent or caregiver has also been found to impact a child's:

(1) *Access to health care* because their fear of interactions with immigration officials makes them significantly less likely to seek medical care, apply for public assistance, or report crimes;[63]
(2) *Risk for foster care* because remaining family members are often unable to support the child in the absence of the deported caregiver, a point illustrated by the fact that "5,000 U.S. citizen children in foster care had a detained or deported parent in 2011";[64]
(3) *Economic outcomes* because deportation of a family member exacerbates rates of home foreclosure and dropping below the poverty line, which is linked to shorter lifespans for family members and further decreases a child's access to healthcare. Notably, between 2006 to 2009, families in six locations in the United States "lost 40-90% of their income within six month of a parent's immigration-related detention or deportation";[65]
(4) *Educational outcomes* because children will finish fewer years of school and face challenges focusing on their studies—some out of a heightened fear of encountering immigration law enforcement, and some out of the need to drop out of school to take on additional jobs to supplement household income.[66]

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61. Chung, *supra* note 57.
62. EC, *supra* note 58.
63. *Id.* at 4.
64. *Id.*
65. *Id.*
66. *Id.*

B. *Applying the ACEs Research to a Fact Pattern*

In order to see how the ACEs research can be applied in a cancellation case, in concert with other conventional evidence related economic and emotional hardship, consider this fact pattern.[67]

> Daniel is 35 years old and has lived in the US for nearly 20 years. He is a native [of] Mexico. He has an 11-year-old son, who is a U.S. citizen. Daniel and the son's mother split up when their son was about 2 years old. But Daniel has, despite the split, remained a very devoted father. He went to family court to get visitation and was awarded joint custody of their son. My understanding is that every two weeks, he gets his son for 4 days (Friday to Monday). His son and Daniel have a very strong bond; he is like a best friend to his son. Daniel's parents describe them as two kids who have lots fun together.
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> Daniel was in ICE custody for about 1.5 years (04/2015-08/2016) because his family could not come up with the $7000 to bond him out. During this time, his family was worried that he would be deported. Daniel's mother (the grandmother) said that this time was also very hard on Daniel's son. His son didn't talk much and was depressed.
>
> Daniel is in custody again (after having been convicted of VC 10851 – driving a stolen vehicle (joyriding)). His son is again depressed and has a hard time focusing in school. His grandmother reports that he was a good student and since his father's detention, his grades have dropped. His mother took him to a therapist to be evaluated, but I understand that he hasn't yet been assigned a therapist.
>
> Daniel has been working and supporting his parents and his son (as he was able to). He did have a short period where he fell into using drugs from time to time. His mother said the drug use started after the family lost their home in the housing bubble in 2007. She believes the loss of the family home really affected Daniel because he had been working hard and giving his family almost all his money to pay the mortgage on the house.
>
> In terms of his immigration relief: We are also applying for asylum/withholding/CAT [Convention Against Torture protection]. This is based on his family ties to his brother, who had been deported, worked for the cartel (Jalisco Nueva Generacion & Sinaloa), and then escaped the cartel. Daniel's brother was tortured in two separate incidents for trying to run away from the cartel. His brother was granted CAT. The theory of the case is that the cartel will punish Daniel for his brother's deeds or try to recruit him as well. Previously, Daniel was ordered

67. This case was presented to co-author Bill Ong Hing in communication with Su Yon Yi, from the Alameda County Public Defender's Office after communications regarding the use of ACEs research in cancellation of removal cases.

> deported, but Asian American Legal Center in LA did his appeal pro bono and won the appeal. The case was remanded to hear relief on non-LPR cancellation and asylum. We just entered as pro bono a few weeks ago.
>
> Daniel's individual [hearing] is scheduled for December 4th. BUT in mid-November, the court will make a ruling on whether he is eligible for cancellation of removal. If we need more time, I can ask for a continuance OR I can go forward with asylum on Dec. 4 and ask for another court date to do the non-LPR case if you think this is the type of case your experts would want to collaborate on.
>
> He does have some convictions – a DUI, petty theft, disorderly conduct, and the joyriding. But none should be statutory bars to cancellation.[68]

An experienced pediatrician and a licensed clinical social worker, both with strong knowledge of the ACEs studies, were enlisted to meet with Daniel's son and to submit reports to the immigration court.

> A pediatrician, Dr. EC, met with Daniel's 11-year-old son, Adrian, and Daniel's mother (Adrian's grandmother). Below are relevant sections of EC's report.
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> Adrian was referred for a medical evaluation by his father's attorney in preparing his immigration court case, in order to assess the current and future health impact, if any, of separation from and potential deportation of his father.
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> . . .
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> Adrian is an 11-year-old boy, cleanly dressed, and polite. At this visit, Adrian initially denied any acute health concerns. He reports doing "okay" at home and school. However, he also reports that ever since his father was detained, he has not been sleeping well through the night. He has also lost his appetite. Adrian also notes that this year, he is doing poorly in school because of difficulty focusing – he is worried about his dropping grades. Adrian describes the two periods of detainment of his father as the most stressful events in his life, and now "scared" [of] being separated from his father indefinitely, if the father is deported to Mexico.
>
> Because his father has been his "best friend" and "we did everything together," Adrian states that with his father's absence, he no longer enjoys doing activities he normally enjoys doing. Adrian and his father would frequently go to the park together, play Fortnite and other video

68. Email from Su Yon Yi, Immigration Att'y, Office of the Pub. Def., Oakland, Cal., to Bill Hing, Professor of Law (Oct. 23, 2018, 10:57 PST) (on file with author).

games together, and watch movies together. His father liked to teach him how to use tools and perform basic construction skills. Adrian learned the importance of being neat and tidy from his father, who always took the time to iron and fold Adrian's clothes. Every night at bedtime, even as an older child, they had a routine where his father would hug and sing or chat with him to sleep. Above all, Adrian loved sharing meals together with his father, because his father would carefully prepare the meals himself and lay out the placemats, glasses, and silverware as you would in a restaurant – each meal was treated as a special occasion.

Adrian says that apart from his "favorite cousin" Daniel – who also sees Adrian's father as a father/best friend figure—he has not shared any of his fears or worries with anyone else. Adrian does not trust anyone. Adrian and Daniel both share with one another how sad they feel about Daniel's absence, and at the same time try to give each other hope. Otherwise, Adrian internalizes most of his emotions and feelings, based on observation, interview, and caregiver report.

Other than his father's detention, Adrian denies other personal or family stressors during this past year. Denies thoughts of self-harm.

Similarly, Adrian's grandmother describes her grandson as being "depressed" and withdrawn ever since his father has been detained. She is concerned that he is no longer interested in activities he used to enjoy doing. She mostly notices Adrian's loss of appetite—since meals are no longer a special occasion between father and son, Adrian has no desire to eat. His grandmother reports that he has lost weight but does not know how much. Adrian has always been a good student (A/B's) but this year has struggled with C's and F's because "I am sad" and cannot focus well. She worries that without the positive presence of his father, Adrian may enter adolescence and "rebel or follow the wrong path."

. . .

Clinical Assessment:

Adrian is an 11-year-old boy whose father has been detained twice in the past 3 years, and is undergoing court hearings for possible deportation to Mexico. His father's absence has had a tremendously negative impact on Adrian. He is struggling with disordered sleep, appetite loss, withdrawal, anhedonia (inability to feel pleasure), and poor academic performance. While some of these signs and symptoms can be transient as a normal stress reaction, in Adrian's case, these health problems have been persistent and worsening to the point of impeding the child's daily activities. In other words, he most likely can be diagnosed with

depression and anxiety, and will need close follow-up with his medical and behavioral health providers. Adrian clearly shares and cherishes an especially strong bond with his father, whom he views not only as mentor, but also as a close friend and confidante. Detention has severed this bond, which has completely disrupted Adrian's sense of routine, security, trust, and support system. Deportation of his father will undoubtedly have a detrimental impact on Adrian's physical and mental health not only in the acute period, but also extending well into adulthood.

. . .

[C]hildren exposed to repeated "adverse childhood events (ACEs)" (such as domestic violence, limited social connectedness, parental mental health illnesses or substance use, parental deportation or incarceration) can significantly alter their neurobiology—precisely at the age when brain development is critical in determining future health. Adolescence adds an additional vulnerability in the maturation of brain regions essential for socioemotional skills, cognitive and executive function, and impulse control. Importantly, not only does recurrent trauma impair healthy brain development, but also leads to lifelong increased risks of cardiovascular disease, chronic lung disease, hypertension, suicide, and other serious adult illnesses.

Using the ACE rubric and medical literature, Adrian does screen positive for a significantly higher risk for developing serious medical illnesses into adulthood, as compared to his peers. I am especially concerned about Adrian's state of health because presently, he is just on the cusp of entering adolescence and puberty, when one's neurobiology is particularly susceptible to toxic stress and hormonal changes. As mentioned above, this can ultimately impact the formative process of the brain areas responsible for executive function, emotional regulation, and impulse control. Therefore, the deportation of his father—forcing an indefinite separation from a caregiver and pillar within his support system—would push Adrian to an even greater risk for irreparable damage to his long-term health. As described above, economic hardship will place these children at greater risk for entering the foster care system.

Furthermore, numerous studies show that the fact that he is a child of an undocumented immigrant parent—regardless of whether the child is a U.S. citizen or not—is also indicative of a higher burden of physical and mental health illnesses as compared to his peers with documented parents. Anxiety, adjustment disorders, and depression are twice as prevalent in large part due to the pervasive stress and uncertainty that these children experience, from knowing or not knowing that at any time, their parents may be taken from them, arrested and deported. Additionally, children of undocumented immigrant parents are

> significantly less likely to seek medical care, apply for public assistance (that they are otherwise eligible for), and report crimes (including domestic violence)—all out of fear of interfacing with immigration law enforcement.
>
> Based upon existing peer-reviewed medical literature and my medical education, professional training and experience, it is my professional opinion to a reasonable degree of medical certainty that parental detention and deportation impose detrimental health outcomes that may otherwise be preventable in children such as Adrian, and must be addressed as a serious health threat for both children and adults.
>
> As a pediatrician, it is my duty to prevent Adrian from sustaining further harm to his present and long term health, and to promote his ability to thrive in school, career, and as a contributing member of society. It is imperative that Adrian's father remain in the United States as one of his integral caretakers and support network in order to provide Adrian with the best health outcomes possible.[69]

After interviewing both the respondent, who was in ICE custody, and his son, a licensed clinical social worker, Dr. BHA, included the following in her report (last names are omitted):

> Daniel was raised by his mother and father who both worked hard to provide for their children. Daniel came to live in the United States with his family when he was in 8th grade. He entered school in Oakland when he was in Junior High and has lived in the Bay Area since that time. Daniel shared he wanted to do well in school but had many challenges with learning. He explained that living in Oakland and the neighborhood environment that his parents could afford was challenging. He did his best to stay close to his family and felt isolated, relying on his brother and sisters as a family. Daniel experienced tough neighborhoods and had to learn how to exist in rough areas where he was constantly threatened and pressured from different directions. He shared that he has always been committed to religious values and grew up with God in his life with teachings from his parents and grandma about being a good person . . . .
>
> Daniel has always lived with his parents, who also rely on him to be present to help them, especially now that they are older. After becoming a father, Daniel has raised his son since he was born with great love and enthusiasm to be a good father to Adrian who is now 11 years old. Adrian lives in Oakland with his mother, who shares custody of Adrian with Daniel. Both Daniel and Adrian report that they have a very strong and close relationship.

69. EC, *supra* note 58.

. . .

Daniel is vulnerable emotionally, diagnosed with [P]ost[-T]raumatic [S]tress [S]yndrome after suffering from hearing and experiencing what happened to his brother. This violent trauma has completely affected the family, particularly Daniel. In addition to the differential diagnosis of Post[-]Traumatic Stress Syndrome that I believe he suffers from, he is also increasingly depressed about the separation from his son, Adrian He describes frequent episodes of panic attacks when he worries about being separated long term from Adrian. When he has the panic attacks, his chest tightens and he has difficulty breathing. During these panic episodes he is able to calm himself down by looking at his son's picture. One of the occurring nightmare patterns he dreams about is his son and mother's death. He is fearful of losing them and is consumed daily by the sadness of imagining life without his son.

. . .

This writer was able to meet and interview Adrian Daniel's eleven-year old son. Adrian was open to sharing and talking with this writer about his life with his father, Daniel. Daniel has been a positive, loving and caring influence in Adrian's life since he was born. Daniel and Adrian's mother, Adriana, were together as a family for the first three years of his life. He reports living with dad until he was four years old. Following the parent's separation, Daniel was granted regular visitation with Adrian and dad has been an active and consistent part of his life. During his time in custody, Adrian continues to visit and spend his court appointed visitation time with his paternal grandparents so he can keep close to his father, hoping to be able to talk to him by phone while his dad is in immigration custody. Paternal Grandmother reports that due to limited phone call times, Adrian often does not get to talk with his father and this has been difficult for him. She reports that, "He waits by the phone to be able to talk to him, hoping he can say hi to his dad, who he loves very much."

Adrian reported to this writer that "me and my dad are really close. Dad spends time doing fun things with me, going to the park, playing basketball, football, going to the movies together and talking[.]" He talked about the delicious meals that dad would prepare him in detail with lots of love. He explained how dad would set the table for him, pour his drink, make his favorite meal and sit with him while he would eat. Adrian shared that one of the favorite things they do together is riding bikes. He shared memories of going to Great America together and the fun they had that "I will never forget[.]" He shared with [the] writer that he is able to confide in dad about his feelings and if he would have a problem at school or home he would talk to him. "Dad hugs me and tells me it's going to be okay and then we go out

and do something together[.]" According to both Daniel and Adrian, [Adrian's] mother is supportive of their relationship and understands how close they are to one another. Daniel has provided for the healthy spiritual development of his son by taking him to mass and being involved with Adrian completing his first communion, which Adrian reports is very important to his life. He states the following "[m]e and my dad are a lot alike, we eat the same and some of the things I do are the same way my dad does them[.]"

Their separation from one another for this past year has taken an emotional toll on Adrian. He shared, "[n]ot having my dad makes me sad and I miss him a lot. I cry in my room thinking about him[.]" He reports he isolates more now in his room this year or just puts his head down, not wanting to talk to others. "I feel sad and miss my dad, I wish he was with me[,]" shared Adrian with [the] writer. He presents as a soft [-]spoken, gentle eleven-year old. He smiled and talked in a quiet voice when he spoke of his father, engaging a genuine admiration and care for his father, Daniel. He expressed a fear of what would happen if he would be separated from his father. "I don't want my dad deported because we do a lot of things together, I need my dad because he is always there for me and the one I talk to when I need help or to share my worries[.]"

Adrian explained that since his father has been in custody and they have been apart, he has not had an appetite and wants to stay in his room, listening to music alone. "When I am sad, I just don't want to eat I want to stay in my room and listen to music. When my grandma told me and my mom that my dad was in immigration [custody], I just didn't want to talk to anyone. I think about my dad every day, not having my dad makes me feel like I can't do my homework and I started failing school. Before my dad was gone my grades were good. But because I am sad my grades went bad, really miss my dad[.]" Adrian also began having sleep issues, not being able to sleep at night with increased worrying and symptoms of "not feeling good[.]"

With a decline in functioning and increasing[ ] depress[ion], Adrian reports that his mom got him a counselor to talk about how he feels. He shared that he thinks daily about how hard it is not to have his dad with him. He reports going to church to pray for his dad to be able to come home with him.

Adrian presented with sad affect when he talked about not being able to see his dad. There is a concern for his healthy development at his young age to have his father removed from his life permanently. Since birth his father has been a significant attachment figure in his life that has contributed to Adrian's healthy development. It is clear that

Daniel's separation from him this past year has had a significant negative impact on Adrian's health. His decrease in appetite, sleep, mood and increasing isolation is all directly related to his father's absence from his life. A permanent separation through deportation would have a significant impact on Adrian. It is also clear that it would be a dangerous situation for Adrian to visit [his] dad in Mexico, putting his young life in jeopardy. This is the developmental stage that Adrian needs his father to guide him and be there as a foundation for his life and healthy development. The strong bond and attachment they have directly points to the healthy development he has had until their separation. Up until the separation from his father, Adrian has functioned very well, do[ne] well in school, exhibit [ed] strong relationship[s] with friends and family and thriv[ed]. However, this sudden decline in his functioning points to the long term negative impact that Daniel's absence from his son would have on Adrian. It is clear that his father is a positive and strong influence on his life. Adrian's positive future depends on having dad as an active and consistent part of his life that is physically present for him.

. . .

Conclusions/Recommendations

1. In my professional opinion, Daniel's report is credible and accurate. His report represents his life as committed to his son and family. His sole focus is to be able to care for his son and work to provide economically for his son and parents. He has little activities outside his work and family as he has focused on his life with his son and creating a new future for himself. He recently finished his G.E.D. and looks forward to how this will positively impact his life for employment and future dreams.

2. In my professional opinion, I observed [Daniel] to be suffering from Post[-]Traumatic Stress Disorder or PTSD because of the severe victimization and trauma his brother suffered and the threatening calls he received. He also suffers from Depression due to the stress and worry about what would happen to his son should they be separated. He explains that he worries about Adrian's safety and what would happen to his development and growth as a young boy growing up in the East Bay. He also is consumed with fear about his own life and safety in Mexico—and believes he will be killed or suffer victimization. [Daniel] reports having severe panic attacks, anxiety, stress and night terrors about being sent to Mexico after experiencing the severe and brutal victimization of his own brother. His depression has increased and his daily functioning has been impaired due to his chronic fear and

sadness about leaving his son and living in Mexico which would be dangerous for him.

3. [Daniel's] son relies on him to provide a base of safety and emotional consistency in his life. Adrian is well adjusted in the United States and has a strong attachment to his father. Separation from his father will have a detrimental impact on his development and can pose a significant risk to his well-being. Given the age of his son, it is critical that [Daniel] remain an active and consistent part of his son's life at this critical developmental stage. His absence would have a long-lasting impact on both their emotional and physical health, with increased risk for mental health symptoms and negative behaviors that could continue an ongoing decline in his overall functioning. Given the secure attachment with his father, it is critical that they remain together to maintain his stable life that his father has provided him.

4. Being returned to Mexico poses a serious risk for Daniel because his primary family is in the United States. His absence poses a significant concern for the overall functioning of his elderly parents who also count on him for their daily functioning. All of Daniel's siblings along with his parents live in the United States. He has not been in Mexico since he was in eighth grade and has no connection to a life there with family or friends. He has no base of support in Mexico and feels extremely scared of being a victim of cartel violence living in Mexico. Access to educational resources and employment opportunities would be severely limited, and would change the financial support that his son and family rely on for survival here in the Bay Area.

5. Daniel's level of intellectual functioning, his vulnerable personality and his brother's history in Mexico makes him a target for victimization in Mexico. His ability to understand and navigate difficult situations is a red flag for concern as this writer questions his level of cognitive function in complex situations living in a country and environment that he is not familiar with and has no support in. Being alone in Mexico without family and support would put Daniel at high risk for physical harm. In addition, his mental health could continue to decline putting him at medical risk without ongoing treatment and long[-]term care that would not be available to him in Mexico.

In conclusion, it is my professional opinion that Daniel should continue to be physically and emotionally present in his son Adrian's life. Adrian will be able to have a healthier life with his father present. It is clear that Adrian's emotional and physical health would decline without his father as is happening now since his absence this past year. Daniel has also suffered a severe decline in mental health functioning and has a serious case of Post[-]Traumatic Stress disorder that would be worsened should he be sent to Mexico. [This] [w]riter worries about

> the victimization he could suffer from which would clearly impact Daniel, and also have a traumatic impact on his young son, Adrian. Adrian's life trajectory was on a positive path with his father active in his life; given a sudden absence, Adrian's life would be forever negatively changed. Without the ability to see and visit his father, Adrian's development would be harmed. It is clear in both my interviews with Daniel and Adrian that they have a strong bond and share a beautiful relationship. I strongly encourage the court to recognize the importance of them staying together and giving Daniel an opportunity to create a positive future for himself, his family and his son, Adrian. Separation to Mexico would mean not only the loss of hope for Daniel's future, but also a loss of hope for his innocent son, Adrian, who dreams and prays for a life together again with his father.[70]

These evaluations from the pediatrician Dr. EC and the clinical social worker Dr. BHA can be used in conjunction with the ACEs research in terms of Adrian's age, health, and other circumstances to provide strong evidentiary support that the hardship requirement is met in this case.

1. *Adrian's Age*

The evaluations by Dr. EC and Dr. BHA both make a point of acknowledging that Adrian is in a critical stage of development that makes him especially vulnerable to the long-term consequences of separation from his father.

In the pediatric evaluation, Dr. EC notes that Adrian was eight years old when his father was first detained by ICE, an age at which "brain development is critical in determining future health."[71] A child is particularly vulnerable in this stage of development due to the ongoing formation of their emotional understanding and unique susceptibility to their environment, suggesting that an experience of trauma during this stage affects a child more seriously. Dr. EC recognized that this age falls within the period of "school age development," in which the "pre-frontal cortex" is "not well-developed" and children are not "ready for rational reasoning."[72] While they are "still developing their emotional knowledge, they are susceptible to their environment and who's around them."[73]

The evaluation by clinical social worker Dr. BHA also concluded that "[t]his is the developmental stage that Adrian needs his father to guide him and be there as a foundation for his life and healthy development."[74] The evaluation of Daniel specifically noted that, "[g]iven the age of his son, it is

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70. Dr. BHA, Immigration Evaluation of "Daniel M.A.," Ayudando Latinos A Soñar 5 (2018) (on file with author) [hereinafter BHA].

71. *Id*.

72. Transcript of Record at 188, *In re* M[ ] A[ ], No. A [;;;] (B.I.A. Sept. 6, 2016) [hereinafter Transcript]

73. *Id*.

74. BHA, *supra* note 70, at 5.

critical that he remain an active and consistent part of his [son's] life at this critical developmental stage."[75] Dr. EC also expressed concern that Adrian 'is already negatively impacted by the trauma of his father's detention and the ongoing fear of deportation" and that "that alone from the age of 8 to age 11 is exposure to a significant amount of trauma."[76] Dr. EC expressed a special concern "about Adrian's state of health because presently, he is just on the cusp of entering adolescence and puberty, when one's neurobiology is particularly susceptible to toxic stress and hormonal changes."[77]

The situation faced by Daniel's son is clear: Adrian is 11 years old and going into the adolescent period which is crucial in brain development and where things start to get more difficult and less carefree than childhood. The brain during this period becomes more prone to toxic stress and hormonal changes. Dr. EC's health exam of Adrian disclosed that he has had difficulty focusing in school and has had trouble sleeping and eating.[78] His grandmother noted that his loss of appetite stemmed from being separated from his father and that sharing meals has been a big part of their relationship. She expressed concern that the poor academic performance may lead to rebellious behavior—a common theme in traumatized youth.[79] These are direct indicators of severe hardship on Adrian's life, especially during this crucial time of development.

2. *Adrian's Health*

Adrian's health has already been negatively affected by the trauma of his father's detention and will only be exacerbated by the experience of another traumatic event, namely, his father's removal. During the time of his father's ICE detention, Adrian became "withdrawn", was "not doing well in school,"[80] and "lost his appetite."[81] Adrian described himself as becoming "isolated" and "not wanting to talk to others" and has "expressed a fear of what would happen if he [was] separated from his father."[82] Finally, Adrian stated that "he no longer enjoys doing activities he normally enjoys doing."[83]

Adrian's medical evaluation concluded that Adrian "screen[ed] positive for a significantly higher risk for developing serious medical illnesses into adulthood, as compared to his peers"[84] because "[h]is father's absence has had a tremendously negative impact on Adrian. He is struggling with disordered sleep, appetite loss, withdrawal, anhedonia (inability to feel pleasure),

75. *Id*. at 6.
76. Transcript, *supra* note 72, at 188.
77. EC, *supra* note 58.
78. *Id*. at 5.
79. *Id*. at 6.
80. Transcript, *supra* note 72, at 191.
81. *Id*.
82. BHA, *supra* note 70, at 4.
83. EC, *supra* note 58.
84. *Id*. at 7.

and poor academic performance."[85] Further, these reactions are distinguishable from the normal stress that a child might feel in these circumstances due to the extent of the impact on Adrian's day-to-day health. "While some of these signs and symptoms can be transient as a normal stress reaction, in Adrian's case, these health problems have been persistent and worsening to the point of impeding [his] daily activities."[86] Dr. BHA's report also noted increased signs of isolation in Adrian, which makes him more vulnerable in stressful situations.

These problems are long term and will surely increase in severity if a parent is deported. Dr. EC explains,

> Studies also show that children of undocumented parents are already more vulnerable for health risks. Recurrent exposure to traumatizing events such as caregiver deportation not only alters the neurobiology of a child during a critical period in development, but also leads to increased risk of foster care placement, chronic cardiovascular and pulmonary disease, depression and anxiety, behavioral dysfunction, suicide, poor economic outcomes, low academic achievement, and intergenerational health risks.[87]

Severing the close relationship between Adrian and his father through removal would compound the negative effects on Adrian's health, both short and long term, that Adrian already experiences because of distress and worry over the possibility of his father's deportation. Daniel is unfamiliar with daily life in Mexico, and Dr. BHA reported: "Daniel has made his life in the United States, living here longer than he has known life in Mexico."[88] Adrian's fear and uncertainty for his father's safety in Mexico will exacerbate the significant behavioral changes and negative effects to his wellbeing that he has already demonstrated as a direct reaction to separation from his father. This level of constant fear over his father's fate is not like that of any other child who loses a parent due to incarceration, death, or separation. Losing his father through deportation, while knowing that he is returning to a community that has already inflicted great harm on his family, forces Adrian to not only navigate life without a father figure, but also to deal with his serious concern for his father's basic safety.

With their current visitation schedule, Adrian is able to see his father frequently; however, it is highly improbable that the two would be able to reunite after removal. Even if it were safe for Adrian to travel to Mexico, his remaining family members in the United States are poor—the family was not able to pay bond to get Daniel out of detention for more than a year,

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85. *Id*. at 6.
86. *Id*.
87. *Id*. at 5.
88. BHA, *supra* note 70, at 4.

Therefore, it seems highly unlikely that Adrian's family would be able to afford travel to Mexico. The resulting biochemical changes to Adrian, including shortened telomeres and decreased cellular life and overall health are severe hardship factors.[89]

Adrian is already suffering negative health impacts resulting from the trauma of his father's ICE detention. If Adrian's father is removed, this poses even greater risks to Adrian's immediate and long-term health. In Dr. EC's examination, Adrian was described as internalizing emotions, which can be problematic, because this can create a habit of not asking for help. The problem will worsen should Daniel be deported. Dr. EC concludes her examination by diagnosing Adrian with anxiety, adjustment disorders, and depression, which will worsen overtime as they extend into adulthood. Dr. EC reports that Adrian is more likely to develop serious medical illnesses into adulthood, as compared to his peers. Dr. EC also states that Adrian would suffer from irreparable damage to his long-term health. All this is predictable if Daniel is removed.[90]

3. *Adrian's Other Circumstances*

Without fully appreciating the ACEs factors, a factfinder might simplistically conclude that Adrian might not experience unusual hardship if separated from his father, particularly because he appears to have a stable place to live in the United States with multiple family members. However, that conclusion would ignore the special circumstances surrounding Adrian's especially close bond with his father and the potential effects of separation via removal, in light of Daniel's unique role in his family.

Adrian has always had a uniquely strong relationship with his father—describing him as "his best friend."[91] Adrian said that he and his father "did everything together."[92] Adrian had a routine with his father that included going to the park, playing video games, watching movies, and learning how to use construction tools.[93] Adrian's father "always took the time to iron and fold Adrian's clothes" and "hug and sing or chat with him to sleep."[94] "Above all, Adrian loved sharing meals together with his father, because his father would carefully prepare the meals himself and lay out the placemats, glasses, and silverware as you would in a restaurant—each meal was treated as a special occasion." [95]Adrian's father "has been an active and consistent part of his life" and while his father has been detained, "[Adrian] waits by the phone to be able to talk to him, hoping he can say hi to his dad, who he loves very much."[96] Adrian "shared that one of the favorite things they do together

89. *See* Chung, *supra* note 57.
90. *Id*. at 7.
91. Transcript, *supra* note 72, at 191.
92. EC, *supra* note 58.
93. *Id*.
94. *Id*.
95. *Id*.
96. BHA, *supra* note 70, at 3–4.

is riding bikes. He shared memories of going to Great America together and the fun they had that 'I will never forget.'"[97] He has also stated that, "[m]e and my dad are a lot alike, we eat the same and some of the things I do are the same way my dad does them" indicating the significance of Adrian's father as a role model in his life during his critical time of development.[98]

Dr. BHA's description of the community that Daniel grew up in in Oakland paints a picture of a place where a child needs strong community in order to thrive. He "experienced tough neighborhoods and had to learn how to exist in rough areas where he was constantly threatened and pressured from different directions."[99] In light of this environment, it is even more significant that Adrian's father also functions as his sole confidante and is uniquely positioned to provide emotional support to Adrian. "Adrian says that apart from his 'favorite cousin' Daniel—who also sees Adrian's father as a father/best friend figure—he has not shared any of his fears or worries with anyone else. Adrian does not trust anyone."[100]

Relying on the availability of other caretakers in his life to diminish Adrian's potential hardship ignores the fact that Adrian's father is his central emotional caretaker and the only adult who Adrian trusts and confides in. Adrian's grandmother has worried that, "without the positive presence of his father, Adrian may enter adolescence and 'rebel or follow the wrong path.'"[101] This worry was expressed even though Adrian's mother and grandmother in his life would presumably remain present in his life. Dr. EC's evaluation of Adrian emphasized that, 'the most unique aspect of this case is Adrian's very tight bond with his father" and that Adrian was "much closer with [his] father than any other caregiver."[102]

Daniel's absence would also bring financial hardship for his son and parents whom he supports. Financial hardship absolutely must be examined in the situations involving children from low income families. The fact that Daniel's family could not post bond and suffered during the 2007 housing crisis indicates that finances are an issue in this case. Dr. EC's report states, A

> Adolescents and young adults whose parents have been abruptly removed from their lives are often forced to pick up additional jobs and/or drop out of school in order to make mortgage or rent payments, among other basic necessities. With poor academic achievement, young adults are again at higher risk for poor health outcomes.[103]

97. *Id*. at 4.
98. *Id*.
99. *Id*. at 2.
100. *Id*.
101. *Id*. at 6.
102. Transcript, *supra* note 72, at 192.
103. EC, *supra* note 58, at 4.

Even worse, economic hardships place children at greater risk for entering the foster care system. In addition, it is well established that financial hardship also increases stressors. Daniel is the sole supporter of his parents. With this fact in mind, Dr. EC provides data on the hardships that result from parental deportations:

> Median household income for undocumented immigrant households overall will drop to an estimated $15,400, putting them below the poverty line. In six U.S locations between 2006 and 2009, families lost 40-90% of their income within six months of a parent's immigration-related detention or deportation."[104]

Although Adrian has other family members who may be willing to take care of him, it is important to highlight the ways in which these family members in no way replace Daniel as a father. For example, Adrian's grandmother is an elderly woman and will soon need her own care, with little or no ability to care for Adrian. In this situation, Daniel is the primary breadwinner for both his son and parents, which would leave Daniel's mother without income even if she were physically able to take over childcare. On the surface, other family members may appear available to care for Adrian if his father is removed, but without Daniels's financial contribution and time, it would be unlikely that Adrian would flourish in any alternate living situation. If Daniel is deported to Mexico, it is unknown what financial support, if any, he could offer from Mexico. It is hard to imagine how Daniel will be able to engage in a job market in a country that he has not known since he was in the eighth grade. With no work or little work prospects in Mexico, Daniel's family will be financially vulnerable if he is removed.

4. *Adrian Would Experience Extreme and Unusual Hardship*

Given the ACEs implications on his son, the evidence demonstrates that Daniel can make a good argument that the exceptional and extremely unusual hardship requirement for cancellation is met. According to *Monreal*, the demonstrated hardship does not need to be "unconscionable,"[105] or "so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief."[106] The hardships created by ACEs and toxic stress accumulations in certain children with deported parents are serious, chronic medical conditions and barriers to healthcare, education, and economic opportunity imposed on children through no fault of their own—conditions and barriers that are otherwise preventable. The ACEs evidence provides an opportunity for the BIA to build upon *Monreal*'s "starting point." The evidence should open the door to a

104. *Id.*
105. *In re* Monreal-Aguinaga, 23 I. & N. 56, 60 (B.I.A. 2001).
106. *In re* Gonzales Recinas, 23 I. & N. 467, 470 (B.I.A. 2002).

finding that children experiencing or at risk of experiencing these serious, unconscionable, chronic medical conditions and barriers meet the exceptional and extremely unusual hardship standard required for cancellation of removal.

In Adrian's case, the increased risk of developing the medical and mental conditions implicated by ACEs and toxic stress accumulation in children of deportable parents—altered neurobiology, increased risk of foster care placement, chronic illnesses, poor academic and economic futures—are circumstances that are "substantially beyond that which would ordinarily be expected to result from the person's departure."[107]

Both Dr. EC and Dr. BHA applied the research regarding ACEs and toxic stress accumulation to Adrian's specific *age* nearing adolescence, having experienced his father's detention during school-age development. They noted Adrian's mental *health* conditions, suggesting anxiety and depression as direct results from separation from his father, and *circumstances* surrounding his separation and extraordinarily close relationship with his father. As a result, these two separate professionals found that Adrian's life trajectory will be permanently altered by increased risks of serious, irreversible physical and mental health consequences if his father is removed.

Dr. BHA recognized that, a "permanent separation through deportation would have a significant impact on Adrian" and that Adrian's functionality was healthy and successful up "until the separation from his father."[108] Dr. BHA's evaluation concluded that, "Adrian's positive future depends on having dad as an active and consistent part of his life that is physically present for him."[109] His father's "absence would have a long-lasting impact on both their emotional and physical health" and so "it is critical that they remain together to maintain his stable life that his father has provided him."[110] Dr. EC noted that "Adrian describes the two periods of detainment of his father as the most stressful events in his life, and is now 'scared' [of] being separated from his father indefinitely, if [Adrian's] father is deported to Mexico."[111] Dr. EC concluded that "[i]t is *imperative* that Adrian's father remain in the United States as one of his integral caretakers and support network in order to provide Adrian with *the best health outcomes possible*."[112]

The effects of ACEs and toxic stress accumulation are compounded by Adrian's vulnerable age. The mental and physical health effects of this experience are already prevalent. He has a particularly close relationship to his father upon whom he depends for many critical aspects of his daily functionality and development. As such, Daniel's removal would trigger greater

107. *Id*.
108. BHA, *supra* note 70, at 5.
109. *Id*.
110. *Id*. at 6.
111. Chung, *supra* note 57, at 5.
112. *Id*. at 7.

negative effects—permanently and irrevocably damaging Adrian's emotional and mental health, as well as hindering his ability to achieve economic success and stability in his own life. Thus, Adrian would suffer exceptional and extremely unusual hardship if his father is removed.

As Dr. EC reported, "[t]oxic stress accumulation in childhood and its devastating long-term health impact is conceptually similar to 'chronic traumatic encephalopathy'— [a] progressive degenerative brain disease in individuals who sustained repetitive brain trauma (such as athletes), associated with subsequent dementia, suicidality, memory loss, among other irreversible conditions."[113] In reference to Adrian's case specifically, Dr. EC stated that "he screen[ed] positive for a significantly higher risk for developing serious medical illnesses into adulthood, as compared to his peers."[114] Dr. EC also stated that due to his vulnerable age as he enters adolescence and puberty—stages in development where one's susceptibility to toxic stress and hormonal change is heightened—the formative process of the brain that develops executive function, emotional regulation, and impulse control can be compromised. Adrian has already suffered psychological harm which can lead to irreversible physical and mental conditions if his father is deported.

Adrian and his father both suffer from depression and anxiety. These conditions have become pronounced during their separation and will be exacerbated if Daniel is removed. Adrian does not have siblings and his father has been a pillar in his life, as well as his best friend throughout his childhood. In his father's absence, Adrian is cared for by his paternal grandmother who relies on Daniel to provide for her financially. The ACEs research establishes that Daniel's indefinite departure from Adrian's life will cause irreparable harm and could lead to devastating effects on Adrian's cognitive development—effects that have already been demonstrated in his poor academic performance, loss of appetite, weight loss, and depression resulting from Daniel's detention.[115]

Therefore, when taking into account the likely long-term, research-based damage to Adrian, the hardships to Daniel's U.S. citizen son should be considered exceptional and extremely unusual hardship. Adrian is 11 years old. His mental health problems will be exacerbated if his father is removed. The behavioral problems and anxiety that manifested when Adrian was separated from his father previously also evidence that Adrian's mental health would likely further deteriorate if his father were removed. The ACEs research clearly demonstrates that long-term neurological, educational, economic, and developmental damage will be sustained. Although Adrian has a mother and grandparents in the United States, he does not rely emotionally on them as he does on his father. Daniel will no longer be able to support Adrian financially

113. *Id.* at 2.
114. *Id.* at 7.
115. *Id.* at 6.

and emotionally, and the dangers faced by Daniel in Mexico will further weigh on Adrian's vulnerabilities.

Although the hardship requirement should be satisfied with ACEs research, the Convention on the Rights of the Child arguments presented below further strengthen this analysis, once the best interests of the child are considered.

IV. THE CONVENTION ON THE RIGHTS OF THE CHILD PROVIDES AN IMPORTANT PERSPECTIVE ON THE HARDSHIP REQUIREMENT

The United Nations Convention on the Rights of the Child (CRC) also adds strong hardship arguments in favor of adjusting the hardship standard under non-LPR cancellation of removal. The strength of the CRC argument comes from the perspective that underlies the Convention. The CRC demands that the potential deportation of a parent include a consideration of the best interests of the child. In this part, we argue that cancellation relief should follow the standards of the CRC, and that the current approach to hardship fails to consider the best interests of the child.

Cancellation is not the only area of immigration law where decision-makers fail to consider the interests and rights of children. U.S. immigration law lags behind family law and international standards, with limited and outdated conceptions of children's rights deeply embedded into its basic framework.[116] With the exception of Special Immigrant Juvenile Status (SIJS), a form of relief for unaccompanied minors, U.S. immigration law does not include any kind of "best interests" consideration.[117] Because of these failures, David Thronson advocates for a variety of reforms which would alter the treatment of children and incorporate mainstream legal and social values regarding children.[118] Drawing on Thronson, other scholars argue that the introduction of a "best interests" standard into immigration law is both "common sense"[119] and the moral responsibility of the United States.[120] Joyce Koo Dalrymple contends that the best interests of the child principle, following the model of SIJS, should be used in the asylum process in order to prevent the deportation of unaccompanied asylum-seeking children.[121] Bridgette Carr

116. *See* David Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979 (2002).

117. David Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1169 (2006).

118. *See* David Thronson, *Thinking Small: The Need for Big Changes in Immigration Law's Treatment of Children*, 14 U.C. DAVIS J. JUV. L. & POL'Y 239 (2010); *see* also David *Thronson, Entering the Mainstream: Making Children Matter in Immigration Law*, 38 FORDHAM URB. L.J. 393 (2010).

119. JENNIFER NAGDA & MARIA WOLTJEN, BEST INTERESTS OF THE CHILD STANDARD: BRINGING COMMON SENSE TO IMMIGRATION DECISIONS, FIRST FOCUS 105, 110 (2015), *available at* https://firstfocus.org/wp-content/uploads/2015/04/Best-Interests-of-the-Child-Standard.pdf.

120. Ann Laquer Estin, *Child Migrants and Child Welfare: Toward a Best Interests Approach*, 17 WASH. U. GLOBAL STUD. L. REV. 589, 614 (2018); Becky Wolozin, *Doing What's Best: Determining Best Interests for Children Impacted by Immigration Proceedings*, 64 DRAKE L. REV. 141, 157 (2015).

121. Joyce Koo Dalrymple, *Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors*, 26 B.C. THIRD WORLD L.J. 131, 136 (2006).

argues that the United States should follow the Canadian model in order to implement a best interests approach in all aspects of immigration law and procedure that affect accompanied children.[122]

Other scholars focus on the CRC itself as a tool for reform. Timothy Fadgen and Dana Prescott argue that U.S. ratification of the CRC would lead to the modernization of immigration law to conform with international standards.[123] Erica Stief argues that the United States is violating its duty to comply with the principle of family preservation—a principle that she argues has risen to the status of customary international law.[124] Erin Corcoran recommends the formation of a statutory federal "best interests of the child" standard informed by the CRC and unconditionally applied to all children seeking immigration relief.[125]

The statute governing non-LPR cancellation is problematic even without considering international norms. Its modification under the 1996 IIRIRA has been characterized as a drastic response to popular pressure which, in the absence of fundamental procedural safeguards including judicial review, has enormous potential for arbitrary and unjust decisions.[126] Scholars note that Congress's failure to provide a clear definition of "exceptional and extremely unusual hardship" has led to uncertainty and unpredictability in decision-making.[127] Scholars suggest various approaches to addressing the harsh and unjust law. Reform for non-LPR cancellation is viewed as a practical, and possible short-term, solution in a political climate that is not conducive to larger-scale change.[128] Lucy Twimasi recommends a new interpretation of the hardship standard, measured less subjectively in terms of "loss" rather than "hardship."[129] Other scholars recommend reverting to pre-1996 immigration laws[130] or implementing new laws through legislation such as the Child Citizen Protection Act (CCPA).[131]

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122. Bridgette A. Carr, *Incorporating a 'Best Interests of the Child' Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120, 145-59 (2009).

123. Timothy P. Fadgen & Dana E. Prescott, *Do the Best Interests of the Child End at the Nation's Shores? Immigration, State Courts, and Children in the United States*, 28 J. AM. ACAD. MATRIM. L. 359, 389 (2016).

124. Erica Stief, *Impractical Relief and the Innocent Victims: How United States Immigration Law Ignores the Rights of Citizen Children*, 79 UMKC L. REV. 477 (2010).

125. Erin B. Corcoran, *Deconstructing and Reconstructing Rights for Immigrant Children*, 18 HARV. LATINO L. REV. 53, 57 (2015).

126. William Underwood, *Unreviewable Discretionary Justice: The New Extreme Hardship in Cancellation of Deportation Cases,* 72 IND. L.J. 885, 887 (1997).

127. *See* Margaret Taylor, *What Happened to Non-LPR Cancellation - Rationalizing Immigration Enforcement by Restoring Durable Relief from Removal*, 30 J.L. & POL. 527 (2015); *see also* Twimasi, *supra* note 24.

128. Taylor, *supra* note 127, at 548–53.

129. Twimasi, *supra* note 24, at 62.

130. *See* U.C. BERKELEY INT'L HUMAN RIGHTS LAW CLINIC, WARREN INSTITUTE, & U.C. DAVIS IMMIGRATION LAW CLINIC, IN THE CHILD'S BEST INTEREST? THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION 1 (2010).

131. *See id.* (recommending that Congress enact the CCPA); WESSLER, *Shattered Families, supra* note 28, at 32 (recommending that Congress reinstate judicial discretion to consider the best interests of children and families in decisions about deportation i.e., the Child Citizen Protection Act).

A smaller group of scholars propose reform of non-LPR cancellation of removal based on the "best interests" standard. Molly Sutter examines the conflict between the hardship standard and international law and suggests a wide range of reforms of both the immigration system and the "best interests" standard itself.[132] Satya Kaskade examines the ways in which the deportation of undocumented immigrants affects citizen children and analyzes the CCPA, which would amend the cancellation statute to include a "best interests" consideration when the qualifying relative is a child.[133]

Despite a growing body of research that criticizes the failure of U.S. lawmakers to adopt a child-centered standard in both immigration law broadly and in non-LPR cancellation of removal, the adjudication of the hardship standard has not changed. In the current political climate, legislative and policy changes remain extremely unlikely. Rather than focusing on policy, this article takes a legal approach, arguing not only that the United States should incorporate a "best interests" analysis into the hardship standard, but that it is bound to do so under international law.

Section A examines the CRC, arguing that both the Convention itself and Article 3, the best interests standard, have risen to the status of customary international law, and are therefore binding on the United States. Section B analyzes the legal principles of statutory interpretation, arguing that the hardship standard is ambiguous and therefore must be interpreted in accordance with customary international law. Section C outlines the differences between the hardship standard and the best interests standard, demonstrating that—despite caselaw suggesting otherwise—the two forms of assessment are considerably different with respect to both procedural and substantive considerations. Section D outlines changes necessary to bring the hardship standard in compliance with the CRC and the "best interests of the child" standard, or at least bring the law closer to meeting the United States' obligations under the CRC.

A. *Is the United States Bound by the CRC?*

The United States is the only country in the world that has failed to ratify the CRC. However, this does not excuse the United States from adhering to the Convention or its guiding principle regarding the "best interests of the child." This section argues that, because of its widespread ratification and acceptance in courts around the world, the CRC has become customary international law (CIL) and is therefore binding on the United States. This section further argues that the best interests standard has itself become a tenet of

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132. Molly Hazel Sutter, *Mixed-Status Families and Broken Homes: The Clash between the U.S. Hardship Standard in Cancellation of Removal Proceedings and International Law*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 783, 813 (2005).

133. Satya Grace Kaskade, *Mothers Without Borders: Undocumented Immigrant Mothers Facing Deportation and the Best Interests of Their U.S. Citizen Children*, 15 WM. & MARY J. WOMEN & L. 447 (2009).

customary international law, due to its widespread use both within and outside of the United States. Finally, this section concludes with an examination of existing caselaw relevant to this argument in the cancellation of removal context, under both sections of section 240A of the INA (LPR and non-LPR cancellation).

Sub-section A.1 provides background on the CRC and the best interests standard. Sub-section A.2 examines the United States' obligations as a signatory to the Convention. Sub-sections A.3 and A.4 argue that the CRC and best interests standard respectively are customary international law. Sub-section A.5 examines the authority of customary international law in the United States, and sub-section A.6 outlines relevant caselaw.

1. *The CRC and the Best Interests Standard: Background*

The "best interests of the child" standard has a longstanding history within domestic and international law. This standard emerged at the turn of the twentieth century, as traditional notions of children as property were replaced with more progressive ideas about child welfare and rights.[134] Reformist discourse in the late nineteenth century began to introduce the idea of children as individual rights-bearers.[135] The movement was not without controversy, but it eventually led to a broad acceptance that "control of children by parents, or the State, is not absolute and that children do have rights."[136] The United States was at the forefront of the "best interests" movement, using principles from family law, particularly in cases of child custody and child abuse.[137]

The "best interests" principle emerged as a rule of international law in the mid-twentieth century. The process of establishing international standards on children's rights began in 1924, when the League of Nations adopted the Declaration of the Rights of the Child.[138] This first Declaration focused primarily on the "care" and "protection" of children, rather than giving children the power to exercise rights.[139] The 1959 United Nations Declaration on the Rights of the Child took a step towards a more rights-centered approach, incorporating the principle that "the best interests of the child shall be the paramount consideration."[140] Both Declarations were important developments in the children's rights movement, but neither placed any direct obligations on states.[141]

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134. Thronson, *supra* note 116, at 984.
135. *Id*. at 983.
136. *Id*. at 981.
137. Carr, *supra* note 122.
138. Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law*, 30 COLUM. HUM. RTS. L. REV. 159, 161 (1998).
139. Cynthia Price Cohen, *The Role of the United States in Drafting the Convention on the Rights of the Child*, 20 EMORY INT'L L. REV. 185, 189 (1998).
140. Todres, *supra* note 138, at 163.
141. *Id*. at 162.

The most important development of the "best interests" principle came in 1989 with the CRC. The CRC represented a "fundamental shift away from the notion of a child as a passive dependent" and codified "a vision of a child as an independent bearer of a unique, tailored set of human rights."[142] This approach was based on the principle that "children possess not only the rights reserved to all persons, but may also claim special assistance in effectuating those rights because of their youth."[143] The CRC quickly became the most widely ratified human rights treaty in history: all UN Member States except the United States have ratified the Convention.[144] The civil, political, economic, social and cultural rights articulated in the Convention constitute the "minimum standards that States must ensure for every child within their jurisdiction."[145] Unlike the prior Declarations, the CRC is legally binding on States that have ratified it.

The central principle of the CRC is the advancement of the best interests of the child. Article 3(1) states that: "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[146] As the "umbrella provision" of the Convention, Article 3 entails a consideration of all other articles in the Convention.[147] Article 3 is interpreted broadly and encompasses any action that directly or indirectly affects children. It does not require that a child's best interests be the *only* criteria, or even the paramount criteria (as in the previous Declaration), but they must be "a primary consideration."[148]

A best interests assessment should be made "at every stage of the process in preparation for any decision that impacts the child's life."[149] As such, Article 3 is engaged "whenever a child may be affected by an immigration decision."[150] The Committee on the Rights of the Child has stated that in order to comply with the Convention, migration policies, practices, and decisions made relating to the "entry, stay or return of a child and/or of his or her parents" must be determined based on the best interests of the child standard.[151]

A second fundamental principle of the CRC is the importance of the views of the child. Article 12 grants "to the child who is capable of forming his or

142. JASON M. POBJOY, THE CHILD IN INTERNATIONAL REFUGEE LAW 6 (Cambridge Univ. Press 2017).
143. Thronson, *supra* note 116, at 989.
144. United Nations Human Rights Office of the High Commissioner, *Status of Ratification: Convention on the Rights of the Child* (last updated Dec. 21, 2018), https://indicators.ohchr.org.
145. COMM. ON THE RIGHTS OF THE CHILD, THE RIGHTS OF ALL CHILDREN IN THE CONTEXT OF INTERNATIONAL MIGRATION: BACKGROUND PAPER 9 (United Nations Human Rights Office of the High Comm'r, Aug. 2012).
146. CRC, *supra* note 4.
147. Todres, *supra* note 138, at 171.
148. *Id*. at 175.
149. COMM. ON THE RIGHTS OF THE CHILD, *supra* note 145, at 10.
150. POBJOY, *supra* note 142, at 223.
151. COMM. ON THE RIGHTS OF THE CHILD, *supra* note 145, at 20.

her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."[152] Early best interests assessments often excluded the views of the child from the process, with the identification of those interests made entirely by adults. Under the CRC, children now have a voice and are entitled to play a role in identifying their best interests.[153] These two fundamental principles —the best interests of the child and the importance of the child's views—place the child at the center of the decision-making process.

2. *U.S. Obligations as Signatory to the CRC*

Although the United States played a pivotal role in the drafting of the CRC, it never ratified the Convention. During the drafting process, from 1979 to 1989, the U.S. proposed more articles than any other nation, including Article 10, the right to family reunification.[154] The Clinton administration signed the CRC in 1995, but did not submit it to the Senate for ratification primarily because of strong opposition from Congress.[155] Opposition stemmed from concerns regarding domestic law and sovereignty, and conservative views regarding the freedom of parents to raise their children as they see fit.[156] During the 2008 presidential campaign, Barack Obama stated that his administration would review the treaty, and reiterated this support in 2011.[157] Despite these statements, the Convention was never sent to the Senate for ratification.

However, as a signatory to the CRC, the United States does have obligations under the Convention. Under Article 18 of the Vienna Convention on the Law of Treaties, a nation that has signed a treaty must refrain from "acts which would defeat the object and purpose of a treaty" until it has made clear its intention not to become party to the treaty.[158] The United States has made no such statement, and therefore cannot engage in acts that defeat the object and purpose of the Convention, namely the protection and advancement of the best interests of the child. The Immigration and Naturalization Service (INS) has acknowledged these obligations in the context of children's rights during the asylum process, stating in its 1998 guidelines that the provisions of the CRC "provide guidance" and that, as a signatory, the United States is obliged to "refrain from acts which would defeat the object and purpose of the Convention."[159]

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152. CRC, *supra* note 4, at art. 12(1).
153. John Tobin, *Justifying Children's Rights*, 21 INT'L J. CHILD RIGHTS 395, 416 (2013).
154. Cohen, *supra* note 139, at 190.
155. LUISA BLANCHFIELD, CONG. RSCH. SERV., UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 1 (2013).
156. *Id*.
157. *See id*.
158. Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Mar. 21, 1986, 25 I.L.M. 543 (1980).
159. Memorandum from Jeff Weiss, Acting Dir., Off. of Int'l Affairs, to Asylum Officers, Immigration Officers, & Headquarters Coordinators, INS Guidelines for Children's Asylum Claims,

3. *The CRC as Customary International Law*

According to contemporary theory, the CRC is customary international law. Customary international law is, by its nature, indeterminate and has thus been the subject of much debate. The definition of customary international law has evolved over time, from a rigidly defined scope to a more fluid and flexible one. The International Court of Justice (ICJ) defines customary international law as "international custom, as evidence of a general practice accepted as law."[160] Traditionally, this has been determined by two elements: (1) the consistent practice of states and (2) the determination (by the practicing state) that the practice is being undertaken out of a sense of legal obligation, or *opinio juris*.[161] Contemporary scholarship has shifted the weight on the second element, legal obligation, placing the role of international legal opinion—something which can evolve relatively quickly—above the role of state practice.[162] This means that customary international law can be created more quickly and bind a wider group of nations than in the past.[163]

Under contemporary theory, a treaty can become customary international law when widely ratified by a representative group of nations. An ICJ decision in 1969 held that widely ratified multilateral conventions or treaties can form customary international law binding on *all States,* rather than just the signatories.[164] In the landmark ruling, *North Sea Continental Shelf,* the ICJ explained that a conventional law (binding only on those who have ratified the convention) can become a customary law (binding on all States) as the result of "widespread and representative participation in the convention."[165] Scholarship on the subject subsequently declared that ratification by a large number of parties constitutes evidence that "these provisions are generally acceptable, and that indeed they have been generally accepted."[166] Generally accepted provisions constitute clear evidence of *opinio juris*, one of the two elements of customary international law.[167]

The CRC has been widely ratified and consistently used by states. The CRC is an internationally agreed treaty which has been ratified not only by a representative group of nations, but "*the* representative group of nations."[168] This overwhelming support "clearly makes it a piece of international

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Immigration and Naturalization Serv. (Dec. 10, 1998) (cited in Pobjoy, *supra* note 142), *available at https://www.aila.org/infonet/ins-guidelines-for-childrens-asylum-claims*.

160. Statute of the International Court of Justice, art. 38(1).

161. Roozbeh (Rudy) Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, 21 EUR. J. INT'L L. 173, 177 (2010).

162. Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213, 282 (2003).

163. Chelsea Padilla-Frankel, *Contemporary Theory on Customary International Law and Human Rights Violations in the United States: Languishing Behind Bars - Juveniles Sentenced to Life Without Parole*, 33 ARIZ. J. INT'L & COMP. L. 803, 810–11 (2016).

164. Baker, *supra* note 161, at 180.

165. North Sea Continental Shelf Cases, Judgment, 1969 ICJ Rep. 3, 43 (I.C.J. 1969).

166. Louis Sohn, *'Generally Accepted' International Rules*, 61 WASH. L. REV. 1073, 1078 (1986).

167. *Id*. at 1077.

168. Padilla-Frankel, *supra* note 163, at 816 (emphasis in original).

customary law."[169] Since its entry into force in 1989, the CRC has been cited in courts across the world. Within the first ten years of its existence, the CRC was cited in at least thirteen legal systems across a range of cases, including immigration.[170] A database created by the Child's Rights International Network (CRIN) includes over a hundred cases that have cited the CRC and its provisions, spread across Europe (38), the Americas (35), Africa (21), Asia (20) and Oceania (20).[171]

Furthermore, contemporary scholarship illustrates that customary international law can develop over a relatively short period of time. Under traditional theory, consistent practice over an "extended period of time" was necessary for a treaty to become customary international law.[172] However, in the *North Sea Continental Shelf* ruling, the ICJ found that just a "short period" of time could be sufficient for this transformation to take place.[173] Therefore, the fact that the CRC is a relatively new Convention does not disqualify it from becoming customary international law.

4. *The Best Interests Standard as Customary International Law*

In theory, a State may opt out of customary international law by making a verbal objection; simple failure to ratify a Convention does not qualify as such.[174] However, there are certain rules of customary international law, *jus cogens* norms, that are considered so vital that they cannot be "contracted out" by states.[175] Similarly, obligations *erga omnes* are so important that any state has jurisdiction to sue another state which is failing to meet those obligations.[176] *Opinio juris* generally determines what norms become *jus cogens* and what obligations become *erga omnes*.[177] The prohibition of genocide, slavery, and torture are traditional examples of *jus cogens* norms.[178]

Contemporary scholarship and jurisprudence have expanded the theory of *jus cogens* norms and *erga omnes* obligations. In the 1964 decision, *Barcelona Traction,* the ICJ held that the "basic rights of human persons" created *erga omnes* obligations.[179] This led to a new understanding of the sources of international law, by which human rights norms could be

169. Stief, *supra* note 124, at 493.
170. Todres, *supra* note 138, at 193.
171. PATRICK GEARY, CRC IN COURT: THE CASE LAW OF THE CONVENTION ON THE RIGHTS OF THE CHILD, CHILD RIGHTS INTERNATIONAL NETWORK 8 (2012), *available at* https://archive.crin.org/docs/CRC_in_Court_Report.pdf.
172. Padilla-Frankel, *supra* note 163, at 811.
173. North Sea Continental Shelf, *supra* note 165, at 43.
174. Baker, *supra* note 161, at 176.
175. *Id.* at 177.
176. *Id.*
177. *Id.*
178. M, Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes,* 59 L. & CONTEMP. PROBS. 63, 68 (1996).
179. Case Concerning Barcelona Traction, Light, and Power Company, Ltd. (New Application) (Belgium v. Spain), Judgment, 1970 ICJ Rep. 3, para. 33 (I.C.J. 1970).

"seamlessly transmuted into customary international law."[180] Fundamental rights can become customary international law simply by virtue of their inclusion in multilateral conventions. The theory of "customary law generation" holds that widely ratified conventions with prohibitions against torture, genocide, or slavery create customary international law obligations for all States Parties, not just the signatories.[181] In this way, conventions themselves "generate customary rules of law."[182]

Under this theory, the rights in the CRC may be considered obligations *erga omnes,* binding upon the United States despite non-ratification.[183] This applies in particular to Article 3, because of its widespread use across States and its existence in other international conventions.[184] The best interests standard has become a "ubiquitous feature of international treaties and the reasoning of international institutions."[185] Furthermore, the best interests standard existed before the CRC, and has been a consistent feature of U.S. family law for two centuries.[186]

The United States' use of the best interests standard in areas outside of immigration law reinforces its place as a widely accepted and used legal principle. Under current laws, courts must consider the best interests of the child in all decisions regarding: placement and custody determinations, safety and permanency planning, and proceedings for termination of parental rights.[187] All states have statutes requiring that the "best interests of the child" be considered whenever certain decisions are made regarding "a child's custody, placement, or other critical life issues."[188] Although state guidelines for assessing a child's best interests differ, many guidelines echo Articles of the CRC. Across state laws, common guiding principles include the importance of family integrity and preference for avoiding the removal of a child from his or her home;[189] the importance of promoting the health, safety, and protection of the child;[190] and assurances that any child removed from their home will receive care that will assist the child in developing into a self-sufficient adult.[191]

Although the best interests standard does not exist in immigration law generally, it is used in granting Special Immigrant Juvenile Status (SIJS). SIJS

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180. Baker, *supra* note 161, at 180.
181. Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUMBIA L. REV. 1110 (1982).
182. *Id.* at 1129.
183. *See* Padilla-Frankel, *supra* note 163, at 811.
184. *See* Dina Supaat, *Establishing the Best Interests of the Child Rule as an International Custom*, 5 INT'L J. BUS., ECON., & L. 109 (2014).
185. Starr & Brilmayer, *supra* note 162, at 225.
186. *See id.* at 216, 225.
187. CHILD WELFARE INFO. GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD 1 (2016) *available at* https://www.childwelfare.gov/pubPDFs/best_interest.pdf.
188. *Id.*
189. *Id.* Approximately 28 state statutes include such provisions.
190. *Id.* 21 state statutes include such provisions.
191. *Id.* 12 state statutes include such provisions.

was created in 1990—the year after the CRC came into force—as an avenue to legal immigration status for children who became juvenile court dependents as a result of abuse, abandonment, or neglect.[192] A child can gain LPR status through SIJS after she is declared dependent on a juvenile court, found eligible for long-term foster care, and a determination is made that it is not in the child's best interests to be returned to her home country.[193] The best interests determination in SIJS follows state, rather than federal, guidelines and procedures, but effectively lays the predicate for the federal benefit of LPR status. The existence of the best interests standard in family law and SIJS reinforces its status as customary international law.

5. *Authority of Customary International Law in the U.S.*

The United States has long recognized the binding nature of customary international law. The *Paquete Habana*, a case involving the seizure of fishing vessels during the Spanish-American War, provides the foundation for U.S. understanding of customary international obligations. In *Paquete Habana*, the Supreme Court held that "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."[194] The Court explained that customary international law may originate "in custom or comity, courtesy or concession," which over time grows "by the general assent of civilized nations, into a settled rule of international law."[195]

The Supreme Court has also acknowledged the influence that standards of the CRC and the practices of other nations can have on U.S. law. In the 2005 case, *Roper v. Simmons,* the court drew on customary international law and international jurisprudence in its decision to abolish the death penalty for juveniles.[196] Literature in the years leading up to the decision advanced the argument that Article 37 of the CRC, the prohibition of juvenile capital punishment, should be considered a norm of *jus cogens*.[197] In *Roper*, the Court acknowledged that, in light of the almost-universal ratification of the CRC, "the United States now stands alone in a world that has turned its face against the juvenile death penalty."[198] Although not determinative or binding on the United States, the "opinion of the world community" provides "respected and significant confirmation for our own conclusions."[199] The Court also

192. Thronson, *supra* note 116, at 1004-06.
193. Dalrymple, *supra* note 121, at 164.
194. The Paquete Habana, 175 U.S. 677, 700 (1900).
195. *Id.* at 694.
196. Roper v. Simmons, 543 U.S. 551, 574–78 (2005).
197. Nancy E. Walker, *The United Nations Convention on the Rights of the Child: A Basis for Jus Cogens Prohibition of Juvenile Capital Punishment in the United States*, 19 BEHAV. SCI. & L. 143, 146 (2001).
198. *Roper*, 543 U.S. at 577.
199. *Id.* at 578.

stated that the experience of the United Kingdom, a country which had abolished the juvenile death penalty 56 years prior, "bears particular relevance" in light of "historic ties."[200] As Section C illustrates, the U.K—along with the EU, Australia and Canada— may be similarly useful in providing a model for a more humane interpretation of the cancellation of removal statute.

6. *The CRC and "Best Interests" in Cancellation of Removal Caselaw*

The role of the CRC and the best interests standard in the cancellation of removal context has received some examination. In *Beharry v. Reno*, a case that involved LPR cancellation of removal under INA § 240A(a), the U.S. District Court for the Eastern District of New York accepted the CRC as customary international law.[201] In the 2002 decision, the court held that the cancellation statute must be interpreted in a way that is in compliance with the Convention.[202] The case involved a habeas petition for a U.S. LPR and citizen of Trinidad who was ineligible for relief because he had been convicted of an aggravated felony.[203] The petitioner, who had a U.S. citizen daughter, argued under international law that he should be granted a hearing to examine the effect deportation would have on his daughter.[204]

In its decision, the *Beharry* court determined that the CRC has become customary international law. Recognizing that customary law is "not static, but rather is subject to change over time as customs change," the court stated that a law becomes customary through "breadth and period of acceptance"—or one of the two, if it strong enough.[205] Because of the "overwhelming acceptance" of the CRC and the fact that it contains "provisions codifying longstanding legal norms" such as the best interests standard, the court held that the CRC should be read as customary international law.[206] As such, the court granted the petitioner a writ of habeas corpus.[207] The Second Circuit later reversed the district court decision on other grounds.[208] As such, the arguments employed in *Beharry v. Reno* remain important.

Several statements in *Beharry v. Reno* have formed the basis for later arguments concerning the applicability of the CRC and best interests standard on cancellation of removal under both INA § 240A(a) and 240A(b). Between 2005 and 2016, seven federal circuit courts considered appeals of cancellation of removal cases based on arguments relating to the CRC and the best interests of the child (See "Table 1"). Two of these were, like the *Beharry*

200. *Id.* at 577.
201. Beharry v. Reno, 183 F. Supp. 2d. 584, 600 (E.D.N.Y 2002).
202. *Id.* at 604.
203. *Id.* at 587.
204. *Id.* at 586.
205. *Id.* at 597-98.
206. *Id.* at 600.
207. *Id.* at 605.
208. Beharry v. Ashcroft, 329 F.3d 51 (2d Cir. 2003) (reversing district court because the petitioner failed to exhaust all remedies before appealing).

TABLE 1: EXISTING CASELAW ON THE CRC AND "BEST INTERESTS" UNDER INA § 240A(B)

Case	Petitioner's Argument	Court Opinion
Cabrera-Alvarez v. Gonzales (9th Cir. 2005)	Statute should be interpreted in a manner consistent with the CRC.	Assuming CRC is customary international law, statute involves consideration of best interests. Denied.
Torres v. Gonzales (9th Cir. 2005)	Best interests should be considered under hardship standard.	Best interests are already at the core of hardship analysis. Dismissed.
Oliva v. DOJ (2d. Cir. 2005)	Petitioner should be permitted to apply for relief under CRC.	CRC has not been ratified and international law is inapplicable because statute controls (and petitioner fails under physical presence requirement). Denied.
Vazquez v. Gonzales (9th Cir. 2006)	Removal results in deprivation of children's rights under CRC.	Statute does not violate CRC, removal would not deprive children of rights. Dismissed in part, denied in part.
Santana-Medina v. Holder (1st Cir. 2010)	Best interests assessment required under CRC.	Petitioner failed to make this argument before the IJ or the BIA, therefore waived right to appeal. Dismissed.
Flores-Nova v. AG of the United States (3rd Cir. 2011)	Statute conflicts with best interests standard of CRC (part of argument).	Assuming CRC is customary international law, statute controls. Petitioner fails under physical presence requirement. Denied.
Bamaca-Perez v. Lynch (6th Cir. 2016)	Best interests should be considered under hardship standard.	Statutory standard applies, not CRC. If CRC is relevant, statute does consider best interests. Denied.

case, dismissed due to lack of jurisdiction.[209] In the other cases, the courts did not definitively determine whether or not the CRC is customary international

209. *See* Santana-Medina v. Holder, 616 F.3d 49 (1st Cir. 2010); Vasquez v. Gonzales, 176 Fed. App'x 717 (9th Cir. 2006).

law, instead basing arguments on one (or both) of two secondary issues regarding the applicability of the CRC and best interests standard to the particular statute.

The courts presuppose that the CRC is customary international law by immediately addressing the secondary issues of interpretation. The first issue concerns the rules governing statutory interpretation in light of customary international law: the Second, Third and Sixth Circuits have employed arguments that the statute "controls" over customary international law (the CRC), since it constitutes a clear expression of congressional intent.[210] This issue is addressed in Section B. The second issue concerns the compliance of the hardship standard with the CRC: the Ninth and Sixth Circuits have argued that the hardship standard *already* entails a consideration of the "best interests of the child," and is therefore already in compliance with the CRC.[211] This issue is addressed in Section C.

This section argued that the CRC and the best interests standard contained in Article 3 should be considered customary international law. There is substantial evidence to suggest that the Convention is customary law, due to its almost-universal ratification and consistent use by States. There is also evidence that the best interests standard, a longstanding legal norm used regularly in U.S. domestic law, is customary international law. Supreme Court precedent emphasizes both the binding nature of customary international law and the authoritative weight of the CRC, demonstrating that the Convention must be considered in domestic law.

Although some litigation has occurred regarding the applicability of the CRC and best interests standard in the context of cancellation of removal, these arguments have, so far, been unsuccessful. The following parts address the two main arguments that Circuit Courts have employed in denying petitions based on the CRC and "best interests" principle. Section B examines the principles of statutory interpretation, assessing the issue of whether the CRC is applicable in the context of relief under INA § 240A(b). Section C addresses the issue of whether the hardship standard is in compliance with the Convention.

B. *Ambiguity and Statutory Interpretation*

Section A argued that the Convention on the Rights of the Child and the best interests standard should be considered customary international law. It also demonstrated how customary international law is, in general, binding on the United States. However, the relationship between customary and

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210. Bamaca-Perez v. Lynch, 670 Fed. App'x 892 (6th Cir. 2016); Flores-Nova v. Att'y Gen. of U.S., 652 F.3d 488 (3d Cir. 2011); Oliva v. U.S. Dep't of Justice, 433 F.3d 229 (2d Cir. 2005).

211. *Bamaca-Perez*, 670 Fed. App'x at 892; Cabrera-Alvarez v. Gonzalez, 423 F.3d 1006, 1010 (9th Cir. 2005); Torres v. Gonzales, 158 Fed. App'x 872 (9th Cir. 2005).

domestic law is not straightforward or well-understood.[212] Although customary international law is recognized as a source of law in U.S. domestic courts, it does not necessarily trump domestic law: both types of law are of equal importance. As a result, the principles of statutory interpretation must be examined in order to understand whether the CRC applies under INA § 240A(b), the statute governing cancellation of removal for non-LPRs.

Questions regarding statutory interpretation and ambiguity have already been answered by courts. According to the *Charming Betsy* canon, an ambiguous statute must be interpreted in a way that accords with international law.[213] If, on the other hands, the statute is unambiguous and expresses the clear intent of Congress, then the statute controls.[214] This section contends that the hardship provision of the INA is ambiguous, and therefore should be interpreted in accordance with the CRC. Sub-section B.1 outlines the *Charming Betsy* canon of statutory interpretation and sub-section B.2 examines the legal concept of ambiguity. Sub-sections B.3 and B.4 analyze existing caselaw concerning ambiguity under INA § 240A(a) and (b) respectively. Finally, sub-section B.5 examines the ambiguity of the hardship standard under INA § 240A(b)(1)(D), concluding that the standard is ambiguous and should therefore be interpreted in a way that accords with the CRC and best interests standard.

1. *The* Charming Betsy *Case and Rules of Statutory Interpretation*

The juridical relationship between international law and domestic law, as two legitimate and equal sources of law in the United States, is governed by several long-standing principles. These principles serve as "rules of decision for resolving in domestic courts the potential inconsistencies between external and internal sources of law."[215] They also express the Supreme Court's view that domestic and international law are two "legitimate sources of norms binding on the United States and enforceable in its courts."[216] The most relevant principles concerning customary international law come from two historic Supreme Court decisions: the *Paquete Habana* (discussed in Section A) and *Charming Betsy* cases. The *Paquete Habana* established the principle that customary international law can provide a rule of decision in the absence of controlling legislative or executive acts.[217] The case *Murray v.*

212. Jack M. Goldklang, *Back on Board the Paquete Habana: Resolving the Conflict between Statutes and Customary International Law*, 25 VA. J. INT'L L. 143 (1984).

213. *See* Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1161 (1990); *see also* Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law,* 86 GEO. L. J. 479, 493–94 (1998).

214. Steinhardt, *supra* note 213, at 1196.

215. *Id.* at 1104.

216. *Id.* at 1106.

217. The *Paquete Habana*, 175 U.S. at 700.

Schooner Charming Betsy created the principle that domestic statutes should be interpreted, when possible, so as not to violate international law.[218]

According to the *Paquete Habana,* customary international law applies when there is no controlling legislative or executive act. As explained in Section A, the *Paquete Habana* decision established the importance of customary international law in domestic courts. However, the decision qualified this principle by stating that customary law must be consulted when there is "no controlling executive or legislative act or judicial decision."[219] In the case of non-LPR cancellation of removal, there is clearly a statute, but it is not clear whether or not the statute should "control" in the case of a conflict with the CRC. The *Charming Betsy* canon addresses that issue.

According the *Charming Betsy* canon, ambiguous congressional statutes should be construed in harmony with customary international law. The canon originated with the Supreme Court decision, *Murray v. Schooner Charming Betsy*.[220] The 1804 case involved the application of international norms regarding the capture of neutral nations and their citizens in wartime and an Act of Congress which prohibited trade.[221] In the decision, Chief Justice Marshall stated that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[222] In essence, the *Charming Betsy* canon acts as a "rebuttable presumption that Congress did not intend to place the United States in breach of international law."[223] To rebut this presumption, Congress must provide an "affirmative expression of congressional intent"[224] to "abrogate the international agreement."[225]

The *Charming Betsy* canon has been the subject of some debate, but has become "deeply embedded in American jurisprudence."[226] The Supreme Court and federal courts apply the *Charming Betsy* principle regularly, and it is enshrined in the provisions of the *Restatement (Third) of the Foreign Relations Law of the United States*.[227] The *Restatement,* which outlines the American Law Institute's opinion on the rules that a tribunal should apply when deciding a controversy in accordance with international law, states that "[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the

218. Murray v. Schooner Charming Betsy, 6 U.S. 64 (1804).
219. The *Paquete Habana*, 175 U.S. at 700.
220. Steinhardt, *supra* note 213, at 1135.
221. *Charming Betsy*, 6 U.S. at 118.
222. *Id*.
223. Michael Franck, *The Future of Judicial Internationalism: Charming Betsy, Medellin v. Dretke, and The Consular Rights Dispute*, 86 B. U. L. REV. 515, 521 (2006).
224. Weinberger v. Rossi, 456 U.S. 25, 32 (1982).
225. Andrew H. Bean, *Constraining Charming Betsy: Textual Ambiguity as a Predicate to Applying the Charming Betsy Doctrine*, 2015 BYU L. REV. 1801, 1801 (2016).
226. Note, *The Charming Betsy Canon, Separation of Powers, and Customary International Law*, 121 HARV. L. REV. 1215, 1215 (2008).
227. *Id*. at 482.

United States."[228] Such a construal will be possible when the statute at issue contains some ambiguity in its interpretation.

Subsequent jurisprudence and statutory guidance affirm the importance of the *Charming Betsy* canon. In *McCulloch v. Sociedad Nacional de Marineros de Honduras,* the Supreme Court applied the *Charming Betsy* canon to avoid construing the National Labor Relations Act in a manner inconsistent with State Department regulations.[229] The Court based its ruling in part on the fact that there was no clear expression of Congress's intent, and that the proposed construction would have been contrary to a "well-established rule of international law."[230] In *United States v. Yousef,* a 2002 decision involving the conviction for terrorist acts conducted outside the United States, the Second Circuit Court reaffirmed the *Charming Betsy* principle.[231] The Court stated that "while it is permissible for United States law to conflict with customary international law, where legislation is susceptible to multiple interpretations, the interpretation that does not conflict with 'the law of nations' is preferred."[232]

2. *What is Ambiguity?*

The determination of statutory ambiguity must occur before the *Charming Betsy* canon can be applied, but there is considerable debate regarding what constitutes ambiguity. Courts have not provided a definitive answer, despite the fact that the *Charming Betsy* canon has guided U.S. courts for over two centuries.[233] Scholars emphasize the difficulty posed by *Charming Betsy*: decision-makers have often been starkly split on whether a statute is ambiguous.[234] This can be explained by the simple fact that clarity is "very much in the eye of the beholder."[235]

An examination of the broader legal principle of ambiguity sheds some light on the issue. Somewhat ironically, the meaning of "ambiguity" is subject to multiple interpretations.[236] As a result, expert testimony from linguists is frequently called upon in order to "convince the court of the presence of ambiguity or vagueness."[237] According to Black's Law Dictionary, ambiguity is "doubtfulness; doubleness of meaning; indistinctness or uncertainty of meaning of an expression used in a written instrument."[238] Ambiguity may

228. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 114 (1987).
229. McCulloch v. Sociedad Nacional De Marineros De Honduras, 372 U.S. 10 (1963).
230. *Id.* at 21.
231. United States v. Yousef, 327 F.3d 56 (2d Cir. 2003).
232. *Id.* at 92.
233. Bean, *supra* note 225, at 1801–02.
234. *See The Charming Betsy Canon, Separation of Powers, and Customary International Law*, 121 HARV. L. REV. 1215, 1228–29 (2008).
235. *Id.* at 1228.
236. *See* Sanford Schane, *Ambiguity and Misunderstanding in the Law*, 25 T. JEFFERSON L. REV. 167, 169–70 (2018).
237. *Id.* at 192.
238. *What is Ambiguity?*, LAW DICTIONARY, https://thelawdictionary.org/ambiguity/ (last visited Oct. 14, 2020).

be either "latent" or "patent."[239] A latent ambiguity occurs when the language may be clear and intelligible, but an extrinsic fact creates the necessity for interpretation or a choice among two or more possible meanings.[240] A patent ambiguity "appears on the face of the instrument," arising from "defective, obscure, or insensible language."[241]

Ambiguity in legal texts can be categorized in two further senses: a general meaning and a more restrictive, legal meaning—both of which have been used by courts. In its "general meaning," ambiguity relates to the way language is "used by speakers or writers and understood by listeners or readers."[242] In this sense, ambiguity can result from a lack of clarity in language; a word or phrase that is capable of being understood in multiple ways. General ambiguity exists when a statute can be understood by reasonably well-informed persons in two or more ways.[243] In its more restrictive, legal meaning, ambiguity occurs "where there is a lack of clarity or when there is uncertainty about the application of a term."[244] This can occur, for example, when the word "treaty" could be understood to involve several different types of international instruments, and the list of instruments is not clarified. Within the law, there has been considerable overlap of these terms, with courts employing the term in its general meaning as well as its restricted meaning.[245]

3. *Ambiguity Under INA § 240A(a):* Beharry *and* Guaylupo-Moya

The most thorough assessment of *Charming Betsy* in the cancellation of removal context occurs in relation to first part of the cancellation statute, INA § 240A(a), which governs relief for lawful permanent residents. In *Beharry v. Reno* (discussed in sub-section A.6), the District Court held not only that the CRC is customary international law, but also that, in light of the *Charming Betsy*, it is legally enforceable. The petitioner argued that, under principles of customary international law, including the CRC, he should be granted a hearing to demonstrate the effect his deportation would have on his family and himself. The court granted the petition, finding that his deportation could be unlawful if done without considering its impact on the petitioner's daughter.[246]

In its decision, the *Beharry* court reasoned that because Congress has not enacted legislation which shows clear intent to repeal the norms of the CRC, the Convention is binding. The court drew on the interaction of the *Paquete Habana* and *Charming Betsy* principles to argue that "since Congress may

239. *Id.*
240. *Id.*
241. *Id.*
242. Schane, *supra* note 236, at 167.
243. J. G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 45:2 (7th ed. 2020).
244. Schane, *supra* note 236, at 167.
245. *See id.*
246. *See* Beharry v. Reno, 183 F. Supp. 2d 584, 602–605 (E.D.N.Y. 2002).

overrule customary international law (*Paquete Habana*), but laws are to be read in conformity with international law where possible (*Charming Betsy*), it follows that in order to overrule customary international law, Congress must enact domestic legislation which both postdates the development of a customary international law norm, and which clearly has the intent of repealing that norm."[247]

In making this determination, the *Beharry* court cited an earlier decision, *Maria v. McElroy*, which recognized that in the absence of a statement to the contrary, Congress can be assumed to be legislating "in conformity with international law."[248] The court also cited a provision in the *Restatement*, that an Act of Congress supersedes an earlier rule of international law as U.S. law "if the purpose of the act to supersede the earlier rule or provision is clear and if the act and the earlier rule or provision cannot be fairly reconciled."[249] Therefore, the *Beharry* court determined that "customary international law is legally enforceable unless superseded by a clear statement from Congress."[250]

Although *Beharry* addressed the issue of congressional intent, it failed to examine the issue of ambiguity—a fact for which it was subsequently criticized. In *Guaylupo-Moya v. Gonzales,* a case involving similar facts, the Second Circuit held that the statutory prohibition of relief for aggravated felons was unambiguous.[251] The *Guaylupo-Moya* court agreed with *Beharry* to a limited degree, but questioned some of its reasoning. The court recognized that the *Beharry* decision applied "the *Charming Betsy* principle that, where legislation is ambiguous, it should be interpreted to conform to international law."[252] However, the *Guaylupo-Moya* court explained that *Charming Betsy* "comes into play only where Congress's intent is ambiguous."[253] Because there are clear sections in the IIRIRA which restrict relief for aggravated felons and expand the definition of aggravated felony, "Congress's intent is controlling."[254] The *Beharry* court fell short in its reasoning primarily because it failed to determine whether the relevant provisions of the statute were ambiguous. The *Guaylupo-Moya* court found that, in the case of the bar concerning relief for aggravated felons under INA § 240A(a)(C), there was no ambiguity.

The *Guaylupo-Moya* decision emphasizes the importance of assessing ambiguity in order to determine what role the CRC may play in interpretation of the INA. *Guaylupo-Moya* also provides evidence that a particular provision of a statute, in this case INA § 240A(a)(C), can be assessed individually. The

247. *Id.* at 599.
248. Maria v. McElroy, 68 F. Supp. 2d 206, 231 (E.D.N.Y. 1999).
249. RESTATEMENT, *supra* note 228.
250. *Beharry*, 183 F. Supp. 2d. at 600.
251. Guaylupo-Moya v. Gonzales, 423 F.3d 121, 130 (2d Cir. 2005).
252. *Id.* at 135.
253. *Id.*
254. *Id.* at 136.

ruling that INA § 240A(a)(C) is unambiguous does not preclude a finding that ambiguity exists in another part of the same statute.

4. *Ambiguity under INA § 240A(b):* Oliva, Flores-Nova, Bamaca-Perez

Later cases have drawn on the reasoning in both *Beharry* and *Gaylupo-Moya* to assess the issue of ambiguity and statutory interpretation under non-LPR cancellation of removal. Three federal circuit court decisions have examined the interpretation of INA § 240A(b) in the context of the CRC as customary international law: *Oliva,*[255] *Flores-Nova,*[256] and *Bamaca-Perez*[257].

In *Oliva,* the Second Circuit held that the cancellation statute (specifically the duration requirement) was not ambiguous and therefore the CRC and Article 3, whether or not they are deemed customary international law, were not relevant to the decision. *Oliva* involved a Guatemalan who had been denied cancellation of removal but had a U.S. citizen child.[258] The petitioner argued that the BIA erred as a matter of law by failing to permit him to apply for relief under the CRC, and that he could not be removed without a hearing considering whether his removal was in the best interests of his U.S. citizen son. The court addressed the issue of ambiguity in statutory interpretation, reasoning that the *Charming Betsy* canon "does not apply where the statute at issue admits no relevant ambiguity."[259] In its analysis, the court explained that the first three parts of the statute are primary requirements—physical presence, good moral character, and no specified offenses— which must be satisfied before the hardship requirement is considered. The court argued that in this case "no ambiguity can be discerned in the timeliness requirement" because the statute "clearly limits relief based on family hardship to aliens who have been continuously physically present in the United States for ten years."[260] The petitioner failed to fulfill one of the primary requirements, and thus, was not entitled to a hardship consideration or any sort of best interests assessment that might follow. The court, therefore, did not need to address the issue of whether the hardship requirement is ambiguous.

In 2011, the Third Circuit echoed the *Oliva* reasoning in *Flores-Nova*. The case involved similar facts: the Mexican parents of three U.S. citizen children had been denied cancellation of removal.[261] The couple failed to meet the continuous physical presence requirement, having left the country for a period exceeding 90 days.[262] The petitioners made several arguments, including that the cancellation of removal statute does not comply with customary international law as expressed in Article 3 of the CRC and that the hardship

255. Oliva v. U.S. Dep't of Justice, 433 F.3d 229 (2d Cir. 2005).
256. Flores-Nova v. Att'y Gen. of U.S., 652 F.3d 488 (3d Cir. 2011).
257. Bamaca-Perez v. Lynch, 670 Fed. App'x 892 (6th Cir. 2016).
258. *Oliva*, 433 F.3d at 231.
259. *Id.* at 235.
260. *Id.*
261. *Flores-Nova*, 652 F.3d at 490.
262. *Id.* at 491.

provision is ambiguous.[263] The court dismissed this claim, concluding that the "plain language of the statute" setting out the physical presence requirement is unambiguous.[264] Like the *Oliva* court, the *Flores-Nova* Court therefore did not need to assess the ambiguity of the (secondary) hardship requirement: "a hearing on the merits as to the extreme hardship factor would not change the result in this case because the Petitioners cannot satisfy the statutory continuous physical presence requirement".[265]

In 2016, the Sixth Circuit relied in part on *Oliva* and *Flores-Nova* to make a broader argument that the CRC and best interests standard are irrelevant because the statutory standard applies, without addressing the issue of ambiguity.[266] In *Bamaca-Perez v. Lynch*, a Guatemalan father of two U.S. citizen children appealed after he was denied relief under the hardship standard.[267] The petitioner contended that the "best interests of the child" must be specifically considered in the hardship analysis when the qualifying relative is a child.[268] In a short decision, the court denied the petition, citing *Paquete Habana* and *Oliva* to support its reasoning that use of customary international law is appropriate only in the absence of a treaty, controlling executive or legislative act, or judicial decision. The Court failed to address the issue of ambiguity, stating only that "Congress has enacted legislation establishing the applicable standard for cancellation of removal" and as such, "that statutory standard, and not the CRC's 'best interests of the child' standard, applies to Bamaca-Perez's application for cancellation of removal."[269]

Relying on *Oliva, Flores-Nova* and *Payne-Barahona,*[270] the *Bamaca-Perez* court felt that, since Congress enacted legislation establishing "the applicable standard for cancellation of removal," it is that standard, rather than Article 3(1) of the CRC, which applies.[271] However, the Sixth Circuit's reliance on those cases is misplaced: as noted above, both *Oliva* and *Flores-Nova* focus on the narrower issue of the physical presence requirement (INA § 240A(b)(1)(A)), while *Payne-Barahona* assesses the ambiguity of the bar to relief for LPRs who have been convicted of aggravated felonies (INA § 240A(a)(3)). In all three cases, the court made an ambiguity assessment and determined that the statute was clear. The *Bamaca-Perez* Court failed to make such a determination on either the non-LPR cancellation statute as a

263. *See id*. at 491–92.

264. "Section § 1229b(d)(2) provides that "[a]n alien shall be considered to have failed to maintain continuous physical presence in the United States . . . if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days." *Id*.

265. *Id*. at 491 n.2.

266. Bamaca-Perez v. Lynch, 670 Fed. App'x 892 (6th Cir. 2016).

267. *Id*.

268. *Id*.

269. *Id*. at 893.

270. Petitioner, Honduran LPR convicted of an aggravated felony, argued in part that under international law (including CRC), U.S. citizen children have a right to have their father reside in the United States. Second Circuit held in part that CRC, because non-ratified, does not have the force of domestic law and denied petition for review. Payne-Barahona v. Gonzales, 474 F.3d 1 (1st Cir. 2007).

271. *Bamaca-Perez*, 670 Fed. App'x at 893.

whole (INA § 240A(b)) or the hardship standard in particular (INA § 240A (b)(1)(D)).

Therefore, although several courts have addressed the issue of statutory interpretation in the case of potential ambiguity in the hardship standard, none have clearly addressed the issue of whether the hardship standard is ambiguous. Indeed, in *Bamaca-Perez*, the Sixth Circuit went on to make a secondary argument: that the inquiry *does* involve a best interests determination (as discussed later in Section C), perhaps recognizing that it had failed to adequately address the issue of statutory interpretation. Since no court has determined whether the hardship standard is ambiguous, the question remains ripe for consideration. Furthermore, these cases illustrate that a single provision of a statute can be individually assessed as ambiguous or unambiguous. Therefore, an argument can be made that solely the hardship section of the non-LPR cancellation of removal statute, INA § 240A(b)(1)(D), is ambiguous.

5. *The Ambiguity of the Hardship Standard: INA § 240A(b)(1)(D)*

The history of the hardship standard in cancellation of removal law is one riddled with ambiguity and varied interpretations. Congress first introduced the standard into what was then known as "suspension of deportation" in the 1952 Immigration and Nationality Act. Under the 1952 Act, an applicant needed to provide proof of five years physical presence and evidence that deportation would result in "exceptional and extremely unusual hardship" to the applicant's citizen or LPR spouse, parent, or child.[272] The previous administrative remedy had been more lenient, allowing suspension of deportation if the applicant could provide evidence of "serious economic detriment" to a citizen or LPR spouse, parent or child upon deportation.[273] Also under this Act, suspension of deportation was available in the "very limited" category of cases in which deportation would be "unconscionable."[274] Since then, the standard has been changed several times in part as a result of efforts to standardize its interpretation.[275]

In 1962, Congress made the standard more lenient, dividing the statute into two categories so that individuals who were deportable on less serious grounds were subject to a lower "extreme hardship" standard.[276] After this change, there was considerable controversy over what was required to establish extreme hardship and the standard was applied inconsistently,

272. Underwood, *supra* note 126, at 889.

273. *Id*.

274. Curtis Pierce, *The Benefits of 'Hardship': Historical Analysis and Current Standards for Avoiding Removal*, IMMIGR. INFO. VISA L. GUIDE, https://www.cpvisa.com/article_1.html (last visited Oct. 19, 2020).

275. *See id*.; Underwood, *supra* note 126; Elwin Griffith, *Admission and Cancellation of Removal Under the Immigration and Nationality Act*, 2005 MICH. ST. L. REV. 979, 1026–27 (2005).

276. Underwood, *supra* note 126, at 890.

culminating in the 1996 BIA decision, *Matter of O–J–O–*.[277] The case involved a citizen of Nicaragua who was granted relief, despite having no family ties in the United States.[278] The BIA based its decision primarily on the individual's ties and assimilation in the United States and the economic and political conditions of Nicaragua.[279] In the decision, the majority stated that "as evidenced by this very decision, and the decisions of this Board which have preceded it, the term 'extreme' in the statute is not readily defined, at least in its application."[280] Several Board members dissented from the opinion and argued that the level of hardship in the case at bar was insufficient. One of the few areas of agreement between the majority and dissent was that the phrase "extreme hardship" is "ambiguous."[281]

The hardship standard was altered again in the 1996 Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA), creating the current language that affords possible relief. While the IIRIRA itself does not define "exceptional and extremely unusual hardship," the House of Representatives Committee Report accompanying the IIRIRA explained that the applicant must show evidence of hardship "substantially beyond that which ordinarily would be expected to result from the alien's deportation."[282] The Report explained that a case with similar facts to *Matter of O–J–O–* would not be approved under the new standard.[283]

Aside from that explanation, though, Congress failed to give any further direction as to how the standard should be interpreted. Writing soon after the introduction of the new standard, William Underwood noted that Congress has "never defined the ambiguous 'extreme' and 'exceptional and extremely unusual' hardship standards" and argued that the factors established in case-law fail to shed light on the ambiguous phrase.[284] Underwood further stated that "under any approach, it would be difficult to say that the term 'extreme hardship' is anything but ambiguous."[285] Later scholarship on the standard argues that there is "nothing predictable or even remotely rational about the current system for adjudicating applications for non-LPR cancellation."[286]

As a result of minimal guidance from Congress, the interpretation of the new "exceptional and extremely unusual hardship" standard was left almost entirely to the Board of Immigration Appeals. Congress granted decision-makers "discretion" when determining the level of hardship that would qualify—unlike the physical presence and disqualifying crimes requirements,

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277. *Id*. at 903.
278. Under the new "extreme hardship" standard, an applicant could supply evidence of hardship to him or herself, without having any qualifying relatives. *See id*. at 887.
279. Griffith, *supra* note 275, at 1025.
280. *In re* O-J-O-, 21 I. & N. Dec. 381, 398 (B.I.A. 1996).
281. *Id*. at 405.
282. H.R. REP NO. 104–828, at 213 (1996) (Conf. Rep.).
283. *Id*.
284. Underwood, *supra* note 126, at 900.
285. *Id*. at 913.
286. Taylor, *supra* note 127, at 533.

which have specific requirements embedded into the statutory text—meaning that the decision-maker has freedom in interpretation.[287] The freedom alone that is afforded the decision-maker constitutes evidence that the hardship requirement is ambiguous. The BIA's three published decisions—*Monreal*, *Andazola*, and *Recinas*—further demonstrate the ambiguity of the standard.

In *Matter of Monreal,* the BIA examined the statutory language in depth in order to determine its meaning, but failed to fully resolve the issue of ambiguity. The BIA stated that "[t]he terms 'exceptional' and 'extremely unusual' seemingly have ordinary meanings."[288] Exceptional is defined as "forming an exception; not ordinary; uncommon; rare" and extremely unusual as "circumstances in which the exception to the norm is very uncommon."[289] However, the apparent "plain meaning" of these terms becomes less clear "when appended to the term hardship, which can have multiple manifestations and inherently introduces an element of subjectivity into this statutory phrase."[290] The court further noted that "if the past 50 years have demonstrated nothing else with regard to the phrases 'exceptional and extremely unusual hardship' and 'extreme hardship,' they have shown that reasonable people can agree that the meaning of these terms is 'clear,' but come to quite different conclusions as to their application in various factual situations."[291] Despite the seemingly clear definitions of these phrases, the hardship standards are not terms of "fixed and inflexible content or meaning."[292] Indeed, the Board members in the decision itself could not come to an agreement, with one member submitting an eight-page dissenting opinion.

Although the BIA in *Monreal* determined that Congress did intend to make the current hardship standard higher than the 1962 "extreme hardship" version, it refrained from drawing on caselaw from the 1952 "exceptional and extremely unusual hardship" standard, arguing that the standard was different yet again. Furthermore, the Board stated that "although guidance as to this term's meaning can be provided, each term must be assessed and decided on its own facts."[293] The Board outlined a variety of factors that might be relevant in making the determination and did not foreclose any particular consideration of what can be considered in a hardship determination. As a result, the concept of hardship is open to change depending on the arguments made and evidence offered in each individual case.

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287. IMMIGR. LEGAL RES. CTR., NON-LPR CANCELLATION OF REMOVAL: AN OVERVIEW OF ELIGIBILITY FOR IMMIGRATION PRACTITIONERS (2018), *available at* https://www.ilrc.org/sites/default/files/resources/non_lpr_cancel_remov-20180606.pdf; *In re* Monreal-Aguinaga, 23 I. & N. Dec. 56, 59 (B.I.A. 2001).

288. *In re* Monreal-Aguinaga, 23 I. & N. Dec. 56, 59 (B.I.A. 2001).

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.* at 63.

In *Matter of Andazola*, Board members debated further as to whether the hardship standard was satisfied. The majority determined that the case could not be "meaningfully distinguish[ed]" from *Matter of Monreal* and denied relief.[294] In doing so, the majority reasoned that it was clearly Congress's intent to narrow the class of noncitizens eligible for relief, and therefore the hardship standard must serve that purpose.[295] In the dissent, Board members recognized the "challenge" of interpretation—stating that "[r]easonable persons can differ on whether a set of circumstances rise to the requisite hardship" and then criticizing the majority's determination.[296]

Both dissenting opinions questioned the majority's interpretation of congressional intent. In the first dissent, Cecelia Espenoza and Lory Rosenberg argued that the likely outcome of this decision—that "no respondent from Mexico will qualify" without a relative who has "severe medical problems"—did not align with congressional intent.[297] In the second dissent, several more Board members argued that Congress did not intend to "make the standard so demanding that it becomes a bar to all but the rarest of cases."[298] The dissenting Board members argued that Congress accomplished its goal of narrowing the class of noncitizens eligible in several other ways, including the added 10-year physical presence requirement and the cap of 4,000 grants per year; therefore, it was not necessary for the hardship requirement to further narrow this pool in a significant manner.

In *Matter of Recinas*, the BIA further elaborated on the hardship standard, and, despite its extremely restrictive application of the standard in the two previous published decisions, found room to grant relief. In fact, the BIA's reasoning placed it closer in line with the dissent in *Andazola,* stating that "the hardship standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief."[299] The Board's inability to agree on congressional intent within and between these three decisions clearly illustrates that multiple interpretations are possible, that congressional intent is not clear, and therefore that the standard is ambiguous.

In summary, there is considerable evidence to suggest that the hardship standard in the non-LPR cancellation of removal statute is ambiguous. Previous caselaw on the CRC and "best interests" fails to make a determination on this issue, leaving room for future litigation. Evidence of ambiguity in the standard can be found in the historical development of the standard and the three published BIA decisions. Because of this ambiguity, the hardship standard should be interpreted in a way that brings it in line with a "best

294. *In re* Andazola-Rivas, 23 I. & N. Dec. 319, 324 (B.I.A. 2002).
295. *Id.* at 322.
296. *Id.* at 329.
297. *Id.* at 325.
298. *Id.* at 333.
299. *In re* Gonzales-Recinas, 23 I. & N. Dec. 467, 470 (B.I.A. 2002).

interests of the child" determination. The following section analyzes a common counterargument made on this point—that the hardship standard is already in line with the CRC—by examining the differences between the hardship standard and the best interests standard.

C. *Hardship v. Best Interests: What's the Difference?*

Because of the ambiguity of the hardship standard, the non-LPR cancellation statute should be interpreted, as far as possible, in a manner that accords with Article 3 of the CRC. As discussed below, some courts have concluded that the hardship standard already does this: that the hardship standard is merely the converse of the best interests standard, and therefore involves a best interests analysis. However, this conclusion is superficial and flawed. It fails to understand that a best interests assessment, as developed in international jurisprudence, entails both substantive and procedural considerations which are absent from current assessments under the hardship standard. This section examines the considerable differences between the two standards. Sub-section C.1 outlines the existing caselaw holding that the standards are the same. Sub-section C.2 provides an initial rebuttal to this argument through an examination of Canadian caselaw. Sub-sections C.3 and C.4 outline the key procedural and substantive differences between the standards.

1. *Best Interests as the Converse of Hardship: Existing Caselaw*

The Ninth and Sixth Circuit Courts have both ruled that the hardship and best interests assessments are synonymous. In *Cabrera-Alvarez v. Gonzales*, the Ninth Circuit addressed the petitioner's claim that the court should consider the CRC's best interests standard in assessing hardship that would result for his two U.S. citizen children. The case involved family separation: the petitioner's children would stay in the United States with their mother if their father was deported because of the greater educational and economic opportunities available.[300] The court did not reject the claim that the best interests of his children should be considered, but concluded that they *had* been considered under the hardship analysis.[301] In assessing hardship, the court argued, the "child's 'best interests' are precisely the issue before the agency, in the sense that 'best interests' are merely the converse of 'hardship.'"[302] The court further contended that "the agency's entire inquiry focuses on the qualifying children, making their interests a 'primary consideration' in the cancellation-of-removal analysis."[303] As such, the petitioner "fail[ed] to demonstrate that the agency's interpretation or application of the statute is inconsistent with the Convention."[304]

300. Cabrera-Alvarez v. Gonzales, 423 F.3d 1006, 1007–08 (9th Cir. 2008).
301. *Id.* at 1012.
302. *Id.*
303. *Id.*
304. *Id.* at 1007.

Three later decisions followed *Cabrera-Alvarez*. The Ninth Circuit cited *Cabrera-Alvarez* in *Torres v. Gonzales* in 2005[305] and *Vasquez v. Gonzales* in 2006.[306] In both cases, the petitioners had sought relief based on the argument that the court should consider the best interests of the child, within or instead of the statutory hardship standard. In short decisions, both courts denied relief, stating that the court had already undertaken this consideration.[307] In the 2016 decision, *Bamaca-Perez v. Lynch,* the Sixth Circuit relied on the same argument.[308] Citing *Cabrera-Alvarez,* the court argued that "best interests" are the converse of "hardship," and since the agency's inquiry focuses on the qualifying children, their best interests are a "primary consideration."[309]

These cases fail to conduct a thorough analysis of the factors involved in a best interests assessment, as required by international jurisprudence. A mere consideration of what may or may not be in the interests of a child does not amount to a best interests assessment under international law. In order to comply with the CRC, a best interests assessment must follow specific procedural guidelines and address particular substantive considerations.

2. *International Caselaw: Canada*

An examination of the equivalent form of relief under Canadian immigration law provides an initial counter for the argument that "best interests" and "hardship" assessments are equivalent. Canada's courts use both standards in their equivalent statute regarding humanitarian and compassionate relief. In assessing humanitarian and compassionate relief considerations, courts examine the level of hardship on the applicant *and* consider "the best interests of a child directly affected."[310] Canadian jurisprudence clearly establishes that these are two separate forms of analysis. According to the Canadian Supreme Court decision, *Hawthorne v. Canada,* a child's best interests must always be assessed in humanitarian and compassionate relief applications. In *Hawthorne*, the court stated that "the concept of 'undeserved hardship' is ill-suited when assessing the hardship on innocent children" because "children will rarely, if ever, be deserving of hardship."[311]

The Canadian Federal Court has reaffirmed the importance of separating the hardship analysis from the best interests analysis several times. In *Williams v. Canada,* the court overturned the decision of an asylum officer

305. Torres v. Gonzales, 158 Fed. App'x 872, 872 (9th Cir. 2005).
306. Vasquez v. Gonzales, 176 Fed. App'x 717 (9th Cir. 2006).
307. *Torres*, 158 Fed. App'x at 872; *Vasquez*, 176 Fed. App'x at 717.
308. Bamaca-Perez v. Lynch, 670 Fed. App'x 892, 892–93 (6th Cir. 2016).
309. *Id*. at 893.
310. *Humanitarian and Compassionate Assessment: Best Interests of a Child*, GOV'T CANADA (Mar. 2, 2016), https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/humanitarian-compassionate-consideration/processing/assessment-best-interests-child.html (last visited Oct. 18, 2020).
311. Hawthorne v. Minister of Citizenship and Immigration, 2002 F.C. 475, para. 9 (Can.).

after determining that the officer applied the "wrong test" by analyzing whether the removal would have a negative impact on the child to the extent where he would suffer "undue and undeserved or disproportionate hardship" rather than conducting a best interests assessment.[312] In *Arulraj v. Canada,* the court held that it was an error in law to incorporate a hardship threshold into the best interests analysis.[313] Similarly, in *Mangru v. Canada,* the court determined that because the application of the "hardship" threshold "permeates [the] analysis of the best interests of the children," the decision-maker reached an "inappropriate conclusion."[314] This caselaw demonstrates that under Canadian law, the two forms of assessment are distinct and should not be conflated.

While Canadian caselaw may not affect U.S. statutory interpretation, it provides an understanding of the difference between the international best interests standard and a similar hardship standard. Both countries share "analogous immigration histories and immigration flows" and have similar immigration systems, making Canada a useful model for the inclusion of CRC standards into domestic law.[315] As illustrated by *Roper v. Simmons*, the Supreme Court can and has looked to "international norms and practices" in its decisions, specifically with regard to the treatment of children and the CRC.[316]

3. *Procedural Differences*

The Ninth Circuit's analysis of the best interests assessment in *Cabrera-Alvarez v. Gonzales* fails to recognize that a best interests assessment entails a specific procedure in the context of parental deportation, which has been developed in international jurisprudence. The primary procedural differences are summarized in "Table 2" below. An Article 3 best interests assessment involves a two-step process, in which the best interests of the child are considered independently of, and prior to, any other factors. The second stage of this assessment involves a balancing exercise in which the best interests, as a primary consideration, are balanced against other factors. This entire assessment is limited only to the situation surrounding the child and the applicant.[317] An integral part of the procedure is the consideration of the views of the child: the child is given a voice and the decision-makers are obliged to listen.

In contrast, under INA § 240A(b), the hardship analysis takes place *after* considering countervailing factors, including the applicant's length of residence, whether they are of "good moral character," and whether they have

312. Williams v. Minister of Citizenship and Immigration, 2012 F.C. 166, para. 55 (Can.).
313. Arulraj v. Minister of Citizenship and Immigration, 2006 F.C. 529, para. 14 (Can.).
314. Mangru v. Minister of Citizenship and Immigration, 2011 F.C. 779, para. 28 (Can.).
315. Carr, *supra* note 122, at 145.
316. Jordan Steiker, *United States: Roper v. Simmons*, 4 INT'L J. CONST. L. 163, 167 (2006).
317. POBJOY, *supra* note 142, at 224.

TABLE 2: PROCEDURAL DIFFERENCES BETWEEN BEST INTERESTS AND HARDSHIP ANALYSIS

	Best Interests (Article 3)	Hardship
Order of Analysis	1. Best interests of the child 2. All other factors	1. Situation of the applicant 2. Hardship to child or other qualifying relative(s)
Weight of Child's Interests	Best interests is a *primary* consideration	Hardship is *a* consideration
Method of Analysis	Pure (fact-specific assessment)	Comparative (facts compared to "typical" case)
Incorporation of Views of the Child	Fundamental element of assessment	Not necessary

been convicted of any criminal offenses.[318] Although it contains a similar balancing exercise, the weight given to the best interests of the child is substantially less than in a best interests assessment. In contrast to the pure best interests analysis under Article 3 of the CRC, the hardship assessment is comparative: adjudicators examine a child's hardship *as compared to* that which would ordinarily be expected. The outcome of this comparative baseline essentially means that any "typical" hardship experienced by a child upon the loss of their parent will not be enough to prevent deportation. Finally, the hardship analysis contains no particular mechanism for hearing and considering the views of the child.

a. Order of Analysis

An Article 3 assessment involves a two-stage analysis: a consideration the child's best interests followed by a balancing of those interests against other relevant factors. The reason for this is simple: without first determining what is in the child's best interests, a decision-maker cannot reasonably assess whether countervailing considerations outweigh those interests.[319] The 2001 Australian Federal Court case, *Wan v. Minister for Immigration and Cultural Affairs*, first recognized the importance of separating this assessment into two stages. The court explained that the tribunal is required "to identify what the best interests of [the] children require . . . and *then* to assess whether the strength of any other consideration, or the cumulative effect of other considerations, outweigh[s] the consideration of the best interests of the child

318. 8 U.S.C. § 1229b(b)(1)(A)–(C) (2018).
319. POBJOY, *supra* note 142, at 224.

understood as a primary consideration."[320] It is "imperative" that a decision-maker consider the initial best interests determination as a "distinct and separate stage" to the secondary balancing exercise.[321] The first stage requires consideration of all other rights held by children under the CRC, as outlined in Sub-section C.4. Only after the best interests have been assessed can the court consider broader factors, including the situation of the parent(s).

A hardship analysis under U.S. law regarding non-LPR cancellation takes place in the opposite order: the applicant's situation is assessed (at least in part) *before* the hardship of their child is considered. Under INA § 240A(b), the applicant must first provide evidence of a ten-year continuous period of residence, good moral character, and no convictions of certain listed crimes.[322] Their child's hardships can only be considered if the applicant first fulfills these requirements. If an applicant does not meet the first three requirements, the impact of deportation on the child is irrelevant to the court's analysis. The cases in Section B illustrate this issue: in both *Oliva* and *Flores-Nova*, the children were never granted an opportunity to introduce evidence of hardship because their parents failed to meet the physical presence requirement.[323]

Similarly, if an applicant has committed a certain crime they will be statutorily barred from relief, and the interests of their children will never be considered in any hardship analysis that may occur. An applicant is statutorily barred from relief in the form of cancellation of removal if they commit the following crimes: aggravated felonies, crimes of moral turpitude, and falsification of documents.[324] These bars do not exist in best interests assessments under customary international law. For example, in the U.K. Supreme Court decision, *ZH (Tanzania)*, the applicant made two fraudulent asylum claims—crimes which on their own would likely have barred her from relief in the United States. However, in line with the requirements of a best interests assessment, the court first considered the best interests of the applicant's children before examining the crimes committed. The court determined that it was in the children's best interests to remain in the United Kingdom with their mother, before weighing these against countervailing considerations, including their mother's "appalling immigration history."[325] As a result of this balancing exercise, the applicant was granted relief from deportation. Not all cases end this way, but every analysis that complies with the CRC

320. Wan v. Minister for Immigration and Multicultural Affairs, [2001] FCA 568 (18 May 2001), para. 32 (Austl.).

321. POBJOY, *supra* note 142, at 225.

322. 8 U.S.C. § 1229b(a)(1)–(3) (2018).

323. *See* Flores-Nova v. Att'y Gen. of U.S., 652 F.3d 488 (3d Cir. 2011); Oliva v. U.S. Dep't of Justice, 433 F.3d 229 (2d Cir. 2005).

324. 8 U.S.C. § 1229b(b)(1)(C) (2018).

325. ZH (Tanzania) v. Sec'y of State for Home Dep't, [2011] UKSC 4, [2011] 2 AC 166, para. 5 (appeal taken from Eng. and Wales); Wan, *supra* note 320.

involves consideration of the child's best interests, regardless of any crimes their parent may have committed.

b. Weight of Child's Interests

A further key procedural difference between the best interests and hardship assessments is the weight given to the child's interests in the analysis. The balancing exercise conducted in the second stage of the best interests assessment illustrates the primacy that is given to the child's best interests under this approach. In a hardship analysis on the other hand, the child's hardship may be given considerably less weight.

Under Article 3, the best interests of the child must be a primary consideration and must be given significant weight in the balancing process. Although Article 3 does not require that the child's best interests be *the* primary consideration, or that they necessarily determine the outcome, it does prohibit any other consideration from being treated as "inherently more significant" than the child's best interests.[326]

For example, in *ZH (Tanzania)*, the U.K. Supreme Court determined the weight that should be given to the best interests of children affected by the decision to deport one or both of their parents. The court examined the circumstances under which it might be permissible to deport a noncitizen parent where their child will also be forced to leave.[327] In its decision, the court drew upon caselaw from the European Court of Human Rights (ECHR), recognizing that the Strasbourg court has become "more sensitive to the welfare of the children who are innocent victims of their parents' choices."[328] The court acknowledged that the cumulative effect of other considerations might outweigh the child's interests, but emphasized that since no single factor can be treated as more important than best interests, a general concern about maintaining immigration control will on its own usually be insufficient to justify an outcome inconsistent with the best interests of the child.[329] The court determined that the countervailing considerations were not strong enough to outweigh the children's best interests, who "were not to be blamed" for their mother's decisions.[330]

Wider public interests, beyond a child's best interests, can also weigh in a child's favor in the Article 3 balancing exercise. Courts have held that there is an independent public interest in promoting the best interests of children. A U.K. Supreme Court decision involving the extradition of a parent held that "[i]t is not just a matter of balancing the private rights of children against the public interest in extradition, because there is also a wider public interest

326. *Id.*
327. ZH, *supra* note 325.
328. *Id.* at para. 21.
329. *Id.* at para. 25.
330. *Id.* at para. 33.

and benefit to society in promoting the best interests of its children."[331] The New Zealand Immigrational Tribunal has also held that there is an independent public interest in the preservation and protection of the family unit.[332] The primacy placed on the best interests of the child extends beyond even the particular child involved in any given case.

In contrast, in the hardship analysis under the INA, children are treated in the same way as other qualifying relatives; the statute makes no distinction between children, spouses, or parents. Rather, the immigration status of the relative in question is determinative. In *Matter of Monreal*, the hardship faced by respondents' two U.S. citizen children was given the same level of attention as the hardship faced by his two LPR parents.[333] In its decision, the BIA found that "the respondent's children [would] suffer some hardship, and likely will have fewer opportunities, should they go to Mexico, and . . . that the respondent's parents [would] suffer some hardship from having their son living farther away" but found that the hardship did not rise to the necessary level.[334] The BIA recognized that the children would accompany their father to Mexico while the applicant's parents would remain in the United States, but failed to distinguish the former hardship as different from or greater than the latter. Furthermore, the BIA failed to distinguish the impact of separation on a child from the impact of separation on an adult—a failure that is a common theme in cancellation cases.

Furthermore, instead of emphasizing the importance of each relative's age, the cancellation statute emphasizes the relative's immigration status: in order to qualify for a hardship assessment, the relative must be either a U.S. citizen or lawful permanent resident. As such, a child who is neither a citizen nor LPR will not qualify, and any hardship to that child will be irrelevant in the cancellation of removal decision. In *Matter of Recinas,* the respondent had four U.S. citizen children and two noncitizen children, aged 15 and 16.[335] These two children were almost irrelevant to the decision it's the court's eye—when they were mentioned, it was only to emphasize that their mother was the sole provider for "six children, four of whom are United States citizens."[336] The court is not required to analyze any child's hardship if they are not a citizen or LPR, making those children essentially invisible in the legal process.

c. Method of Analysis

The third procedural difference between the best interests and hardship assessments is the method of analysis. An Article 3 best interests assessment

331. HH v. Deputy Prosecutor of the Italian Republic, Genoa [2012] UKSC 25, [2013] 1 AC 338, para. 25 (on appeal from Eng. and Wales).
332. Singh v. Minister of Immigration [2012] NZIPT 500067, para. 96 (N.Z.).
333. *See In re* Monreal-Aguinaga, 23 I. & N. Dec. 56, 57 (B.I.A. 2001).
334. *Id.* at 65.
335. *In re* Gonzales-Recinas, 23 I. & N. Dec. 467 (B.I.A. 2002).
336. *Id.* at 469.

entails a pure analysis of the situation of both the child and applicant, along with other factors relevant to the particular case. Conversely, a hardship analysis compares a child's hardship to the level of hardship that might typically be expected to result from a separation from the parent.

The nature of a best interests assessment is such that it examines the interests of the child in each particular case, and does not compare these to any typical case involving a child facing parental deportation. The first stage of the best interests analysis requires examination of the child's best interests in "isolation from other factors."[337] Even in during the balancing exercise in the second stage, the decision-maker must decide based purely on the "particular facts and circumstances of the particular case."[338]

In contrast, the hardship analysis is a comparative exercise. The child's hardship is not balanced against countervailing considerations, but instead compared to a baseline level of hardship. According to *Matter of Monreal,* the applicant must demonstrate that the qualifying relative would suffer hardship "substantially beyond that which would ordinarily be expected to result from the alien's deportation."[339] The hardship analysis is essentially a hypothetical comparative exercise: the court must determine whether the hardship that would be suffered as a result of deportation is beyond that of a "typical" level of hardship. Because of this comparative baseline, hardship experienced by nearly every child following parental deportation will be insufficient to grant cancellation of removal. In *Matter of Andazola,* the BIA found that "the fact pattern presented here is, in fact, a common one, and the hardships the respondent has outlined are simply not substantially different from those that would normally be expected upon removal to a less developed country."[340] This comparative exercise is far from the pure assessment of best interests

337. Kaur v. Sec'y of State for the Home Dep't, [2017] UKUT 00014 (IAC).

338. ZH (Tanzania), *supra* note 325, at para. 15.

339. *In re* Monreal-Aguinaga, 23 I. & N. Dec. 56 (B.I.A. 2001). As we point out below, in enacting the current hardship requirement for non-LPR cancellation, the House report discusses that evidence of hardship must be "substantially beyond that which ordinarily would be expected to result from the alien's deportation." H.R. REP. NO. 104-828, at 213 (1996) (Conf. Rep.). Importantly, the report says that a case like *Matter of O-J-O* would not be approved under the new standard. *Id.* (citing *In re* O-J-O, 21 I. & N. Dec. 381 (BIA 1996)). This is significant because the respondent in *O-J-O-* had no family ties or citizen children in the United States. The BIA based its conclusion that hardship had been satisfied under the prior standard, deciding primarily based on the applicant's ties and assimilation in the United States, as well as in the economic and political conditions of Nicaragua. So, the BIA's "substantially beyond" language of *Andazola* and *Monreal* is misplaced.

340. *In re* Andazola-Rivas, 23 I. & N. Dec. 319, 324 (B.I.A. 2002). As we point out above, in enacting the current hardship requirement for non-LPR cancellation, the House report uses this "substantially" different language that evidence of hardship must be "substantially beyond that which ordinarily would be expected to result from the alien's deportation." H.R. REP NO. 104-828, at 213 (1996) (Conf. Rep.). Importantly, the report says that a case like *Matter of O-J-O-*, would not be approved under the new standard. *Id.* (citing *In re* O-J-O-, 21 I. & N. Dec. 381 (B.I.A. 1996). This is significant, because the respondent in *O-J-O-* had no family ties, much less citizen children, in the United States. The BIA based its conclusion that hardship had been satisfied under the prior standard decision primarily on his ties and assimilation in the United States and the economic and political conditions of Nicaragua. So the BIA's "substantially beyond" language of *Andazola* and *Monreal* is actually misplaced.

required under the CRC, and essentially makes the hardships experienced by most children meaningless in analyses under the cancellation statute.

d. Views of the Child

The final procedural difference between the two analytical frameworks is the importance given to a child's views. Consideration of a child's views is a fundamental element of the best interests determination, one which sets Article 3 apart from earlier conceptions of best interests.[341] Meanwhile, in a hardship analysis, nothing requires that the child's views even be heard.

In a best interests analysis, Article 12 provides the right to have the child's views given "due weight in accordance with the age and maturity of the child."[342] In doing so, the child must be "provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."[343]

In the immigration context, courts have held that the interests of the child are unlikely to conflict with those of the family, so separate representation is usually not necessary.[344] However, courts are careful to recognize that "while [children's] interests may be the same as their parents' this should not be taken for granted in every case."[345] As such, decision-makers should be "alive to the point and prepared to ask the right questions."[346] In *ZH (Tanzania),* a letter from the children's school and a report from a youth worker were deemed sufficient to represent the children's views.[347] However, the court emphasized that "immigration authorities must be prepared at least to consider hearing directly from a child who wishes to express a view and is old enough to do so."[348]

In contrast, under the U.S. cancellation statute, there is no requirement or interpretive guideline mandating consideration of a child's views. U.S. Citizenship and Immigration Services (USCIS) guidelines on determining extreme hardship make no mention of the incorporating a child's views.[349] BIA caselaw makes some reference to children's views but fails to give their views due weight or consideration.[350] In *Matter of Monreal,* the eldest (U.S. citizen) child testified in court regarding "his life in this country and his desire not to depart for Mexico, which he would do if his father was required

341. Tobin, *supra* note 153, at 414–15.
342. CRC, *supra* note 4, at art. 12(1).
343. *Id.* at art. 12(2).
344. *See, e.g.*, EM (Lebanon) v. Sec'y of State for Home Dep't, [2008] UKHL 64, [2009] 1 AC 1198 (appeal taken from Eng. and Wales).
345. ZH (Tanzania), *supra* note 325, at para. 37.
346. *Id.* at 36.
347. *See id.* at 37.
348. *Id.*
349. *See* U.S. CITIZENSHIP & IMMGR. SERVS., USCIS POLICY MANUAL 9 (2020), *available at* https://www.uscis.gov/policy-manual/volume-9-part-b-chapter-5.
350. *See, e.g.*, *In re* Monreal-Aguinaga, 23 I. & N. Dec. 56 (B.I.A. 2001).

to leave the United States";[351] however, this consideration was only weighed as evidence that the facts involved only showed that de facto deportation would result, rather than separation from his father.

The remaining two decisions grant even less weight to children's views. In *Matter of Andazola,* the eldest child testified about her "very close relationship with her grandmother," but this was given no further consideration in the decision.[352] In *Matter of Recinas,* there is no evidence to suggest that any of the four children (aged 12, 11, 8, and 5) testified in court.[353] INA § 240A (b) provides, at face value, a venue for child testimony, but fails to give the views of the child due consideration. This failure to incorporate the views of the child shows that the hardship analysis does not provide an equivalent quality result when compared to those reached through best interests analysis.

4. *Substantive Differences*

The substantive considerations involved in the best interests and hardship analyses are also considerably different. The factors considered in each type of analysis are overlapping to some degree: all factors considered in the hardship analysis are also considered in the best interests analysis, but not vice versa.

Under the first stage of a best interests analysis, the decision-maker must consider three factors: (1) the views of the child; (2) the specific situation and vulnerabilities of the child, including age, maturity and particular vulnerabilities; and (3) the extensive catalogue of rights protected under the CRC.[354]

In contrast to the specific set of rights considered under a best interests analysis, a hardship analysis can—but is not compelled to—consider a range of indeterminate factors. These factors, listed under the USCIS guidance on extreme hardship, are much more broadly defined than the rights listed in the CRC. Decision makers can consider family ties and impact, social and cultural impact, economic impact, and country conditions.[355] In *Matter of Monreal*, the Board determined that the same hardship factors considered under the previous "extreme hardship" standard should be considered, but that they must be "weighed according to the higher standard required for cancellation of removal."[356] More important, however, are the rights in the CRC that are absent from the hardship analysis.

The rights enshrined in the CRC, which must be considered in every best interests analysis, span a wide range of social, economic, health, civil, political, and cultural factors. Some of the most fundamental rights in the

351. *Id*. at 57.
352. *In re* Andazola-Rivas, 23 I. & N. Dec. 319, 320 (B.I.A. 2002).
353. *See In re* Gonzales-Recinas, 23 I. & N. Dec. 467 (B.I.A. 2002).
354. POBJOY, *supra* note 142, at 225.
355. USCIS POLICY MANUAL, *supra* note 349.
356. *In re* Monreal-Aguinaga, 23 I. & N. Dec. 56, 63 (B.I.A. 2001).

immigration context, aside from Article 3, are the right to non-discrimination (Article 2), the right to a nationality (Articles 7 and 8), the right to life, survival and development (Article 6), and the right to not be separated from family (Article 9). All of these rights are either completely absent, or given insufficient weight, during the hardship analysis.

The right to non-discrimination (Article 2) is one of the most important rights in the CRC and is not considered in the hardship analysis. Article 2 states that parties must respect the rights in the Convention for each child "irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."[357] The principle of non-discrimination provides that all rights are applicable to "each child within [the State Parties'] jurisdiction without discrimination of any kind."[358] Therefore, the CRC prohibits discrimination based on immigration status. The statutory requirement that a child's hardship is considered only if that child is a U.S. citizen or LPR clearly violates this requirement—discriminating against noncitizen and non-LPR children.

The right to non-discrimination does not mean that citizenship is irrelevant—indeed, courts have recognized that citizenship plays an important role in the balancing process.[359] The CRC recognizes the right of every child to acquire a nationality (Article 7) and to preserve her identity, including nationality (Article 8). As such, courts have held that, although nationality is not a "trump card," it should be of particular importance in the balancing exercise.[360] However, because Article 2 requires that a child not be made invisible or irrelevant in the proceedings by virtue of lack of citizenship or lawful residence, when combined with Articles 7 and 8, the CRC provides that all children must have their best interests considered regardless of their citizenship. To the extent that their citizenship is considered, it should either be viewed as neutral or weigh in favor of remaining in the country.

Third, the fundamental rights to life, survival, and development in Article 6 of the CRC are absent from non-LPR cancellation. These rights go beyond physical survival and include the development of the child "to the maximum extent possible."[361] The Committee on the Rights of the Child recognized that "decisions to repatriate" can "significantly impact a child's life and development."[362]

Furthermore, the health conditions within the country where a child may be deported can significantly impact a child's development. USCIS guidelines on hardship determination state that decision-makers should consider

357. CRC, *supra* note 4, at art. 2(1).
358. CRC, *Rights of All Children*, *supra* note 145, at 10.
359. *See* ZH (Tanzania), *supra* note 325.
360. *Id.*
361. CRC, *supra* note 4, at art. 6(1).
362. CRC, *Rights of All Children*, *supra* note 145, at 11.

health conditions and care.[363] However, in practice, this will only make a difference if the child in question has a significant health issue which requires superior healthcare. In *Matter of Andazola*, two dissenting Board members stated that "under the interpretation announced today, it is more likely than not that no respondent from Mexico will qualify for cancellation unless the qualifying relative has severe medical problems."[364] In doing so, the BIA is failing to properly consider the significant effects that deportation can have on a child's health and development—whether or not they have pre-existing medical problems—violating Article 6 of the CRC.

Finally, the CRC provides children the right not to be separated from their family, a right that is also not recognized in cancellation of removal from the United States. Article 9 sets forth that a child should not be separated from their family "except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child."[365] This is a strict form of best interests analysis: best interests must be not simply *a* primary factor, but *the* "determining" factor for decisions that would lead to the separation of a child from their parents.[366] Although USCIS guidance states that decision-makers should consider "family ties and impact," there is no particular emphasis on family unity or the impact of separation.[367] Further, the fact that the BIA's discretionary decisions related to the hardship requirement are not subject to judicial review[368] suggests that, even if such a determination were made, the statute would remain in conflict with Article 9 of the CRC.

D. *Possibilities for Re-interpretation*

There are several key differences between the best interests and hardship analyses. As a result of these differences, the interpretation of the cancellation statute in its current form does not comply with the CRC and Article 3. Caselaw from the Canadian courts provides an initial rebuttal to arguments that the hardship standard is simply the "converse" of best interests. There are key procedural and substantive differences between the best interests and hardship analyses, which demonstrate that—contrary to the Ninth Circuit's superficial interpretation of the best interest standard—the two standards are entirely different. Because of the ambiguity within the hardship standard, demonstrated in Section A, the statute may be re-interpreted in a way that complies with the CRC.

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363. USCIS POLICY MANUAL, *supra* note 349.
364. *In re* Andazola-Rivas, 23 I. & N. Dec. 319, 325 (B.I.A. 2002).
365. CRC, *supra* note 4, at art. 9(1).
366. ZH (Tanzania), *supra* note 325, at para. 35.
367. *See* USCIS POLICY MANUAL, *supra* note 349.
368. Romero-Torres v. Ashcroft, 327 F.3d 887, 892 (9th Cir. 2003) ("We lack jurisdiction to review the BIA's discretionary determination that an alien failed to satisfy the 'exceptional and extremely unusual hardship' requirement for cancellation of removal"); *see also* Gonzalez-Oropeza v. Att'y Gen. of U.S., 331 F.3d 1331, 1332-33 (11th Cir. 2003).

The United States is failing to fulfill its obligations under customary international law to consider the best interests of the child under non-LPR cancellation of removal. Through an analysis of theories of customary law, Section A demonstrated that the CRC and the "best interests" standard are customary international law. Furthermore, existing cancellation of removal caselaw supports the conclusion that the CRC has risen to the level of customary international law. The United States' commitment to international law, enshrined in the *Paquete Habana*, illustrates that U.S. immigration law should accord with the CRC.

Section B analyzed whether the non-LPR cancellation statute should be interpreted in accordance with customary international law. Through an analysis of scholarship and caselaw on statutory ambiguity, this article argued that the hardship standard, contained in section (D) of INA § 240A(b), is ambiguous. The BIA's published decisions illustrate the ambiguity present in the statutory text and in congressional intent. According to the *Charming Betsy* canon, this ambiguity requires that the statute be interpreted in a way that accords with customary international law.

Section C tested whether the statute already accords with the CRC and best interests standard. Drawing on international jurisprudence and a close examination of procedural and substantive considerations required in each type of analysis, this article concluded that the best interests and hardship analysis are fundamentally different. Because of these differences, the hardship statute currently conflicts with customary international law and should therefore be re-interpreted in a way that ensures it complies—as far as possible—with the best interests standard.

In order to comply with the CRC, the non-LPR cancellation statute should be re-interpreted in a way that minimizes, and preferably eliminates, the differences identified in Section C. First and foremost, the hardship analysis must incorporate a best interests analysis when the qualifying relative is under the age of 18, and in such cases should follow the precedent of international jurisprudence. Some of the procedural differences between the hardship and best interest frameworks—in particular the order of analysis—may require a broader legislative change since they relate to the entire statute and not simply the hardship requirement. However, the majority of the substantive requirements can be altered through re-interpretation of the statute, which can be conducted through litigation.

The procedural and substantive changes required to bring the hardship analysis in line with the CRC and Article 3 are as follows:

1. **Reverse the order of analysis**: assess the best interests of the child before the parent's situation. (This would require a change to INA § 240A(b) sections (A), (B), and (C), as well as the hardship requirement in (D), so it may only be possible with a legislative change.)
2. **Treat the best interests of the child as a primary consideration**. This means that, although other cumulative considerations may

outweigh the best interests of the child, no other consideration can inherently be more important.

3. **Remove the comparative baseline**. The best interests of the child and the facts of the particular case should be considered without comparison to a "typical" fact pattern.
4. **Grant children the right to be heard**. Invite children to express their views through testimony and require decision-makers to grant those views due consideration and weight.
5. **Incorporate a best interests assessment for every child**, regardless of immigration status, in line with Article 2 of the CRC, the right to non-discrimination.
6. **Place greater emphasis on the importance of nationality**, and the right of a U.S. citizen child to remain in their country of citizenship, in line with Articles 7 and 8 of the CRC.
7. **Place greater emphasis on the right to life, survival, and development for every child**, in line with Article 6 of the CRC.
8. **Place greater emphasis on the right to family unity** and the right of a child to not be separated from their family, in line with Article 9 of the CRC.

In short, saying that a child will not suffer great hardship from separation or forced accompaniment to an unfamiliar country during deportation, does not mean that the separation or the forced accompaniment is in their best interest. In other words, just because a child may only suffer mild hardship when forced to live in another country, that does not mean it is in the child's best interest to live in the other country. Similarly, because a child may only suffer mild hardship from separation resulting from parental deportation this does not mean that it is in the child's best interest to be separated from their parent. Those who contend that the hardship requirement incorporates the best interests of the child might argue that even the best interests approach requires a balancing. While true, the best interests framework at least requires the analysis to begin with the child's voice—it requires courts to start by asking what is in the child's best interest. Countervailing points may outweigh the child's best interest, but these should only be considered *after* the best interests assessment. The decision-maker should make a determination based on best interests *first*.

A big problem with the current approach to hardship is that the analysis usually asks what hardship the child might suffer, which may not be any different from what the average child in this situation might suffer. The largest problem with this analytical approach is that this question does not consider the child's best interest. The best interests approach forces decision-makers to address that question directly—not vaguely or implicitly.

The changes recommended here aspire to bring the hardship requirement into compliance with the CRC and the best interests standard. Further, this recommended approach is consistent with recommendations of prominent

pediatricians.[369] However, the changes recommended are admittedly ambitious and may not be practical in the short-term due to significant barriers that exist in courts.

A more moderate change to the current framework could be made by re-interpreting the current standard to incorporate some level of best interests assessment for qualifying relatives under the age of 18. This assessment could consider the child's views and their rights under the CRC, including the traumatic impacts that deportation has children and their increased age-related vulnerability.

If Congress intended to narrow the category of applicants eligible for cancellation relief, as the BIA has held, this more moderate interpretation would still be consistent with that intended outcome. This change would likely make applicants with children are more likely to gain relief, whereas applicants without children may be less likely to. With the best interests analysis incorporated into the hardship standard, a child's hardship would generally be higher than that which an adult might ordinarily be expected to experience. In this framing, a parent facing deportation who has a child under the age of 18 could be at a much lower risk of deportation than a parent without a child.

Although this outcome is far from ideal, it could act as a short-term solution that better aligns the non-LPR cancellation of removal statute with the CRC and the "best interests" standard. There are elements of the best interests assessment, particularly procedural considerations, which may be challenging to incorporate into the hardship standard without a complete statutory change, such as the order of analysis. The moderate re-interpretation recommended here could act as a short-term solution with the long-term goal of adhering to the recommended long-term changes listed above. The long-term goal must begin with small steps: it is imperative to recognize that the hardship statute is not in compliance with the CRC and that it must undergo some kind of change in order to incorporate a best interests analysis for all children facing parental deportation.

V. CONCLUSION

The BIA approach to hardship to U.S. citizen children in cancellation cases is ripe for challenge and reconsideration. If parental deportation would result in separation from a citizen child, the likely long-term health, educational, and economic effects from neurologic and toxic stress factors should be sufficient to satisfy the exceptional and extremely unusual hardship requirement. Furthermore, because the Convention on the Rights of the Child is customary international law and the cancellation statute is ambiguous, the hardship standard must be re-interpreted so that it incorporates a best interests analysis in parental deportation cases involving citizen children.

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369. "[O]ur country needs immigration laws and policies that take into account children's needs . . . consistent with 'Article 9 of the Convention on the Rights of Children.'" Fernando S. Mendoza, et al., *Immigration Policy: Valuing Children*, 18 ACAD. PEDIATRICS 723, 724 (2018)