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Resisting Separation: A New Approach to Protecting the Unique Rights of U.S.-Born Minor Children Whose Parents Face Deportation

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RESISTING SEPARATION: A NEW APPROACH TO PROTECTING THE UNIQUE RIGHTS OF U.S. - BORN MINOR CHILDREN WHOSE PARENTS FACE DEPORTATION

I. INTRODUCTION

For Brenda Barrios, 31, who lives in Silver Spring, Md., [Donald] Trump's election is a "nightmare." She allowed her 10-year-old American-born son, Frankie, to stay up an hour past his bedtime to watch election results on Univision.

"When he saw the map go red, and red, and red, and red, he asked me, 'Mommy, is Donald Trump going to win?'" she said. "I told him not to worry." But the next morning, when Frankie woke up for school, the first question out of his mouth was: Who won? When Barrios told him it was Trump, Frankie burst into tears.

"He is afraid his mom is going to be sent to another country," she said. For Barrios, that pain is all too real. Her parents immigrated illegally to the United States when she was 5, leaving her and her sister behind in Guatemala. When she and her sister joined them in 2003, Barrios finally felt like she had a family. But it didn't last. Her father was deported in early 2005. Barrios's mom went with him. She hasn't seen them since.

With Trump as president, Barrios shares her son's fear that her own family will be torn apart. She fears ICE will arrest her husband, who is a carpenter and plumber, while he is at work. Or that they will come for her.¹

This Note addresses how, in the wake of recent executive and judicial decisions regarding removal of parents of U.S. citizen children, advocates for such families should pursue a judicial remedy; the approach detailed here is designed with the purpose of avoiding the dead end these families have encountered in the judicial system over the course of decades.²

¹ Michael E. Miller, *'I Don't Feel Safe': Undocumented Immigrants Fear What Trump Will Do as President*, WASH. POST (Nov. 9, 2016), https://www.washingtonpost.com/local/i-dont-feel-safe-undocumented-immigrants-fear-what-trump-will-do-as-president/2016/11/09/0a2bfc36-a6cc-11e6-8042-f4d111c862d1_story.html (describing some undocumented immigrants' fear of deportation under President Trump).

² See *infra* Part IV.

Part II of this Note addresses the scale of the issue of minor U.S. citizens whose parents face removal, recent executive action addressing the issue, and the resulting court actions responding to the executive action.³ Part III of this Note outlines the courts' unique approach to the constitutional rights of minors.⁴ Part IV discusses advocates' prior attempts to block removal on the basis of constitutional rights violations.⁵ Part V explains the history of the "best interests of the child" standard and its application in the immigration context.⁶ Finally, Part VI proposes that advocates should pursue a judicial remedy, and may find the most success in court by: (1) focusing on the rights of minor U.S. citizens rather than those of their parents; (2) arguing that the removal of a parent prior to the child's attainment of the age of majority impermissibly forces that child to choose between the unique right of a minor to family unity, and the child's qualified right to remain, which incorporates consideration of the child's best interests; and (3) emphasizing the existence of a more narrowly-tailored alternative to immediate removal, with recent executive action serving as a template.⁷

II. MINOR CITIZENS WHOSE PARENTS FACE DEPORTATION

In the half-decade leading up to 2013, about a half million U.S. citizen children experienced the deportation of one or both parents.⁸ Most minor children of parents who have been removed stay in the United States, sometimes in the care of friends or distant family members, or even in foster care.⁹ The effects of separation on children include depression and other mental health issues, problems in school, and financial difficulties.¹⁰

As of 2014, there were 4.7 million children under the age of eighteen, like Frankie, who were born in the United States and lived with at

³ See *infra* Part II.

⁴ See *infra* Part III.

⁵ See *infra* Part IV.

⁶ See *infra* Part V.

⁷ See *infra* Part VI.

⁸ Emily DeRuy, *What Happens To a Child After a Parent is Deported?*, ATLANTIC (Sept. 21, 2015), <http://www.theatlantic.com/politics/archive/2015/09/what-happens-to-a-child-after-a-parent-is-deported/432870/> (describing Migration Policy Institute report on children whose parents were deported). In 2013 alone, Immigration and Customs Enforcement ("ICE") removed 72,410 people with one or more U.S.-born children. See Elise Foley, *Deportation Separated Thousands Of United States-Born Children From Parents in 2013*, HUFFINGTON POST (June 26, 2014), http://www.huffingtonpost.com/2014/06/25/parents-deportation_n_5531552.html (detailing 2013 reports to U.S. Senate on removal of U.S.-citizen children's parents).

⁹ See Foley, *supra* note 8 (noting options for children of deported parents who remain in the United States); see also DeRuy, *supra* note 8 (describing living situation of children whose parents are deported).

¹⁰ See DeRuy, *supra* note 8 (outlining hardships faced by children of deported parents).

least one parent who was an undocumented immigrant.¹¹ Because about two-thirds of all undocumented immigrants currently residing in the United States have lived here for at least a decade, many have children who were born here.¹² Their children are citizens, pursuant to the Fourteenth Amendment of the United States Constitution, which establishes citizenship for anyone born in the United States.¹³ Children of undocumented parents are not the only young citizens who face the removal of a parent; even legal permanent residents may be removed for various reasons.¹⁴ For instance, a majority of the parents of U.S. citizen children who were removed in 2013 had been convicted of a crime, a removal ground that applies to any non-citizen; the scale of this phenomenon is not surprising given that the Immigration and Nationality Act (“INA”) allows for removal of those who committed infractions as minor as jumping a turnstile, even if such infractions occurred decades ago.¹⁵

While it did not offer relief to all children whose parents faced removal, the Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”) program, created in 2014, could have provided at least a temporary solution for many of the millions of families comprised of an undocumented parent and U.S. citizen child.¹⁶ However,

¹¹ See Jeffrey S. Passel & D’Vera Cohn, *Number of Babies Born to Unauthorized Immigrants in U.S. Continues to Decline*, PEW RES. CTR.: FACT TANK (Oct. 26, 2016), <http://www.pewresearch.org/fact-tank/2016/10/26/number-of-babies-born-to-unauthorized-immigrants-in-u-s-continues-to-decline/> (describing demographic research revealing number of minor citizens with undocumented parents).

¹² See Jeffrey S. Passel & D’Vera Cohn, *Children of Unauthorized Immigrants Represent Rising Share of K-12 Students*, PEW RES. CTR.: FACT TANK (Nov. 17, 2016), <http://www.pewresearch.org/fact-tank/2016/11/17/children-of-unauthorized-immigrants-represent-rising-share-of-k-12-students/> (correlating increasing percentage of students with undocumented parents with rising number of long-term undocumented residents).

¹³ See Passel & Cohn, *supra* note 11 (explaining origin of birthright citizenship).

¹⁴ See Immigration and Nationality Act § 237, 8 U.S.C. § 1227 (2016) (describing numerous classes of removable non-citizens). Grounds for removal are not limited to undocumented immigrants, though certain removal grounds arise from being undocumented. *Id.*

¹⁵ See Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1941-42 (2000) (explaining immigration consequences of small offenses if severe sentencing is available, even retroactively); see also Foley, *supra* note 8 (explaining most parents of U.S.-born children removed for criminal activity, including less-serious offenses); cf. Immigration and Nationality Act § 238, 8 U.S.C. § 1228 (2016) (describing expedited removal process of all non-citizens convicted of aggravated felonies). The INA definitions of deportable crimes are quite broad; for instance, the term “aggravated felony” includes offenses that are neither aggravated nor felonies under state laws, such as certain theft offenses. Immigration and Nationality Act § 101(a)(43), 8 U.S.C. § 1101 (2016). Similarly, the INA defines “conviction” broadly, including not only formal adjudication of guilt, but also situations where the accused “has admitted sufficient facts to warrant a finding of guilt.” Immigration and Nationality Act § 101(a)(48)(A), 8 U.S.C. § 1101 (2016).

¹⁶ See Rodrigo Ugarte, *Immigration: 5.5 Million US Citizen Children Affected by DAPA Decision, Report Says*, LATIN POST (June 24, 2015, 3:16 PM),

this program was placed under injunction while facing legal challenges from many states, and in June 2016, an evenly divided Supreme Court upheld the injunction while returning the case to lower courts for trial on the merits.¹⁷ Then in November of 2016, Donald Trump became President-elect and both parties to the ongoing proceedings requested a stay until February 20, 2017, in light of possibility that a new Presidential Administration would end the program.¹⁸

Upholding its campaign promises, the Trump administration rescinded the DAPA program in June 2017, therefore the lawsuit will not continue.¹⁹ Furthermore, based on the administration's stated agenda, it appears less likely that the administration will pursue congressional action

<http://www.latinpost.com/articles/61929/20150624/immigration-5-million-citizen-children-affected-dapa-decision-report.htm> (citing report that claimed DAPA might benefit around 5.5 million U.S.-born children). Under DAPA, parents of U.S. citizens and legal permanent residents would be able to "request deferred action (on removal) and employment authorization for three years . . . provided they have lived in the United States continuously since January 1, 2010, and pass required background checks." See also U.S. CITIZENSHIP AND IMMIGR. SERVS., EXECUTIVE ACTIONS ON IMMIGRATION, <https://www.uscis.gov/archive/2014-executive-actions-immigration> (last updated Apr. 15, 2015) (explaining DAPA eligibility guidelines). However, those non-citizens who were "enforcement priorities," such as those who had criminal backgrounds, those deemed national security threats, and those who committed fraud, would have been ineligible for DAPA; as a result, a portion of those who faced removal would not have been helped by the order. *Id.*

¹⁷ See Marcia Coyle, *Texas Court, After Trump Win, is Asked to Put Immigration Case on Hold*, NAT'L L. J. (Nov. 18, 2016, 4:53 PM), <http://www.nationallawjournal.com/id=1202772849853/Texas-Court-After-Trump-Win-Is-Asked-to-Put-Immigration-Case-on-Hold?slreturn=20170126155944> (follow "Continue to Lexis Advance" hyperlink) (describing status of states' challenge to DAPA).

¹⁸ See Marcia Coyle, *Texas Court, After Trump Win, is Asked to Put Immigration Case on Hold*, NAT'L L. J. (Nov. 18, 2016), <http://www.nationallawjournal.com/id=1202772849853/Texas-Court-After-Trump-Win-Is-Asked-to-Put-Immigration-Case-on-Hold?slreturn=20170126155944> (noting mutual decision to stay proceedings).

¹⁹ See Marcia Coyle, *Texas Court, After Trump Win, is Asked to Put Immigration Case on Hold*, NAT'L L. J. (Nov. 18, 2016), <http://www.nationallawjournal.com/id=1202772849853/Texas-Court-After-Trump-Win-Is-Asked-to-Put-Immigration-Case-on-Hold?slreturn=20170126155944> (explaining new administration could end litigation "by withdrawing the guidance that authorized the deportation delays."). The Department of Homeland Security officially rescinded DAPA on June 15, 2016. See also *Rescission of Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA")*, DEPARTMENT OF HOMELAND SECURITY (June 15, 2016), <https://www.dhs.gov/news/2017/06/15/rescission-memorandum-providing-deferred-action-parents-americans-and-lawful>. This decision addresses President Trump's promise during his campaign to end President Obama's deferred action programs, which he referred to as "illegal executive amnesties." *Id.*; Katie Reilly, *Here's What President Trump Has Said About DACA in the Past*, TIME (Sept. 05, 2017), <http://time.com/4927100/donald-trump-daca-past-statements/> (documenting candidate's statements regarding DAPA and DACA at August 2016 campaign event); Becki Young, *Immigration Predictions Under a Trump Presidency*, LAW360 (Nov. 14, 2016, 4:25 PM), <https://www.law360.com/articles/862078/immigration-predictions-under-a-trump-presidency> (explaining President Trump's campaign promises regarding immigration).

to address the plight of those like the Barrios family, and more likely it will pursue removal for undocumented immigrants like Frankie's mother.²⁰ As under past administrations, undocumented immigrants are likely not the only parents of U.S. citizen children who may face removal; the Trump campaign pledged to aggressively pursue removal of "criminal aliens," which under current law includes the large category of those who have committed even low-level offenses, regardless of whether or not the individual is undocumented.²¹

III. THE UNIQUE HISTORICAL CONTEXT OF THE CONSTITUTIONAL RIGHTS OF CHILDREN

Courts have consistently permitted a parent to assert his child's rights in the context of the parent's removal.²² With the assertion of a child's right, a unique area of constitutional law provides the framework for legal arguments.²³ The Supreme Court has made clear that children are protected

²⁰ See Young, *supra* note 19 (noting Trump campaign's focus on deportations and restrictions, rather than comprehensive immigration reform through congress). As a candidate, President Trump emphasized removal of undocumented immigrants, and his discussion of immigration law reform focused not on creating options for those without status, but on prioritizing U.S. citizens and keeping immigration levels "within historical norms." See also Los Angeles Times Staff, Transcript: Donald Trump's Full Immigration Speech, Annotated, L.A. TIMES (Aug. 31, 2016, 9:35 PM), <http://www.latimes.com/politics/la-na-pol-donald-trump-immigration-speech-transcript-20160831-snap-htmlstory.html#annotations:10316347> (outlining candidate's immigration policy plan).

²¹ See Morawetz, *supra* note 15, at 1944-46 (explaining how strict sentencing and "petty crime" enforcement increases numbers of deportable "criminal aliens"); Los Angeles Times Staff, Transcript: Donald Trump's Full Immigration Speech, Annotated, L.A. TIMES (Aug. 31, 2016, 9:35 PM), <http://www.latimes.com/politics/la-na-pol-donald-trump-immigration-speech-transcript-20160831-snap-htmlstory.html#annotations:10316347> (highlighting candidate's plan to remove "criminal aliens"). Non-citizens with criminal records were already enforcement priorities under the Obama administration, so it is unclear whether this policy will change, except in degree, with the Trump campaign having vowed to bolster Immigration and Customs Enforcement resources. See *id.* (reporting candidate Trump's vow to "triple the number of ICE agents"); U.S. CITIZENSHIP AND IMMIGR. SERVS., *supra* note 16 (listing those with criminal records as enforcement priorities for deportations).

²² See *Marin-Garcia v. Holder*, 647 F.3d 666, 670-71 (7th Cir. 2011) (explaining third-party standing question is addressed prior to, and independent of, merits); *Payne-Barahona v. Gonzales*, 474 F.3d 1, 2 (1st Cir. 2007) (holding standing requirements "easily met" in case of child whose parent faces removal); *cf. Fiallo v. Bell*, 430 U.S. 787, 790 (1977) (hearing appeal of U.S. citizen fathers denied immigration preference for their illegitimate children); Joanne Joseph, Note, *The Uprooting of the American Dream: The Diminished and Deferred Rights of the U.S. Citizen Child in the Immigration Context*, 24 CORNELL J.L. & PUB. POL'Y 209, 219 (2014) (noting the "Court has recognized that potential separation of citizens' family members by immigration policy is a legally cognizable injury of association.").

²³ See *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (noting "[t]he Court long has recognized that the status of minors under the law is unique in many respects.").

by the Constitution, but that their rights “cannot be equated with those of adults.”²⁴ The Supreme Court based this differentiation on “the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.”²⁵ As a result of this special legal status, under some circumstances, a child has more robust protection under the Constitution than an adult would receive; in other instances, a child’s liberty interests are subordinated to a parent, or to the state, where an adult’s rights would not face similar subordination.²⁶

The Supreme Court acknowledges that because of the differences in maturity and vulnerability between adults and children, sometimes a child’s rights may be violated under a set of circumstances that would not result in a violation of the rights of an adult.²⁷ For instance, the Court has held that both the death penalty, and (in some situations) life imprisonment without possibility of parole, constitute unconstitutionally cruel and unusual punishment when imposed upon a juvenile, though not when imposed on an adult.²⁸ In making such a determination, the Court has declared that it is critical to take into consideration the marked differences between children and adults when applying constitutional protections, and that while each child’s case is unique, a categorical approach to juveniles best acknowledges

²⁴ *Id.* (listing three reasons why constitutional rights of children are unique).

²⁵ *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (differentiating between rights of children and adults).

²⁶ *See Graham v. Florida*, 560 U.S. 48, 67-69 (2010) (holding children’s reduced culpability requires different, in effect greater degree of protection under Eighth Amendment); *Schall v. Martin*, 467 U.S. 253, 265 (1984) (explaining parent’s or state’s interest in child’s welfare may override child’s liberty interest). When a child’s liberty interests are at stake, her rights are usually equivalent to those of an adult, however, “the State is entitled to adjust its legal system to account for children’s vulnerability and their needs for ‘concern, . . . sympathy, and . . . paternal attention.’” *Bellotti*, 443 U.S. at 635 (alteration in original) (quoting *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971) (plurality opinion)) (explaining reason for differing treatment of children’s liberty interests in some cases).

²⁷ *See Graham*, 560 U.S. at 68-69 (explaining why juvenile offender has diminished moral culpability). The Court in *Graham* noted that a juvenile’s “lack of maturity,” increased susceptibility to “outside pressures,” and greater ability to change, “when compared to an adult murderer,” meant that “a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability.” *Id.*

²⁸ *See Graham*, 560 U.S. at 74 (holding sentence of life without parole for juvenile non-homicide offender violates Eighth Amendment). The Court noted that it was drawing “[t]his clear line . . . to prevent the possibility that life without parole sentences will be imposed on juvenile . . . offenders who are not sufficiently culpable to merit that punishment.” *Id.*; *Roper v. Simmons*, 543 U.S. 551, 574 (2005) (holding those who commit crimes while under age eighteen ineligible for death penalty). Similar to the Court in *Graham*, the Court in *Roper* noted that “is the point where society draws the line for many purposes between childhood and adulthood.” *Id.*

inherent differences from adults and reduces the risk of erroneous decisions.²⁹

The flip side of categorically greater protections for juveniles under the Constitution is that the Supreme Court has been willing to subordinate a minor child's liberty interests to those of a parent, or to the state itself, under certain circumstances.³⁰ The reasoning behind such subordination is the broader social and legal context in which minors, "by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*."³¹ The subordination of a child's individual rights to parental decision-making rights has been broadly and repeatedly affirmed by the courts, with the notable exception of the decision to acquire an abortion.³² In *Bellotti v. Baird*, the Supreme Court held that a child's decision to acquire an abortion could not be subordinated to parental decision-making because of the "grave and indelible" nature of the decision.³³

Overall, the Supreme Court has been less willing to subordinate a child's liberty interests to state interests than to parental rights, largely confining such subordination to instances where children are unable due to their age to make choices that are in their own best interests, or where they are otherwise uniquely vulnerable.³⁴ For instance, in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the Court held that government interests in preventing a disturbance in a school setting did not outweigh the right of children to express their views in school, even anti-war views.³⁵ This is in contrast to *Ginsberg v. New York*, 390 U.S. 629 (1968), where the Court permitted a restriction on the sale of sexually themed

²⁹ See *Graham*, 560 U.S. at 77-79 (holding categorical approach is best for dealing with issues of juveniles and Eighth Amendment).

³⁰ See *Schall*, 467 U.S. at 265 (explaining juvenile liberty interests may be subordinated because minors, "are always in some form of custody").

³¹ *Schall v. Martin*, 467 U.S. 253 at 265 (1984) (alteration in original) (describing unique lack of liberty inherent to childhood).

³² See Alison M. Osterberg, Note and Comment, *Removing the Dead Hand on the Future: Recognizing Citizen Children's Rights Against Parental Deportation*, 13 LEWIS & CLARK L. REV. 751, 768 (2009) (describing courts' deference to parental rights, based on ability to act in child's best interest).

³³ *Bellotti v. Baird*, 443 U.S. 622, 642 (1979) (noting abortion one of "few" situations where denial of decision-making right has far-reaching consequences).

³⁴ *Bellotti v. Baird*, 443 U.S. 622, 635-36 (1979) (describing precedent that State may limit children's choices where children are unable to protect themselves); cf. Osterberg, *supra* note 32, at 768 ("[W]hen the rights of children primarily conflict with government objectives, the Supreme Court has been more willing to recognize the [children's] independent substantive rights.").

³⁵ See *Tinker*, 393 U.S. at 508 (rejecting government's argument for prohibition on students wearing anti-war armbands at school).

magazines to a child, though such a sale would be protected by the First Amendment in the case of an adult.³⁶ The Court reasoned that the sale of such magazines is a danger to children, and that the state has the right to intervene in order to protect children from this danger because they lack the maturity necessary to protect themselves.³⁷

International custody disputes present another context in which state interests may be weighed against the rights of a minor U.S. citizen, a context complicated by the fact that these cases also involve the rights of parents.³⁸ In such cases, any citizenship-based right a child has to remain in the United States has been wholly subordinated by courts to the combined interests of parents and the state.³⁹ The courts have determined that when a parent seeks to live outside the United States with her minor child, that parent's right to care, custody, and control of her child takes precedence.⁴⁰ Also choosing to prioritize the state's interest in such cases, the Supreme Court has emphasized the compelling reasons why countries developed international treaties related to custody, in particular the state's interest in promoting the welfare of children in the face of possible international abduction by a parent.⁴¹ The Court noted that the separation from home and parent forced by such an abduction may cause children to endure loss of community, loss of stability, psychological problems, and loss of a support system.⁴² In the

³⁶ See *Ginsberg*, 390 U.S. at 634-35 (conceding adults have First Amendment right to purchase magazines prohibited for purchase by children).

³⁷ See *Ginsberg*, 390 U.S. at 638 (justifying infringement of juvenile's right based on state's interest in protecting child).

³⁸ See *Abbott v. Abbott*, 560 U.S. 1, 5, 15 (2010) (describing interests of parent in custody decisions, and interest of Executive Branch in interpreting treaty); *Sánchez-Londoño v. Gonzalez*, 752 F.3d 533, 537, 540 (1st Cir. 2014) (describing limited parental choice regarding child residence, regardless of child's citizenship, if parents disagree).

³⁹ See *Abbott*, 560 U.S. at 20 (failing to consider a citizen child's right to remain when handling international custody dispute). In *Abbott*, the Court noted that an international treaty orders a child to return to the country the child had lived in, if that child is abducted by a parent, but that the treaty "does not alter the existing allocation of custody rights," instead allowing "the courts of the home country to decide what is in the child's best interests." *Id.*; see also *Darín v. Olivero-Huffman*, 746 F.3d 1, 7-8 (1st Cir. 2014) (describing overriding force of state interest in preventing international child abductions); *Sánchez-Londoño*, 752 F.3d at 540 (explaining children are unable to decide where to live, so parents have decision-making right).

⁴⁰ See *Abbott*, 560 U.S. at 6, 11, 15 (deciding father's right of custody included right to have U.S. citizen son returned to Chile); see also *Darín*, 746 F.3d at 5, 14 (finding mother wrongfully retained son, who had dual citizenship, in United States against father's will).

⁴¹ See *Abbott*, 560 U.S. at 20-21 (explaining interest of state in promoting child's best interest by preventing abduction); *Darín*, 746 F.3d at 7-8 (describing purpose of treaty as preventing abduction induced by lure of forum shopping).

⁴² See *Abbott*, 560 U.S. at 20-21 (listing abduction harms). The Court, in describing the state's interest in preventing child abduction, has detailed a list of harms that an abducted child may suffer from being separated from a parent, including: trauma from lack of support systems, depression, stress, post-traumatic stress disorder, and impairment of ability to mature and form identity. *Id.*

unique context of international custody disputes, therefore, it appears that a child's rights may be trumped either by a parent's wishes, or by the state's interest in promoting the child's welfare by preventing separation from a parent and community.⁴³

IV. JUDICIAL HISTORY OF ATTEMPTS TO BLOCK REMOVAL OF PARENTS

Non-citizens in deportation proceedings generally have few, if any, options available for relief if they fail to show that they are not subject to removal.⁴⁴ In some instances, a person facing removal may apply for a waiver.⁴⁵ However, such a waiver is only available in a limited number of cases, and where it is a possibility, the standard of "extreme hardship" makes it very difficult to qualify for relief; additionally, those who seemingly meet the standard are still faced with the reality that the waiver is subject to judicial discretion.⁴⁶ Furthermore, some non-citizens are subject to mandatory removal without the possibility of applying for a waiver.⁴⁷ Those denied a waiver, or those who are unable to apply either because they do not meet qualifications or because they are subject to mandatory removal, may nonetheless appeal a removal order based on violation of constitutional rights.⁴⁸

The backdrop to every constitutional challenge in removal proceedings is the plenary powers doctrine.⁴⁹ The Supreme Court has repeatedly made clear that, due to national sovereignty issues, Congress's

Additionally, there are harms the child may suffer specifically from "loss of community and stability," including: "loneliness, anger, and fear of abandonment." *Id.*

⁴³ See *Abbott*, 560 U.S. at 20-21 (acknowledging state's right to override one parent's decision regarding child's residence, to prevent abduction harms); *Sánchez-Londoño*, 752 F.3d at 540 (explaining parents, not child, have right to determine child's place of residence).

⁴⁴ See Morawetz, *supra* note 15, at 1940-43 (describing mandatory deportation category barring relief, and hurdle detention may cause those eligible for relief).

⁴⁵ See Grace Kaskade, Note, *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, 460 (2009) (describing INA's extreme hardship waiver provision for certain non-citizens facing removal).

⁴⁶ See Kaskade, *supra* note 45, at 460, 464 (describing high bar for proving removal would result in extreme hardship to qualifying family members).

⁴⁷ See Morawetz, *supra* note 15, at 1948 (explaining mandatory removal category).

⁴⁸ See *Hernandez-Lara v. Holder*, 563 F. App'x 401, 403 (6th Cir. 2014) (upholding court's jurisdiction over constitutional claims in removal proceedings); *cf. Martial-Emanuel v. Holder*, 523 F. App'x 345, 348-49 (6th Cir. 2013) (explaining limited power of judicial review in removal proceedings). "Although Congress has largely removed from our oversight the government's exercise of discretion in this area, we do have jurisdiction to review 'constitutional claims for questions of law raised upon a petition to review.'" *Id.* at 349 (quoting 8 USC § 1252(a)(2)(D)).

⁴⁹ See Joseph, *supra* note 22, at 213 (explaining plenary powers doctrine).

power over immigration-related decisions is rarely subject to a high standard of judicial review.⁵⁰ This rule, which is strongest in the context of admissions to the U.S., does have exceptions, but in general the doctrine presents a significant hurdle for those advocating on behalf of immigrants and their families.⁵¹ The doctrine sets forth a standard of judicial review for immigration-related matters that is so minimal, it is arguably less thorough than rational basis review.⁵² Even in immigration cases where a U.S. citizen's fundamental constitutional rights appear to be at stake, courts have tended to defer to Congress.⁵³

In the context of a minor U.S. citizen's parent's removal, many advocates have focused on the fundamental rights of the child citizen, rather than any rights of the non-citizen parent, when making an argument in court.⁵⁴ The aim is seemingly to attempt to subject the cases to strict scrutiny, requiring the government interest at stake to be substantial, and the means of achieving such a purpose to be as narrowly tailored as possible.⁵⁵

These attempts at relief have largely relied on two substantive due process theories: removal violates either a fundamental right to remain in the United States, or a fundamental right to family unity.⁵⁶ Both theories have

⁵⁰ See *id.* (detailing basis of plenary powers in concept of sovereignty).

⁵¹ See Joanne Joseph, Note, *The Uprooting of the American Dream: The Diminished and Deferred Rights of the U.S. Citizen Child in the Immigration Context*, 24 CORNELL J.L. & PUB. POL'Y 209, 214, 219 (2014) (noting modern trend for courts to limit plenary powers, but that scope of limitation is unclear). The strength of the plenary powers doctrine does appear to be strongest in relation to issues of admission into the United States. *Id.*

⁵² See *id.* at 213 (outlining low standard of review).

⁵³ See *Fiallo v. Bell*, 430 U.S. 787, 798 (1977) (emphasizing plenary powers in case where U.S. citizen fathers' illegitimate children were denied immigration preference); *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (relying on "facially legitimate and bona fide reason" to bar author's admission when U.S. citizens claimed First Amendment violation); *Hernandez-Rivera v. INS*, 630 F.2d 1352, 1356 (9th Cir. 1980) (agreeing child of deported parents face de facto deportation, but still deferring to Congress); *Perdido v. INS*, 420 F.2d 1179, 1181 (5th Cir. 1969) (noting "rational distinction" in barring minor from petitioning for parent, despite age discrimination argument).

⁵⁴ See, e.g., *Hernandez-Lara v. Holder*, 563 F. App'x 401, 403 (6th Cir. 2014) (noting numerous cases dealing with rights asserted by U.S. citizen children of people facing removal); *Martial-Emanuel v. Holder*, 523 F. App'x 345, 350 (6th Cir. 2013) (describing numerous cases dealing with rights asserted by U.S. citizen families of people facing removal); *Marin-Garcia v. Holder*, 647 F.3d 666, 672-74 (7th Cir. 2011) (acknowledging frequency of petitioner's approach of asserting rights of citizen child).

⁵⁵ See *Aptheker v. Sec'y of State*, 378 U.S. 500, 509 (1964) (outlining strict scrutiny standard for fundamental rights); *Marin-Garcia*, 647 F.3d at 672-73 (inferring petitioner sought "a more stringent standard should apply" in asserting child's rights).

⁵⁶ See *Osterberg*, *supra* note 32, at 759 (describing basis for assertion of rights of U.S. citizen children in context of parental removal). Other unsuccessful theories have included the claim that removal is a form of punishment and therefore subject to the Eighth Amendment, and that the "extreme hardship" standard for removal waivers constitutes an Equal Protection violation, since it is not the standard applied to children of non-immigrants. See *Hinds v. Lynch*, 790 F.3d 259, 264

met such consistent rejection over the years that some courts now barely even address the issues, instead determining that the substantive due process rights of neither children, nor parents, are ever infringed in the case of ordinary removal proceedings, and describing the issue as well-settled.⁵⁷

A. Right to Remain

The right to remain argument is based on the principle that a U.S. citizen may not be deported.⁵⁸ Because the right of a U.S. citizen against deportation has been firmly established as a fundamental constitutional guarantee, advocates have attempted to argue that removal of a parent also effectively removes a U.S. citizen minor child, since the child is dependent on that parent.⁵⁹ Courts have generally rejected this argument in one of three ways.⁶⁰ One line of reasoning is that a minor is unable to exercise a constitutional right to remain, because he is subject to the decisions of his guardians on the matter due to his age, and therefore the right simply does not exist during a child's minority.⁶¹ Another line of reasoning is that because a child compelled to leave the United States with a parent may freely choose to return at a different date, namely after reaching the age of majority, her departure is not a true removal in the first place.⁶² Similarly, some courts reason that a child in such circumstances has not faced actual removal since

(1st Cir. 2015) (rejecting claim that removal is punishment and subject to Eighth Amendment restrictions); *Hernandez-Lara*, 563 F. App'x at 403 (rejecting claim that waiver standard unconstitutional because it only applies to children of non-citizens).

⁵⁷ See, e.g., *Payne-Barahona v. Gonzáles*, 474 F.3d 1, 2 (1st Cir. 2007) ("The circuits that have addressed the constitutional issue . . . have uniformly held that a parent's otherwise valid deportation does not violate a child's constitutional right."); *Hernandez-Lara*, 563 F. App'x at 403 ("[T]he law on this point is settled: a United States-citizen child's constitutional rights are not implicated by the government's otherwise valid decision to deport that child's parents."); *Marin-Garcia*, 647 F.3d at 674 ("[S]everal other circuits have ruled that the removal of an illegal alien does not work a constitutional violation on the alien's citizen-children.").

⁵⁸ See *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (establishing deportation of citizen as violation of liberty interest).

⁵⁹ See Amanda Colvin, Comment, *Birthright Citizenship in the United States: Realities of De Facto Deportation and International Comparisons Toward Proposing a Solution*, 53 ST. LOUIS L. J. 219, 220-21 (2008) (describing phenomenon of de facto deportation).

⁶⁰ See *infra* notes 61-63 (explaining courts' reasoning in rejecting claims of citizen children).

⁶¹ See *Ayala-Flores v. INS*, 662 F.2d 444, 445-46 (6th Cir. 1981) (reasoning right to remain is theoretical until person can consciously choose domicile); *Perdido v. INS*, 420 F.2d 1179, 1181 (5th Cir. 1969) (explaining "minor children do not ordinarily determine where their own home will be").

⁶² See *Ayala-Flores*, 662 F.2d at 446 (noting U.S. citizen child free to choose United States as residence upon becoming an adult); Alison M. Osterberg, Note and Comment, *Removing the Dead Hand on the Future: Recognizing Citizen Children's Rights Against Parental Deportation*, 13 LEWIS & CLARK L. REV. 751, 761 (2009) (describing Third Circuit case that reasoned children are delayed in exercising right to remain).

she is free to remain in the United States even during her age of minority, albeit without her parent(s), and that what is really at issue is her ability to confer this right onto her parent(s), which she may not do.⁶³

The backdrop to these decisions, however, is that advocates either essentially positioned one constitutional right (the right to remain) in opposition to the plenary powers of Congress, or advocated for the general inadvisability of separating families; they did not directly argue that a child was forced to choose between a right to remain and another protected *fundamental* constitutional right.⁶⁴ The failure to achieve this positioning may have been decisive.⁶⁵ It is a long-standing principle of constitutional law that the government may not force a person to choose between two fundamental rights.⁶⁶

B. Right to Family Unity

The recurring argument that the Constitution encompasses a fundamental right to family unity has its roots in the courts' long history of protecting "the family unit from unwarranted intrusions by the state," and the "interests of parents in the care, custody, and control of their children."⁶⁷ In cases involving removal of the parent of a U.S. citizen child, courts have regularly rejected the argument that removal violates a fundamental right to unity for a few reasons.⁶⁸ Some courts have rejected the contention that such a right exists, noting the disparate factual scenarios giving rise to the relevant case law.⁶⁹ Other courts, although appearing to find less fault with arguments supporting the existence of a fundamental right to family unity, have been hesitant to give such a right legal force; their hesitation is due to the prospect of children relying on the right to prevent separation in

⁶³ See *Perdido*, 420 F.2d at 1181 (holding child has right to remain but cannot "confer immigration benefits on his parents"); Amanda Colvin, Comment, *Birthright Citizenship in the United States: Realities of De Facto Deportation and International Comparisons Toward Proposing a Solution*, 53 ST. LOUIS L. J. 219, 220 (2008) (citing case where court noted right to remain "is personal and cannot be imputed to non-citizens").

⁶⁴ See sources cited *supra* notes 61- 63.

⁶⁵ See *Osterberg*, *supra* note 32, at 764-65 (noting series of dissents in Ninth Circuit removal cases focused on impermissible choice between rights).

⁶⁶ See *Aptheker v. Sec'y of State*, 378 U.S. 500, 505 (1964) (holding government could not effectively force choice between right to travel and free association).

⁶⁷ See *Joseph*, *supra* note 22, at 227 (quoting *Sims v. State Dep't of Pub. Welfare*, 438 F. Supp. 1179, 1190 (S.D. Tex. 1997) and *Troxel v. Granville*, 530 U.S. 57, 65 (2000)) (citing history of common law protecting family unit).

⁶⁸ See *Joseph*, *supra* note 22 at 228 (noting pattern of defeat for claim of right to family unity in removal cases).

⁶⁹ See *Payne-Barahona*, 474 F.3d at 3 (noting diversity in cases creates difficulty in fitting them into a pattern).

circumstances such as parental incarceration or subjection to the military draft.⁷⁰

In non-immigration contexts, courts have been more willing to acknowledge the existence of some sort of right to family unity.⁷¹ In cases involving removal, courts have been reluctant to acknowledge its existence, and even where courts indicate there may be a right to family unity, they have not relied on its existence to halt removal.⁷² Some courts have reasoned that the right to family unity is not abridged in the case of a parent's removal because the right is narrowly enforceable by the court system, and in removal cases it is not enforceable at all since the family separation may be temporary.⁷³ In other instances in the immigration context, courts simply refused to use strict scrutiny when considering violation of a right to family unity; instead, they relied on the plenary powers doctrine in order to use a lenient standard of review, ultimately deferring to Congress's power to exclude non-citizens.⁷⁴ However, like the removal cases that relied on a child's right to remain in the United States, those cases relying on a right to family unity have generally not explicitly argued that a citizen was forced into an impermissible choice between two fundamental rights.⁷⁵

V. THE BEST INTERESTS OF THE CHILD STANDARD AND ITS APPLICATION IN THE IMMIGRATION CONTEXT

The “best interests of the child” standard has a long history in the United States.⁷⁶ It is a standard often used in custody proceedings between two parents, and also during proceedings terminating parental custody or

⁷⁰ See *Payne-Barahona*, 474 F.3d at 3 (fearing right to family unity might be asserted by child in other contexts).

⁷¹ See *Santosky v. Kramer*, 455 U.S. 745, 758 (1982) (quoting *Stanley v. Illinois*, 405 U.S. at 651) (noting fundamental liberty interest for parent to have “companionship, care, custody, and management” of children in case involving termination of parental rights); Joseph, *supra* note 22, at 230 (describing D.C. Circuit case finding “rights of parent and child to one another’s companionship”).

⁷² See *infra* notes 73-74.

⁷³ See *Aguilar v. U.S. Immigration & Customs Enf’t Div. of the Dept’ of Homeland Sec.*, 510 F.3d 1, 23 (1st Cir. 2007) (deciding family integrity right not recognized in removal context since it is only temporary).

⁷⁴ See *Fiallo v. Bell*, 430 U.S. 787, 794-95 (1977) (deciding issue of family unity does not necessitate a more “exacting standard” of review); *Martial-Emanuel v. Holder*, 523 F. App’x 345, 350 (6th Cir. 2013) (holding right to “live . . . with family as one chooses” outweighed by Congress’ immigration authority).

⁷⁵ See sources cited *supra* notes 73-74.

⁷⁶ See *Kaskade*, *supra* note 45, at 457 (explaining best interests standard is a “guiding star,” incorporated into legal codes in many jurisdictions).

rights overall.⁷⁷ It has also been used to justify a government interest outweighing a child's rights, where the government interest *itself* is preservation of the child's best interest.⁷⁸ There are limitations upon the application of the standard; the state cannot give preference to its own determination of a child's best interest over that of a fit parent.⁷⁹

In the immigration context, advocates have argued that the best interests of the child standard should be applied in court proceedings surrounding removal waivers, when a parent may be separated from a child who is a U.S. citizen.⁸⁰ Petitioners have gained courts' acknowledgement that "any separation of a child from its [parent] is a hardship," and therefore not in the child's best interest.⁸¹ However, in the face of a removal that would clearly *not* be in the child's best interest, courts have nonetheless consistently applied the "extreme hardship" standard, and have determined that because it is a more stringent standard, it requires suffering beyond that which is inherent to any separation caused by removal.⁸²

Courts have held that it is permissible for Congress to require the extreme hardship standard for waivers, rather than the best interest standard, reasoning that Congress has a rational basis for such a decision because it might otherwise not be able to remove anyone with a child who is a U.S. citizen.⁸³ However, a recent Ninth Circuit decision, *Cabrera-Alvarez v.*

⁷⁷ See *Troxel v. Granville*, 530 U.S. 57, 58 (2000) (noting there is presumption that fit parent will act in child's best interest); *Reno v. Flores*, 507 U.S. 292, 303-04 (1993) (calling the standard "proper and feasible criterion" for awarding custody to one parent over another). The Court has ruled that the state may only intervene on a child's behalf, over the wishes of parents, if the parents are unfit and consequently, there is no presumption that they will act in the child's best interest. *Id.*

⁷⁸ See *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (holding where children unable to "recognize and avoid choices that could be detrimental to them," state intervention appropriate).

⁷⁹ See *Troxel*, 530 U.S. at 72-73 (finding violation of parental right to make child-rearing decisions where state imposes view that "'better' decision could be made").

⁸⁰ See *Kaskade*, *supra* note 76, at 460 (describing best interest standard in context of extreme hardship waiver).

⁸¹ See *Hernandez-Lara v. Holder*, 563 F. App'x 401, 402-03 (6th Cir. 2014) (noting emotional hardship inherent in any separation of parent and child during removal proceedings); see also Amanda Colvin, Comment, *Birthright Citizenship in the United States: Realities of De Facto Deportation and International Comparisons Toward Proposing a Solution*, 53 ST. LOUIS L.J. 219, 220 (2008) (quoting *Oforji v. Ashcroft*, 354 F.3d 609, 617 (7th Cir. 2003)).

⁸² See *Hernandez-Lara*, 563 F. App'x at 402-03; *Marin-Garcia v. Holder*, 647 F.3d 666, 673-74 (7th Cir. 2011) (upholding congressional authority to make exacting hardship standard, despite threat to "integrity of the family unit"); *Cabrera-Alvarez v. Gonzáles*, 423 F.3d 1006, 1012-13 (9th Cir. 2005) (explaining and upholding extreme hardship standard).

⁸³ See *Hernandez-Lara*, 563 F. App'x at 403 (rejecting categorization of parental deportation as unusual hardship on child). The court in *Hernandez-Lara* was concerned that a contrary ruling would "create a substantial loophole in the immigration laws, allowing all deportable aliens to remain in this country if they bear children here." *Id.* (quoting *Newton v. INS.*, 736 F.2d 336, 343 (6th Cir. 1984)). Similarly, the court in *Marin-Garcia* reasoned that the entire point of extreme hardship standard is to prevent the "perverse incentive" to "avoid the consequences of unlawful

González, opened up the possibility that the best interests of the child may be considered as a factor within the extreme hardship standard, and that the more exacting standard does not mean that a child's best interest is not relevant at all.⁸⁴ Whether the Ninth Circuit's interpretation will become the majority view remains to be seen; regardless, it only applies to those cases where a non-citizen is able to apply for discretionary relief, not in mandatory removal cases.⁸⁵

The other immigration context where the best interests of the child standard has been discussed in court is pre-removal juvenile detention hearings.⁸⁶ In *Reno v. Flores*, the Supreme Court considered whether there was a requirement for a child's best interests to prevail in making pre-hearing custody arrangements.⁸⁷ The Court held that in a case where the government was exercising its custodial responsibility, there was no requirement for a child's best interest to prevail among other interests.⁸⁸ The Court explained that a child in such circumstances has a fundamental right to a minimum standard of care, but that anything beyond that involves a balancing of factors, and the state has no obligation to choose the very best option.⁸⁹ But while the Court determined that there was no *substantive* due process right for a child's best interests to prevail, it did not fully address whether there

entry into the United States by having a child." *Marin-Garcia*, 647 F.3d at 674 (rejecting categorization of parental deportation as unusual hardship on child); see also *Cabrera-Alvarez*, 423 F.3d at 1013 ("[N]o rule of statutory construction required the agency to elevate the qualifying child's best interests to a level that would effectively eliminate or alter the express comparative standard set forth in the statutory text.").

⁸⁴ See *Cabrera-Alvarez*, 423 F.2d at 1012 (reasoning "'best interests' are merely the converse of 'hardship'").

⁸⁵ See *id.* at 1012 (explaining standard applies if parent able to seek cancellation of removal); Nancy Morawetz, Symposium: *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1940-43 (2000) (explaining relief not available to all in mandatory removal proceedings).

⁸⁶ See *Reno v. Flores*, 507 U.S. 292, 303-05 (1993) (addressing respondents' argument for use of best interest standard for pre-removal juvenile detention).

⁸⁷ See *Flores*, 507 U.S. at 303-05 (addressing arguments regarding pre-removal detention arrangements). At question in *Flores* was whether juveniles facing pre-removal detention have the "right to an individualized hearing on whether private placement would be in the child's 'best interests'—followed by private placement if the answer is in the affirmative." *Id.* at 303.

⁸⁸ See *Flores*, 507 U.S. at 304 ("'The best interests of the child' is . . . not an absolute and exclusive constitutional criterion for the government's exercise of . . . custodial responsibilities."). The Court noted that while the "best interests of the child" standard is often used as a criterion for official decision-making, "it is not traditionally the sole criterion—much less the sole constitutional criterion—for . . . judgments involving children, where their interests conflict in varying degrees with the interests of others." *Id.*

⁸⁹ See *Flores*, 507 U.S. at 304 (noting other situations where state was under obligation to meet baseline needs only). Where the state is required to provide for a child's schooling, healthcare, or housing, it is not required to provide the best option available for meeting those needs. *Id.* In these instances, the decision to surpass these requirements is not mandated by constitutional requirements. *Id.*

might be a *procedural* due process requirement to consider the child's best interest as a factor, and also left open the possibility that its holding might be different for U.S. citizen children.⁹⁰

VI. ANALYSIS

When the parent of a child who is a U.S. citizen is deported, the child is invariably injured—either by having to leave his life and community in the United States, or by losing a parent or both parents; both alternatives will lead to that child suffering emotionally, developmentally, financially, and otherwise.⁹¹ Advocates have attempted to seek a judicial remedy for these children and their families, but have thus far resoundingly failed to achieve success.⁹² Recently, the executive branch's attempt to at least partially address the issue through DAPA was blocked in court.⁹³ Based on its campaign promises to ramp up immigration enforcement, and its quick repeal of DAPA, it seems unlikely that an executive remedy or an attempt to encourage immigration reform through the legislative process will be forthcoming during the Trump administration.⁹⁴ Regardless of what the Trump administration chooses to do going forward, DAPA's history of challenges in the court system, and the subsequent threat of shifts in policy based on new executive priorities, illustrates the perils of relying on executive action to address immigration related issues.⁹⁵ Given DAPA's inability to address the problem of separation of U.S citizen minors and their deported parents due to legal challenges, occurring at the same time that a new administration has threatened increased removals, it may be prudent for

⁹⁰ See *Flores*, 507 U.S. at 301-04 (outlining and rejecting substantive due process claim that child's best interest should prevail); cf. *id.* at 305-06 (“[I]f we harbored any doubts as to the constitutionality of institutional custody over unaccompanied juveniles, they would surely be eliminated as to those juveniles . . . who are aliens.”). The Court did emphasize that Congress has authority to pass laws regarding non-citizens that are *unacceptable* when applied to citizens. The Court in *Flores* also rejected a procedural due process claim, but its reasoning focused on, and subsequently rejected, the argument that each juvenile should have an individualized hearing regarding his best interests, and that his best interests should prevail. See *id.* at 308 (describing procedural claim as reframing of substantive claim). The Court also determined that the state was, in fact, focusing on the child's needs, describing the conflict as one between a child's “interest in being released into the custody of strangers” versus the state's interest in “protecting the welfare of the juveniles who have come into the Government's custody.” *Id.* at 305.

⁹¹ See sources cited *supra* notes 10-11 (describing damage done to children of deported parents).

⁹² See cases cited *supra* note 54 (setting forth history of failed challenges of parent's removal).

⁹³ See sources cited *supra* notes 17-18 (tracing DAPA court history).

⁹⁴ See sources cited *supra* notes 19-21 (describing current administration's campaign promises).

⁹⁵ See sources cited *supra* notes 17-21 (explaining DAPA injunction, stay of court proceedings, shift in administration immigration policies).

advocates to fully pursue judicial remedies for the affected families, despite past failures in court.⁹⁶

A challenge to the deportation of the parents of minor U.S. citizens should first and foremost focus on the rights of the child rather than the parents, to increase chances of success in court.⁹⁷ The Court has made abundantly clear that Congress has a strong interest in maintaining national sovereignty by enforcing immigration laws.⁹⁸ Advocates hoping to challenge the removal of a non-citizen will do best if their cases are reviewed under a strict scrutiny standard, as government interests are likely to outweigh individual rights under a lower standard of scrutiny in most cases.⁹⁹ However, courts have been reluctant to use strict scrutiny when reviewing cases of non-citizens in removal proceedings.¹⁰⁰ While these individuals are certainly “persons,” and therefore might expect to have their fundamental constitutional rights upheld, courts regularly treat removal proceedings as interchangeable with initial exclusion from entry.¹⁰¹ As a result, courts generally review the rights of non-citizens in removal under a less rigorous standard, relying on the plenary powers doctrine.¹⁰² Accordingly, to increase chances of strict scrutiny review, advocates should focus their arguments on the rights of U.S. citizen children.¹⁰³

Those who have attempted to pursue relief from removal by basing their challenges on the rights of U.S. citizen children have still been defeated in court again and again over the decades, therefore those hoping to succeed in the face of this bleak precedent would do best with a multi-faceted approach.¹⁰⁴ First, it may be critical to argue that a parent’s removal forces the minor child into an unconstitutional choice between two fundamental

⁹⁶ See sources cited *supra* note 12 (describing increase in U.S.-born children of undocumented parents due to large percentage of long-term residents); see also sources cited *supra* notes 17-19 (reiterating Trump campaign’s promise regarding new emphasis on removal).

⁹⁷ See case cited *supra* note 90 and accompanying text (noting Court’s willingness to consider right for citizen children that it rejected for non-citizen children).

⁹⁸ See Joseph, *supra* note 22, at 214, 219 (explaining plenary powers doctrine); see also sources cited *supra* note 53 (illustrating Court’s use of doctrine to defer to other branches of government on immigration issues).

⁹⁹ See sources cited *supra* note 55 (explaining strict scrutiny standard of review).

¹⁰⁰ See sources cited *supra* note 54 (describing historic difficulty of challenging parent’s removal).

¹⁰¹ See sources cited *supra* note 63 (reasoning failure to deport parent due to citizen child’s presence impermissibly grants right to remain).

¹⁰² See sources cited *supra* note 74 (deciding plenary powers doctrine controls standard of review).

¹⁰³ See case cited *supra* note 90 (clarifying review of rights includes critical factor of whether children hold citizenship).

¹⁰⁴ See sources cited *supra* note 54 (explaining precedent reflects difficulty in arguing parental removal based on children’s citizenship).

rights, rather claiming only one fundamental right is at stake.¹⁰⁵ Second, in order to establish the existence of a choice between fundamental rights, it may be necessary to establish that a minor child has a fundamental right to family unity during her age of minority even if her parent does not have a reciprocal right to family unity, and that a minor citizen has at least a qualified right to remain in the United States that incorporates consideration of her best interests.¹⁰⁶ Finally, it may help to use DAPA as an example of a more narrowly tailored alternative to immediate removal that preserves the minor child's right while upholding the state's interest in enforcing immigration laws.¹⁰⁷

A. An Impermissible Choice Between Fundamental Rights

To succeed where other advocates have failed at persuading courts that a minor child's fundamental rights are violated when a parent is removed, it may be necessary to argue that the child has been unconstitutionally forced to choose between rights.¹⁰⁸ Advocates have had some success arguing that a child's fundamental right is at stake when a family faces division in the immigration context.¹⁰⁹ For instance, some courts have conceded that minor citizens retain the right to remain in the United States.¹¹⁰ Yet these same courts held that the right was not violated in the context of a parent's removal, as the child was technically free to remain in the United States.¹¹¹ In the absence of an unconstitutionally coerced choice between the right to remain and another right, therefore, a constructive deportation argument against the removal of a child's parent is likely to fail.¹¹²

The relative weakness of an argument focused on only one fundamental right violation, or even multiple rights that are not set up in the context of a coerced choice, has played out again and again in the history of

¹⁰⁵ See analysis *infra* Section 0.

¹⁰⁶ See analysis *infra* Section 0.

¹⁰⁷ See analysis *infra* Section 0.

¹⁰⁸ See case cited *supra* note 66 (explaining principle that government may not force people to choose between fundamental rights).

¹⁰⁹ See sources cited *supra* notes 62-63 (acknowledging citizen children have right to choose to remain).

¹¹⁰ See sources cited *supra* notes 62-63 (noting children, like all citizens, have right to be free from deportation).

¹¹¹ See sources cited *supra* note 63 (determining child's ability to transfer right to parent distinct from child's right to remain).

¹¹² See case cited *supra* note 66 (explaining principle that government may not force people to choose between fundamental rights).

immigration cases, beyond just cases where a parent faces removal.¹¹³ In *Kleindienst v. Mandel*, the Court held that the government's interest in excluding individuals for a "facially legitimate and bona fide reason" outweighed the First Amendment rights of U. S. citizens who wanted to hear those individuals speak.¹¹⁴ In *Fiallo v. Bell*, another critical Supreme Court decision, the Court again deferred to Congress's powers to determine who to exclude, when those powers were weighed against both sex-based discrimination and citizens' interests in family unity.¹¹⁵

The history of failed constitutional challenges to immigration laws illustrates two reasons why advocates might see more success if alleging a forced choice to preserve one fundamental right at the expense of another.¹¹⁶ The first reason is that the existence of impermissible coercion, in addition to the potential violation of any given fundamental right, might tilt the scales against government interest in a way that a simple balancing of liberty interests against plenary power has not.¹¹⁷ The second reason is that the assertion of such an impermissible choice could preclude the government from arguing that there is no violation of rights in the case at hand, given the option of another permissible choice.¹¹⁸ Where advocates have been successful in persuading courts that a right to family unity, or a right to remain, is at stake when a citizen child's parent faces removal, they have still ultimately lost due to the government's argument either that such rights were not violated, because the child *could* remain (and be separated from family), or that the violation of the right was outweighed by government interests.¹¹⁹ Those lines of argument should be countered by establishing the presence of an impermissible choice between rights.¹²⁰

¹¹³ See cases cited *supra* note 53 (detailing cases where government has prevailed absent argument of coerced choice between rights).

¹¹⁴ See *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (describing the balancing between the interests and weighing of government interests).

¹¹⁵ See sources cited *supra* notes 53-54 (articulating *Fiallo v. Bell* case).

¹¹⁶ See *Aptheker v. Sec'y of State*, 378 U.S. 500, 505 (1964) (reviewing policy that people should not be forced to choose between fundamental rights); see also *supra* note 65 (noting dissenting opinions focused on impermissible choice between rights); cases cited *supra* notes 63, 73-74 (describing failure of arguments focused on only one asserted right).

¹¹⁷ See *supra* note 65 (reviewing a required impermissible choice between rights might assist argument prevailing); see also sources cited *supra* notes 63, 73-74 (highlighting arguments focusing on one asserted right is often weak).

¹¹⁸ See sources cited *supra* notes 65-66 (reflecting prohibition on forcing individuals to choose between fundamental rights).

¹¹⁹ See sources cited *supra* notes 63, 73-74 (noting arguments likely to fail when focused on only one asserted right).

¹²⁰ See *Aptheker v. Sec'y of State*, 378 U.S. 500, 505 (1964) (noting strength in arguing there is a choice between rights conflicting).

B. Minor Children's Unique Right to Family Unity, and Right to Remain in the United States

However, to successfully claim that a minor U.S. citizen, whose parent faces removal proceedings, has been impermissibly forced to choose between fundamental rights, it may first be necessary to establish unique boundaries of a child's rights in the immigration context.¹²¹ In particular, it may be necessary to argue that (1) a minor child has a right to family unity even where her parent may not have a reciprocal right, and (2) a minor citizen has an immediate right to remain in the United States, that she is able to independently exercise when her parent's decisions regarding her residency have been coerced by the state without consideration of the child's best interests.¹²²

i. A Minor's Unique Right to Family Unity

One premise at the core of attempts to prevent removal of the parents of minor U.S. citizens is that separation of the family is ultimately detrimental to the child, and advocates can point to a wealth of supporting evidence.¹²³ It seems certain that courts support this premise; in rulings on custody and parental termination, courts have firmly established that in the eyes of the law, children are best served by remaining with their parents in anything but drastic situations.¹²⁴ But in the framework of a challenge to a parent's removal that claims an unconstitutionally coerced choice between rights, it may be necessary to establish a *fundamental* right to family unity.¹²⁵ This need is both practical, in that there are a limited number of rights that advocates could realistically assert are violated in such cases, and logical, as advocates regularly rely on arguments about the value of family integrity in such cases even where they assert no fundamental right, given the facial relevance of the issue.¹²⁶

¹²¹ See analysis *infra* Sections 0-0.

¹²² See analysis *infra* Sections 0-0.

¹²³ See sources cited *supra* notes 68-70 (claiming right to family unity in immigration context); see also case cited *supra* note 42 (describing studies detailing harms of separating child from parent).

¹²⁴ See *Troxel v. Granville*, 530 U.S. 57, 72-73 (2000) (highlighting importance of maintaining family unity); see also sources cited *supra* notes 67, 71, 81 (establishing court's interest in preserving family integrity, removing children only if parent unfit).

¹²⁵ See sources cited *supra* notes 67-71 (illustrating diversity of court opinions regarding existence of fundamental right to family unity).

¹²⁶ See Amanda Colvin, Comment, *Birthright Citizenship in the United States: Realities of De Facto Deportation and International Comparisons Toward Proposing a Solution*, 53 ST. LOUIS U.

To successfully establish existence of a fundamental right to family unity, advocates will likely need to limit the scope of such a right to a significant extent, and to rely on our judicial system's unique approach to the rights of children.¹²⁷ Courts are generally reluctant to find "new" fundamental rights; while some courts looked at the long history of case law protecting a parent's custody, care, companionship, and control of his child and determined that a right to family unity may already exist, they either chose not to give such a right legal teeth for fear of the ramifications, or determined that it is only enforceable in extremely limited circumstances.¹²⁸ Where courts have acknowledged a right to family unity, they have tended to limit the scope of its applications to cases where a threatened separation would be permanent, rather than temporary, addressing concerns that such a right would complicate issues such as incarceration or the military draft.¹²⁹ Given this judicial history, while there is precedent for the assertion of a right to family unity, the assertion of that right might be more successful if narrow in scope, as it would address the serious concerns courts have about its broad application.¹³⁰

Furthermore, many courts have conflated the concept of a right to family unity with broader parental rights.¹³¹ In the context of the removal of a parent, this parental rights lens has meant that any violation of the parent's rights has been subject to a lower level of scrutiny, and the government's ultimate court victory, due to the plenary powers doctrine.¹³² As a result, when narrowly defining a right to family unity, advocates would be wise to focus on the right as one independently held by the minor child, to increase

L. J. 219, 220-21 (2008) (acknowledging theory of *de facto* deportation, rooted in understanding that families should not be separated).

¹²⁷ See *Bellotti v. Baird*, 443 U.S. 622, 633-34 (1979) (establishing children's constitutional rights as distinct from those of adults).

¹²⁸ See *Payne-Barahona v. Gonzáles*, 474 F.3d 1, 3 (1st Cir. 2007) (holding no right to family unity, expressing fear of consequence of establishing right); see also *Aguilar v. U.S. Immigration & Customs Enf't Div. of the Dep't of Homeland Sec.*, 510 F.3d 1, 23 (1st Cir. 2007); cf. sources cited *supra* note 71 (finding right to family unity in non-immigration cases).

¹²⁹ See *Aguilar v. U.S. Immigration & Customs Enf't Div. of the Dep't of Homeland Sec.*, 510 F.3d 1, 23 (1st Cir. 2007) (holding right to family unity only issue when permanent separation threatened); see also *Payne-Barahona v. Gonzáles*, 474 F.3d 1, 3 (1st Cir. 2007) (detailing court's concern about ramifications of broadly invoked right to family unity).

¹³⁰ See *Payne-Barahona v. Gonzáles*, 474 F.3d 1, 3 (1st Cir. 2007) (detailing court's concern about ramifications establishing broad right to family unity).

¹³¹ See *Santosky v. Kramer*, 455 U.S. 745, 758 (1982) (quoting *Stanley v. Illinois*, 405 U.S. 745, 651 (1982)) (noting parents' fundamental liberty interest in "companionship, care, custody, and management" of children).

¹³² See cases cited *supra* note 74 (refusing to utilize higher standard when reviewing cases focusing on family unity).

the likelihood that a challenge based on the violation of this right is subject to strict scrutiny.¹³³

Given the courts' continual reliance on the benefits a child derives from family unity in other legal contexts, an advocate would not be making a significant stretch in arguing the historical roots of a child's right to an intact family.¹³⁴ Advocates would be wise, however, to strengthen their arguments in a few ways.¹³⁵ First, in order to bolster claims that minor children's rights can be differentiated from that of their parents, advocates should draw a positive comparison between the context of a parent's removal and other contexts in which the courts have found a child has a right independent of parents.¹³⁶

In a critical decision, the Supreme Court held that a minor had an independent right to obtain an abortion due to the uniquely "grave and indelible" nature of the choice to reproduce.¹³⁷ It would be hard for the government to argue that family separation is not "grave" in the face of the courts' past reasoning surrounding the importance of family unity, but the government has successfully argued in prior cases that any separation caused by removal is temporary, which hardly qualifies as "indelible."¹³⁸ Advocates should therefore focus on the uniquely indelible nature of the *results* of separation during critical developmental years, despite the potentially

¹³³ See cases cited *supra* note 90 (highlighting possible differential treatment of rights between citizens and non-citizens).

¹³⁴ See source cited *supra* note 42 (detailing problems inherent to family separation in international custody dispute); source cited *supra* note 81 (noting hardship inherent to any separation of parent and children).

¹³⁵ See *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (reasoning children's vulnerability, "importance of . . . parental role in child rearing" mandate unique judicial approach to rights). In certain specific instances, such as abortion, the child's liberty interest must override that of a parent. *Id.* at 642; *cf.* cases cited *supra* notes 27-29 and accompanying text (explaining why child's rights violated under same set of facts where adult's rights not violated). See also sources cited *supra* notes 8, 10 (reviewing issues children face when parents are deported); cases cited *supra* note 74 (refusing to analyze issues regarding family unit with higher standard).

¹³⁶ See *Bellotti v. Baird*, 443 U.S. 622, 642 (1979) (exemplifying child's liberty interest overriding that of parent); *cf.* *Perdido v. Immigration & Naturalization Serv.*, 420 F.2d 1179, 1181 (5th Cir. 1969) (explaining "minor children do not ordinarily determine where their own home will be").

¹³⁷ See *Bellotti v. Baird*, 443 U.S. 622, 642-43 (1979) (distinguishing abortion rights from other decisions).

¹³⁸ Compare *Aguilar v. U.S. Immigration & Customs Enf't Div. of the Dep't of Homeland Sec.*, 510 F.3d 1, 23 (1st Cir. 2007) (reasoning any family separation caused by removal is temporary), with case cited *supra* note 42 and accompanying text (detailing problems inherent to family separation in international custody dispute), and sources cited *supra* note 81 (noting hardship inherent to any separation of parent and children).

temporary duration of separation itself, when arguing for a minor child's independent right to family unity in the face of a parent's removal.¹³⁹

Additionally, any argument for the existence of a minor's independent right to family unity would be bolstered by the proposition that a minor may have a stronger claim to a right to family unity than does an adult, even that child's own parent.¹⁴⁰ This is partially because a parent's right to family unity has historically been subordinated to the interests of the state; emphasizing the relative strength of a child's right may therefore be necessary to bolster chances of outweighing state interests.¹⁴¹ More importantly, the issue of family unity may be one in which a child may have greater categorical protection under the Constitution due to minors' unique vulnerability and level of maturity, and this greater categorical protection may make strict scrutiny more likely.¹⁴² Advocates could reasonably draw parallels between a minor child's right to family unity in the face of parental removal, and a child's right to be free from cruel and unusual punishment in the face of life imprisonment or capital punishment.¹⁴³ In the cruel and unusual punishment cases, the Supreme Court reasoned that it was both appropriate and necessary to take into account a minor's unique developmental attributes, holding that as a result of those unique attributes, a punishment that would not violate an adult's rights would violate the rights of a child.¹⁴⁴ Similarly, a minor's unique developmental state should be considered in the context of violations of a right to family unity, as a minor depends on her parents for physical, mental, and developmental health in a way that an adult does not depend on a child, and any separation would therefore have the potential to damage a child more severely.¹⁴⁵

¹³⁹ See *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (reasoning children's vulnerability and "importance of the parental role in child rearing" mandate unique judicial approach to rights); *cf.* sources cited *supra* notes 8, 11 (describing damage done to children of deported parents).

¹⁴⁰ See cases cited *supra* notes 27-29 and accompanying text (explaining why child's rights violated under same set of facts where adult's rights not violated); *see also* cases cited *supra* note 74 (refusing to review immigration law cases, focused on family unity, with higher standard).

¹⁴¹ See cases cited *supra* note 74 (refusing to review family unit issues under stricter standard).

¹⁴² See cases cited *supra* notes 27-29 and accompanying text (clarifying why children's rights differ from adult's rights).

¹⁴³ See *Graham v. Florida*, 560 U.S. 48, 77-79 (2010) (reasoning vulnerability and maturity differences between children and adults); *see also* *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (quoting *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971) (plurality opinion)) ("[T]he State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention.'").

¹⁴⁴ See sources cited *supra* notes 27-29 and accompanying text (distinguishing cruelty can be different between varying age groups).

¹⁴⁵ See *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (noting unique justifications for rights of parents and children differing); *cf.* sources cited *supra* notes 8, 11 (describing challenges children of deported parents face).

Accordingly, any argument regarding a minor child's right to family unity would be bolstered by emphasizing the intersection between that child's healthy development and his ability to be reared by his parent(s).¹⁴⁶

ii. A Minor's Qualified Right to Remain, With Consideration of Best Interest

Even if an advocate is successful in persuading a court that a minor has a fundamental right to family unity, she must also establish that the child has a right to remain in the United States in order to frame the issue as one of an impermissibly coerced choice between fundamental rights.¹⁴⁷ While the right of an adult U.S. citizen to remain in the United States is firmly established, the issue of whether a child has such a right, or is able to exercise it, remains less certain.¹⁴⁸ Therefore, an advocate aiming to successfully argue that a minor whose parents face removal is forced to choose between family unity, and a right to remain, will need to establish both that the minor has an immediate right to remain in the United States, and that she is able to independently exercise it.¹⁴⁹

To successfully make such an argument, an advocate would need to emphasize that any such right is limited in its scope; court rulings in the context of international custody battles indicate that if a child has a right to remain, it is subordinate to both parental decisions and certain compelling state interests.¹⁵⁰ The removal context should be differentiated from an international custody dispute in a critical way: A parent's freely-made decision regarding the best interest of her child is at stake in an international custody dispute, whereas any purported parental "decision" to raise a child outside the United States is made under duress in the context of parental removal.¹⁵¹ This distinction is crucial; courts have consistently held that a fit parent has the right to decide what is in his child's best interest, and have

¹⁴⁶ See discussion *supra* Section 0.

¹⁴⁷ See Osterberg, *supra* note 32, at 761 (describing decisions reasoning children's right to remain is delayed until adulthood); see also cases cited *supra* note 61 (outlining court decisions holding that children do not have power to choose residence).

¹⁴⁸ Compare *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (establishing deportation of citizen as violation of liberty interest), with cases cited *supra* note 61 (describing court decisions that reason children are unable to exercise right to remain).

¹⁴⁹ See sources cited *supra* note 62 (describing decisions reasoning children's right to remain is delayed until adulthood); see also cases cited *supra* note 61 (describing decisions asserting minors do not retain authority to choose domicile).

¹⁵⁰ See cases cited *supra* notes 40-43 and accompanying text (describing instances where U.S. citizen children were ordered into custody of parents overseas).

¹⁵¹ 40 and accompanying text (describing voluntary parental decisions). *But see* cases cited *supra* note 61 (explaining parental decision regarding child's future residence in removal cases).

subordinated certain rights of children to the decisions of their parents, but *only* in the context where what is at stake is the parent's freely made choice.¹⁵² Where the parent is not in a position to voluntarily choose what is in her child's best interest, but instead is forced to make a decision under duress, it is less plausible to reason (as some courts have done in the context of parental removal) that a child cannot independently exercise a right to remain because any right she has is subordinate to her parent's decision-making rights.¹⁵³ A successful advocate, therefore, should emphasize that parents cannot freely choose what is in their children's best interest when faced with removal, and therefore a minor in such circumstances may be able to independently exercise a right to remain in that specific context.¹⁵⁴

Furthermore, a successful advocate may need to address an argument that a child's right to remain is subordinate to the decision-making of the state in the absence of a parent's ability to freely decide where the child will reside.¹⁵⁵ Here, the best interest of the child standard should be addressed.¹⁵⁶ An advocate should rely on the fact that courts have been reluctant to subordinate a child's fundamental rights to the interests of the state, merely because of the child's status as a minor, except where the child is unable to protect herself from harm, or where the state must otherwise act in the child's best interest.¹⁵⁷ Even in cases involving international custody disputes, where the state's interest in upholding international treaties have been upheld, part of the rationale for upholding the treaties was their purpose to protect vulnerable children from kidnapping and other harm.¹⁵⁸ In the case of a parent's removal proceeding, where the government's interests are not related to promoting the child's best interest, it is therefore not appropriate to expect the child to subordinate her right to remain to the power of the state.¹⁵⁹

¹⁵² See sources cited *supra* notes 30-32 (outlining courts' deference to parental rights).

¹⁵³ 40 (describing nature of parental decisions). *But see* cases cited *supra* note 61 (discussing child's residence in removal cases is parental determination).

¹⁵⁴ 40 (describing parental decisions and consequential risks of abduction if ignored). *But see* cases cited *supra* note 61 (explaining parent decision governs).

¹⁵⁵ See *Schall v. Martin*, 467 U.S. 253, 265 (1984) (explaining state's role in promoting child's wellbeing when parent falters).

¹⁵⁶ See *Ginsberg v. New York*, 390 U.S. 629, 634-38 (1968) (justifying infringement of juvenile's right based on state's interest in protecting child).

¹⁵⁷ See cases cited *supra* notes 34-37 (describing state interests outweighing child's liberty interests only in limited circumstances).

¹⁵⁸ See cases cited *supra* note 41 (highlighting state's interest in promoting welfare of children, in face of possible abduction by parent).

¹⁵⁹ See *Cabrera-Alvarez v. Gonzáles*, 423 F.3d 1006, 1013 (9th Cir. 2005) (“[N]o rule of statutory construction required the agency to elevate the qualifying child's best interests to a level that would effectively eliminate or alter the express comparative standard set forth in the statutory text.”).

Because there is significant precedent of courts rejecting the argument that a child has an independent right to remain in the United States that is jeopardized in removal proceedings, it is possible that even in emphasizing the involuntary nature of any parental decision, and the inappropriateness of the state making a decision for the child in a removal context, an advocate may not find success.¹⁶⁰ It would therefore help to argue that at the very least, the state's decision regarding the child's effective right to remain should take her best interests into consideration.¹⁶¹ The courts have regularly held that the state is not required to choose to act in a child's best interest, but implicit in many decisions is that, as a matter of due process, the state should at least consider the child's best interest as a factor.¹⁶² Accordingly, an advocate might find success arguing that a minor facing constructive deportation has a right to have her best interests weighed as a factor, if the state is to avoid violating her narrow right to remain.¹⁶³ The result would be that the government would need to consider a child's best interest in making parental removal decisions, and an advocate could compellingly argue that it is in a child's best interest to remain with her family, in her community, in the United States.¹⁶⁴ Alternatively, if the government failed to consider the child's best interest, it would violate the child's independent right to remain, and an advocate could once again put forth the argument that the child was impermissibly forced to choose between two fundamental rights.¹⁶⁵

C. Existence of More Narrowly-Tailored Alternatives to Immediate Removal

An advocate who is successful in arguing that a minor U.S. citizen's fundamental rights are at stake in his parent(s) removal proceedings will still

¹⁶⁰ See sources cited *supra* notes 61-63 (explaining reasoning in rejecting U.S. citizen children's claims).

¹⁶¹ See cases cited *supra* notes 83-84 and accompanying text (noting state may consider best interest as factor in determining extreme hardship); see also case cited *supra* notes 86-88 and accompanying text (holding in cases regarding juvenile pre-removal detention no requirement for child's best interest to prevail).

¹⁶² See cases cited *supra* notes 83-84 and accompanying text (noting state considers weighs factors in extreme hardship analysis); see also cases cited *supra* notes 86-88 and accompanying text (holding child's best interest need not be determinative factor).

¹⁶³ See cases cited *supra* notes 83-84 and accompanying text (discussing possibility that child's best interests may be considered as one factor).

¹⁶⁴ See sources cited *supra* note 22 (discussing challenges removal causes for children); see also case cited *supra* note 42 and accompanying text (describing harms child faces losing parents and community).

¹⁶⁵ See *Aptheker v. Sec'y of State*, 378 U.S. 500, 505 (1964) (explaining principle prohibiting government from forcing people to choose between fundamental rights).

need to show that the parent's removal during the child's age of minority, in violation of that child's fundamental rights, is not a sufficiently narrowly-tailored way of achieving the government's admittedly compelling interest in enforcing immigration laws.¹⁶⁶ An advocate might find success in using the proposed DAPA program as an example of the existence of alternatives to immediate removal.¹⁶⁷ The program included very limited provisions, allowing for a non-citizen to lawfully reside and work in the United States for a specific period of time, but not conferring benefits such as the ability to sponsor another individual, the right to gain a direct path to citizenship, or the right to receive government benefits.¹⁶⁸

Because of these restrictions, the temporary nature of the program, and the necessity for renewal and government oversight, programs like DAPA do not ultimately impede the state's ability to choose who to exclude; those participating aren't truly enjoying the full benefits of immigration, and the government has the right and ability to remove participants at the program's termination date.¹⁶⁹ But such programs do provide an alternative to immediate removal, allowing participants to remain in the United States for a time.¹⁷⁰ In the context of parental removal, an advocate could convincingly argue that some sort of deferred action program might be offered to those in removal proceedings who are parents of a minor U.S. citizen, lasting until the child reaches the age of majority, and that such a program would promote the government's interest in enforcing immigration laws while upholding the citizen child's fundamental rights.¹⁷¹ The government might reasonably argue that, given their potential for lengthy delay in ultimate enforcement of immigration laws, such programs are not the ideal way to advance the government's goals.¹⁷² But under strict scrutiny, the government must use the most narrowly-tailored means available to advance its goals where fundamental rights are at stake, not the ideal means from a policy perspective; therefore the mere existence of alternatives such

¹⁶⁶ See cases cited *supra* note 55 (outlining fundamental rights involves strict scrutiny standard).

¹⁶⁷ See sources cited *supra* notes 16-17 and accompanying text (describing DAPA program).

¹⁶⁸ See sources cited *supra* notes 16-17 and accompanying text (acknowledging limited benefits of DAPA program).

¹⁶⁹ See sources cited *supra* notes 16-17 and accompanying text (reviewing DAPA program's scope).

¹⁷⁰ See sources cited *supra* notes 16-17 and accompanying text (describing process for remaining in U.S. under DAPA).

¹⁷¹ See sources cited *supra* notes 16-17 and accompanying text (outlining compromise program offering some temporary benefits).

¹⁷² See sources cited *supra* note 19 (explaining administration's view that delays in removal constitute "amnesty").

as DAPA should be sufficient to establish that removal is not a permissible means of achieving the state's goals in this context.¹⁷³

VII. CONCLUSION

Advocates who have attempted to prevent the deportation of parents of minor U.S. citizens have not yet found much success in the courts. However, as the scale of the problem grows, and remedies proposed by other branches of government fail to materialize, the time may be ripe for new attempts at, and approaches to, a judicial remedy. To increase chances of success in court, advocates should focus on the rights of minor U.S. citizens rather than those of their parents, in the hope of avoiding the lax scrutiny afforded under the plenary powers doctrine. Furthermore, advocates may meet with more success if they position the issue as one of an unconstitutional choice between two fundamental rights: a qualified right for the citizen child to remain in the United States, incorporating consideration of the child's best interests, and the unique right of a minor to family unity. Finally, to reduce the strength of the government's argument that immediate deportation of parents is the only way to enforce immigration laws, and to reduce worry that judicial acknowledgement of the citizen child's rights would create incentives for undocumented immigrants to give birth in the United States, advocates should lean on the example of DAPA as evidence of the existence and feasibility of more narrowly-tailored alternatives.

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¹⁷³ See cases cited *supra* note 55 and accompanying text (outlining strict scrutiny standard for fundamental rights).