NO PARENT LEFT BEHIND: SEEKING EQUALITY FOR PARENTS OF U.S. CITIZENS

JESUS TORRES-ROJAS*

ABSTRACT

When applying for an immigration benefit they are otherwise eligible for, several parents of U.S. citizens are confronted with the reality of the three and ten-year bar to admissibility. This bar to admissibility, enacted by Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, prevents an individual from obtaining legal status if they were or are unlawfully present in the United States. This is the reality for many individuals who entered the United States irregularly and have U.S. citizen children who are now of age to petition for an immigration benefit for their parents. While a waiver to such bar is available for spouses and offspring of U.S. citizens, the waiver fails to afford the same opportunity to said parents of U.S. citizens. This Note explains the source of the bar, formulates an equal protection claim against the waiver by establishing that the familial relationships at issue are similarly situated, finds the appropriate standard of review to be strict scrutiny, explains how the waiver fails strict scrutiny, and resolves that the waiver must be extended to the parents of U.S. citizens.

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* Jesus Torres-Rojas, J.D. Candidate, 2022, University of Arkansas School of Law. The author thanks his family for their support throughout this process, Professor Zilberman for her invaluable feedback, and the editors of the *Georgetown Immigration Law Journal* for their tremendous help.

Casi 14 años, Sin ir a mi tierra, A donde nací, Ya todo ha cambiado, Le ruego a mi Dios, No se olviden de mí, Se murió mi madre, Y dice mi padre que ya está muy Viejo, Y no quiere venir
Y yo sin poder ir
Y yo sin poder ir[1]

I. INTRODUCTION

"You are barred." Those are the words that parents of U.S. citizens often hear when seeking permanent residency in the United States. The devastating news hits them like a bucket of cold water. After twenty-one years of waiting, they finally hoped to emerge from the shadows now that their children reached adulthood and are eligible to petition for permanent residency on their behalf. During the twenty-one-year waiting period, the parents of those U.S citizens live in fear, miss significant family occasions, and lose loved ones. Despite the difficulties, they remain strong and hopeful. Inevitably, they are confronted with the disheartening news that sentences them to an uncertain future. These cases are not few.

While births to undocumented immigrants have been declining since the Great Recession, there were an estimated 2.1 million births to undocumented immigrants from 1980–1999.[2] This means that, currently, at least 2.1 million U.S. citizens are of age to petition for an immigration benefit for one or both of their parents. Considering the total births from 1980–2016, five million U.S. citizens are or will be of age to petition for an immigration benefit for one or both of their parents by 2026 at the latest.[3] It is in this context that this Note analyzes the source of this bar, formulates an equal protection claim against the applicable waiver that leaves out parents of U.S. citizens, finds strict scrutiny to be the appropriate standard of review, and, in the final analysis, finds that the waiver does not pass strict scrutiny.

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1. CALIBRE 50, *El Corrido de Juanito*, *in* GUERRA DE PODER (Andaluz Records 2017) (translating to "It has been almost 14 years since I was in my homeland, where I was born. Now everything's different and I pray to God they never forget me. My mother died and my father says that he is very old now and he doesn't want to come, and I can't go there, and I can't go there.").

2. *Number and Share of U.S. Births to Unauthorized Immigrants, 1980-2016*, PEW RSCH. CTR. (on file with author).

3. *Id.*

II. BACKGROUND

Immigration legalization was not always as partisan as it is today.[4] In fact, a Democratic majority House of Representatives, a Republican majority Senate, and a Republican President passed the Immigration Reform and Control Act of 1986 which, among other provisions, granted amnesty to millions of undocumented individuals.[5] The drastic partisan divide occurred in 1993.[6] Leading up to that year, anti-immigration groups had "bec[ome] adept at utilizing the news media to focus attention on what they characterized as an 'out of control' border."[7] Immediately after the 1993 attacks on the World Trade Center, the leader of a prominent anti-immigration group appeared on national television and "create[ed] a panic over asylum-seekers . . . [which] provid[ed] momentum for proposals to curtail due process and create significant obstacles for individuals seeking asylum."[8] This message appeared to explicitly concern asylum seekers, but, in reality, it sought to implicitly generalize these claims to other types of immigrants.

The success of anti-immigration groups in spreading their rhetoric is evidenced by the passage of California's Proposition 187 and the ushering of the "Gingrich Republican revolution" in 1994.[9] While California's Proposition 187 was halted through the judiciary,[10] the Gingrich Republican Revolution brought the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 that is still in effect today.[11] IIRIRA created bars to admissibility based on unlawful presence,[12] which is the reason parents of U.S. citizens are often ineligible to adjust their status despite qualifying for an immigration benefit.

IIRIRA was aimed at deterring unlawful presence in the United States.[13] The House Committee report on IIRIRA framed the legislation as a response to the country's need to "exercise its national sovereignty to control its

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4. *See* Frank Sharry, *Backlash, Big Stakes, and Bad Laws: How the Right Went for Broke and the Left Fought Back in the Fight over the 1996 Immigration Laws*, 9 DREXEL L. REV. 269, 272 (2017).

5. Muzaffar Chishti, Doris Meissner, & Claire Bergeron, *At Its 25th Anniversary, IRCA's Legacy Lives On*, MIGRATION POL'Y INST. (Nov 16, 2011), https://perma.cc/4TRK-E5NW.

6. Sharry, *supra* note 4, at 273.

7. *Id*. at 273–74 (explaining that the television networks "regularly r[an] a drumbeat of stories suggesting that the borders were 'out of control' . . . for example, repeatedly showing footage of a soccer field in Tijuana, Mexico, where individuals would gather and run across the border").

8. *Id*. at 274.

9. *Id*. at 275–76. Proposition 187 was a "California voter initiative that proposed to prohibit undocumented immigrants from accessing nonemergency medical care, social services, and education within the state, and to require state and local officials to report individuals suspected of being undocumented to federal immigration officials."

10. League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244, 1261 (C.D. Cal. 1997) (finding that "California [was] powerless to enact its own legislative scheme to regulate immigration . . . [and] to enact its own legislative scheme to regulate alien access to public benefits").

11. Sharry, *supra* note 4, at 272–79; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546 [hereinafter IIRIRA] (codified as amended in scattered sections of 8, 18, and 28 U.S.C.).

12. IIRIRA § 301(b)(1) (codified as amended in 8 U.S.C. § 1182((a)(9)(B)(i)).

13. *See, e.g*., Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183, 1201 (2015).

borders and pursue an immigration policy that serves the fundamental needs of the nation."[14]

However, the influx of immigrants from Latin America, and specifically Mexico, was not new. Prior to contract labor programs, there "was a pre-existing pattern of Mexican migration to the [United States]."[15] Up until 1924, the year the U.S. Border Patrol was created, citizens of Mexico and the United States could move freely between the two countries.[16] This exchange compensated for labor shortages due to restrictions on immigration from other countries and due to World War I.[17] Despite the essential role they played, these workers were sent back to Mexico during the Great Depression, as the government did not want to provide them with public assistance.[18] The United States benefited from Mexicans' cheap labor, but did not hesitate to dispose of them at the first opportunity.

A few years later, World War II again created a manpower shortage, leading to a bilateral agreement between the United States and Mexico in 1942, which provided the founding document for the Bracero Program.[19] This agreement allowed growers to bring workers to the United States from Mexico and lasted for twenty-two years.[20] Unsurprisingly, those twenty-two years were not uninterrupted.[21] The increased labor demand during program interruptions caused by negotiation impasses caused the "undocumented alien population in the [United States to] continue[] to increase significantly".[22] From 1950 to 1954, the number of undocumented people rose from 458,215 to 1,075,168.[23] Distinctively, this period of migration was "circular," meaning the migrants "tended to circulate back and forth" between the United States and Mexico.[24] Even though now the migrants could not freely move between the countries, they still managed to return to their home country routinely. However, this circular pattern of migration ceased due to significant increase in spending on border enforcement beginning in 1986.[25]

By 1986, "the costs and risks of border crossing were dramatically higher."[26] Therefore, migrants were not willing to continue the circular

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14. H.R. REP. NO. 104-469, pt. 1, at 110 (1996).

15. Kristi L. Morgan, *Evaluating Guest Worker Programs in the U.S.: A Comparison of the Bracero Program and President Bush's Proposed Immigration Reform Plan*, 15 BERKELEY LA RAZA L.J. 125, 126 (2004).

16. *See id.*

17. *See id.*

18. *Id.* at 126–27; *See A Latinx Resource Guide: Civil Rights Cases and Events in the United States*, LIB. OF. CONG., https://perma.cc/J2S4-L8QX (last visited Apr. 23, 2021).

19. Morgan, *supra* note 15, at 127.

20. *Id.* at 127–29 (discussing the expansions and difficulties faced by both the U.S. and Mexico throughout those 22 years).

21. *See generally id.* at 127.

22. *See generally id.* at 128.

23. *Id.*

24. Douglas S. Massey, Jorge Durand & Karen A. Pren, *Why Border Enforcement Backfired,* 121 AM. J. SOC., 1557, 1559 (2016).

25. *Id.* at 1581.

26. *Id.*

pattern of migration and risk not being able to return to the United States to earn a decent living.[27] Thus, the number of people accumulating unlawful presence and the length of that unlawful presence began to increase. Through IIRIRA and, specifically, the unlawful presence bar, Congress sought to solve a problem it had created.

A. *Unlawful Presence*

8 U.S.C. § 1182 delineates specific grounds that make an individual inadmissible into the United States.[28] Subject to various exceptions, the regulation generally provides that if immigrants fall into one of the stated inadmissibility grounds, they are not able to obtain immigration benefits from the U.S. government. On April 1, 1997, unlawful presence became one of those grounds to inadmissibility that was added by the IIRIRA.[29] Immigrants who are deemed inadmissible are also "ineligible to receive visas and ineligible to be admitted to the United States."[30] The unlawful presence bar provision states that:

> Any alien (other than an alien lawfully admitted for permanent residence) who—
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> (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 1254a(e)2 of this title) prior to the commencement of proceedings under section 1225(b)(1) of this title or section 1229a of this title, and again seeks admission within 3 years of the date of such alien's departure or removal, or
>
> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States,
>
> is inadmissible.[31]

Accordingly, this is commonly known as the three- and ten-year bars to admissibility due to unlawful presence.

Unlawful presence is accumulated "if the [person] is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled."[32] If an immigrant accumulates six months or more of unlawful presence, the unlawful presence bar is triggered once the immigrant exits the

27. *Id.*
28. *See generally* Inadmissible Aliens, 8 U.S.C. § 1182.
29. 8 U.S.C. § 1182(a)(9)(B)(i); IIRIRA (codified as amended in 8 U.S.C. § 1182((a)(9)(B)(i)); LIZZ CANNON, MCLE IMMIGR. PRAC. MANUAL, EXHIBIT 27B (2018).
30. *See* 8 U.S.C. § 1182(a).
31. 8 U.S.C. § 1182(a)(9)(B)(i).
32. 8 U.S.C. § 1182(a)(9)(B)(ii).

United States and "again seeks admission."[33] In this context, there are three considerations affecting the applicability of the unlawful presence bar: admission, inspection, and adjustment of status.

First, seeking admissions "mean[s], with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."[34] Second, inspection occurs "when the foreign national presents himself or herself to Customs and Border Protection (CBP) at a port of entry for examination and a determination of eligibility or ineligibility to be allowed entrance to the United States"[35] Finally, only those people that are "inspected and admitted or paroled into the United States . . . may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence" inside the United States.[36] This discretionary process is known as adjustment of status. Those seeking to be granted adjustment of status must have been inspected and admitted or paroled into the United States to be eligible for it. Through adjustment of status, it is possible for people to complete their immigration process without leaving the United States and without triggering the unlawful presence bar. This is because if the immigrant is not "seeking admission," the unlawful presence bar does not apply. For example, if an applicant is an international student who was inspected and admitted to the United States on an F-1 visa, accumulates unlawful presence, marries a U.S. citizen or permanent resident, and is granted adjustment of status inside the United States, they will not trigger the unlawful presence bar because they are not "seeking admission" when they adjust status inside the United States.[37]

For those not eligible for adjustment of status, the interview portion of the immigration process must be conducted at a U.S. Embassy or Consulate abroad.[38] For instance, when someone comes into the United States without inspection, accumulates unlawful presence, and applies for an immigration benefit that they are eligible for, they will have to depart the United States for an interview at a U.S. Embassy or Consulate as part of the process. However, as soon as they depart the country, they are barred from being admitted into the United States for three or ten years depending on the length of their unlawful presence. This is the case of parents of U.S. citizens, who entered the country irregularly. Because the parents were not admitted or paroled into the United States, they are not eligible for adjustment of status. Thus, the parents will likely trigger the unlawful presence bar if, or when, they depart

33. 8 U.S.C. § 1182(a)(9)(B)(i).
34. 8 U.S.C. § 1101(a)(13)(A).
35. MIKI KAWASHIMA MATRICIAN, ADJUSTMENT OF STATUS: AN OVERVIEW, IPM MA-CLE § 22.2.1 (2019).
36. 8 U.S.C. § 1255(a).
37. *See supra* text accompanying notes 32–35.
38. *Immigrant Visa Process*, U.S. DEP'T OF STATE BUREAU OF CONSULAR AFFS., https://perma.cc/79TE-G9KV (last visited Apr. 23, 2021).

the United States to attend the immigration interview for an immigration benefit they are otherwise eligible for. Thus, parents of U.S. citizens, face the difficult choice between leaving the United States to seek an immigration benefit and risking a three- or ten-year bar to reentry or "do[ing] nothing and remain[ing] in the shadows, fearful of removal and unable to participate fully in American society."[39]

Ironically, the unlawful presence bar is disincentivizing eligible people from regularizing their status. Just like increased spending on border enforcement terminated the circular pattern of migration and led to an increase in irregular stays, the unlawful presence bar has led to an increase in immigrants with unlawful presence. Both policies resulted in the opposite of their intended effects.

B. *Waiver for Unlawful Presence*

Various waivers to inadmissibility are available, including unlawful presence.[40] Congress established that the three- and ten-year bar may be waived, at the discretion of the Attorney General,

> in the case of an immigrant who is the spouse or son or daughter of a U.S. citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.[41]

This general waiver requires the requestor to "[b]e the *spouse, son, or daughter* of a U.S. citizen . . . or lawful permanent resident . . . ; [b]e able to establish extreme hardship to the [U.S. citizen] or [lawful permanent resident] spouse or parent; and [w]arrant a favorable exercise of discretion."[42] Unfortunately, this general waiver is specifically limited to the spouse, son, or daughter of a U.S. citizen and leaves out parents of U.S. citizens. Furthermore, the statutory waiver can only be requested after a denial; the statutory waiver process does not allow for a qualifying relative to file a waiver for unlawful presence until the individual has attended the immigration interview and has been deemed inadmissible.[43] This creates another "catch-22" for people who would otherwise be eligible to seek an

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39. Dree K. Collopy, *I-601A Provisional Unlawful Presence Waivers: A Practitioner's Guide for Preserving Family Unity*, 13-06 IMMIGR. BRIEFINGS 1, 2 (June 2013).

40. *See* 8 U.S.C. § 1182.

41. 8 U.S.C. § 1182(a)(9)(B)(v).

42. Ariel Brown, *Immigrant Legal Res. Ctr., I-601A Provisional Waiver: Process, Updates, and Pitfalls to Avoid*, PRAC. ADVISORY 3 (2019), https://perma.cc/67Y4-CK3Z (emphasis added); *see* 8 U.S.C. § 1182(a)(9)(B)(v).

43. *Secretary Napolitano Announces Final Rule to Support Family Unity During Waiver Process, Dep't .of Homeland. Sec*. (Jan. 2, 2013), https://perma.cc/VRB4-CWVZ [hereinafter *Napolitano*].

immigration benefit.[44] In order for an applicant to be eligible for the waiver, they must first condemn themselves to the unlawful presence bar.

C. *Provisional Waiver for Unlawful Presence*

Recognizing the dilemma faced by people who would otherwise be eligible to receive immigration benefits, the Provisional Unlawful Presence Waiver of Inadmissibility for Certain Immediate Relatives rule became effective on March 4, 2013.[45] According to then Secretary of Homeland Security (DHS) Janet Napolitano, this rule sought to "facilitate[] the legal immigration process and reduce[] the amount of time that U.S. citizens are separated from their immediate relatives who are in the process of obtaining an immigrant visa."[46] In addition to the requirements for the general waiver,[47] the person requesting the provisional unlawful presence waiver must:

> [b]e at least 17 years old; [b]e physically present in the [U.S.] at the time of submitting the I-601A application; [i]ntend to depart the [U.S.] to attend an immigrant visa interview at a U.S. consulate abroad; [b]e the beneficiary of an approved visa petition; [h]ave paid the immigrant visa processing fee . . .; [c]omply with the biometrics request . . .; [n]ot be inadmissible under any other ground of inadmissibility besides § 212(a)(9)(B); [h]ave any removal proceedings administratively closed; and [h]ave been granted an I-212 consent to reapply if prior removal, deportation, or exclusion order.[48]

This allows the qualifying person to submit a waiver for the unlawful presence bar in the United States and wait for that waiver to be processed while continuing their life in the United States.[49] In case the waiver is denied, the requestor can choose to postpone the interview process.[50]

While this provisional waiver was expanded in 2016 to include "all statutorily eligible immigrant visa categories," [51] it still requires the statutory elements to be met, meaning that the requestors must demonstrate hardship to a U.S. citizen's parent or spouse. Rooted in the statutory waiver, this provisional waiver is inapplicable to parents of U.S. citizens. It is possible to argue that the provisional unlawful presence waiver was an attempt to simplify and humanize the unlawful presence waiver by allowing some people to complete the process within the United States. However, this attempt failed to humanize or simplify

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44. Collopy, *supra* note 39, at 2.
45. *Id*. at 3; 8 C.F.R. §§ 212.7(e)(3)–(4) (2020).
46. Napolitano, *supra* note 43.
47. *See* § 1182, *supra* note 40 and accompanying text.
48. Brown, *supra* note 42, at 3; *see also* 8 CFR §§ 212.7(e)(3)–(4) (2020).
49. Brown, *supra* note 42, at 2.
50. *See id*.
51. AUSTIN T. FRAGOMEN, JR., CAREEN SHANNON & DANIEL MONTALVO, IMMIGR. PROC. HANDBOOK § 19:24 (2020–21 ed. 2020).

it for parents of U.S. citizens. This differing treatment by the statutory waiver is a violation of the equal protection clause as it treats similarly situated familial relationships differently and impinges on a fundamental right.[52]

III. EQUAL PROTECTION

¿De qué me sirve el dinero si estoy como prisionero dentro de esta gran nación?

Cuando me acuerdo hasta lloro y aunque la jaula sea de oro
No deja de ser prisión.[53]

The unequal treatment of parents of U.S. citizens is an equal protection violation. While the Fifth Amendment does not contain an explicit reference to equal protection, the Court has held that the same equal protection principles applicable to state action under the Fourteenth Amendment are present with respect to the federal government via the Fifth Amendment's Due Process Clause.[54] In fact, the "Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."[55] The Fourteenth Amendment states that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[56] This is "essentially a direction that all persons similarly situated should be treated alike."[57]

Equal protection claims challenge disparities in the government's treatment of classes of people whose situations are arguably indistinguishable.[58] Equal protection claims state that the government is intentionally treating one group of people differently from another group and, given the government's intent or purpose, there is no appropriate distinction between the two groups; the two groups are similarly situated.[59] The statutory waiver that this Note focuses on qualifies as government action, as it is legislation enacted by the federal government.[60] Additionally, the statutory waiver in question

52. *See infra P*art II.

53. LOS TIGRES DEL NORTE, *Jaula de Oro*, *in* JAULA DE ORO (Fonovisa 1983) (translating to "What's money good for if I live like a prisoner in this great nation? When I'm reminded of this I cry, and although this cage is made of gold, it's still a prison").

54. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Lawrence v. Texas, 539 U.S. 558, 575 (2003) ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.").

55. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) (citing various U.S. Supreme Court cases).

56. U.S. CONST. amend. XIV, § 1.

57. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216 (1982)).

58. *See id.*; *see e.g.*, People v. Guzman, 35 Cal. 4th 577, 591 (2005).

59. *See Guzman,* 35 Cal. 4th at 591–92.

60. *See supra* Part I discussion.

divides applicants' familial relationships by specifically listing certain relationships as eligible.[61] The statutorily qualifying relationships are those involving a U.S. citizen or permanent resident spouse or parent, while familial relationships between an applicant and a U.S. Citizen or U.S. Permanent Resident's son or daughter are insufficient.[62] The following sections will expand upon how these familial relationships are similarly situated and how the statute does not survive the applicable standard of review: strict scrutiny.

A. *Similarly Situated*

Courts have consistently held that "the first step in equal protection analysis is to identify the state's classification of groups."[63] In addition, "the groups must be comprised of similarly situated persons so that the factor motivating the alleged discrimination can be identified."[64] The groups "do not need to be similar in all respects . . . but they must be similar in those respects that are relevant [.]"[65] When determining if two groups are similarly situated, the "inescapable answer is that [the Court] must look beyond the classification to the purpose of the law."[66] Thus, "[a] reasonable classification is one that includes all persons who are similarly situated with respect to the purpose of the law."[67]

Here, the unlawful presence waiver excludes familial relationships that are similarly situated to qualifying familial relationships, despite their similarities in the strength of the relationships and consistent similar treatment by the family-based immigration system. The unlawful presence waiver, on its face, separates similarly situated familial relationships: immediate family members. 8 U.S.C. §1151 defines immediate family members as "the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age."[68] This section specifies that these immediate family members may petition for an immigration benefit without numerical limitations.[69] This is a significant benefit since visa applications with numerical limitations, as demonstrated by Figure 1, have a long waiting period.[70] A U.S. citizen can petition for their parents,

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61. *See supra* Part I discussion.
62. *See supra* Part I discussion.
63. Country Classic Dairies, Inc. v. Mont. Dep't of Com. Milk Control Bureau, 847 F.2d 593, 596 (9th Cir. 1988).
64. Thornton v. City of St. Helens, 425 F.3d 1158, 1167 (9th Cir. 2005).
65. Ariz. Dream Act Coal. v. Brewer, 855 F.3d 957, 966–68 (9th Cir. 2017) (citing Nordlinger v. Hahn, 505 U.S. 1, 10 (1992)) (finding irrelevant, for purpose of granting drivers' licenses, a distinction based on receiving relief through the Deferred Action for Childhood Arrivals policy or the Immigration and Nationality Act).
66. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 346 (1949).
67. *Id*.
68. 8 USC § 1151(b)(2)(A)(i).
69. 8 USC § 1151(b).
70. *See Visa Bulletin for January 2021*, U.S. DEP'T OF STATE: BUREAU OF CONSULAR AFF. (Dec. 8, 2020), https://perma.cc/GEJ6-RQ2B (demonstrating that wait times for processing visa applications subject to numerical limitations range from six years to twenty-five years) [*hereinafter Visa Bulletin*].

spouse, and children without being subject to the numerical limitations on visas set by statute.[71]

FIGURE 1: VISA BULLETIN FOR JANUARY 2021[72]

Family-Sponsored	All Chargeability Areas Except Those Listed	China-mainland Born	India	Mexico	Philippines
F1	15SEP14	15SEP14	15SEP14	15JAN98	01JAN12
F2A	C	C	C	C	C
F2B	08JUL15	08JUL15	08JUL15	01MAY99	15AUG11
F3	08JUL08	08JUL08	08JUL08	22AUG96	01MAR02
F4	08OCT06	08OCT06	15MAR05	01JUL98	01FEB02

The statute delineating primary eligibility for an immigrant visa gives these three specific familial relationships special benefits because of the importance and strength of these relationships. A spousal relationship is not one of blood but of emotion. The right to marriage "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[73] Consequently, Congress recognized the importance of these bonds by including spouses in the list of relationships to which it afforded exclusive benefits.

Similarly, the parent and child relationship is the strongest blood relationship.[74] The genetic code that creates a human is derived from both parents.[75] While various familial relationships share genetic codes, the parent/child relationship shares 50 percent of their genetic makeup—the highest between any relatives except for identical twins.[76] This special and important connection was recognized by Congress when it granted exclusive benefits to this

71. *See generally* 8 USC § 1153(a).

72. *Visa Bulletin*, *supra* note 70.

73. Loving v. Virginia, 388 U.S. 1, 12 (1967); *See also* Maynard v. Hill, 125 U.S. 190, 205, 211 (1888) (stating that marriage is "the most important relation in life" and "the foundation of the family and society, without which there would be neither civilization nor progress"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (stating that the right "to marry, establish a home and bring up children" is a central part of liberty protected by the Due Process Clause); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (stating that marriage to be "one of the basic civil rights of man," "fundamental to the very existence and survival of the race"); Boddie v. Connecticut, 401 U.S. 371, 376, 383 (1971) (stating that "marriage involves interests of basic importance to our society" and is "a fundamental human relationship").

74. *See generally* Marina Watanabe, *I Didn't Get It from My Mama: Children with DNA Almost Exclusively from Their Dads*, SCIENCE IN THE NEWS, https://perma.cc/7GKX-AH65 (last visited Apr. 23, 2021).

75. *Id.*

76. *Average Percent DNA Shared Between Relatives,* 23ANDME, https://perma.cc/652U-42EH (last visited Apr. 23, 2021).

relationship, such as eligibility for a family-based immigrant visa without numerical limitations. Congress recognized that this important connection goes both ways when it stipulated that U.S. citizens may petition for family-based immigrant visas for their parents and children.

It is true that the statute treats married sons and daughters and those over the age of twenty-one differently from unmarried children and children under twenty-one years old—it limits the number of visas that may be granted to sons and daughters over the age of twenty-one and those that are married.[77] This differing treatment can be used to claim that the unlawful presence waiver's treatment of children of U.S. citizens is justified. However, that comparison is unequal. The focus of the family-based immigration statute is the U.S. citizen petitioner; the U.S. citizen petitioner has the statutory ability to request an immigration benefit for her spouse, parents, and progeny. The numerical limitation on sons and daughters over the age of twenty-one and those that are married does not prevent a U.S. citizen from petitioning for these children. In contrast, in the context of applying for an unlawful presence waiver, a U.S. citizen is prevented from being the basis for the unlawful presence waiver for their parents. For parents of U.S. citizens, the unlawful presence wavier is not simply a numerical limitation that might prolong the process; it is a prohibition by exclusion. Consequently, the relationships between a U.S. citizen and their spouse, parent, and children are similarly situated.

B. *Scrutiny*

Courts are in consensus that "[t]he basic framework of analysis of such a[n Equal Protection Claim] is well settled."[78] It must first be decided "whether the [statute] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny."[79] The Court in *Plyer v. Doe* recognized that undocumented individuals "may claim the benefit of the Fourteenth Amendment's guarantee of equal protection."[80] Moreover, the Court has also established "the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[81]

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77. *See generally* 8 U.S.C. § 1153(a).

78. Maher v. Roe, 432 U.S. 464, 470 (1977).

79. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

80. Plyler v. Doe, 457 U.S. 202, 210 (1982) (stating that "[w]hatever [their] status under the immigration laws, an [undocumented individual] is surely a 'person' in any ordinary sense of that term").

81. Troxel v. Granville, 530 U.S. 57, 66 (2000); *See also* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); Santosky v. Kramer, 455 U.S. 745, 753 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (explaining that liberty includes "the right of the

The Second Circuit has recognized "the right of the family to remain together without the coercive interference of the awesome power of the state."[82] This stems from the Supreme Court's recognition of the interest of a parent in the companionship, care, custody, and management of his or her children" and the fact that "[t]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment . . . , the Equal Protection Clause of the Fourteenth Amendment . . . , and the Ninth Amendment.[83]

The Court has also expressed that "[t]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association."[84] A parent is not free to direct the upbringing of their children when they live under the fear of deportation, cannot freely travel, or are thousands of miles away. Consequently, a review under strict scrutiny is appropriate as the narrow waiver infringes upon the fundamental right of parents to direct the upbringing of their children.

It is true that the Court has "repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens[,]"[85] and in *Fiallo v. Bell*, the Court appeared to establish a deferential standard of review, analogous to rational basis review, for immigration legislation.[86] However, the unlawful presence waiver necessitates, and precedent supports, a review under strict scrutiny.

In *Fiallo*, three sets of illegitimate offspring and their unwed natural fathers sought a special immigration preference through their relationships to either a U.S. citizen (or permanent resident) father or U.S. citizen (or permanent resident) offspring.[87] The individuals challenged Sections 101(b)(1)(D) and 101(b)(2) of the Immigration and Nationality Act because the sections' respective definition of child and parent prevented the father or offspring from receiving preferential treatment.[88] The challengers sought the preferential treatment of not being subject to "an applicable numerical quota or the labor certification requirement."[89]

The Court began its justification for using rational basis review of the legislation by explaining its deference to Congress in immigration matters,

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individual to . . . bring up children"); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534–35 (1925) (finding "it entirely plain that the Act . . . unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control").

82. Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977).

83. Stanley v. Illinois, 405 U.S. 645, 651 (1972) (citations omitted); *see also Duchesne*, 566 F.2d at 825.

84. Smith v. Org. of Foster Fams. For Equal. & Reform, 431 U.S. 816, 844 (1977); *See Duchesne*, 566 F.2d at 825.

85. Fiallo v. Bell, 430 U.S. 787, 792 (1977) (citations omitted).

86. *See id*. at 795; Sessions v. Morales-Santana, 198 L. Ed. 2d 150, 155 (2017).

87. *Fiallo*, 430 U.S. at 790.

88. *Id*. at 788–91.

89. *Id*. at 789–90.

but it recognized that "Congress regularly makes rules that would be unacceptable if applied to citizens."[90] Importantly, the Court in *Fiallo* expressed reluctance towards using any type of heightened judicial scrutiny under the unique facts of *Fiallo*, as petitioned by one of the parties, because the case law presented involved procedural, not substantive, law.[91] The difference between substantive and procedural immigration laws has "proved elusive,"[92] yet it significantly differentiates *Fiallo* from the equal protection claim against the unlawful presence waiver.

Fiallo involved the classification of unwed natural fathers and their illegitimate children for purposes of family-based preference.[93] In *Fiallo*, parents were seeking reclassification to be placed under the same preferential categories as those who satisfied the statutory parent-child relationship.[94] Therefore, the parents would not be subject to the statutory numerical limitation.[95] The claim for equal protection that this Note focuses on does not question or challenge the statutory fulfillment of the parent-child relationship between U.S. citizens. Importantly, the claim of equal protection regarding parents of U.S. citizens, unlike *Fiallo*, does not seek a reclassification of the preferential system under which parents, who fulfill the statutory parent-child definition, fall under. The parents, who are the subject of this Note, without question, fall under the immediate family member preference category and are not subject to numerical limitations.

In *Fiallo*, the court analyzed a claim seeking to change a substantive immigration statute by expanding the familial relationships that would not be subject to numerical limitations.[96] With parents of U.S. citizens, the equal protection claim does not involve substantive requirements. The parents' claim does not seek to grant eligibility to otherwise ineligible individuals. In fact, their claim seeks remedy for individuals that meet the substantive requirements of the family-based visa classification set out by statute but are prevented from obtaining an immigration benefit by the procedure that treats similarly situated familial relationships differently.

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90. *Id*. at 792.

91. *Id*. at 794 ("At issue in the border-search cases, however, was the nature of the protections mandated by the Fourth Amendment with respect to Government *procedures* designed to stem the illegal entry of aliens.") (emphasis added).

92. Barmo v. Reno, 899 F. Supp. 1375, 1383 n.8 (E.D. Pa. 1995) (citing Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1659–73 (1992)). While it is true that the Sixth Circuit in a footnote stated that "substantive immigration laws answer the questions, [']who is allowed entry['] or [']who can be deported [,][']" Detroit Free Press v. Ashcroft, 303 F.3d 681, 686 n.6 (6th Cir. 2002), here, the unlawful presence waiver does not answer either of those questions. The unlawful presence waiver does not make anyone eligible for entry; it is merely a procedural addition to the unlawful presence bar which does make an individual ineligible for entry. Moreover, not fulfilling the requirements of the unlawful presence waiver does not make an individual deportable.

93. *Fiallo*, 430 U.S. at 789.

94. *Id*. at 789, 791.

95. *Id*.

96. *See id*. at 788–90.

Moreover, the party challenging the legislation in *Fiallo* "apparently . . . [was] not challeng[ing] the need for special judicial deference to congressional policy choices in the immigration context [,]"[97] which could be one of the reasons the Court "s[aw] no reason to review the broad congressional policy choice at issue . . . under a more exacting standard than was applied in [*Kleindienst v. Mandel*]."[98] However, like *Fiallo*, *Kleindienst* is distinguishable from the claim of equal protection at issue in this Note. In *Kleindienst*, Mandel, a Belgium professional journalist, and six university professors from the United States challenged Mandel's visa ineligibility and the Attorney General's waiver denial.[99] Specifically, the plaintiffs challenged Section 212(a)(28) of the Immigration and Nationality Act of 1952, which excludes individuals who advocate for and write about "governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship."[100] The plaintiffs argued, inter alia, that the denial of the Belgian journalist's visa violated the professor's First Amendment rights by excluding "leftists" and that the waiver provision was "an unconstitutional delegation of congressional power to the Attorney General because of its broad terms, lack of standards, and lack of prescribed procedures."[101]

The facts in *Kleindienst* are distinguishable from the equal protection claim at issue in this Note. The claim in *Kleindienst* involved agency discretion.[102] The claimant in *Kleindienst* challenged the decision of the Attorney General to grant a waiver of inadmissibility, a decision subject exclusively to the Attorney General's discretion.[103] In fact, the standard that the Court in *Fiallo* extracted and adopted from *Kleindisent* is specifically linked to the Executive's exercise of power delegated to it by Congress,[104] not a blanket standard for immigration legislation. While the granting of the waiver of unlawful presence at issue is similarly subject to the Attorney General's discretion, a decision by the Attorney General is not at issue; a constitutional violation is at issue. The difference in treatment of similarly situated individuals in violation of the constitution is at issue, and a review of such claims is "of the very essence of judicial duty."[105]

The claim that this Note focuses on is similar to the claim in *Sessions v. Morales-Santana*.[106] In *Morales-Santana*, the foreign-born son of a U.S. citizen sought to oppose his deportation by challenging the constitutionality of 8 U.S.C. § 1409(c), which created an exception to 8 U.S.C. § 1401(a)(7) for

97. *Id.* at 793.
98. *Fiallo*, 430 U.S. at 795 (citation omitted).
99. Kleindienst v. Mandel, 408 U.S. 753, 756–60 (1972).
100. *Id.* at 755.
101. *Id.* at 760.
102. *See id.* at 754–55.
103. *See id.*
104. *Kleindienst*, 408 U.S. at 770.
105. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).
106. Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017).

unwed U.S.-citizen mothers only.[107] Under 8 U.S.C. § 1401(a)(7), in order for a U.S. citizen to grant U.S. citizenship to his or her foreign-born child, the U.S. citizen parent must have lived in the United States for at least ten years prior to the birth of the child.[108] As applicable only to unwed U.S. citizen mothers, § 1409(c) reduced the requirement of physical presence in the United States from ten years to just one year.[109] Mr. Morales-Santana, whose father was twenty days short of meeting the general rule's physical presence requirement of ten years, brought an equal protection claim to assert citizenship.[110]

The Court in *Morales-Santana* recognized that *Fiallo* concerned an expansion of the preferential immigration system, which was not at issue in *Morales-Santana*.[111] Similarly to how *Morales-Santana* "involves no entry preference for aliens," there is no question regarding the preference category that parents of U.S. citizens fall under as immediate relatives, nor is it an issue. When a claimant is not seeking to expand the preferential system, "the Court has not disclaimed, as it did in *Fiallo*, the application of an exacting standard of review."[112] Recognizing this difference and acknowledging precedent, the Court in *Morales-Santana* declined to depart from the traditional standard applicable in classifications based on gender, the classification at issue in *Morales-Santana*.[113]

Accordingly, in the equal protection claim at issue here, a court should not depart from strict scrutiny, the traditional standard of review applicable in equal protection claims that infringe upon fundamental rights. Precedent does not prevent, and in fact supports, using strict scrutiny when a fundamental right is involved in a procedural immigration statute. Under a strict scrutiny review of an equal protection claim, a statute can be "constitutional only if [it is] narrowly tailored to further [a] compelling governmental interest[]."[114]

1. *Government Interest*

In analyzing legislation under strict scrutiny, courts will not accept just any interest as compelling.[115] Some examples of compelling government interests noted by the Court are protecting children from injury,[116] pregnant women and unborn babies,[117] and "voters from confusion and undue

107. *Id.* at 1686.
108. *Id.* at 1682.
109. *Id.*
110. *Id.* at 1686–87.
111. *Id.* at 1693–94.
112. *Id.* at 1694 (citation omitted).
113. *See id.* at 1693–94 (finding that the "the Government has supplied no 'exceedingly persuasive justification[]' . . . for § 1409(a) and (c)'s 'gender-based' and 'gender-biased' disparity").
114. Grutter v. Bollinger, 539 U.S. 306, 326 (2003).
115. *See* Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720–21 (2007) ("[O]ur prior cases, in evaluating the use of racial classifications in the school context, have recognized two interests that qualify as compelling. The first is the compelling interest of remedying the effects of past intentional discrimination . . . [T]he second . . . is the interest in diversity in higher education . . . ").
116. *See* Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 755 (1996) (plurality opinion) ("We agree with the Government that protection of children is a 'compelling interest.'").
117. *See*, *e.g.*, Roe v. Wade, 410 U.S. 113, 162–63 (1973).

influence."[118] The government must prove that something is a compelling State interest[119] and must "establish that the alleged objective is the actual purpose underlying the discriminatory classification."[120]

The passage of IIRIRA occurred "in a rushed atmosphere."[121] However, legislators' comments during official debate on this Act and the Antiterrorism and Effective Death Penalty Act (AEDPA) provide some insight into the alleged government interest: preventing criminal activity.[122] The discussion and passage of these laws came after three major events: the 1993 World Trade Center bombing, the popularity of anti-immigrant legislation in California in 1994, and the 1995 Oklahoma City bombing.[123] These two legislations, enacted within months of each other, "contain[ed] comprehensive amendments to the Immigration and Nationality Act (INA)."[124] IIRIRA and AEDPA together create one of the most sweeping reforms to the INA, specifically in regards to deportability and inadmissibility.[125] During an official AEDPA debate, Representative Bill McCollum stated the need for ". . . deporting . . . in a proper fashion . . . would-be terrorists and criminal aliens . . . ."[126] During the same discussions, Representative Lamar Smith stated that the AEDPA "[e]nsured that [Americans] will be protected from the criminals and terrorists who want to prey on them."[127] In the same spirit, when President Bill Clinton signed the IIRAIRA into law, he stated that "[i]t strengthens the rule of law by cracking down on illegal immigration at the border, in the workplace, and in the criminal justice system."[128] In fact, in *I. N.S. v. St. Cyr*, the government acknowledged that these laws were "designed in large part to reduce the opportunities for criminal aliens to obtain administrative relief from deportation, and to facilitate their removal."[129] Assuming a court accepts this as the actual purpose of the legislation *and* that it is a compelling government interest, it must still be narrowly tailored to achieve that interest.

2. *Narrowly Tailored*

A statute is not considered narrowly tailored if it does not advance the compelling government interest, is overinclusive, underinclusive, or not the

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118. Burson v. Freeman, 504 U.S. 191, 199 (1992).

119. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 428–29 (2006); Burwell v. Hobby Lobby Stores, 573 U.S. 682, 737 (2014) (Kennedy, J., concurring).

120. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982).

121. *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy* 19 HUM. RTS. WATCH 1, 16, https://perma.cc/2JWN-N44C [hereinafter *Forced Apart*].

122. *See id.* at 116-19 (combining the discussion of the Antiterrorism and Effective Death Penalty Act (AEDPA) and IIRIRA into the discussion of the "1996 laws").

123. *Forced Apart*, *supra* note 121.

124. I.N.S. v. St. Cyr, 533 U.S. 289, 292 (2001).

125. *See* Sharry, *supra* note 4, at 270.

126. 142 CONG. REC. 4,806 (1996) (statement of Rep. McCollum) [hereinafter Debate].

127. *Id.* at 7972 (statement of Rep. Smith).

128. *Presidential Statement on Signing the Omnibus Consolidated Appropriations Act 1997*, 32 WEEKLY COMP. PRES. DOC. 1935 (Sept. 30, 1996), https://perma.cc/9EW8-B98G.

129. Brief for Petitioner at 2, I.N.S. v. St. Cyr, 533 U.S. 289 (2001) (No. 00-767).

least restrictive alternative.[130] From their enactment, the IIRIRA and AEDPA were criticized for being overinclusive and failing to advance the implied government interest.[131] Representative Patsy Mink of Hawai'i expressed concern that this legislation "expand[ed] authorization for deportation of aliens without any association with crimes of violence or terrorism."[132] The following analysis of waivers for immigration inadmissibility demonstrates that this unlawful presence waiver is not narrowly tailored.

The history of immigration reform evidences that family reunification is the current focus of the U.S. immigration system. Prior to 1965, the U.S. immigration system, in addition to a national quotas system, used a four-category selection system which prioritized individuals with "high education or exceptional abilities."[133] Consequently, 50 percent of the number of visas allotted to a nation were allocated to individuals with high education or exceptional abilities, the prioritized category.[134] Nevertheless, the system reserved the remaining 50 percent to be divided among three specific categories of relatives of U.S. citizens and permanent residents.[135] This four-category system was a precursor to the current preference system.[136]

The current preference system was established by the Immigration and Nationality Act Amendments of 1965 and "place[d] higher priority on family reunification than on needed skills."[137] At first, the application of the new system and country origin quotas varied by geographic locations, but in 1978, legislation "combined the separate ceilings into a single worldwide ceiling of 290,000 with a single preference system."[138] Eventually, the preference system established four categories of immigrants.[139] One of those categories is family-based immigration which is further broken down into a five-category family-based preference system.[140] Within the overarching family-based immigration category, the first sub-category is immediate relatives of U.S. citizens (spouses, minor children, and parents) which stipulates no numerical limitations.[141] The other four sub-categories, which do have numerical limitations, include: (1) unmarried sons and daughters of U.S citizens; (2) spouses, children, and unmarried sons and daughters of permanent residents; (3) married sons and daughters of

130. Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2421–22 (1996).

131. *See Forced Apart*, *supra* note 121, at 18 (quoting statements by Rep. Mink and President Clinton).

132. Debate, *supra* note 126, at 7972 (statement of Rep. Mink).

133. JOYCE VIALET, CONG. RSCH. SERV., 80-223 EPW, A BRIEF HIST. OF U.S. IMMIGR. POL'Y 21 (1980) [hereinafter VIALET].

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 21, 24.

138. VIALET, *supra* note 133, at 25 (Prior to 1978, "the preference system and the per-country limits were applied to the two hemispheres under the separate ceilings of 170,000 for the Eastern Hemisphere, and 120,000 for the Western Hemisphere").

139. WILLIAM A. KANDEL, CONG. RSCH. SERV., 7-5700, U.S. FAMILY-BASED IMMIGRATION POLICY 3 (2018) (listing the four categories as family-based, employment-based, diversity visa, and refugees and asylum).

140. *Id.* at 1.

141. *Id.* at 3.

U.S. citizens; and (4) brothers and sisters of U.S. citizens.[142] These last four subcategories of family-based immigration are allotted 71 percent of the total immigrant visas allocated among the general four categories of immigrants.[143] This does not include the unlimited number of visas for eligible immediate family relatives of U.S. citizens.[144] The significant and uncoincidental allocation to immediate family members emphasizes the goal of family reunification throughout the U.S. immigration system.

FIGURE 2: NUMBER OF VISAS ALLOCATED TO DIFFERENT CATEGORIES[145]

Family-Sponsored Immigrants			480,000
Immediate Relatives of U.S. Citizens:		unlimited	
Family Preference Immigrants:		226,000	
1st Preference:	Unmarried sons and daughters of citizens 23,400 + unused 4th Preference visas	23,400	
2nd Preference (A):	Spouses and minor children of LPRs	87,900	
2nd Preference (B):	Unmarried sons and daughters of LPRs + unused 1st Preference visas	26,300	
3rd Preference:	Married children of citizens + unused 1st and 2nd Preference visas	23,400	
4th Preference:	Siblings of adult U.S. citizens + unused 1st, 2nd, & 3rd Preference visas	65,000	
Employment-Based Preference Immigrants			**140,000**
Diversity Visa Lottery Immigrants			**55,000**
Refugees and Asylees			**unlimited**
TOTAL			**675,000**

142. *Id*. at 3–4.
143. *See id*. at 3; 8 U.S.C. §1151.
144. *See* KANDEL, *supra* note 139, at 3.
145. *Id*. at 4 (breaking down the number of visas allocated to the different categories).

When a statutory waiver omits one of the strongest familial relationships, it goes against family reunification, a long-established government interest specific to the U.S. immigration system. The specific statutory waiver that this Note focuses on appears to be in accord with this established tradition by allowing a waiver for spouses, daughters, and sons of U.S. citizens. However, it goes directly against the family reunification interest by failing to list parents of U.S. citizens. Because the U.S. immigration system does not make this distinction and gives the same statutory preference and immigration eligibility to spouses, parents, sons, and daughters of U.S. citizens, the waiver at issue is underinclusive.

The similarities between the relationships is further demonstrated through analyzing how all the other immigration waivers are allowed under the same section. First, while current or past membership in a totalitarian party makes one inadmissible to the United States,[146] the applicable statute explicitly carves out an exception for close family members of U.S. citizens.[147] Even if someone has current or past membership in a totalitarian party,

> [t]he Attorney General may, in the Attorney General's discretion, waive the application of [the totalitarian party prohibition] in the case of an immigrant who is the parent, spouse, son, daughter, brother, or sister of a citizen of the United States or a spouse, son, or daughter of an alien lawfully admitted for permanent residence for humanitarian purposes, to *assure family unity*.[148]

The waiver for membership in a totalitarian party specifically lists parents of U.S. citizens; a relationship that is not included in the unlawful presence waiver. Thus, because the unlawful presence waiver does not include parents of U.S. citizens like the waiver to membership in a totalitarian party, the unlawful presence waiver fails to accord with the family unity spirit of the immigration system and is underinclusive.

Similarly, the inadmissibility statute prohibits admissibility of an individual who at "any time knowingly has encouraged, induced, assisted, abetted, or aided" the smuggling of another person into the United States.[149] However, the statute once again carves out an exception or "special rule" for involvement in smuggling "in the case of family reunification."[150] If the person applying for an immigration benefit "encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law," then the inadmissibility

146. 8 U.S.C. § 1182(a)(3)(D)(i).
147. 8 U.S.C. § 1182(a)(3)(D)(iv).
148. *Id.* (emphasis added).
149. 8 U.S.C. § 1182(a)(6)(E)(i).
150. 8 U.S.C. § 1182(a)(6)(E)(ii).

grounds based on smuggling can be waived.[151] The statute aimed at preventing smuggling allows a waiver, in the spirit of family unity, for petitioners who sought to bring their spouses, parents, daughters, and sons into the United States against the law. This is another provision that affords the same privileges to spouses, parents, daughters, and sons of U.S. citizens, indicating the significance of this group of familial relationships and demonstrating that the unlawful presence waiver is underinclusive by failing to include the parents of U.S. citizens.

Similarly to the length of the unlawful presence bar that is this Note's focus, 8 U.S.C. § 1182(9) deems an individual ineligible to apply for admission into the United States until five or ten years after his departure if the applicant has been ordered removed or "departed the United States while an order of removal was outstanding."[152] However, an exception to this prohibition is applicable if "within a period . . . , prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission." [153] In other words, if a person is ordered removed, they are prohibited from readmission into the United States for five or ten years. However, the Attorney General has the authority to exempt the individual from the applicability of this section. This provision carries a similar penalty to the unlawful presence bar, but it differs in that it can be obtained by anyone at the Attorney General's discretion without the requirement of being a spouse, parent, daughter, or son of a U.S. citizen. The similarity in the length of the prohibition on admission evidences that Congress judges a violation of this provision to be at the same level as that of accruing unlawful presence yet does not limit the opportunity to receive the waiver based on familial relationships. This evidences that the unlawful presence waiver listing of eligible familial relationships is not the least restrictive alternative.

An immigrant can also be deemed inadmissible into the United States on health grounds, including having a communicable disease, lacking vaccination against vaccine-preventable diseases, and drug abuse or addiction.[154] However, in the spirit of family unity, the same statute allows the Attorney General to waive inadmissibility based on communicable diseases if the applicant has a spouse, parent, son or daughter that is a U.S. citizen.[155] In

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151. 8 U.S.C. § 1182(d)(11). In addition to this waiver, and still seeking to maintain family unity, the prohibition simply does not apply if the actions in question occurred before May 4, 1988. The applicant must have been present in the United States before May 4, 1988, and the applicant must be "seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990." 8 U.S.C. § 1182 (a)(6)(E)(ii).

152. 8 U.S.C. § 1182(a)(9)(A)(i)-(ii) (prescribing that the length of the bar depends on the section under which the applicant was removed).

153. 8 U.S.C. § 1182(a)(9)(A)(iii).

154. *See* 8 U.S.C. §§ 1182(a)(1)(A)(i)–(iv).

155. *See* 8 U.S.C. § 1182(g)(1).

fact, the statute does not limit applicability to a U.S. citizen's spouse, parent, son, or daughter but extends it to the same relatives that are permanent residents or have "been issued an immigrant visa."[156] This exception further demonstrates the preference given to the spouse, parent, daughter, and son familial relationships and the underinclusive nature of the unlawful presence waiver.

8 U.S.C § 1182(h) provides an expansive waiver for inadmissibility on criminal grounds. Specifically, this subsection provides a waiver for crimes involving moral turpitude, multiple criminal convictions, prostitution and commercialized vice, certain "aliens" involved in serious criminal activity who have asserted immunity from prosecution, and possession of substances "insofar as it relates to a single offense of simple possession of thirty grams or less of marijuana."[157] A crime involving moral turpitude is "'conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general.'"[158] Once again, in the spirit of family unity, the statute provides that the Attorney General can waive inadmissibility on criminal grounds including crimes involving moral turpitude and multiple criminal convictions if the applicant is the "spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence."[159] Crimes of moral turpitude can be waived if a person is the parent of a U.S. citizen, but not unlawful presence.

In sum, the same statutory provisions that make "criminals" inadmissible; that appear to be in the spirit of the purpose of the 1966 immigration overhaul as expressed by President Clinton, Rep. McCollum, and Rep. Smith;[160] and that "added four more types of crimes to the aggravated felony definition and lowered certain threshold requirements,"[161] have a waiver that is specifically available to spouses, parents, daughters, and sons of U.S. citizens or permanent residents.[162] This not only shows that the unlawful presence waiver is underinclusive, as it fails to include parents of U.S. citizens contrary to several other waivers, but it also shows that the waiver is not the least restrictive alternative and is not framed to advance the compelling government interest. Accordingly, because the unlawful presence wavier is underinclusive, not the least restrictive alternative, and does not advance the compelling government interest, it is not narrowly tailored.

156. *Id*.
157. 8 U.S.C. § 1182(h).
158. *Short*, 20 I & N Dec. 136, 139 (B.I.A. 1989) (citation omitted).
159. 8 U.S.C § 1182(h)(1)(B).
160. *See supra* notes 126–28.
161. *Forced Apart*, *supra* note 121.
162. *See supra* Part II(B)(ii) discussion.

IV. CONCLUSION

A los veinte años me fui, A los veinte regrese, Las piedras si son las mismas, Pero pues ya para que, Si mis padres ya no viven[163]

The U.S. immigration system currently is based upon the goal of family reunification. This purpose is at odds with the unlawful presence waiver that treats similarly situated familial relationships differently, thus violating the equal protection clause.[164] This violation is demonstrated through the historical development of the immigration system and the continuance of waivers for family reunification despite major changes within the system. A clear pattern is demonstrated through examining the current system of waivers in the inadmissibility statute: the importance of the spouse, parent, daughter, and son familial relationships. It is not coincidental that the family-based preference system, the broad waiver for criminal convictions, and at least four other statutory waivers all group together the spouse, parent, daughter, and son familial relationships.[165] This intentional grouping indicates that the spouse, parent, daughter, and son relationship groups are similarly situated and the distinction made by the unlawful presence waiver does not advance the stated government interest, is underinclusive, and is not the least restrictive alternative. In other words, it fails strict scrutiny. In these matters, the Court has two options: extension or exclusion of the benefit.[166] As the Court noted in *Sessions v. Morales-Santana*, "[o]rdinarily, . . . 'extension, rather than nullification, is the proper course.'"[167] Thus, the Court should extend the waiver availability to parents of U.S. citizens. The long list of waivers demonstrates that this is the "course Congress likely would have chosen 'had it been apprised of the constitutional infirmity.'"[168]

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163. GRUPO MONTEZ DE DURANGO, *Las Mismas Piedras*, *on* EL SUBE Y BAJA (Disa Records 2002) (recounting in Spanish: "At the age of twenty I left, At twenty I came back, The stones are the same, But what good is that, If my parents no longer live.").

164. An alternative to this claim, which would provide the same relief to parents of U.S. citizens, is through the Secretary of Homeland Security's discretion to "parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States." 8 U.S.C. § 1182(d)(5); *Privacy Impact Assessment for the ICE Parole and Law Enforcement Programs Unit Case Management System*, U.S. DEP'T OF HOMELAND SEC. (Dec. 3, 2018), https://perma.cc/LVA2-SCCM. Through the granting of this parole, the parents of U.S. citizens would be eligible to adjust their status inside the United States and, thus, not be barred by the unlawful presence bar. *See supra* Part IA.

165. There are two waivers that do not follow the same grouping, however, they both express that the waiver is for family unity. *See* 8 U.S.C. § 1182(a)(9)(B)(iii)(III) (stating that "[n]o period of time in which the alien is a beneficiary of family unity protection pursuant to section 301 of the Immigration Act of 1990 shall be taken into account in determining the period of unlawful presence in the United States."); 8 U.S.C. § 1182(a)(6)(d)(12) (establishing a waiver for individuals subject to a civil penalty "for humanitarian purposes or to assure family unity").

166. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1698 (2017).

167. *Id*. at 1699 (quoting Califano v. Westcott, 443 U.S. 76, 89 (1979)); *see also id*. at 1701 (quoting Levin v. Com. Energy, 560 U.S. 413, 427 (2010)) (finding that the Court "must adopt the remedial course Congress likely would have chosen 'had it been apprised of the constitutional infirmity'" and applying the longer physical presence requirement, at issue in the case, to all "in the interim").

168. *See id*. at 1701 (quoting Levin v. Com. Energy, 560 U.S. 413, 427 (2010)).