

HERE STOOD MY DREAMING TREE: A
PROPOSAL TO REFORM NON-LPR
CANCELLATION OF REMOVAL TO BRING
UNDOCUMENTED IMMIGRANTS OUT OF THE
SHADOWS

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I. INTRODUCTION

10.5 million.¹ This is the latest estimate on the number of undocumented immigrants, persons without lawful status, currently in the United States.² Immigrants and immigrants' rights activists have long advocated for reform to bring undocumented immigrants out of the shadows—facing seclusion and oppression because of their lack of lawful status.³ Undocumented immigrants are subjected to racial profiling and ongoing discrimination,⁴ immigration raids in their homes and workplaces,⁵

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¹ The latest estimate of 10.5 million undocumented immigrants is from 2017 data. Jens Manuel Krogstad et al., *5 Facts about illegal immigration in the U.S.*, PEW RESEARCH CENTER (June 12, 2019), <https://www.pewresearch.org/fact-tank/2019/06/12/5-facts-about-illegal-immigration-in-the-u-s/> [<https://perma.cc/HM8B-JTZY>].

² I will refer to undocumented immigrants, immigrants with temporary status, and lawful permanent residents as noncitizens. When comparing undocumented immigrants to other noncitizens, I will distinguish between both. I will refrain from using “alien” as much as possible.

³ See *LULAC Supports Immigration Reform and Amnesty for Dreamers*, LULAC (June 28, 2011), https://lulac.org/news/pr/LULAC_Supports_Immigration_Reform_and_Amnesty_for_Dreamers/ [<https://perma.cc/Z9NC-FQ8E>]; Marshall Fitz, *Time to Legalize Our 11 Million Undocumented Immigrants*, CTR. FOR AM. PROGRESS (Nov. 14, 2012, 6:30 AM), <https://www.americanprogress.org/issues/immigration/reports/2012/11/14/44885/time-to-legalize-our-11-million-undocumented-immigrants/> [<https://perma.cc/6YGU-R9KL>]; Tanya Golash-Boza, *It's time to legalize all undocumented immigrants*, AL JAZEERA AMERICA (Aug. 7, 2015, 2:00 AM), <http://america.aljazeera.com/opinions/2015/8/its-time-to-legalize-all-undocumented-immigrants.html> [<https://perma.cc/3TTJ-K6PK>]; Janet Murguia, *The American Family Makes This Country Great, and It's in Danger*, N.Y. TIMES (May 2, 2019), <https://www.nytimes.com/2019/05/02/opinion/trump-immigration-families.html> [<https://perma.cc/6YFU-VVGP>].

⁴ Latinos in the United States, especially immigrants from Mexico and Central America, are disproportionately targeted for deportation. This pattern is evident in common stereotypes about immigrants, spending on and constructing the border wall along the United States-Mexico border, and the racial patterns associated with deportation. Federal authorities publicized workplace raids, aimed at immigrants from Mexico and Central America working in meatpacking plants and other low-wage jobs, and home raids, often ignoring Constitutional requirements against breaking into homes without legal authority, searching without a warrant, arresting innocent people, and racially profiling Latinos. Doris Marie Provine, *Institutional Racism in Enforcing Immigration Law*, 8 NORTEAMÉRICA 31, 32-35 (2013).

⁵ See *Announcements of ICE Enforcement Actions*, AM. IMMIGR. LAWYERS ASS'N. (Jan. 7, 2021), <https://www.aila.org/infonet/ice-announcements-of-enforcement-actions#2020> [<https://perma.cc/5HRB-KX8C>] (listing press releases issued by ICE's Enforcement and Removal Operations (“ERO”) and

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immigration detention,⁶ and ultimately deportation from the United States.⁷ The typical undocumented immigrant adult has lived in the United States for fifteen years,⁸ and a growing share of children, nearly 8%, of students in kindergarten through 12th grade, have undocumented immigrant parents.⁹ By failing to implement pathways to lawful status for 10.5 million undocumented immigrants, the United States government isolates these persons and their families, keeping them invisible, and perpetrating the harmful and misguided expectation of deservingness of lawful status and citizenship that has existed for decades in the immigration system.¹⁰ This Note proposes expanding non-LPR cancellation of removal, a current form of relief from deportation available only to certain undocumented immigrants, as a means to provide lawful status to undocumented persons who call the United States their home.

B is a 49-year-old dedicated husband and father living in the suburbs of New York with his wife and two young children.¹¹ He lives a simple

media stories about enforcement activities); Adam Harris, *When ICE Raids Homes*, ATLANTIC, (July 17, 2019), <https://www.theatlantic.com/family/archive/2019/07/when-ice-raids-homes-immigration/594112/> [<https://perma.cc/GSD6-TV8Z>] (reporting on ICE's shift from largescale workplace raids to home raids).

⁶ See *Detention by the numbers*, FREEDOM FOR IMMIGRANTS, <https://www.freedomforimmigrants.org/detention-statistics> (last visited Apr. 8, 2021) [<https://perma.cc/4JAA-4KEJ>] (noting the increase in average lengths of immigration detention: 21 days in FY 2015, 22 days in FY 2016, and 34 days in FY 2017).

⁷ See generally U.S. IMMIG. AND CUSTOMS ENF'T, ENF'T AND REMOVAL OPERATIONS, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT FISCAL YEAR 2020 ENFORCEMENT AND REMOVAL OPERATIONS REPORT (2020) <https://www.ice.gov/doclib/news/library/reports/annual-report/eroReportFY2020.pdf> [<https://perma.cc/2NNZ-548T>] (reporting an increase from FY 2016 to FY 2019 in removals and a greater percentage of removals stemming from an initial apprehension by CBP than by ICE, then a decrease of 30% in removals stemming from expulsion of immigrants at the Southern Border due to the COVID-19 pandemic in FY 2020).

⁸ JEFFREY S. PASSEL & D'VERA COHN, PEW RES. CTR., U.S. UNAUTHORIZED IMMIGRANT TOTAL DIPS TO LOWEST LEVEL IN A DECADE 22–23 (2018), https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2019/03/Pew-Research-Center_2018-11-27_U-S-Unauthorized-Immigrants-Total-Dips_Updated-2019-06-25.pdf [<https://perma.cc/84V7-EYT2>] (finding that about two-thirds of undocumented immigrant adults have lived in the United States for more than a decade and that in 2016 the typical undocumented immigrant adult had lived in the United States for nearly fifteen years).

⁹ *Id.* at 25–26 (finding that 4.1 million students had undocumented immigrant parents in 2016).

¹⁰ The Center for American Progress published a report discussing immigrants' responses to local immigration restrictions and enforcement. The report found that exclusionary policies and increased federal enforcement prevent undocumented immigrants and their families from incorporating into their communities, and lead to problems for the entire community: undocumented immigrants avoid interaction with police, are reluctant to accompany their children to school, and avoid leaving their home and engaging civically in their community. See generally ANGELA S. GARCIA & DAVID G. KEYES, CTR. FOR AM. PROGRESS, LIFE AS AN UNDOCUMENTED IMMIGRANT: HOW RESTRICTIVE LOCAL IMMIGRATION POLICIES AFFECT DAILY LIFE (2012), https://cdn.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/life_as_undocumented.pdf?_ga=2.37525795.263223190.1617941313-3-304862154.1617941313 [<https://perma.cc/5K6P-XR33>].

¹¹ Interview with B (Feb. 26, 2020) (on file with author).

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life: his children are in public school, his wife is a stay-at-home mom, and he worked a full-time job six days a week up until the COVID-19 pandemic hit.¹² But like the 10.5 million undocumented persons just like him, B has been living in the shadows since 1991, the year when he entered without inspection into the United States.¹³ Despite spending over half of his life in the United States and never having had any contact with the criminal justice system, B knows that any minor mistake can lead to his deportation.¹⁴ His undocumented status controls every aspect of his and his family's lives and keeps them in a constant state of unease and anguish.¹⁵ His life in the United States is uncertain: any day can be his final day at home.¹⁶

¹² B lost his job in summer 2020 due to the Covid-19 pandemic and he has been unemployed since then. He and his family have been struggling financially and living off their savings. *Id.*

¹³ *Id.*

¹⁴ *Id.* Being caught driving without a driver's license can place an undocumented immigrant into removal proceedings. In 2010, the New York Times reported on the case of an undocumented woman, who despite living in the United States for seventeen years, was detained for twelve days and placed into removal proceedings after being involved in a car crash in the suburbs of Georgia. Julia Preston & Robert Gebeloff, *Some Unlicensed Drivers Risk More Than a Fine*, N.Y. TIMES (Dec. 9, 2010), <https://www.nytimes.com/2010/12/10/us/10license.html> [<https://perma.cc/G8VJ-HQ7W>]; See also Liz Robbins, *Driving While Undocumented, and Facing the Risks*, N.Y. TIMES (July 18, 2017), <https://www.nytimes.com/2017/07/18/nyregion/driving-illegal-immigration-trump-administration.html> [<https://perma.cc/7YJR-XGHF>]. According to DHS data, crimes for traffic violations consistently rank among the top three crime categories leading to removal. From 2010 to 2018, removals as a result of traffic violations have ranged from 14,795 to 46,141. Other crime categories include immigration offenses such as entry and reentry, false claims to citizenship, and smuggling of persons and crimes involving dangerous drugs such as the manufacturing, distribution, sale, and possession of illegal drugs. MIKE GUO & RYAN BAUGH, DEP'T OF HOMELAND SECURITY OFF. OF IMMIGR. STAT., IMMIGRATION ENFORCEMENT ACTIONS: 2018 10 (2019), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/enforcement_actions_2018.pdf [<https://perma.cc/4DCB-5BUK>]. State and local law enforcement agencies can contract with ICE through a program known as 287(g). The program is offered via three models: the task force model, the jail model, and the warrant service officer model. The task force model allows local officers to enforce immigration laws, make immigration stops and arrests, issue detainers, and process persons for deportation; there are currently no state or local agencies participating in this model. The jail model allows local officers to engage in immigration enforcement only within their jail, investigate immigration history, issue detainers and warrants, and transfer persons to ICE custody; 72 state and local agencies participate in this model as of January 2021. The warrant service officer model allows local officers to arrest immigrants pursuant to ICE warrants in a local jail and detain them while transferring to longer-term ICE custody; 76 state and local agencies participate in this model as of January 2021. *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. AND CUSTOMS ENF'T, <https://www.ice.gov/287g> (last updated Apr. 8, 2021) [<https://perma.cc/6P67-Z3HZ>].

¹⁵ Interview with B, *supra* note 11.

¹⁶ *Id.*; As part of President George W. Bush's administration's Operation Endgame, which aimed to remove all eleven million undocumented immigrants in the United States within a decade, a workplace raid occurred in Postville, Iowa in May 2008. 389 undocumented immigrants, nearly 20% of the town's population, were detained. The raid cost \$5 million and destroyed the town's economy. President Donald Trump's administration promised similar workplace raids; then-acting director of ICE Thomas Homan, declared that these enforcements would increase by "400 percent." In April 2018, 97 undocumented immigrants were detained at a meatpacking plant in Tennessee. In June 2018, 114

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B was born in 1972 to a family of poor farmers who had very little recourse for social and economic mobility in rural Guatemala.¹⁷ Twentieth-century Guatemala was notorious for its authoritarianism and instability.¹⁸ Its long history of internal conflict and violence included a civil war that lasted from 1960 to 1996, during which the Guatemalan military maintained power and repressed and violated the human rights of its citizens, notably its indigenous population; over 200,000 Guatemalans were killed or disappeared.¹⁹

As the oldest son in his family, B was responsible at a young age for helping support his family financially.²⁰ Because they lived in a remote village, they had no indoor plumbing or electricity; the village well was

undocumented immigrants were detained at a landscaping business in Ohio. That same month, another 146 undocumented immigrants were arrested at a meat supplier's facilities in Ohio. Alice Sperti, *Film: How a Brutal Immigration Raid Devastated An American Small Town—And How It Bounced Back*, INTERCEPT (July 14, 2018, 11:00 AM), <https://theintercept.com/2018/07/14/immigration-raid-ice-postville-iowa/> [<https://perma.cc/TB65-3QZH>]. In August 2019, immigration authorities raided seven Mississippi chicken processing plants and arrested 680 undocumented immigrants. This was the largest workplace sting in a decade. Rogelio V. Solis & Jeff Amy, *Largest US immigration raids in a decade net 680 arrests*, ASSOCIATED PRESS (Aug. 7, 2019), <https://apnews.com/bbcef8ddae4e4303983c91880559cf23> [<https://perma.cc/EC9L-RDX2>]. Months after the raid, about 300 undocumented immigrants who were arrested remained detained at two ICE detention facilities in Louisiana. About 90 of them were charged criminally for using fraudulent Social Security numbers. The towns suffered tremendously, especially the children whose parents disappeared overnight. Maye Primera, *Months After ICE Raids, An Impoverished Mississippi Community is Still Reeling*, INTERCEPT (Oct. 13, 2019, 7:00 AM), <https://theintercept.com/2019/10/13/ice-raids-mississippi-workers/> [<https://perma.cc/7EL5-EUME>]. See also *Worksite Immigration Raids*, NAT'L IMMIGR. L. CTR., <https://www.nilec.org/issues/workersrights/worksite-raids/> (last updated Jan. 2020) [<https://perma.cc/F5ZS-X5T3>] (documenting worksite raids under the Trump administration).

¹⁷ Interview with B, *supra* note 11.

¹⁸ In ninety-six years, Guatemala experienced six coups d'état, five constitutions, and thirty-five different governments. The aftermath of these events was filled with widespread physical and human destruction and wide-scale social fragmentation and polarization. MARKUS KOSTNER ET AL., THE WORLD BANK AND THE CARTER CENTER, FROM CIVIL WAR TO CIVIL SOCIETY: THE TRANSITION FROM WAR TO PEACE IN GUATEMALA AND LIBERIA 1 (1997), <https://www.cartercenter.org/documents/1200.pdf> [<https://perma.cc/46A8-2CYC>].

¹⁹ The civil war began with a group of young army officers, supported by anti-Cuban forces, rebelling against corruption. The rebellion failed and the officers disappeared into rural areas of the country, forming a guerilla army and beginning a war against the government. The country seemed to head towards peace in the early to mid-1980s with a new constitution, the election of a civil president, political pluralism and personal liberties. CONGRESSIONAL RES. SERV., GUATEMALA: POLITICAL AND SOCIOECONOMIC CONDITIONS AND U.S. RELATIONS 1–2 (2019). The Guatemalan government transitioned from brutal authoritarianism in 1985 and the country remained semi-democratic throughout the 1980s and 1990s. Failure to combat civil rights violations continued into the 1990s. Fabrice Lehoucq, *Democratization and Other Civil War Legacies in Central America* 4–5 (Kellogg Institute for International Studies, Working Paper No. 402, 2015), https://kellogg.nd.edu/sites/default/files/old_files/documents/402_0.pdf [<https://perma.cc/K2J3-QPJ9>]. A final agreement between the guerilla movement and the newly formed government was signed in December 1996. KOSTNER ET AL., *supra* note 18, at 2.

²⁰ Interview with B, *supra* note 11.

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their water source.²¹ Children in the village were expected to contribute to their households in any way they could.²² B and his older sister were two of the luckier children in their village and attended school up until sixth grade, the highest level of education offered in their village.²³ Their parents, who did not know how to read or write, valued their children's education and saved up what little money they had to enable their children to attend school.²⁴ After school, B worked alongside his father as a farmer, mostly growing beans and corn and raising cattle.²⁵ When he could no longer afford to continue with school, B worked with his father as a farmer full-time in their remote village.²⁶

Life in a developing country with little opportunity for its young people was difficult: economic, social and cultural inequality, among other things, kept the poor poor.²⁷ Migrating to the United States was an attractive opportunity for all of the young people in B's village.²⁸ B saw his older peers doing well financially in the United States and providing for their parents back home.²⁹ The prospect of a steady income, among other inviting pull factors, convinced B to make the dangerous, overland journey across Guatemala, through Mexico and into the United States in 1991.³⁰

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* While Guatemala's economy is centered on agriculture, a majority of the land is controlled by a small portion of the population. In 1979, 2.6% of the population controlled 64.5% of the land; in 2000, 1.5% controlled 62.5%. INT'L CRISIS GROUP, GUATEMALA: SQUEEZED BETWEEN CRIME AND IMPUNITY 5 (2010), <https://www.crisisgroup.org/latin-america-caribbean/central-america/guatemala/guatemala-squeezed-between-crime-and-impunity> [<https://perma.cc/BF77-Y4BQ>].

²⁶ Interview with B, *supra* note 11.

²⁷ INT'L CRISIS GROUP, *supra* note 25, at 2.

²⁸ Interview with B, *supra* note 11; Due in part to the Guatemalan government's inability to enforce an adequate tax code, it has been unable to provide the most basic services to its urban and rural populations. This failure reflects the economic elite's disinterest in reforming the country's deficient legal structures that maintain the status quo. A pattern whereby the government serves as a means to advance the elite's interests rather than the public's interests has been hard to break. INT'L CRISIS GROUP, *supra* note 25, at 2. In the post-war era, Guatemalans have been forced out of their country due to its severe and continual socioeconomic problems, natural disasters, increasing social violence. According to figures from the U.S. Immigration and Naturalization Service, during the civil war years the number of Guatemalan immigrants to the United States rose from 13,785 in 1977 to 45,917 at its peak in 1989. The number then decreased to 22,081 in 1996. Susanne Jonas, *Guatemalan Migration in Times of Civil War and Post-War Challenges*, MIGRATION POL'Y INST. (Mar. 27, 2013), <https://www.migrationpolicy.org/article/guatemalan-migration-times-civil-war-and-post-war-challenges/> [<https://perma.cc/D7SL-GVES>].

²⁹ Interview with B, *supra* note 11; Jonas, *supra* note 28 (noting that nearly 15 million Guatemalans rely on remittances from their U.S.-based relatives).

³⁰ Interview with B, *supra* note 11.

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Not speaking a word of English, combined with B's very limited skills and education, made his early years in the United States very difficult.³¹

Fast forward to 2021. B continues to lack any work authorization and, up until the COVID-19 pandemic hit, worked for the same employer since he entered the United States.³² He was never entitled to sick days or vacation days, overtime pay, health insurance, or even a proper lunch break.³³ Like so many undocumented workers, B did not take a sick day to see a doctor when he was sick; rather, he went into work for fear of losing his job and livelihood.³⁴ Understanding the repercussions of one mistake, B has managed to live in the shadows for thirty years: he is a hardworking man who hopes that one day he will be able to obtain lawful status which will allow him and his family to change their lives completely and finally have security in their home.³⁵

Now with two U.S. citizen children, B and his wife, who is also undocumented, live in constant fear of being discovered by U.S. Immigration and Customs Enforcement ("ICE") and being deported to their native Guatemala.³⁶ Unable to get their own apartment lease, B and his family share a two-bedroom apartment with another family in a middle-class suburb in New York.³⁷ B and his wife accept this living arrangement, albeit uncomfortable, since it allows their children to attend school in an affluent school district where they can thrive to the best of their abilities.³⁸ Despite being in elementary school and middle school, B's two young boys understand the anti-immigrant rhetoric that was voiced and became popular during the 2016 presidential election.³⁹ They have connected the dots for

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*; The detention and/or deportation of a parent can lead to significant negative impacts on a child, including mental health problems, economic instability and negative educational outcomes. Detention and/or deportation, or even the threat of these actions, can negatively impact a child's long-term health and development; a child can experience mental health problems, like depression and anxiety, toxic stress, chronic mental health conditions, and physical conditions such as cancer, stroke, diabetes, and heart diseases. Children can also experience changes to their eating and sleeping habits. Studies support the conclusion that detention or deportation of a parent puts children at risk of economic instability. These studies have generally found that families lost between 40 and 90% of their income following a parent's immigration-related arrest, detention, or deportation. If a parent is unable to arrange childcare or custody prior to detention or deportation, the child risks being placed into foster care. Children's lives can also be disrupted even with just the threat of detention. Communities that partner with ICE or are the focus of ICE raids tend to drive out their immigrant communities: Hispanic families choose to leave or avoid moving into those communities. AM. IMMIGR. COUNCIL, U.S. CITIZEN

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why their family cannot own a car, cannot live in their own apartment, and cannot travel.⁴⁰ The young boys have been forced to become aware of the reality of their parents' undocumented status: that one day their lives could change forever and they would be forced to make the very difficult decision of leaving the United States together as a family or being separated in two very different countries.⁴¹ Despite spending over half of his life in the United States, B lives in constant fear of being deported to Guatemala and being separated from his family.⁴² Guatemala never fully recovered from its civil war⁴³ and remains a third world country.⁴⁴ It has failed to provide

CHILDREN IMPACTED BY IMMIGRATION ENFORCEMENT 1–3 (2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/us_citizen_children_impacted_by_immigration_enforcement.pdf [<https://perma.cc/5R84-52MY>]; *See generally* RANDY CAPPS ET AL., URBAN INSTITUTE, MIGRATION POL'Y INST., IMPLICATIONS OF IMMIGRATION ENFORCEMENT ACTIVITIES FOR THE WELL-BEING OF CHILDREN IN IMMIGRANT FAMILIES (2015), <https://www.urban.org/sites/default/files/alfresco/publication-exhibits/2000405/2000405-Implications-of-Immigration-Enforcement-Activities-for-the-Well-Being-of-Children-in-Immigrant-Families.pdf> [<https://perma.cc/YHE8-QLYG>] (discussing the impacts of parental detention and deportation on children, the needs of children with detained and deported parents, and the immigration enforcement that affects undocumented immigrant parents and their children).

⁴⁰ Interview with B, *supra* note 11; *See generally* JOANNA DREBY, CTR. FOR AM. PROGRESS, HOW TODAY'S IMMIGRATION ENFORCEMENT POLICIES IMPACT CHILDREN, FAMILIES, AND COMMUNITIES: A VIEW FROM THE GROUND (2012), <https://www.americanprogress.org/wp-content/uploads/2012/08/DrebyImmigrationFamiliesFINAL.pdf> [<https://perma.cc/Q7N7-3NH7>] (describing the great effect that media has on children's feelings of powerlessness and finding that young children "believe that immigration has negative connotations," prefer that "others not know that either they or their parents are immigrants," and "internalize a stigma of immigrant status").

⁴¹ Interview with B, *supra* note 11. In 2012, there were an estimated 5.3 million children in the United States with at least one undocumented parent; 4.5 million were U.S. citizens and about 800,000 were undocumented as well. There is no data on the amount of children leaving the United States, but an estimated 500,000 U.S. citizen children lived in Mexico in 2010 and a significant amount also live in Guatemala, Honduras, and El Salvador. CAPPS ET AL., *supra* note 39, at 11–12, 23.

⁴² Interview with B, *supra* note 11.

⁴³ The Atlantic Council Task Force completed a public opinion survey in the Northern Triangle in September 2016. The researchers found that 75% of residents believed their country was on the wrong path and 90% believed that corruption was widespread and that the justice system favored the rich and powerful. Nearly 10% of Northern Triangle citizens have left their native countries seeking to reunify with their families, relief from poverty, and protection from growing violence. JOHN NEGROPONTE ET AL., ATLANTIC COUNCIL, BUILDING A BETTER FUTURE: A BLUEPRINT FOR CENTRAL AMERICA'S NORTHERN TRIANGLE 8, 10 (2017), https://www.atlanticcouncil.org/wp-content/uploads/2017/05/Building_a_Better_Future_web_0504.pdf [<https://perma.cc/7PAS-WC64>].

⁴⁴ Interview with B, *supra* note 11; Guatemalan authorities contend that Guatemala is not a failed state. They point to the country's functional schools, hospital system, public transportation system in the capital city, better roads and infrastructure in the countryside and other signals of stability. However, these positive developments have not reduced the disparity between the poor and the rich's access to services or justice. INT'L CRISIS GROUP, *supra* note 25, at 17. The United States, Canada, the European Union and several European states fund the International Commission against Impunity in Guatemala (CICIG), the United Nations sanctioned body that works with Guatemalan authorities to prosecute high-profile cases. The CICIG was created in 2006 and designed to strengthen Guatemala's capacity to destroy illicit networks involving government contact to ensure impunity. In addition to its prosecutorial

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safety and stability for its citizens,⁴⁵ and as a result thousands continue to flee to the United States, primarily due to extreme poverty, climate change, and widespread and uncontrollable gang violence.⁴⁶ With limited or no possibilities to lawfully immigrate to the United States, immigrants from Guatemala unlawfully crossed, and continue to cross, the U.S.-Mexico border as their only opportunity to enter the United States.⁴⁷

Undocumented people like B live in a constant state of uncertainty where every aspect of their lives is controlled by their unlawful status.⁴⁸

authority, the CICIG can propose and promote new legislation and recommend removal or sanction of public officials whom it deems corrupt. *Id.* at 19–20.

⁴⁵ Central American street gangs began operating in the Northern Triangle in the early 1990s. Factors such as poverty, marginalization, lack of basic services and educational opportunities, dysfunctional families, deportation of gang members from the United States, and a culture of violence in which guns were prevalent bolstered the advancement particularly of the Mara Salvatrucha (MS-13) and the Barrio 18 (or Mara 18). Both gangs originated in Los Angeles, California. The gangs have impacted the region's security tremendously, particularly as it relates to violence, extortion, kidnapping. Such crimes have crippled communities and even parts of the state. Gangs operate extortion rings that target small business owners and transportation companies. Gangs control much of the illegal drug distribution networks and smuggle immigrants across borders with the assistance of corrupt police and border patrol. INT'L CRISIS GROUP, *supra* note 25, at 12–13.

⁴⁶ In March 2018, large groups of Northern Triangle immigrants, known as caravans, started making their journey to the United States in hopes of applying for asylum. The large groups pose an attractive option because they provide protection against criminals who prey on immigrants on their journeys north. Kirk Semple, *Migrant Caravan Arrives at U.S. Border, but Long Road Awaits*, N.Y. TIMES (April 24, 2018), <https://www.nytimes.com/2018/04/24/world/americas/migrant-caravan-mexico.html> [<https://perma.cc/9G8J-7R4A>]. The largest caravan journeyed north in October 2018. The United Nations estimated that 7,000 people traveled with the caravan; UNICEF estimated that at least 2,300 children were part of the group. The Mexican government estimated that the caravan was much smaller—3,600 people. Many of the migrants fled danger, poverty, and unemployment in their home countries. The largest group of migrants were adult men traveling alone. Social media facilitated the organization of the caravan and drew migrants from Honduras, Nicaragua, El Salvador, and Guatemala. Although the caravan represented a fraction of migrants who arrive at the border each year—according to CBP, it detained an estimated 396,579 people at the United States-Mexico border from October 2017 to September 2018—it still received much attention and President Trump used it as a reminder of his campaign promise to be tough on immigrants and secure the border. Annie Correal & Megan Specia, *The Migrant Caravan: What to Know About the Thousands Traveling North*, N.Y. TIMES (Oct. 26, 2018), <https://www.nytimes.com/2018/10/26/world/americas/what-is-migrant-caravan-facts-history.html> [<https://perma.cc/H83Q-H3RP>]; *Southwest Border Migration FY2018*, U.S. CUSTOMS AND BORDER PATROL, <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018> (last modified Nov. 9, 2018) [<https://perma.cc/825F-6PSZ>]. See also Nicole Narea, *Migrants are heading north because Central America never recovered from last year's hurricanes*, VOX (Mar. 22, 2021, 12:50 PM), <https://www.vox.com/policy-and-politics/2021/3/22/22335816/border-crisis-migrant-hurricane-eta-iota> [<https://perma.cc/9H9B-G9KR>] (hurricanes in November 2020 devastated the Northern Triangle region already facing high levels of violence and poverty).

⁴⁷ See generally Douglas S. Massey & Fernando Riosmena, *Undocumented Migration from Latin America in an Era of Rising U.S. Enforcement*, 630 ANNALS OF THE AM. ACADEMY OF POLITICAL AND SOC. SCI. 294 (2010) (compiling and analyzing data on undocumented migration from Latin America).

⁴⁸ During a hearing with the Appropriations Committee's Homeland Security Subcommittee, signaling that the Trump administration would prioritize all undocumented immigrants for removal, then-acting director of ICE Thomas Homan cautioned undocumented immigrants that “[y]ou should be uncomfortable. You should look over your shoulder. You need to be worried. No population is off the

Without a permanent and reasonable solution from the federal government to provide lawful status, millions of undocumented persons will continue to endure life as second-class citizens in the land of opportunity.⁴⁹ Non-LPR cancellation of removal is a form of relief from removal available to undocumented immigrants who meet strict criteria: been physically present in the United States for at least ten years; have good moral character during that period of time; not have been convicted of certain offenses; and to deport him would cause “exceptional and extremely unusual hardship” to his qualifying relative.⁵⁰ Through the non-LPR cancellation of removal process, undocumented immigrants repent for breaking the law and seek redemption by demonstrating their “deservingness” and “Americanness”—that is their assimilation to certain values, lifestyles, and social norms as decided by the immigration system.⁵¹ While undocumented immigrants like B may seem to meet the criteria to obtain the relief, become a lawful permanent resident (“LPR”), and be put on a pathway to citizenship, applying for non-LPR cancellation of removal can be a risky choice.⁵² First, it is available only as a defensive form of relief, meaning that an undocumented immigrant must be in removal proceedings in order to apply for the relief. Second, the relief has strict standards that are extremely difficult for immigrants to meet, thus leading to denial and deportation for most applicants. Third, the relief is capped at 4,000 adjustments of status each year meaning that even if an undocumented immigrant is granted the relief, he may have to wait months to obtain lawful status. This Note proposes amendments to non-LPR cancellation of removal: eliminating the 4,000-person cap on grants for the relief, modifying it into an affirmative form of relief more easily accessible to undocumented immigrants with longstanding ties to the United States, primarily parents of U.S. citizens and LPRs, and lowering the hardship standard.

Part II of this Note will provide a brief historical overview of the major changes to immigration law, with a focus on the effects to non-LPR cancellation of removal relief. Part III will examine the current form of

table.” Adam Harris, *When ICE Raids Homes* (July 17, 2019), <https://www.theatlantic.com/family/archive/2019/07/when-ice-raids-homes-immigration/594112/> [<https://perma.cc/R48C-QFEW>].

⁴⁹ See generally GARCIA & KEYES, *supra* note 10 (discussing the consequences of local policies targeting undocumented immigrants).

⁵⁰ 8 U.S.C. § 1229b(b)(1); INA § 240A(b)(1).

⁵¹ Margot K. Mendelson, *Constructing America: Mythmaking in U.S. Immigration Courts*, 119 YALE L. J. 1012, 1035 (2010).

⁵² See generally IMMIGRANT LEGAL RESOURCE CTR., NON-LPR CANCELLATION OF REMOVAL: AN OVERVIEW OF ELIGIBILITY FOR IMMIGRATION PRACTITIONERS (2018), https://www.ilrc.org/sites/default/files/resources/non_lpr_cancel_remov-20180606.pdf [<https://perma.cc/T82Z-7AE7>].

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non-LPR cancellation of removal. Part IV will review the characteristics of undocumented immigrants, focusing on those from Mexico and the Northern Triangle, and their contributions to the United States. Part IV will also debrief the current forms of limited status available to undocumented immigrants. Finally, Part V will propose amendments to non-LPR cancellation of removal.

II. IMMIGRATION LEGISLATION IN THE UNITED STATES

While courts characterize removal proceedings as civil proceedings, they have also recognized the potentially severe consequences of removal.⁵³ Consequently, Congress, recognizing the potential impact of removing persons with ties to the United States, has allowed for discretionary relief for certain noncitizens to remain in the country.

A. The Immigration Act of 1891, the Immigration Act of 1924 and the Alien Registration Act of 1940

Until the 1890s, the U.S. federal government did little to regulate immigration.⁵⁴ It wasn't until Congress passed the Immigration Act of 1891 that a federal system for deportation was created.⁵⁵ Between 1892 to 1920, anywhere from a few hundred to nearly 3,000 noncitizens were deported each year;⁵⁶ the law included a one year statute of limitations on deportation which was increased to five years in 1917.⁵⁷ The Immigration Act of 1924 changed immigration law by creating a quota system intended to favor desirable immigrants.⁵⁸ And in 1929, Congress criminalized unlawful entry (making it a misdemeanor) and reentry (making it a felony) into the United States, thus providing a manner to criminally punish noncitizens who entered the country without authorization.⁵⁹

⁵³ *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (Justice John Paul Stevens stating that “immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation.”); *So v. Reno*, 251 F. Supp. 2d 1112, 1122 (E.D.N.Y. 2003) (“[a]side from the immediate loss of family, friends, livelihood, and home in the United States and return to an uncertain future in an often now unfamiliar land entailed by deportation, a final order of removal itself has potentially lifelong collateral consequences.”).

⁵⁴ Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN L. REV. 1827, 1835–36 (2007).

⁵⁵ Immigration Act of 1891, ch. 551, §§ 10, 11, 26 Stat. 1084, 1086.

⁵⁶ Chacón, *supra* note 54, at 1836.

⁵⁷ *Id.*

⁵⁸ Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153; Chacón, *supra* note 54, at 1836–37.

⁵⁹ Act of Mar. 4, 1929, Pub. L. No. 70-1018, §§ 1, 2, 45 Stat. 1551, 1551; Chacón, *supra* note 54, at 1837.

In the early 1900s, there was no relief available to noncitizens who became deportable after developing close ties to the United States.⁶⁰ The Alien Registration Act of 1940 provided relief, known as suspension of deportation, for certain noncitizens by authorizing the Attorney General to suspend their deportation if the noncitizen could establish five years of residence in the United States, good moral character, and that his deportation would result in “serious economic detriment to a citizen or a [lawful] resident alien who [was] the [noncitizen’s] spouse, parent, or minor child.”⁶¹ Through amendments in 1948, the Attorney General was required to report any decision to suspend deportation to Congress, which could override the decision and deport the noncitizen.⁶²

B. The Immigration and Nationality Act

Pressured by criticism that the “serious economic detriment” hardship standard was too generous, Congress amended the standard through the passage of the Immigration and Nationality Act (“INA”) in 1952, the first comprehensive statutory scheme regulating immigration.⁶³ At that time, policymakers agreed that immigration reform was needed, but were divided on how to proceed.⁶⁴ Ultimately, the 1965 amendments to the INA terminated the national origins quota system and replaced it with a family-based and employment-based visa system.⁶⁵

The INA of 1952 created the basic structure of “suspension of deportation,” which authorized the Attorney General to “suspend deportation and adjust the status” of noncitizens facing deportation.⁶⁶ “Suspension of deportation” was important because it was one of few legal options available to noncitizens in removal proceedings who did not qualify for persecution-based relief or adjustment of status.⁶⁷ Noncitizens were required to show continuous physical presence in the United States, good moral character, and that their deportation would result in “exceptional and

⁶⁰ Elwin Griffith, *The Transition Between Suspension of Deportation and Cancellation of Removal for Nonpermanent Residents Under the Immigration and Nationality Act: The Impact of the 1996 Reform Legislation*, 48 *DRAKE L. REV.* 79, 81 (1999). Although a noncitizen’s deportation was not preventable, a judge or the Secretary of Labor could stay the deportation. H.R. Doc. No. 392, at 5–6 (1932).

⁶¹ Alien Registration Act of 1940, Pub. L. No. 76-670, 54 Stat. 670, 672 (1940); Griffith, *supra* note 60, at 81–82.

⁶² See Act of July 1, 1948, ch. 783, 62 Stat. 1206.

⁶³ Griffith, *supra* note 60, at 82.

⁶⁴ Mendelson, *supra* note 51, at 1030.

⁶⁵ Immigration and Nationality Act Amendments, Pub. L. No. 89-236, 79 Stat. 911; Mendelson, *supra* note 51, at 1030–1031.

⁶⁶ Immigration and Nationality Act, Pub. L. No. 82-414, § 244(a), 66 Stat. 163; Mendelson, *supra* note 51, at 1036.

⁶⁷ Mendelson, *supra* note 51, at 1034.

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extremely unusual hardship”—more than economic hardship—to themselves or their qualifying relatives.⁶⁸

In 1952, the Board of Immigration Appeals (“BIA”), the administrative body authorized to interpret and apply immigration laws and review appeals of decisions by immigration judges (“IJ”) and district directors of the Department of Homeland Security (“DHS”),⁶⁹ outlined factors to be considered in determining whether a noncitizen’s deportation would result in “exceptional and extremely unusual hardship”: the noncitizen’s length of residence in the United States, his family ties, his possibility of obtaining a visa abroad, the financial burden on him to obtain a visa abroad, and his age and health to travel to obtain a visa abroad.⁷⁰ A few years later, the Supreme Court affirmed the BIA’s holding and added that not all noncitizens who met the legal standards would be granted the relief, but that suspension of deportation was “a matter of discretion and of administrative grace, not mere eligibility.”⁷¹

Congress amended the INA in 1962 and divided the relief from removal into two categories with different hardship standards—“extreme hardship” and “exceptional and extremely unusual hardship.”⁷² Noncitizens with serious crime violations had to show ten years of continuous physical presence in the United States and “exceptional and extremely unusual hardship” to themselves or their qualifying relatives.⁷³ Noncitizens who were deportable for other reasons had to prove seven years of continuous physical presence in the United States and “extreme hardship” to themselves or their qualifying relatives.⁷⁴ Through this change Congress sought to produce a more attainable standard for noncitizens who did not pose a large threat to the public and a stricter standard for less desirable noncitizens.⁷⁵

In 1978, the BIA identified factors that should be considered in determining a noncitizen’s “extreme hardship”—“political and economic conditions in [a noncitizen’s] homeland...advanced age, severe illness, family ties... economic detriment.”⁷⁶ In 1994, the BIA defined additional

⁶⁸ Immigration and Nationality Act, Pub. L. No. 82-414, § 244(a), 66 Stat. 163; Mendelson, *supra* note 51, at 1036.

⁶⁹ *Board of Immigration Appeals*, DEP’T OF JUSTICE, <https://www.justice.gov/eoir/board-of-immigration-appeals> (last updated Dec. 7, 2020) [<https://perma.cc/U7H4-9BN4>].

⁷⁰ *In the Matter of S-*, 5 I & N Dec. 409, 409 (BIA 1953). See Griffith, *supra* note 60, at 95–96.

⁷¹ *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 77 (1957); See also Mendelson, *supra* note 51, at 1037.

⁷² Act of October 24, 1962, Pub. L. No. 87-885, 76 Stat. 1247 (repealed 1996).

⁷³ *Id.* § 4, 76 Stat. at 1248.

⁷⁴ *Id.* § 4, 76 Stat. at 1247–48.

⁷⁵ Griffith, *supra* note 60, at 82–83.

⁷⁶ *Matter of Anderson*, 16 I & N Dec. 596, 596 (BIA 1978). See Griffith, *supra* note 60, at 99.

factors for consideration: the noncitizen's length of residence in the United States; his family ties in the United States and abroad; his health, financial status, business or occupation; the possibility of other means to adjust status; his immigration history; and his position in the community.⁷⁷ In 1988, Congress amended the INA to eliminate its participation in suspension of deportation decisions; grants of cancellation took effect upon final approval by an IJ or the BIA.⁷⁸

C. The Immigration Reform and Control Act

In 1984, President Ronald Reagan conveyed his belief “in the idea of amnesty for those who have put down roots and lived here, even though sometime back they may have entered illegally.”⁷⁹ In 1980, between 2.5 and 3.5 million undocumented immigrants lived in the United States; by 1986, the population increased to between 3 million and 5 million.⁸⁰ Amidst much debate on how to approach the issue, the Immigration Reform and Control Act (“IRCA”) of 1986⁸¹ was the country's first attempt to provide status to undocumented immigrants en masse.⁸² The legislation sought to reduce unlawful immigration, dry up demand for undocumented workers, increase border and interior enforcement, and deport undocumented immigrants that were excluded from the legalization program.

For the first time, since the INA began regulating immigration in 1952, IRCA permitted undocumented immigrants to become LPRs without having to leave the United States.⁸³ But primarily, Congress passed IRCA to constrain attractive work opportunities for undocumented immigrants to migrate to the United States, finding employer sanctions to be “the most humane, credible and effective way to respond to the large-scale influx of undocumented [immigrants].”⁸⁴ IRCA enhanced border security efforts,

⁷⁷ Matter of Ige, 20 I & N Dec. 880, 882 (BIA 1994).

⁷⁸ Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 2(q), 102 Stat. 2609, 2613.

⁷⁹ *A Reagan Legacy: Amnesty for Illegal Immigrants*, NPR (July 4, 2010, 2:12 PM), <https://www.npr.org/templates/story/story.php?storyId=128303672> [<https://perma.cc/HBM4-PBAQ>]

⁸⁰ MICHAEL FIX ET AL., THE URBAN INSTITUTE, IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT 23–24 (1994), http://webarchive.urban.org/UploadedPDF/305184_immigration_immigrants.pdf [<https://perma.cc/59G8-X2KY>]

⁸¹ Pub. L. No. 99-603, 100 Stat. 3359.

⁸² Bryn Siegel, *The Political Discourse of Amnesty in Immigration Policy*, 41 AKRON L. REV. 291, 296 (2008).

⁸³ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359; Siegel, *supra* note 82, at 296–297.

⁸⁴ H.R.Rep. No. 99-682(I), at 46 (“Employment is the magnet that attracts aliens here illegally...Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens

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established an employment verification system, and imposed monetary penalties on employers who hired undocumented immigrants.⁸⁵ IRCA's separate parts worked towards alleviating unauthorized immigration: legalization provided status to undocumented immigrants currently living in the United States, employer sanctions sought to decrease demand for undocumented workers, and increased border and interior enforcement expected to implement a system for detection, apprehension, and removal of undocumented immigrants.⁸⁶

1. Legalization Program

IRCA imposed eligibility criteria for its legalization program: the program benefited undocumented immigrants who could prove five years of continuous residence in the United States prior to January 1, 1982, paid a \$185 filing fee, and could establish that they were unlikely to become a public charge.⁸⁷ Once the applicant met these three requirements, he received an 18-month temporary residence card, in addition to work authorization and travel authorization.⁸⁸ To receive LPR status, the applicant was required to complete an English language course and civics program within one year of the expiration of the 18-month temporary residence.⁸⁹

While IRCA's legalization program provided relief to approximately 1.6 million undocumented immigrants at the time it was enacted and continues to be generally referred to as an amnesty statute, it is largely viewed as a failed attempt to regulate unauthorized immigration.⁹⁰

and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.”).

⁸⁵ Siegel, *supra* note 82, at 297.

⁸⁶ Muneer I. Ahmad, *Beyond Earned Citizenship*, 52 HARV. CIV. RIGHTS-CIV. LIBERTIES L. REV. 257, 267 (2017).

⁸⁷ 8 U.S.C. § 1255a(a)(2), (c)(7)(A), (d)(2)(B)(ii)(IV); INA § 245A; Ahmad, *supra* note 86, at 269–70.

⁸⁸ 8 U.S.C. § 1255a(a), (b)(3); INA § 245A; Ahmad, *supra* note 86, at 270.

⁸⁹ 8 U.S.C. § 1255a(b)(1)(D); INA § 245A; Ahmad, *supra* note 86, at 270.

⁹⁰ Siegel, *supra* note 82, at 297; Ahmad, *supra* note 86, at 269–70. See Ingrid Rojas, *The 1986 Immigration Reform Explained*, ABC NEWS (May 5, 2013, 3:17 PM), https://abcnews.go.com/ABC_Univision/Politics/1986-amnesty/story?id=18971179

[<https://perma.cc/2XV4-L229>] (referring to IRCA as an amnesty); Amanda Sakuma, *Ronald Reagan amnesty haunts immigration action*, MSNBC (Aug. 3, 2014, 9:45 AM), <http://www.msnbc.com/msnbc/reagan-amnesty-haunts-immigration-action> [<https://perma.cc/A78Y-2M53>] (same); Emily Badger, *What happened to the millions of immigrants granted legal status under Ronald Reagan?*, WASH. POST (Nov. 26, 2014, 10:06 AM), <https://www.washingtonpost.com/news/wonk/wp/2014/11/26/what-happened-to-the-millions-of-immigrants-granted-legal-status-under-ronald-reagan/> [<https://perma.cc/DE2T-7YNR>] (same); Alicia A. Caldwell, *Today's immigration debate rooted in 'Reagan amnesty,' experts say*, PBS NEWS HOUR (Aug.

Undocumented immigrants with a felony conviction or three misdemeanors were ineligible for both temporary and permanent residence.⁹¹ As many as two million undocumented immigrants were excluded because they failed to meet the continuous residence requirement; another estimated 500,000 undocumented immigrants were eligible but did not apply for the program.⁹² The exclusion of some undocumented immigrants and flaws in the IRCA legislation—ineffective enforcement of employer sanctions, exclusion of immediate family members from the legalization program,⁹³ and a failure to reform modes for legal immigration—contributed to the existence of the current undocumented population.⁹⁴ Following IRCA, undocumented immigrants continued to migrate to the United States and remained in the country without any available path to lawful status.⁹⁵

2. Employer Sanctions

Because undocumented workers provided a source of cheap labor, Americans blamed them for the country's economic difficulties.⁹⁶ Prior to the enactment of IRCA, employers were exempted from being charged for "harboring" an undocumented immigrant.⁹⁷ IRCA's employer sanctions were based on certain assumptions: 1) the right to work is a privilege linked to citizenship; 2) there is a direct relationship between undocumented workers and jobs lost to others; 3) employers will voluntarily comply with the sanctions; 4) the threat of sanctions will extinguish the employment of undocumented workers; 5) the decrease in available jobs will persuade undocumented workers to leave the United States and return to their home countries; and 6) the decrease in available jobs will disincentivize immigrants from Mexico and other countries from migrating to the United States.⁹⁸ IRCA demanded that employers determine a person's work

23, 2016, 1:07 PM), <https://www.pbs.org/newshour/nation/todays-immigration-debate-rooted-reagan-amnesty-experts-say> [<https://perma.cc/3WDC-PTXR>] (same).

⁹¹ 8 U.S.C. § 1255a(b)(2)(B)(ii); INA § 245A; Ahmad, *supra* note 86, at 270.

⁹² Ahmad, *supra* note 86, at 270–71.

⁹³ In 1987, the INS put a hold the deportations of children who had a parent covered by IRCA. A temporary hold on deportations was meant to give the parent with newly lawful status the appropriate time to petition for a visa for the child. See Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 106 GEO. L. J. ONLINE 96, 121–122 (2015).

⁹⁴ Ahmad, *supra* note 86, at 270–271.

⁹⁵ Siegel, *supra* note 82, at 298.

⁹⁶ Mabel Aguilar, *The Discriminatory Impact of the Immigration Reform and Control Act of 1986*, 10 CHICANO L. REV. 14, 15 (1990).

⁹⁷ 8 U.S.C. § 1324(a)(3); INA § 274; Gregory A. Loken & Lisa R. Babino, *Harboring, Sanctuary and the Crime of Charity Under Federal Immigration Law*, 28 HARV. CIV. RIGHTS-CIV. LIBERTIES L. REV. 119, 164–165 (1993).

⁹⁸ Aguilar, *supra* note 96, at 18.

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authorization by requiring specific documents necessary to establish a person's identity and eligibility to work.⁹⁹

IRCA created civil liabilities ranging from \$250 to \$10,000 for employers that knowingly hired undocumented workers.¹⁰⁰ IRCA also created penalties ranging from \$100 to \$1,000 for employers that failed to verify the work authorization of prospective employees.¹⁰¹ For both types of offenses, an employer could claim a good faith defense.¹⁰² In addition, Congress enacted an antidiscrimination provision to bar discrimination in employment based on national origin or citizenship status.¹⁰³ While such provision may seem progressive, certain discriminatory practices remained protected.¹⁰⁴ For example, the antidiscrimination provision only covered recruitment, referral, hiring, and discharge practices.¹⁰⁵ Additionally, the antidiscrimination provision applied only to U.S. citizens or LPRs, individuals who were lawfully admitted for temporary residence under IRCA's general amnesty program, refugees, and asylees—excluding the targeted undocumented workers.¹⁰⁶

⁹⁹ Examples of accepted documents were a U.S. passport, a certificate of U.S. citizenship, a certification of naturalization, or an unexpired foreign passport with appropriate work authorization. 8 U.S.C. § 1324a(b)(1)(A); INA § 274A.

¹⁰⁰ 8 U.S.C. § 1324a(e)(4)(A)(i)–(iii); INA § 274A.

¹⁰¹ 8 U.S.C. § 1324a(e)(5); INA § 274A.

¹⁰² 8 U.S.C. § 1324a(a)(3); INA § 274A. The employer must demonstrate compliance with the verification requirements and need only attest that the documents reasonably appeared to be valid. The defense could be refuted if evidence showed that the documented did not appear to be genuine, that the verification process was fraudulent, or that the employer and employee conspired in falsifying the documents. 8 U.S.C. § 1324a(b)

¹⁰³ 8 U.S.C. § 1324b; INA § 274B.

¹⁰⁴ Aguilar, *supra* note 96, at 21. The provision also allowed for discrimination on the basis of citizenship status under certain circumstances when “required in order to comply with the law, regulation, or executive order, or required by Federal, State, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government.” 8 U.S.C. § 1324b(a)(2)(c); INA § 274B.

¹⁰⁵ 8 U.S.C. § 1324b(a)(1) (2012); INA § 274B.

¹⁰⁶ 8 U.S.C. § 1324b(a)(3)(B); INA § 274B. The Supreme Court also vocalized the importance of deterring unauthorized immigration. In *Hoffman Plastics Compounds, Inc. v. N.L.R.B.*, the Court held that the National Labor Relations Board was foreclosed by IRCA and could not hold an employer, who had allegedly laid off union supporters, to award an undocumented worker backpay because he was not authorized to work in the United States; such a holding would “encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations.” *Hoffman Plastics Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 151 (2002). Since *Hoffman*, courts have struggled to balance federal immigration law and employment laws. *Madeira v. Affordable Housing Foundation, Inc.*, 469 F.3d 219 (2d Cir. 2006) (holding that federal immigration law did not preempt a New York law allowing injured undocumented workers to recover compensatory damages for lost earnings); *Salas v. Sierra Chemical Co.*, 327 P.3d 797 (Cal. 2014) (holding that federal immigration law partially preempts state law protections to all workers regardless of immigration status); *Coma Corp. v. Kansas Dep’t of Labor*, 154 P.3d 1080 (Kan. 2007) (holding that IRCA did not preempt state law governing earned, but unpaid wages, of an undocumented worker);

IRCA made it unlawful to knowingly employ an undocumented worker, yet a number of factors impaired the effectiveness of the employer sanctions.¹⁰⁷ First, IRCA did not establish a reliable system for employers to determine whether workers were unauthorized to work; the availability of counterfeit documents made it difficult to find employers accountable of “knowingly employ[ing]” undocumented workers.¹⁰⁸ Second, the federal government failed to adequately fund worksite enforcement.¹⁰⁹ Third, a steady demand for low-wage/low-skilled workers and a falling supply of U.S. workers in certain sectors and regions contributed to persistent growth in the demand for undocumented workers.¹¹⁰

D. The Illegal Immigration Reform and Immigrant Responsibility Act

An increase in anti-immigrant sentiment led to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”).¹¹¹ IIRIRA sought to reduce the growing number of undocumented immigrants through two main ways: cutting back on the availability of judicial review of immigration rulings and eliminating forms of relief available to noncitizens facing exclusion and deportation orders.¹¹² But notably, IIRIRA affected undocumented immigrants by imposing time bars and replacing “suspension of deportation” with “cancellation of removal.”¹¹³ The modified relief authorized the Attorney General to “cancel” the “removal” proceedings against noncitizens who fulfilled stricter eligibility criteria.¹¹⁴ Compared to suspension of deportation, cancellation of removal is more restrictive, available to a narrower category of noncitizens, and requires a stricter hardship requirement.¹¹⁵ IIRIRA combined exclusion proceedings and deportation proceedings into one

Staff Management v. Jimenez, 839 N.W.2d 640 (Iowa 2013) (holding that IRCA does not preempt payment of healing period benefits to undocumented workers under state law).

¹⁰⁷ MARK R. ROSENBLUM & KATE BRICK, MIGRATION POL’Y INST., WOODROW WILSON INT’L CTR. FOR SCHOLARS, U.S. IMMIGRATION POLICY AND MEXICAN/CENTRAL AMERICAN MIGRATION FLOWS: THEN AND NOW 9 (2011), <https://www.migrationpolicy.org/pubs/RMSG-regionalflows.pdf> [<https://perma.cc/Q6B5-2SSY>].

¹⁰⁸ 8 U.S.C. § 1324a; INA § 274A; ROSENBLUM & BRICK, *supra* note 107, at 9.

¹⁰⁹ ROSENBLUM & BRICK, *supra* note 107, at 9.

¹¹⁰ *Id.*

¹¹¹ Austen Ishii, *There and Back, Now and Then: IIRIRA’s Retroactivity and the Normalization of Judicial Review in Immigration Law*, 83 FORDHAM L. REV. 949, 953 (2014).

¹¹² *Id.* at 953–54.

¹¹³ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

¹¹⁴ *Id.* at § 304; 8 U.S.C. § 1229b(b); INA § 240A.

¹¹⁵ Mendelson, *supra* note 51, at 1037.

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removal proceeding¹¹⁶ and introduced time bars for noncitizens who had been unlawfully present in the United States for a certain period of time.¹¹⁷ The time bars were a means to deter violation of immigration laws:¹¹⁸ upon re-entry, persons who were unlawfully present in the country for over 180 days were subject to a three-year bar and those who were unlawfully present for over one year were subject to a ten-year bar.¹¹⁹ However, the time bars did not deter undocumented immigrants from unlawfully entering or staying in the United States but disincentivized them to leave once they entered.¹²⁰ Given the severe consequences, undocumented immigrants avoided any contact with immigration authorities.¹²¹

IIRIRA limited relief available to undocumented immigrants with new eligibility criteria for cancellation of removal.¹²² The criteria was distinct for LPRs and undocumented immigrants who sought the relief from removal. In order to restore their LPR status, these noncitizens had to establish that they had been lawfully admitted for permanent residence for not less than five years, resided in the country for seven continuous years, and not been convicted of an aggravated felony;¹²³ this relief is called LPR cancellation of removal. In contrast, to apply for non-LPR cancellation of removal, undocumented immigrants had to establish continuous physical presence in the United States for not less than ten years, good moral character during that period, absence of any conviction of an offense under the grounds of inadmissibility or deportability related to criminal offenses and security threats under the cited statutes,¹²⁴ and that their deportation would result in “exceptional and extremely unusual hardship” to their U.S. citizen or LPR spouse, parent, or child.¹²⁵ As opposed to LPRs, undocumented immigrants were subject to stricter eligibility criteria,

¹¹⁶ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

¹¹⁷ 8 U.S.C. § 1182(a)(9)(B)(i)(I)–(II); INA § 212.

¹¹⁸ Siegel, *supra* note 82, at 299–300.

¹¹⁹ 8 U.S.C. § 1182(a)(9)(B)(i)(I)–(II); INA § 212.

¹²⁰ Siegel, *supra* note 82, at 299–300.

¹²¹ *Id.* at 300.

¹²² IIRIRA reflected the government’s effort to combat unauthorized immigration and to target undocumented immigrants already living in the United States. Around the time that Congress passed IIRIRA, political instability in Central America began to settle. This made it more difficult for asylum seekers to establish grounds for political asylum. Whereas asylum seekers had to focus on their home conditions, applicants for cancellation of removal had to emphasize their success in establishing a new life in the United States. Eli Coffino, *A Long Road to Residency: The Legal History of Salvadoran & Guatemalan Immigration to the United States with a Focus on NACARA*, 14 CARDOZO J. INT’L & COMP. L. 177, 188–89 (2006).

¹²³ 8 U.S.C. § 1229b(a); INA § 240A.

¹²⁴ 8 U.S.C. § 1182(a)(2), 8 U.S.C. § 1227(a)(2), (a)(3).

¹²⁵ 8 U.S.C. § 1229b(b)(1) (2006); INA § 240A.

especially a heightened hardship standard—from “extreme hardship” in suspension of deportation to “exceptional and extremely unusual hardship” in “cancellation of removal.”¹²⁶

Congress limited the availability of non-LPR cancellation of removal in three ways. First, the period of required continuous physical presence was extended from seven years to ten years.¹²⁷ Second, undocumented immigrants with certain criminal convictions or security-related convictions were barred from relief.¹²⁸ Third, the hardship standard was raised from “extreme hardship” to “exceptional and extremely unusual hardship.”¹²⁹

E. The REAL ID Act of 2005

IIRIRA and the REAL ID Act of 2005¹³⁰ further restricted relief by eliminating judicial review of denials of non-LPR cancellation of removal by federal courts of appeals.¹³¹ Prior to IIRIRA, an undocumented immigrant who was denied this relief before an IJ could appeal to the BIA which reviewed the decision *de novo*, and if the BIA affirmed the denial of relief, the undocumented immigrant could appeal to a federal court of appeals which reviewed the BIA decision for abuse of discretion.¹³² The REAL ID Act dramatically increased the authority of IJs in making discretionary decisions by diminishing undocumented immigrants’ opportunity to obtain review of discretionary findings about hardship and good moral character in their cancellation cases.¹³³ Whereas federal courts of appeals still have jurisdiction over other aspects of immigration law, the BIA is the ultimate adjudicator on discretionary findings in non-LPR cancellation of removal cases.¹³⁴ Because these changes further perpetuate the view that non-LPR cancellation of removal is a form of “administrative grace,” few safeguards exist to ensure that the relief is granted consistently.¹³⁵

¹²⁶ Compare 8 U.S.C. § 1229b(b)(1)(D) with 8 U.S.C. § 1254(a)(1); Margaret H. Taylor, *What Happened to Non-LPR Cancellation? Rationalizing Immigration Enforcement by Restoring Durable Relief from Removal*, 30 J.L. & POL. 527, 529–530 (2015).

¹²⁷ Compare 8 U.S.C. § 1229b(b)(1)(A) with 8 U.S.C. § 1254(a)(1).

¹²⁸ Compare 8 U.S.C. § 1229b(b)(1)(C) with 8 U.S.C. § 1254.

¹²⁹ Compare 8 U.S.C. § 1229b(b)(2)(D) with 8 U.S.C. § 1254(a)(1).

¹³⁰ REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005).

¹³¹ *Id.*; Mendelson, *supra* note 51, at 1040.

¹³² Mendelson, *supra* note 51, at 1038.

¹³³ *Id.* at 1040.

¹³⁴ *Board of Immigration Appeals*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/eoir/board-of-immigration-appeals> (last updated Dec. 7, 2020) [<https://perma.cc/Z62S-2ZV5>]; Mendelson, *supra* note 51, at 1040.

¹³⁵ Mendelson, *supra* note 51, at 1040.

III. NON-LPR CANCELLATION OF REMOVAL

Cancellation of Removal for Non-Permanent Residents, more commonly known as non-LPR cancellation of removal, is a form of relief from removal available to certain undocumented immigrants in removal proceedings who do not qualify for other relief, such as persecution-based relief or family-based adjustment of status.¹³⁶ Furthermore, the relief is only available defensively, meaning that it is only available to undocumented immigrants who are in removal proceedings and at risk of deportation, and it is usually considered an option of last resort—it is infrequently granted because of the high hardship standard.¹³⁷ For those undocumented immigrants like B who are unknown to immigration authorities, the relief is unavailable unless they place themselves in removal proceedings—an extremely risky decision.¹³⁸ Immigration court becomes the forum for undocumented immigrants to repent for breaking immigration laws and demonstrate that they have conformed to certain American values and identities, and thus are worthy of the relief.¹³⁹ Unlike immigrants applying affirmatively for status, undocumented immigrants applying for non-LPR cancellation of removal seek relief for being unlawfully present in the United States.¹⁴⁰

DHS initiates removal proceedings by serving a noncitizen with a Notice to Appear (“NTA”), a document ordering him to appear before an IJ, and filing the NTA with an immigration court.¹⁴¹ The NTA contains important information for the noncitizen, including the alleged immigration law violations.¹⁴² During removal proceedings, the U.S. government is represented by a DHS attorney and the noncitizen may be represented (at no expense to the U.S. government) or appear *pro se* where he may provide a defense to the charges or apply for any available forms of relief from removal¹⁴³ The DHS attorney only needs to establish a *prima facie* case of

¹³⁶ 8 U.S.C. § 1229b(b)(1); INA § 240A(b)(1); Mendelson, *supra* note 51, at 1034.

¹³⁷ 8 U.S.C. § 1229b(b)(1); INA § 240A(b)(1); Mendelson, *supra* note 51, at 1034; *See generally* Lucy Y. Twimasi, *Hardship Reconstructed: Developing Comprehensive Legal Interpretation and Policy Congruence in INA § 240A(b)'s Exceptional and Extremely Unusual Hardship Standard*, 34 CHICANA/O-LATINA/O L. REV. 35 (2016).

¹³⁸ The relief is also unavailable to: people to have already received cancellation of removal or suspension of deportation; people who persecuted others or are inadmissible or deportable under anti-terrorist grounds; and crewmen who entered after June 30, 1964; and certain “J” visa exchange visitors. 8 U.S.C. § 1229b(c); INA § 240A(c).

¹³⁹ Mendelson, *supra* note 51, at 1035.

¹⁴⁰ *Id.* at 1035.

¹⁴¹ EXECUTIVE OFF. FOR IMMIGR. REV., EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: AN AGENCY GUIDE 2 (2017), https://www.justice.gov/eoir/page/file/eoir_an_agency_guide/download [<https://perma.cc/7GMR-4EVK>].

¹⁴² *Id.*

¹⁴³ *Id.*

the undocumented immigrant's alienage; once that is established by DHS, the burden shifts to the undocumented immigrant to prove, unless he is lawfully present pursuant to a prior admission, that he is entitled to be admitted to the United States and is not inadmissible as charged.¹⁴⁴ If the undocumented immigrant seeks to apply for relief from removal, the IJ will schedule an individual merits hearing where the undocumented immigrant and the DHS attorney may present arguments and evidence related to the application for relief.¹⁴⁵ A standard removal proceeding can end in two different ways: the IJ may order the noncitizen removed or grant relief from removal.

Non-LPR cancellation of removal has been a highly discretionary form of relief and though facially neutral, the hardship and good moral character criteria have been used to determine an undocumented immigrant's worth to remain in the United States.¹⁴⁶ The statute, INA § 240A, authorizes the Attorney General to cancel the removal and adjust the status of an undocumented immigrant if the undocumented immigrant:

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application; (B) has been a person of good moral character during such period; (C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.¹⁴⁷

Plainly put, the undocumented immigrant must demonstrate that he has been continuously physically present in the United States for at least ten years, has "good moral character," has not committed a crime identified in the cited statutes, and meets the "exceptional and extremely unusual hardship" standard. The undocumented immigrant bears the burden of proving that he is statutorily eligible for the relief.¹⁴⁸ Apart from these statutory requirements, IJs and the BIA may only grant applications for non-LPR cancellation of removal until the 4,000 limitation has been reached in that fiscal year.¹⁴⁹ Once the cap has been reached, further

¹⁴⁴ 8 C.F.R. § 1240.8(c).

¹⁴⁵ EOIR, *supra* note 141, at 2.

¹⁴⁶ Mendelson, *supra* note 51, at 1035.

¹⁴⁷ 8 U.S.C. § 1229b(b)(1); INA § 240A(b)(1).

¹⁴⁸ 8 C.F.R. § 1240.8(d).

¹⁴⁹ 8 U.S.C. § 1229b(e)(1); INA § 240A.

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decisions to grant or deny relief are reserved until a grant becomes available under the annual limitation for the following fiscal year.¹⁵⁰

A. Continuous Physical Presence

To meet the first requirement, the undocumented immigrant must demonstrate that he has been continuously physically present in the United States for over ten years. This prong raises two questions: when does time stop accruing (i.e. “stops the clock”) and what effect do absences from the United States have?¹⁵¹ Under INA § 240A, the ten-year period stops accruing once the undocumented immigrant is served with an NTA listing the charges of removability.¹⁵² The ten-year accrual is also stopped when the undocumented immigrant commits certain crimes, but any such crime would bar the undocumented immigrant from applying for non-LPR cancellation of removal.¹⁵³ Continuous physical presence stops if the undocumented immigrant has one absence of ninety days or multiple absences that total more than 180 days.¹⁵⁴

B. Good Moral Character

Second, the undocumented immigrant must establish “good moral character” for the previous ten years.¹⁵⁵ Many of the statutory bars to establishing good moral character are also statutory bars to non-LPR cancellation of removal.¹⁵⁶ But most significantly, a “good moral

¹⁵⁰ IJs and the BIA may deny without reserving decision cancellation of removal applications where the undocumented immigrant has failed to establish statutory eligibility for the relief. 8 C.F.R. § 240.21(c)(1).

¹⁵¹ IMMIGRANT LEGAL RESOURCE CTR., NON-LPR CANCELLATION OF REMOVAL: AN OVERVIEW OF ELIGIBILITY FOR IMMIGRATION PRACTITIONERS 2 (2018), https://www.ilrc.org/sites/default/files/resources/non_lpr_cancel_remov-20180606.pdf [<https://perma.cc/T82Z-7AE7>].

¹⁵² 8 U.S.C. § 1229b(d)(1). Undocumented persons like B will be charged as inadmissible under INA § 212 unless they previously entered the United States with a visa or permitted to enter through a port of entry. 8 U.S.C. § 1182(a)(6)–(a)(7). Undocumented immigrants who have been “admitted” will be charged as deportable under INA § 237. 8 U.S.C. § 1227. *See also* IMMIGRANT LEGAL RESOURCE CTR., THE NOTICE TO APPEAR (NTA) 2 (2020), https://www.ilrc.org/sites/default/files/resources/nta_practice_advisory.pdf [<https://perma.cc/4SDY-VANY>].

¹⁵³ 8 U.S.C. § 1229b(b)(1)(C); INA § 240A(b)(1)(C); *See* IMMIGRANT LEGAL RESOURCE CTR., *supra* note 151, at 3.

¹⁵⁴ 8 U.S.C. § 1229b(d)(2); INA § 240A(d)(2); *See* IMMIGRANT LEGAL RESOURCE CTR., *supra* note 151, at 3.

¹⁵⁵ 8 U.S.C. § 1229b(b)(1)(B); INA § 240A(b)(1)(B). An undocumented immigrant is statutorily barred from establishing this element if he has been convicted of murder or an aggravated felony after November 29, 1990, or if he has engaged in persecution, genocide, torture, or severe violations of religious freedom. 8 U.S.C. § 1101(f)(8); INA § 101(f)(8); 8 C.F.R. § 316.10(b)(1)(ii); *See* IMMIGRANT LEGAL RESOURCE CTR., *supra* note 151, at 5.

¹⁵⁶ *See* IMMIGRANT LEGAL RESOURCE CTR., *supra* note 151, at 6.

character” finding is a discretionary decision of the IJ; the IJ may consider other negative factors apart from the listed statutory bars.¹⁵⁷

C. Criminal Bars

The third element that the undocumented immigrant must meet is that he must not have been convicted of any offense listed in INA § 212(a)(2), § 237(a)(2), or § 237(a)(3).¹⁵⁸ Disqualifying convictions include: a crime involving moral turpitude,¹⁵⁹ an offense relating to controlled substances, and an aggravated felony.¹⁶⁰

D. Exceptional and Extremely Unusual Hardship

Lastly, the undocumented immigrant must prove that his deportation would cause “exceptional and extremely unusual hardship” to his qualifying relative. The “exceptional and extremely unusual hardship” standard is often the most difficult element for an undocumented immigrant to prove.¹⁶¹ The hardship must affect the undocumented immigrant’s qualifying relative—U.S. citizen or LPR children,¹⁶² spouse, or parents of the noncitizen.¹⁶³ The qualifying relative must exist at the time of the non-LPR cancellation adjudication; if a child ages out or a qualifying relative dies, then the undocumented immigrant cannot rely on that qualifying relative to meet the hardship standard.¹⁶⁴

The BIA has delivered important cases that define what circumstances meet the hardship threshold for non-LPR cancellation of removal; the three primary decisions on the issue are *Matter of Monreal*, *Matter of Andazola-Rivas*, and *Matter of Recinas*.¹⁶⁵ In *Matter of Monreal*,

the BIA held that such standard requires “evidence to establish that [the undocumented immigrant’s] qualifying relatives would suffer hardship that is substantially different from, or beyond, that which would normally

¹⁵⁷ *Id.* at 7.

¹⁵⁸ 8 U.S.C. § 1229b(b)(1); INA § 240A(b)(1).

¹⁵⁹ While crimes involving moral turpitude (“CIMT”) generally are bars to non-LPR cancellation of removal, there is one narrow exception. This exception applies if the undocumented immigrant has applied only one CIMT, a sentence of six months or less was imposed, and the offense carries a maximum possible sentence of less than one year. IMMIGRANT LEGAL RESOURCE CTR., *supra* note 151, at 4.

¹⁶⁰ 8 U.S.C. § 1229b(b)(1); INA § 240A(b)(1); *See* IMMIGRANT LEGAL RESOURCE CTR., *supra* note 151, at 4–7.

¹⁶¹ IMMIGRANT LEGAL RESOURCE CTR., *supra* note 151, at 8–12.

¹⁶² A “child” is defined as someone under 21 years old and unmarried. Stepchildren and adopted children also qualify as a “child.” 8 U.S.C. § 1101(b)(1); INA § 101(b)(1).

¹⁶³ 8 U.S.C. § 1229b(b)(1)(d); INA § 240A(b)(1)(d).

¹⁶⁴ IMMIGRANT LEGAL RESOURCE CTR., *supra* note 151, at 9.

¹⁶⁵ *Id.* at 10.

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be expected from the deportation of [an undocumented immigrant] with close family members here.”¹⁶⁶ The BIA rejected an “unconscionable” standard as too high a burden of proof for this standard but ultimately denied relief for the 34-year-old native and citizen of Mexico with two U.S. citizen children and LPR parents; the BIA noted that while an “unconscionable” standard had been referenced in legislative history of the INA, such hardship was “nearly 50 years old” and applied in the suspension of deportation context.¹⁶⁷ In *Matter of Andazola-Rivas*, the BIA held that poor economic conditions, lack of family to assist in home country, and diminished educational opportunities in home country for U.S. citizen children did not meet the hardship standard.¹⁶⁸ Similarly, the BIA rejected relief for the native and citizen of Mexico with two U.S. citizen children and no family in Mexico.¹⁶⁹ On the other hand, in *Matter of Recinas*, the BIA granted non-LPR cancellation of removal to a single mother with six children (two children who are citizens of Mexico and four who are citizens of the United States), LPR parents, and five U.S. citizen siblings.¹⁷⁰ The BIA found the case distinguishable from *Matter of Monreal* and *Matter of Andazola-Rivas*, and explained that, “the hardship standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief.”¹⁷¹ It considered, among others, the following factors in assessing hardship on the U.S. citizen children: the children’s unfamiliarity with the Spanish language; the children’s unfamiliarity with life outside the United States; and the increased hardship the children would face in Mexico as a result of their single mother as their sole financial and emotional support.¹⁷² Additionally, the fact that Ms. Recinas’s entire adult family “reside lawfully in the United States” was found to be significant because of the probability that they would “remain in the United States indefinitely.”¹⁷³

In addition to relying on guidance from the BIA, undocumented immigrants are advised to provide evidence on all factors related to their qualifying relative, such as: age; health; special needs in school; length of residence in the United States; family and community ties in the United States; family and community ties in the home country; home country conditions; and alternative methods for the undocumented immigrant to

¹⁶⁶ *Matter of Monreal*, 23 I & N Dec. 56, 65 (BIA 2001).

¹⁶⁷ *Id.* at 60.

¹⁶⁸ *Matter of Andazola-Rivas*, 23 I & N Dec. 319 (BIA 2002).

¹⁶⁹ *Id.*

¹⁷⁰ *Matter of Recinas*, 23 I & N Dec. 467 (BIA 2002).

¹⁷¹ *Id.* at 470.

¹⁷² *Id.* at 471–73.

¹⁷³ *Id.* at 472.

immigrate to the United States.¹⁷⁴ In addition to these factors, an undocumented immigrant must argue whether his qualifying relative(s) would suffer hardship by staying in the United States without him or by accompanying him to his home country if he were deported.¹⁷⁵

INA § 240A(b)(1) delineates the basic eligibility criteria for non-LPR cancellation of removal, but the grant of relief primarily depends upon judicial determination of the undocumented immigrant's good moral character and the hardship to qualifying relatives if he were deported.¹⁷⁶ "Good moral character" and "exceptional and extremely unusual hardship" are discretionary determinations that require the IJ to consider the facts of the case and the law.¹⁷⁷ The other requirements—ten years of continuous physical presence and criminal bars—are not discretionary determinations.¹⁷⁸ The ultimate decision to grant non-LPR cancellation of removal is up to the IJ.¹⁷⁹ If the IJ denies the relief and orders the undocumented immigrant removed, the immigrant may appeal to the BIA.¹⁸⁰ If the BIA affirms the denial of relief thereby affirming the order of removal, the discretionary decision is not reviewable by federal appeals courts.¹⁸¹ The Attorney General is authorized to review BIA decisions and affirm, modify, or overrule them.¹⁸²

IV. UNDOCUMENTED IMMIGRANTS AND AVAILABLE FORMS OF RELIEF

A. Undocumented Immigrants' Characteristics and Statistics

The American Dream has been defined as "the aspirational belief in the US that all individuals are entitled to the opportunity for success and upward social mobility through hard work."¹⁸³ The "pull" factors that draw immigrants to the United States—employment opportunities, higher wages,

¹⁷⁴ IMMIGRANT LEGAL RESOURCE CTR., *supra* note 151, at 10.

¹⁷⁵ *Id.* at 10–11.

¹⁷⁶ 8 U.S.C. § 1229b. Mendelson, *supra* note 51, at 1034–1035.

¹⁷⁷ IMMIGRANT LEGAL RESOURCE CTR., *supra* note 151, at 12.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ See 8 C.F.R. § 3.1 (regulating authority and powers of the BIA).

¹⁸¹ REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005) (amending 8 U.S.C. § 1252(a)(2)(B) and prohibiting judicial review regarding the grant of relief under INA § 240A). The undocumented immigrant may file a motion to reconsider, pointing out the errors of fact or law made in the decision, or a motion to reopen proceedings if his circumstances change following his removal proceedings. Decisions denying motions to reopen and to reconsider are no longer reviewable by federal courts of appeals. 8 U.S.C. § 1252(a)(2)(B).

¹⁸² 8 C.F.R. § 1003.1(h).

¹⁸³ *The American Dream*, DICTIONARY.COM, <https://www.dictionary.com/e/pop-culture/the-american-dream/> (last visited Apr. 10, 2021).

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and better working and living conditions—coupled with aspirations of the American Dream, have made undocumented immigrants an easy target for exploitation, particularly in the form of subpar wages and working conditions.¹⁸⁴ Admissions of LPRs and temporary immigrants into the United States have not kept up with push factors in Mexico and the Northern Triangle—Guatemala, El Salvador, and Honduras—or with family-based and employment-based pull factors within the United States.¹⁸⁵ Sectors heavily employing undocumented immigrants—such as farming, maintenance, construction, and food service—face constraints in hiring documented foreign workers and rely extensively on undocumented immigrants.¹⁸⁶

Immigrants that entered the United States without inspection or that entered lawfully but overstayed their visas¹⁸⁷ comprise the millions of persons without lawful status who are often described as “undocumented,” “unauthorized,” and even “illegal.”¹⁸⁸ The United States government has never had the resources to deport all undocumented immigrants.¹⁸⁹ Unauthorized immigration became a defining issue for policymakers as a result of the 1965 reforms to the INA—replacing the national-origins quota system with family-based and employment-based visas.¹⁹⁰ The reforms failed to anticipate economic, political, and social changes in Mexico and

¹⁸⁴ Aguilar, *supra* note 96, at 15.

¹⁸⁵ ROSENBLUM & BRICK, *supra* note 107, at 13.

¹⁸⁶ *Id.*

¹⁸⁷ The majority of undocumented immigrants prior to 2010 entered the United States without authorization, also known as entering without inspection (EWI). Persons who overstayed their required departure date, as required by their visa, have made up a large majority of undocumented immigrants since 2010. Jeffrey S. Passel & D’Vera Cohn, *Mexicans decline to less than half the U.S. unauthorized immigrant population for the first time*, PEW RES. CTR. (June 12, 2019), <https://www.pewresearch.org/fact-tank/2019/06/12/us-unauthorized-immigrant-population-2017/> [<https://perma.cc/8F3V-X7U6>]. Most of the undocumented immigrants from Europe, Canada, and Asia are “visa overstayers.” Undocumented immigrants that enter without authorization via the U.S.-Mexico border are primarily from Mexico and Central America. Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 10 (2006).

¹⁸⁸ Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115, 1126 (2015); Suzanne Gamboa, *Rep. Joaquin Castro: Stop Using the Word “Alien” in Federal Law, Signs*, NBC NEWS (Oct. 22 2015, 1:47 PM), <https://www.nbcnews.com/news/latino/rep-joaquin-castro-drop-word-alien-federal-law-signs-n449336> [<https://perma.cc/GL27-55J2>] (reporting on U.S. Representative Joaquin Castro’s proposed bill, the CHANGE Act, which strikes the word “alien” and uses the term “foreign national” in federal law).

¹⁸⁹ Heeren, *supra* note 188, at 1126; *See generally* RYAN EDWARDS & FRANCESC ORTEGA, CTR. FOR AM. PROGRESS, *THE ECONOMIC IMPACTS OF REMOVING UNAUTHORIZED IMMIGRANT WORKERS: AN INDUSTRY- AND STATE-LEVEL ANALYSIS* (2016), https://cdn.americanprogress.org/wp-content/uploads/2016/09/21030027/massdeport1003.pdf?_ga=2.145217459.647419399.1618413520-304862154.1617941313 [<https://perma.cc/9JHV-KRF4>].

¹⁹⁰ ROSENBLUM & BRICK, *supra* note 107, at 5–6.

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the Northern Triangle as well as more accessible transportation that enabled international migration.¹⁹¹ Between 1970 and 1985, spending on migration control, particularly Border Patrol personnel, increased five-fold.¹⁹² Yet, a continuous demand for low-wage workers and conflicting pressures—liberals and business groups were opposed to new enforcement measures, and labor unions and social conservatives were opposed to new admissions—disincentivized Congress to enact genuine reform.¹⁹³

The undocumented immigrant population rose sharply in the 1990s and peaked in 2007 when it reached 12.2 million persons.¹⁹⁴ The population has decreased since then, and in the most recent estimate from 2017, was about 10.5 million persons.¹⁹⁵ In 2017, undocumented persons comprised 23% of the United States' foreign-born population, temporary lawful residents comprised 5%, LPRs comprised 27%, and naturalized citizens comprised 45%.¹⁹⁶ In 1990, there were approximately 2.05 million undocumented Mexicans, 300,000 undocumented Salvadorans, 120,000 undocumented Guatemalans, and 40,000 undocumented Hondurans.¹⁹⁷ By 2017, these numbers increased substantially: 4.95 million undocumented Mexicans, 750,000 undocumented Salvadorans, 600,000 undocumented Guatemalans, and 400,000 undocumented Hondurans.¹⁹⁸ Undocumented immigrants are becoming long-term residents in the United States; in 2016, 43% lived in households with U.S.-born children compared to 32% in 2007.¹⁹⁹ In 2016, five million U.S.-born children younger than 18 years old lived with their undocumented parents;²⁰⁰ another 675,000 children were undocumented immigrants themselves.²⁰¹ That same year, an additional 975,000 adult U.S.-born children lived with their undocumented parents.²⁰²

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ JEFFREY S. PASSEL & D'VERA COHN, PEW RES. CTR., *SIZE OF U.S. UNAUTHORIZED IMMIGRANT WORKFORCE STABLE AFTER THE GREAT RECESSION* 23 (2016), https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2016/11/LaborForce2016_FINAL_11.2.16-1.pdf [<https://perma.cc/9M8U-L4E8>].

¹⁹⁵ Krogstad, *supra* note 1.

¹⁹⁶ Abby Budiman, *Key findings about U.S. immigrants*, PEW RES. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/> [<https://perma.cc/3GEV-XYMX>].

¹⁹⁷ *Unauthorized immigrant population trends for states, birth countries and regions*, PEW RES. CTR. (June 12, 2019), <https://www.pewresearch.org/hispanic/interactives/unauthorized-trends/> [<https://perma.cc/HRY9-NXU7>].

¹⁹⁸ *Id.*

¹⁹⁹ PASSEL & COHN, *supra* note 8, at 6.

²⁰⁰ *Id.* at 12.

²⁰¹ *Id.*

²⁰² *Id.*

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The undocumented immigrant population includes fewer people who arrived in the previous five years: in 2016, 20% of all undocumented immigrants had arrived in the previous five years, compared to 32% in 2007.²⁰³ In 2007, an undocumented immigrant adult had typically lived in the United States for 8.6 years, compared with 14.8 years by 2016.²⁰⁴ About two-thirds of all undocumented immigrant adults have lived in the United States for more than ten years.²⁰⁵

In 2016, undocumented workers comprised 4.8% of the nation's workforce, a decrease from its peak of 5.4% in 2007.²⁰⁶ In the age group of 18-year-old to 64-year-old men, 91% of undocumented immigrant men and 79% of U.S.-born men were in the work force in 2016.²⁰⁷ This difference is due to a higher share of U.S.-born men being in school, disabled, or retired according to a Pew Research Center analysis of census data.²⁰⁸ In the same age group, 61% of undocumented immigrant women and 73% of U.S.-born women were in the work force in 2016.²⁰⁹

B. Undocumented Immigrants' Contributions to the United States

There is a widespread belief that undocumented immigrants cost more to the U.S. government than what they contribute to the economy.²¹⁰ There have been multiple studies to demonstrate that this conclusion is untrue and that, on the contrary, undocumented immigrants provide an economic benefit to federal, state, and local economies.²¹¹ Undocumented immigrants support the United States' economy by contributing to Social Security, Medicare, and unemployment insurance programs.²¹² Despite having no right to vote on local, state, or federal taxes, undocumented immigrants contribute billions of dollars in sales, excise, property, income and payroll taxes to local, state, and federal funds.²¹³ Undocumented immigrants paid an estimated \$7 billion in sales taxes, \$1.1 billion in income taxes, and \$3.6

²⁰³ *Id.* at 9.

²⁰⁴ *Id.* at 10.

²⁰⁵ *Id.* at 22.

²⁰⁶ *Id.* at 13.

²⁰⁷ *Id.* at 27.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Lipman, *supra* note 187, at 1.

²¹¹ *Id.* at 1–4 (citing to studies finding a net economic benefit on federal, state, and local economies).

²¹² *Id.*

²¹³ *Id.* at 5.

billion in property taxes in 2013.²¹⁴ Because undocumented workers are ineligible for Social Security benefits, their contributions will never be returned to them.²¹⁵ Undocumented immigrants are also prohibited from receiving almost any government benefit, including Supplemental Nutrition Assistant Program (food stamps),²¹⁶ Temporary Assistance for Needy Families,²¹⁷ Medicaid,²¹⁸ federal housing,²¹⁹ Unemployment Insurance,²²⁰ Social Security Retirement,²²¹ and Medicare.²²²

The benefits that lawful status would bring to the 10.5 million undocumented immigrants and their families are countless and valuable. Lawful status would provide these immigrants access to the protections of a social safety net, such as food stamps, medical care and cash assistance; one-fifth of undocumented immigrant adults live in poverty, double the rate of U.S.-born adults.²²³ Lawful status would also allow undocumented immigrants to obtain driver's licenses: because driving without a license typically means driving uninsured, car accidents can harm undocumented immigrants and others involved financially.²²⁴ Other transactions, such as leasing and buying a home, registering for school, and opening a bank account would be available to immigrants were they provided with lawful status.²²⁵

C. Current Forms of Status and Relief

Because comprehensive immigration reform is a contentious issue and efforts to pass reform have repeatedly failed, the federal government has expanded the number of persons placed in categories of "nonstatus."²²⁶ To

²¹⁴ *Adding Up the Billions in Tax Dollars Paid by Undocumented Immigrants*, AM. IMMIGR. COUNCIL 1 (2016), <https://www.americanimmigrationcouncil.org/research/adding-billions-tax-dollars-paid-undocumented-immigrants> [<https://perma.cc/HW6J-86CR>].

²¹⁵ If an undocumented immigrant obtains lawful status, work authorization, and a valid Social Security Number, he may apply for Social Security benefits based on his entire contribution, regardless of work status. Lipman, *supra* note 187, at 25.

²¹⁶ 7 U.S.C. § 2015(f).

²¹⁷ 8 U.S.C. § 1611.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ 26 U.S.C. § 3304(a)(14)(A).

²²¹ 8 U.S.C. § 1611.

²²² *Id.*

²²³ Few states grant driver's licenses to undocumented immigrants and without a driver's license, driving while undocumented becomes criminalized in that a traffic violation can lead to an arrest, detention and eventual deportation. Angélica Cházaro, *Beyond Respectability: Dismantling the Harms of "Illegality"*, 52 HARV. J. ON LEGIS. 355, 369 (2015).

²²⁴ *Id.*

²²⁵ *Id.* at 369–370.

²²⁶ Heeren, *supra* note 188, at 1120–21.

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avoid risk of deportation, undocumented immigrants who could qualify for lawful status through a risky mechanism like non-LPR cancellation of removal, accept administrative closure of their cases instead.²²⁷ This administrative closure results in a limbo state where the noncitizen may obtain work authorization, but no pathway to lawful permanent residency or citizenship.²²⁸ Noncitizens can end up in this scenario if they receive a “status” that confers minimal gains, such as deferred action, deferred enforced departure (“DED”), Temporary Protected Status (“TPS”), withholding of removal, and deferral of removal.²²⁹

Deferred action is a form of prosecutorial discretion available to defer a noncitizen’s removal.²³⁰ For example, Deferred Action for Childhood Arrivals (“DACA”) is a form of deferred action.²³¹ A noncitizen granted deferred action is considered to be lawfully present while the deferred action is in effect; however, deferred action does not give lawful status to the noncitizen and can be terminated or renewed at DHS’s discretion.²³² A noncitizen is eligible for work authorization provided that he can demonstrate “an economic necessity for employment.”²³³ Relatedly, DED is a remedy available at the discretion of the president as part of his constitutional power to conduct foreign relations.²³⁴ Covered individuals may be eligible to receive work authorization and may be able to travel outside the United States.²³⁵

²²⁷ *Id.* at 1119.

²²⁸ Additionally, these noncitizens are deprived of ever obtaining the right to vote, the opportunity to seek government benefits, and the ability to travel freely. *Id.*

²²⁹ *Id.*

²³⁰ DHS DACA FAQs, U.S. CITIZENSHIP AND IMMIGR. SERV., <https://www.uscis.gov/humanitarian/humanitarian-parole/frequently-asked-questions> (last updated Feb. 4, 2021) [<https://perma.cc/F4V4-WXS3>]

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*; 8 C.F.R. § 274a.12(c)(14).

²³⁴ The President sets the eligibility terms for a country’s nationals and individuals covered by DED are not subject to removal for a designated period of time. Covered individuals may be able to travel outside the United States (advanced parole required). Currently, Liberians are covered under DED through June 30, 2022 and Venezuelans are covered through July 30, 2022. *Deferred Enforced Departure*, U.S. CITIZENSHIP AND IMMIGR. SERV., <https://www.uscis.gov/humanitarian/deferred-enforced-departure> (last updated Mar. 12, 2021) [<https://perma.cc/5K6T-JNNB>]; *DED Granted Country-Venezuela*, U.S. CITIZENSHIP AND IMMIGR. SERV., <https://www.uscis.gov/humanitarian/deferred-enforced-departure/ded-granted-country-venezuela> (last updated Mar. 16, 2021) [<https://perma.cc/32LH-YPAD>].

²³⁵ *Deferred Enforced Departure*, *supra* note 234. As many as 3,600 Liberians are DED holders; estimates for eligible Venezuelans range from 94,000 to 200,00. *Fact Sheet: Deferred Enforced Departure (DED)*, NATIONAL IMMIGRATION FORUM (Mar. 12, 2021), <https://immigrationforum.org/article/fact-sheet-deferred-enforced-departure-ded/#:~:text=How%20many%20Liberians%20currently%20hold,ranges%20from%20840%20to%203%2C600> [<https://perma.cc/2YSZ-G57C>].

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TPS, created as part of the Immigration Act of 1990, provides temporary protection to foreign nationals of a particular country that is experiencing extraordinary conditions that threaten the safety of those nationals were they to return.²³⁶ While inadmissibility grounds apply, the only eligibility criteria are continuous physical presence in the United States since the moment of country designation and timely registration.²³⁷ The Secretary of Homeland Security may designate a country for TPS if it is experiencing “ongoing armed conflict,” “substantial, but temporary, disruption of living conditions” due to environmental disaster, or “extraordinary and temporary conditions” that prevent those nationals from returning safely.²³⁸ During the grant period, TPS protects covered individuals from removal,²³⁹ provides them with work authorization,²⁴⁰ and allows them to travel abroad with prior consent.²⁴¹ TPS protection periods range from six to eighteen months and DHS can decide not to renew the protection.²⁴² Like DED, TPS does not create any pathway to citizenship.²⁴³ Countries currently designated for TPS are Burma, El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, Venezuela, and Yemen.²⁴⁴

Withholding of removal is a type of relief issued by an IJ to a person who demonstrates more than a 50% chance of being persecuted in his home country on account of his race, religion, nationality, membership in a particular social group, or political opinion.²⁴⁵ Like asylum, withholding of removal protects a person from being removed to a country where he fears

²³⁶ 8 U.S.C. § 1254a; Heeren, *supra* note 188, at 1140.

²³⁷ TPS applicants must meet timely apply and prove that they have resided continuously in the United States since the designation date for their country. 8 U.S.C. § 1254a(c); Benjamin M. Haldeman, *Discretionary Relief and Generalized Violence in Central America: The Viability of Non-Traditional Applications of Temporary Protected Status and Deferred Enforced Departure*, 15 CONN. PUB. INT. L.J. 185, 187–88 (2016).

²³⁸ 8 U.S.C. § 1254a(b)(1)(A)–(C).

²³⁹ 8 U.S.C. § 1254a(a)(1)(A).

²⁴⁰ 8 U.S.C. § 1254a(a)(1)(B).

²⁴¹ 8 U.S.C. § 1254a(f).

²⁴² 8 U.S.C. § 1254a(b)(3)(B)–(C).

²⁴³ 8 U.S.C. § 1254a(f)(1).

²⁴⁴ *Temporary Protected Status*, U.S. CITIZENSHIP AND IMMIGR. SERV., <https://www.uscis.gov/humanitarian/temporary-protected-status> (last updated Mar. 23, 2021) [<https://perma.cc/P3JR-2XQQ>]. In 2016, approximately 317,000 noncitizens, about 3% of the undocumented immigrant population, had TPS. D’Vera Cohn et al., *Many Immigrants with Temporary Protected Status face uncertain future in U.S.*, PEW RES. CTR. (Nov. 27, 2019), <https://www.pewresearch.org/fact-tank/2019/11/27/immigrants-temporary-protected-status-in-us/> [<https://perma.cc/BF3R-AD5D>].

²⁴⁵ 8 U.S.C. § 1231(b)(3); *Withholding of Removal and CAT*, IMMIGR. EQUALITY, <https://www.immigrationequality.org/get-legal-help/our-legal-resources/asylum/withholding-of-removal-and-cat/#.Xm5yOS2ZNp9> (last visited March 15, 2020).

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persecution.²⁴⁶ But unlike asylum, withholding of removal provides limited benefits: no lawful permanent residency or path to citizenship, a requirement to pay a yearly renewal fee for employment authorization, limited government benefits, no travel outside of the United States, risk of being removed to a country other than the one from which they were granted withholding of removal, and improper detention.²⁴⁷ Similarly, deferral of removal also prohibits returning noncitizens to a specific country where they would face torture.²⁴⁸ Deferral of removal is an option for noncitizens who would face torture but are ineligible for withholding of removal because of criminal history.²⁴⁹ Noncitizens granted deferral of removal can apply for work authorization.²⁵⁰ The relief can be terminated if the noncitizen no longer is likely to be tortured in the country of removal or if the U.S. government receives assurances that the noncitizen will not be tortured if returned.²⁵¹

Unable to pass comprehensive immigration reform, the Obama administration instead sought to use prosecutorial discretion as a means to close cases against noncitizens with family, educational, or other ties to the United States and to focus DHS's resources on cases of noncitizens who posed a serious threat to public safety or national security.²⁵² From its inception in 2011 through 2013, there was a large variation in the rates of

²⁴⁶ IMMIGR. EQUALITY, *supra* note 245.

²⁴⁷ AM. IMMIGR. COUNCIL, *THE DIFFERENCE BETWEEN ASYLUM AND WITHHOLDING OF REMOVAL* 1–2 (2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_difference_between_asylum_and_withholding_of_removal.pdf [<https://perma.cc/W78B-F8DH>]. In FY 2018, 1,157 noncitizens were granted withholding of removal. EXECUTIVE OFF. FOR IMMIGR. REV., *STATISTICS YEARBOOK FISCAL YEAR 2018* 30 (2019), <https://www.justice.gov/eoir/file/1198896/download> [<https://perma.cc/K6YV-925R>].

²⁴⁸ 8 C.F.R. § 1208.17.

²⁴⁹ EXECUTIVE OFF. FOR IMMIGR. REV., *ASYLUM AND WITHHOLDING OF REMOVAL RELIEF CONVENTION AGAINST TORTURE PROTECTIONS* 8 (2009), <https://www.justice.gov/sites/default/files/eoir/legacy/2009/01/23/AsylumWithholdingCATProtections.pdf> [<https://perma.cc/VST9-SMD8>].

²⁵⁰ IMMIGRANT LEGAL RESOURCE CTR., *QUALIFYING FOR PROTECTION UNDER THE CONVENTION AGAINST TORTURE 2* (2020), https://www.ilrc.org/sites/default/files/resources/cat_advisory-04.2020.pdf [<https://perma.cc/6336-PY9X>].

²⁵¹ EXECUTIVE OFF. FOR IMMIGR. REV., *supra* note 247, at 8. In FY 2018, 177 noncitizens were granted deferral of removal. *Id.* at 30.

²⁵² AM. IMMIGR. COUNCIL, *UNDERSTANDING PROSECUTORIAL DISCRETION IN IMMIGRATION LAW* 1–2 (2011), https://www.americanimmigrationcouncil.org/sites/default/files/research/IPC_Prosecutorial_Discretion_090911_FINAL.pdf [<https://perma.cc/Q6EP-NE93>]; *Once Intended to Reduce Immigration Court Backlog, Prosecutorial Discretion Closures Continue Unabated*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE IMMIGR. (Jan. 15, 2014), <http://trac.syr.edu/immigration/reports/339> [<https://perma.cc/CLG3-ZGQA>].

prosecutorial discretion across immigration courts.²⁵³ For example, the Seattle and Tucson immigration courts led with 29.8% and 26.0% prosecutorial discretion closures, respectively.²⁵⁴ In comparison, the Houston and New York City immigration courts recorded rates of 1.7% and 3.7%, respectively.²⁵⁵ Low prosecutorial discretion rates can occur for many reasons: for example, some courts may do a more effective job at screening out cases that would meet the administration's standards for closure before they reach the court.²⁵⁶ In fiscal years 2012, 2013, and 2014, the percentage of all cases closed via prosecutorial discretion was 4.7%, 8.5%, and 7%, respectively. The Trump administration curbed the use of prosecutorial discretion by targeting any individual "subject to a final removal order of removal but [has] not complied with [his] legal obligation to depart the United States" as an enforcement priority.²⁵⁷ On his first day in office, President Joe Biden revoked the Trump issued executive order—Enhancing Public Safety in the Interior of the United States—that listed a broad set of priorities without any mention of the use of prosecutorial discretion.²⁵⁸ That same day, the Biden administration announced a 100-day deportation moratorium, a move that was applauded by immigrants and immigrants' rights advocates;²⁵⁹ however, the moratorium was short lived as a federal judge quickly blocked the administration from enforcing it.²⁶⁰

V. PROPOSAL: AMENDMENTS TO NON-LPR CANCELLATION OF REMOVAL

During the final presidential debate on October 22, 2020, then-candidate Joe Biden declared that in his first 100 days, he would send to Congress "a pathway to citizenship for over 11 million undocumented

²⁵³ TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE IMMIGR *supra* note 252.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* Following this rationale, a high prosecutorial discretion closure rate could signify that a court is inadequately reviewing cases before officials file an action in court seeking a removal order.

²⁵⁷ Memorandum from John Kelly, Sec'y, U.S. Dep't of Homeland Security, to Kevin McAleenan, Acting Commissioner, U.S. Customs and Border Protection et al., Enforcement of the Immigration Laws to Serve the National Interest 2 (Feb. 20, 2017).

²⁵⁸ Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017).

²⁵⁹ Memorandum from David Pekoske, Acting Sec'y, U.S. Dep't of Homeland Security, to Tae Miller, Acting Director, U.S. Immig. and Customs Enf't et al., Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities (Jan. 20, 2021).

²⁶⁰ Sabrina Rodriguez, *Biden dealt blow on 100-day deportation moratorium*, POLITICO (Jan. 26, 2021, 3:50 PM), <https://www.politico.com/news/2021/01/26/biden-deportation-moratorium-462784> [<https://perma.cc/K4LT-5E4A>].

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people.”²⁶¹ While it seemed that the whole world watched the events of the 2020 U.S. presidential election, millions of undocumented immigrants in the United States clung onto Biden’s promise.²⁶²

The Trump administration left the United States damaged to say the least. Trump was openly hostile to immigrants and promoted anti-immigrant rhetoric from the moment he launched his presidential campaign in 2015²⁶³ until his final days in office,²⁶⁴ doing everything in his power to ostracize immigrants of color. The Biden administration has much work ahead of it to unite the country and reverse the harm caused by its predecessor.

But proposing and passing comprehensive immigration reform are two different things, and the Biden administration faces an uphill battle to pass such reform. Even though the Democrats control the House and the Senate, obtaining the required Republican votes to pass the U.S. Citizenship Act of 2021, the bill seeking “to provide an earned path to citizenship, to address the root causes of migration and responsibly manage the southern border, and to reform the immigrant visa system”²⁶⁵ will be complicated. With the filibuster in the way of comprehensive immigration reform and pitiful Republican support,²⁶⁶ Democrats have limited options to move forward in the Senate.²⁶⁷

²⁶¹ Meg Wagner et. al., *Final 2020 presidential debate*, CNN (Nov. 23, 2020, 2:27 PM), https://www.cnn.com/politics/live-news/presidential-debate-coverage-fact-check-10-22-20/h_25f28f98839741c5691f2cb4f9df4bc4 [<https://perma.cc/UKW4-DAMY>].

²⁶² *Promesas de Joe Biden alimentan la esperanza entre los inmigrantes indocumentados* (Telemundo news broadcast Nov. 9, 2020), <https://www.telemundo.com/shows/al-rojo-vivo/videos/al-rojo-vivo/inmigracion/promesas-de-joe-biden-alimentan-la-esperanza-entre-los-inmigrantes-indocumentados-3846413> [<https://perma.cc/K8PU-926H>] (reporting on undocumented immigrants’ hope for comprehensive immigration reform).

²⁶³ Raul A. Reyes, *Taco Trucks to Bad Hombres: 7 Times Latinos Figured in Trump’s Campaign*, NBC NEWS (Nov. 10, 2016 11:27 AM), <https://www.nbcnews.com/news/latino/taco-trucks-bad-hombres-7-times-latinos-figured-trump-s-n680811> [<https://perma.cc/3DVQ-5MZ7>] (reporting on Trump’s anti-immigrant rhetoric).

²⁶⁴ Jacob Soboroff & Julia Ainsley, *Trump administration trying to sabotage Biden immigration plans with last-minute deals, say officials*, NBC NEWS (Jan. 20, 2021, 5:00 AM), <https://www.nbcnews.com/politics/immigration/trump-administration-trying-sabotage-biden-immigration-plans-last-minute-deals-n1254733> [<https://perma.cc/CE74-9JJC>] (reporting on the Trump administration’s efforts to hinder the Biden administration’s efforts to undo tough immigration policies).

²⁶⁵ S. 348, 117th Cong. (2021); H.R. 1177, 117th Cong. (2021).

²⁶⁶ Republican Representative Maria E. Salazar introduced a proposal for a competing immigration reform plan that would grant temporary lawful status and eventual permanent resident status to undocumented immigrants that meet certain criteria, including paying back taxes and passing a criminal background check. Press Release, United States Congresswoman Maria E. Salazar, Congresswoman Maria Elvira Salazar Introduces Dignity Plan (Mar. 17, 2021), <https://salazar.house.gov/media/press-releases/congresswoman-maria-elvira-salazar-introduces-dignity-plan> [<https://perma.cc/CXP3-UTKT>]. Republican Senator Lindsey Graham acknowledged that President Biden needs to strengthen security at the U.S.-Mexico border and reinstate the Migrant Protection Protocols in order to initiate negotiations on immigration reform. Daniel Bush, *Democrats under pressure to act alone on immigration if Senate*

Demonstrating the difficulty of passing immigration reform, recent efforts to push ahead the American Dream and Promise Act²⁶⁸ and the Farm Workforce Modernization Act,²⁶⁹ smaller-scale immigration bills that would grant legal status to nearly 5 million people, have been met with little Republican cooperation in the House: nine Republican Representatives voted to approve the American Dream and Promise Act for a vote of 228 to 197; thirty Republican Representatives voted to pass the Farm Workforce Modernization Act for a vote of 247 to 174.²⁷⁰ The pressure from advocates is ramping up and Democrats must take action now to ensure that the U.S. Citizenship Act of 2021 passes successfully.²⁷¹ Without minimizing the importance of the U.S. Citizenship Act of 2021, this Note recommends Congressional and Executive fixes to amend non-LPR cancellation of removal in an attempt to provide alternative relief to some of the undocumented immigrants were the proposed legislation to fail.

A. The U.S. Citizenship Act of 2021 Explained

The U.S. Citizenship Act of 2021 was introduced by Democratic Senator Bob Menendez in the Senate and Democratic Representative Linda Sánchez in the House of Representatives in February 2021.²⁷² In an effort to promote family unity, the legislation most crucially seeks to provide a pathway to citizenship for all undocumented immigrants.²⁷³ DACA recipients, TPS recipients, and certain farmworkers would be placed on an expedited, three-year path to citizenship.²⁷⁴ All other undocumented

Republicans don't sign on, PBS NEWS HOUR (Mar 18, 2021, 3:36 PM), <https://www.pbs.org/newshour/politics/democrats-under-pressure-to-act-alone-on-immigration-if-senate-republicans-dont-sign-on> [<https://perma.cc/QMB4-M9CZ>].

²⁶⁷ Ted Hesson, *Democrats roll out Biden immigration bill without Republican backers*, REUTERS (Feb. 18, 2021, 10:55 AM), <https://www.reuters.com/article/us-usa-biden-immigration-bills/democrats-roll-out-biden-immigration-bill-without-republican-backers-idUSKBN2AI2AI> [<https://perma.cc/6Y8H-NRS5>] (reporting that Senate Democrats need to win over 10 Senate Republicans to avoid a filibuster).

²⁶⁸ The proposal would put DACA recipients and TPS recipients on a path the citizenship. H.R. 6, 117th Cong. (2021).

²⁶⁹ The proposal would provide legal status for agricultural workers who meet certain criteria. H.R. 1603, 117th Cong. (2021).

²⁷⁰ Camilo Montoya-Galvez, *House passes immigration bills with path to citizenship for "Dreamers" and farmworkers*, CBS NEWS (Mar. 19, 2021, 6:52 AM), <https://www.cbsnews.com/news/daca-immigration-reform-farmworkers-citizenship-house-passes-bills/> [<https://perma.cc/82M8-F6FW>].

²⁷¹ Bush, *supra* note 266.

²⁷² Press Release, United States Senator Bob Menendez, Menendez, Sánchez Introduce Bicameral U.S. Citizenship Act of 2021 to Overhaul American Immigration System (Feb. 18, 2021), <https://www.menendez.senate.gov/newsroom/press/menendez-sanchez-introduce-bicameral-us-citizenship-act-of-2021-to-overhaul-american-immigration-system> [<https://perma.cc/8MTB-KZE9>].

²⁷³ *Id.*

²⁷⁴ *Id.*

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immigrants who pass background checks and pay taxes would be placed on an eight-year path to citizenship.²⁷⁵

The legislation includes reforms to the family-based immigration system,²⁷⁶ changes to the employment-based immigration system, funds for state initiatives promoting immigrant integration, protection from exploitation for workers and improvements to the employment verification process, support for asylum seekers and other vulnerable populations, and replacement of “alien” with “noncitizen” in U.S. immigration laws.²⁷⁷ It also addresses the root causes of migration from Central America: increasing assistance to El Salvador, Guatemala, and Honduras conditioned on the governments’ ability to reduce corruption, violence, poverty, and famine; creating legal channels for people to apply for legal status while in Central America, reinstating the Central American Minors program and creating the Central American Family Reunification Parole Program; enhancing prosecution of individuals involved in smuggling, narcotics, and trafficking networks; improving immigration court function; modernizing border management; and protecting border communities.²⁷⁸ If passed, the U.S. Citizenship Act of 2021 would bring the most significant reforms to the immigration system since 1986.

B. Legislative Fixes to Non-LPR Cancellation of Removal

Even though there is majority support for providing a pathway to citizenship for undocumented immigrants,²⁷⁹ legislation proposing such reform has failed to pass both the House and Senate in the past twenty years.²⁸⁰ Moreover, legislation to amend non-LPR cancellation of removal

²⁷⁵ *Id.*

²⁷⁶ The bill reforms the family-based immigration system by clearing backlogs, increasing per-country visa caps, eliminating the 3 and 10-year time bars. Press Release, United States Congresswoman Linda Sanchez, The U.S. Citizenship Act of 2021, <https://lindasanchez.house.gov/uscitizenshipact> (last visited Apr. 18, 2021) [<https://perma.cc/5V5D-WTZK>].

²⁷⁷ *Id.*; Press Release, *supra* note 272.

²⁷⁸ Press Release, *supra* note 272; Press Release, *supra* note 276.

²⁷⁹ Maria Sacchetti, *Democrats call for ‘big, bold’ action on immigration as Biden’s bill is introduced*, WASH. POST (Feb. 18, 2021, 8:45 PM), https://www.washingtonpost.com/immigration/democrats-introduce-biden-citizenship-bill/2021/02/18/e843bb22-7179-11eb-b8a9-b9467510f0fe_story.html [<https://perma.cc/B7UY-4NEW>] (reporting that 65% of Americans said undocumented immigrants should be allowed to apply for citizenship); Nicole Narea, *Poll: Most Americans support a path to citizenship for undocumented immigrants*, VOX (Feb. 4, 2021, 8:30 AM), <https://www.vox.com/policy-and-politics/2021/2/4/22264074/poll-undocumented-immigrants-citizenship-stimulus-biden> (reporting that 69% of likely voters strongly support a pathway to citizenship for undocumented immigrants).

²⁸⁰ Donna Smith, *Senate kills Bush immigration reform bill*, REUTERS (June 28, 2007, 7:55 PM), <https://www.reuters.com/article/us-usa-immigration/senate-kills-bush-immigration-reform-bill-idUSN2742643820070629> [<https://perma.cc/ZJM5-HBSS>] (reporting on 2007 immigration reform bill failing to pass the Senate, obtaining a yes vote only from 33 Democrats, 12 Republicans, and 1

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has been rarely introduced.²⁸¹ But given the current makeup of and the adversity within the 117th United States Congress,²⁸² passing legislation to reform current forms of relief should be a realistic priority for Congress to bring a large portion of undocumented immigrants out of the shadows.

After asylum-related relief, cancellation of removal is the second most common form of relief.²⁸³ From January 20, 2017 to September 30, 2020, there were over 60,000 non-LPR cancellation of removal applications in immigration court; about 6.5% of the 941,000 total applications for deportation relief.²⁸⁴ Major reforms to non-LPR cancellation of removal would be to eliminate the 4,000 cap, to transform the relief into an affirmative form of relief, and to amend the “exceptional and extremely unusual hardship” standard.

The first proposed reform is to eliminate the annual cap of 4,000 on the number of grants for non-LPR cancellation of removal. Currently, this cap does not depress the number of applicants each year nor does it impact

Independent); Philip Bump, *Boehner Kills the Senate Immigration Bill, to the 2012 GOP's Dismay*, ATLANTIC (Nov. 13, 2013), <https://www.theatlantic.com/politics/archive/2013/11/boehner-kills-senate-immigration-bill-2012-gops-dismay/355071/> [<https://perma.cc/VG9X-YFH7>] (reporting on Speaker John Boehner’s refusal to participate in conference committee discussion on the Senate’s immigration reform proposal).

²⁸¹ Democratic Representative Bobby Rush introduced the American Right to Family Act in October 2020 which sought to amend INA § 240A to grant temporary lawful status to defined groups of immigrants. The bill would have created INA § 240A(f) titled “Cancellation of Removal and Temporary Resident Status for Certain Long-Term Resident Parents” and would have covered (among other) undocumented immigrants who have been continuously present in the United States for more than ten years. The bill would have provided 3-year temporary resident status that could be renewed without limits, and the 4,000 cap would not apply to this newly created relief from removal. H.R. 8585, 116th Cong. (2020); Press Release, United States Congressman Bobby L. Rush, Rush Introduces Legislation to Stop Family Separations (Oct. 13, 2020), <https://rush.house.gov/media-center/press-releases/rush-introduces-legislation-to-stop-family-separations> [<https://perma.cc/9HE7-UXV5>]. The bill was referred to the House Judiciary but ultimately did not receive a vote. *H.R. 8585 (116th): American Right to Family Act*, GOVTRACK, <https://www.govtrack.us/congress/bills/116/hr8585> (last visited Apr. 18, 2021) [<https://perma.cc/TE4H-QVUG>]. Other bills have sought to limit disqualification from cancellation of removal. See H.R. 1485, 106th Cong. (1999) (limiting the aggravated felonies to disqualify an applicant from cancellation of removal and creating cancellation of removal for certain permanent residents for urgent humanitarian reasons or significant public benefit); H.R. 5062, 106th Cong. (2000) (limiting disqualification from cancellation of removal).

²⁸² There are 212 Republican Representatives and 218 Democratic Representatives (and 5 vacancies), and 50 Republican Senators and 48 Democratic Senators (plus 2 Independent Senators caucusing with Democrats). *Party Breakdown*, U.S. HOUSE OF REPRESENTATIVES PRESS GALLERY, <https://pressgallery.house.gov/member-data/party-breakdown> (last visited Apr. 18, 2021) [<https://perma.cc/7YKM-V8R8>]; *Party Division*, U.S. SENATE, <https://www.senate.gov/history/partydiv.htm> (last visited Apr. 18, 2021) [<https://perma.cc/MXF4-896Y>].

²⁸³ *Beyond Asylum: Deportation Relief During the Trump Administration*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE IMMIGR, <https://trac.syr.edu/immigration/reports/631/> (last updated Oct. 29, 2020) [<https://perma.cc/X6Y3-Q8XH>].

²⁸⁴ *Id.*

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who can establish that they qualify for the relief.²⁸⁵ Rather, the cap requires the Executive Office for Immigration Review (“EOIR”), which oversees immigration courts, to hold off granting relief to undocumented immigrants and creates delays that keep applicants in a legal limbo.²⁸⁶ Currently, IJs are alerted once the cap is met, and at that point they must reserve decisions granting the relief.²⁸⁷ IJs may prepare a draft written decision, but may not release the decision to the parties or to the public, that is entered into a queue to be issued once grants are available once again.²⁸⁸ A significant risk created by this cap is the potential to moot out an undocumented immigrant’s claim.²⁸⁹ Recognizing this issue, in May 1997, Democratic Representative Luis Gutiérrez introduced H.R.1545, a bill to amend the INA to eliminate the 4,000 cap;²⁹⁰ but unfortunately the bill did not receive a vote.²⁹¹

The second proposed reform is modifying non-LPR cancellation of removal into affirmative relief that can be adjudicated by the U.S. Citizenship and Immigration Services (“USCIS”), a branch of DHS. This reform would require Congress to amend INA § 240A to grant the Secretary of Homeland Security, in addition to the Attorney General as the statute is currently written, the jurisdiction to adjudicate requests for non-LPR cancellation of removal.²⁹² This reform would allow undocumented

²⁸⁵ Taylor, *supra* note 126, at 548.

²⁸⁶ *Id.*

²⁸⁷ IJs are not required to reserve decision where: the application is denied or pretermitted for any reason; the application pertains to a detained undocumented immigrant; or the application is for suspension of deportation filed by a battered spouse or parent during proceedings where the charging document was filed prior to April 1, 1997 or is for cancellation of removal under INA § 240A(e)(3). Memorandum from MaryBeth Keller, Chief Immigration Judge, to all Immigration Judges et al., Operating Policies and Procedures Memorandum 17-04: Applications for Cancellation of Removal or Suspension of Deportation that are Subject to the Cap (Dec. 20, 2017).

²⁸⁸ *Id.*

²⁸⁹ For example, a claim can become moot if the U.S. citizen child turns 21 years old before the application is completed. IMMIGRANT LEGAL RESOURCE CTR., *supra* note 151, at 9.

²⁹⁰ H.R. 1545, 105th Cong. (1997).

²⁹¹ *H.R. 1545 (105th): To amend the Immigration and Nationality Act and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to eliminate the numerical limitations relating to cancellations of removal and suspensions of deportation*, GOVTRACK, <https://www.govtrack.us/congress/bills/105/hr1545> (last visited Apr. 18, 2021) [<https://perma.cc/8J8N-G3UK>].

²⁹² For example, the INA allows “The Secretary of Homeland Security or the Attorney General [to] grant asylum” to a noncitizen who has applied for the relief in accordance with the requirements and procedures established by the Secretary or the Attorney General. INA § 208(b). Asylum is available affirmatively with USCIS or defensively before an immigration judge, *Obtaining Asylum in the United States*, U.S. CITIZENSHIP AND IMMIGR. SERV., <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states> (last updated Mar. 22, 2021) [<https://perma.cc/J2TC-LE38>].

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immigrants to apply for the relief without placing themselves into removal proceedings and appearing before an IJ.

First, this reform is supported by the need to manage the ongoing backlog in U.S. immigration courts; as of February 2021, there are over 1,299,000 pending immigration cases.²⁹³ Even if the Biden administration halted immigration enforcement, it would take more than the entire four-year term for cases in the active backlog to be completed.²⁹⁴ Second, undocumented immigrants will face fewer barriers by interacting with USCIS versus immigration courts: they will encounter a less adversarial system,²⁹⁵ fewer barriers to accessing counsel,²⁹⁶ and a potentially higher likelihood of obtaining a grant for relief.²⁹⁷ Even though Department of Justice (“DOJ”) policy prohibits hiring based on political or ideological affiliation, the Trump administration was suspected of politicizing IJ hiring: of 23 IJs hired in August 2018, more than half previously worked with DHS and the others came from a law-enforcement background; of 46 IJs hired in September 2018, 19 previously worked for ICE, 10 had worked at DOJ or as local prosecutors, and 7 had military backgrounds.²⁹⁸ The immigration court’s fairness and legitimacy can be clouded by the lack of IJ diversity, as well as the appointment of a Chief Immigration Judge with no judicial experience but who had served as ICE’s chief immigration prosecutor and

²⁹³ *Immigration Court Backlog Tool*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog/ (last visited Apr. 18, 2021) [<https://perma.cc/DKM6-B8XJ>].

²⁹⁴ *The State of the Immigration Courts: Trump Leaves Biden 1.3 Million Case Backlog in Immigration Courts*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE IMMIGR. (JAN. 19, 2021), <https://trac.syr.edu/immigration/reports/637/> [<https://perma.cc/S4DM-KE6N>].

²⁹⁵ It should be noted that USCIS’s “non-adversarial” interview model raises concerns regarding adjudicator impartiality given that the adjudication system is within a policy-making agency and has increases its enforcement functions. Consistent with the Trump administration’s anti-immigrant policies, USCIS’s interests appeared to also move in that direction. See generally Beth K. Zilberman, *The Non-Adversarial Fiction of Immigration Adjudication*, 2020 WIS. L. REV. 707 (2020).

²⁹⁶ Nationally, only 37% of all immigrants obtained legal representation in their removal cases; these rates varied widely by court jurisdiction. Immigrants with removal proceedings in small cities were more than four times less likely to obtain legal representation than those with hearings in large cities. INGRID EAGLY & STEVEN SHAFER, AM. IMMIGR. COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 2 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf [<https://perma.cc/MVQ9-5A3L>].

²⁹⁷ As a point of comparison, in 2019, USCIS received 96,952 affirmative asylum cases and granted 27,643, and immigration courts received 210,752 defensive asylum cases and granted 18,865. USCIS receives considerably fewer cases yet grants nearly double that of immigration courts. OFF. OF IMMIGR. STAT., REFUGEES AND ASYLEES: 2019 9 (2020), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/refugee_and_asylee_2019.pdf [<https://perma.cc/N9TR-W97C>].

²⁹⁸ Priscilla Alvarez, *Jeff Sessions is Quietly Transforming the Nation’s Immigration Courts*, ATLANTIC (Oct. 17, 2018), <https://www.theatlantic.com/politics/archive/2018/10/jeff-sessions-carrying-out-trumps-immigration-agenda/573151/> [<https://perma.cc/Y7UH-DR5K>].

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the appointment of a former immigration policy adviser to the Trump administration as the Chief Appellate Immigration Judge;²⁹⁹ Furthermore, then-Attorney General Jeff Sessions exclaimed that “the vast majority of asylum claims are not valid” and that if IJs do their jobs “the number of illegal aliens and the number of baseless claims will fall.”³⁰⁰ USCIS is an adequate addition as an adjudicator because it has capacity to investigate and adjudicate affirmative applications for immigration benefits; three of its units—the Service Center Operations Directorate, the Field Operations Directorate, and the Refugee, Asylum & International Operations Directorate—currently take on these responsibilities.³⁰¹ Interviews may also be required for this amended non-LPR cancelation of removal: USCIS requires interviews for asylum seekers³⁰² and has discretion to interview Special Immigration Juvenile petitioners.³⁰³ USCIS uses interviews “to elicit and provide information related to eligibility for an immigration benefit or for some other official purpose” and uses a non-adversarial approach: the USCIS officer is a neutral decisionmaker, and it is not the USCIS officer’s role to oppose the petitioner’s request or application, and it is inappropriate to interrogate or argue with the applicant.³⁰⁴ Moreover, access to counsel in immigration court has been found to be scarce and unevenly distributed by court jurisdiction: an alarming 11% of immigrants with court hearings in small cities versus 47% of immigrants with court hearings in large cities were represented by counsel.³⁰⁵ Because the only in-person contact with USCIS may be for an interview, as opposed to multiple hearings in an immigration court, access to counsel issues that undocumented immigrants in removal proceedings face may be avoided through this amended relief: USCIS accepts filings by mail and electronically³⁰⁶ whereas EOIR halted the expansion of its online filing

²⁹⁹ *Id.*; George Tzamaras & Belle Woods, *Trump Administration Makes Immigration Courts an Enforcement Tool by Appointing Prosecutors to Lead*, AM. IMMIGR. LAW. ASS’N. (July 6, 2020), <https://www.aila.org/advo-media/press-releases/2020/trump-administration-makes-immigration-courts-an-e> [<https://perma.cc/A428-L2RF>].

³⁰⁰ Reade Levinson et al., *Special Report: How Trump administration left indelible mark on U.S. immigration courts*, REUTERS (Mar. 8, 2021, 7:06 AM), <https://www.reuters.com/article/us-usa-immigration-trump-court-special-r/special-report-how-trump-administration-left-indelible-mark-on-u-s-immigration-courts-idUSKBN2B0179>

³⁰¹ Zilberman, *supra* note 295, at 737.

³⁰² 8 C.F.R. § 208.9.

³⁰³ 8 C.F.R. § 103.2(b)(9).

³⁰⁴ U.S. CITIZENSHIP AND IMMIGR. SERV., RAI0 DIRECTORATE: OFFICER TRAINING 11, 15 (2019), https://www.uscis.gov/sites/default/files/document/foia/Interviewing_-_Intro_to_the_NonAdversarial_Interview_LP_RAIO.pdf [<https://perma.cc/CH65-NNJL>].

³⁰⁵ EAGLY & SHAFER, *supra* note 296, at 10

³⁰⁶ *Forms Available to File Online*, U.S. CITIZENSHIP AND IMMIGR. SERV., <https://www.uscis.gov/file-online/forms-available-to-file-online> (last updated Apr. 12, 2021), <https://perma.cc/6P7S-JAZU>.

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system (EOIR Courts & Appeals System)³⁰⁷ and as a result of the COVID-19 pandemic is temporarily accepting filings by email.³⁰⁸ While USCIS views its interviews to be non-adversarial, Congress should safeguard undocumented immigrants' meaningful opportunity to be heard and their right to counsel in this amended relief.³⁰⁹

The third reform is to amend the “exceptional and extremely unusual hardship” standard to a lower standard, such as “extreme hardship,” affecting the undocumented immigrant or his qualifying relatives. By returning to the hardship standard used for suspension of deportation, an undocumented immigrant would need to meet a lower standard and would be able to use hardship onto himself to argue against his removal. Undocumented immigrants with established lives in the United States, such as B, would have a greater opportunity at obtaining this relief from removal. Furthermore, because hardship is a discretionary determination based on the undocumented immigrant's presented facts, the BIA would be tasked with creating precedent for the IJs to follow. The Attorney General also has the authority to create precedent to define what constitutes hardship to warrant a grant for this relief.

C. Executive Fixes to Non-LPR Cancellation of Removal

EOIR is the agency within DOJ responsible for “interpret[ing] and administer[ing] federal immigration laws by conducting immigration court proceedings, appellate reviews, and administrative hearings.”³¹⁰ EOIR houses the BIA and the Office of the Chief Immigration Judge consisting of the Chief Immigration Judge and IJs.³¹¹ The Chief Immigration Judge is appointed by the Attorney General and is responsible for the supervision, direction, and scheduling of the IJs.³¹² IJs are also appointed by the Attorney General, and exercise powers and duties delegated to them by the

³⁰⁷ *EOIR Courts & Appeals System (ECAS): Online Filing*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/eoir/ECAS> (last updated Feb. 4, 2021) [<https://perma.cc/KW68-HKCV>].

³⁰⁸ *Filing by Email: Immigration Courts*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/eoir-operational-status/filing-email-immigration-courts> (last updated Dec. 21, 2020) [<https://perma.cc/FR3G-GAYQ>].

³⁰⁹ A 2012 report by the Pennsylvania State University Law School and the American Immigration Council detailed USCIS's restrictions on access to counsel, in particular, preventing attorneys from explaining the interview process to their clients and clarifying officers' questions. *See generally* PENN STATE LAW, AM. IMMIGR. COUNCIL, *BEHIND CLOSED DOORS: AN OVERVIEW OF DHS RESTRICTIONS ON ACCESS TO COUNSEL* (2012), https://www.americanimmigrationcouncil.org/sites/default/files/research/behind_closed_doors.pdf [<https://perma.cc/Y646-VSR5>].

³¹⁰ *About the Office*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/eoir/about-office> (last updated Feb. 3, 2021) [<https://perma.cc/RKS4-ZU6Q>].

³¹¹ 8 C.F.R. § 1003.0(a); 8 C.F.R. § 1003.9(a).

³¹² 8 C.F.R. § 1003.9(a)-(b).

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INA and the Attorney General.³¹³ The BIA is composed of twenty-three members appointed by the Attorney General and has a Chairman who directs, supervises, and establishes the BIA's internal operation procedures and policies.³¹⁴ The BIA has authority to make independent determinations and to issue decisions, but those decisions are subject to final review by the Attorney General.³¹⁵

The executive branch has taken a more proactive role in immigration policymaking due to Congress's general inability to pass immigration reform.³¹⁶ One mechanism is the "referral and review power" that allows the Attorney General to review and overrule decisions made by the BIA.³¹⁷ While viewed as controversial because of the lack of definite procedures governing the referral and review process,³¹⁸ the Attorney General has the authority to refer and review immigration cases to himself,³¹⁹ giving himself "the opportunity to exercise power in a manner more obscured to the public and thus less constrained by legislative and political forces" through "administrative adjudication of an individual case as a means for political ends."³²⁰ In using this authority, the Attorney General must weigh his law enforcement responsibilities and interest in enhancing adjudications with the need to ensure the accuracy and fairness of proceedings.³²¹ The Attorney General's decision becomes the final agency decision and binds future cases.³²²

This Note therefore proposes that Attorney General Merrick B. Garland use his self-referral authority to instruct IJs on the proper factors to consider in determining whether an undocumented immigrant meets the amended "extreme hardship" for non-LPR cancellation of removal. Similarly, this Note also proposes that Secretary of Homeland Security Alejandro Mayorkas, through his authority as the overseer of USCIS, issue

³¹³ 8 C.F.R. § 1003.10.

³¹⁴ 8 C.F.R. § 1003.1(a)(1)-(2).

³¹⁵ 8 C.F.R. §§ 1003.1(d)(1)(ii), 1003.1(d)(7)(i).

³¹⁶ SARAH PIERCE, MIGRATION POLICY INSTITUTE, *OBSCURE BUT POWERFUL: SHAPING U.S. IMMIGRATION POLICY THROUGH ATTORNEY GENERAL REFERRAL AND REVIEW* 8 (2021), https://www.migrationpolicy.org/sites/default/files/publications/rethinking-attorney-general-referral-review_final.pdf [https://perma.cc/SJA3-JQK5].

³¹⁷ *Id.* at 1.

³¹⁸ *See generally* Laura S. Trice, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766 (2010) (proposing procedural safeguards to constrain the Attorney General's authority on referral and review of BIA cases).

³¹⁹ 8 C.F.R. § 1003.1(h).

³²⁰ Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. ONLINE 129, 132-33 (2017).

³²¹ PIERCE, *supra* note 316, at 10.

³²² 8 C.F.R. § 1003.1(g).

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a memorandum to USCIS to direct it in applying the “extreme hardship” standard.³²³ Because the “extreme hardship” standard has not been used since suspension of deportation, a case will presumably reach the BIA to create uniformity and guidance for IJs. To ensure that the BIA is interpreting the “extreme hardship” standard in a reasonable manner, the Attorney General can use his authority to ensure that the relief is available to undocumented immigrants like B—individuals with established lives in the United States. Factors to consider should include: the undocumented immigrant’s family ties in the United States, including whether he has LPR or U.S. citizen children; the effects of family separation, primarily loss of economic and emotional support to the undocumented immigrant’s LPR or U.S. citizen children; the difficulty in readjusting and diminished educational opportunities to LPR and U.S. citizen children in returning to the undocumented immigrant’s home country; the feasibility of obtaining an immigrant visa to return to the United States; and any other special need warranting a need to remain in the United States.

Unlawful status not only affects an undocumented immigrant, but also creates challenges to a child’s development and wellbeing: increased family stress, fear of deportation, poor work conditions, reduced income, and inferior housing can stunt the emotional and social development of children.³²⁴ Studies have shown that immigration enforcement, or even the threat of it, can negatively impact a child’s long-term health and development: mental health problems like depression, anxiety, and psychological distress increase following the detention and/or deportation of a parent.³²⁵ Families can experience a loss of income and face poverty following the detention or deportation of a father: a family loses on average 70% of its income in the six months following the detention or deportation of the primary provider.³²⁶ Furthermore, children may end up in the child welfare system as a result of their parent’s detention or deportation: in 2011, an estimated 5,000 children in foster care had a detained or deported parent.³²⁷ In 2019, ICE removed nearly 28,000 noncitizens who claimed to have at least one U.S.-born child.³²⁸ While the U.S. government does not

³²³ 8 C.F.R. § 2.1.

³²⁴ RANDY CAPPS ET AL., URBAN INSTITUTE, MIGRATION POLICY INSTITUTE, DEFERRED ACTION FOR UNAUTHORIZED IMMIGRANT PARENTS: ANALYSIS OF DAPA’S POTENTIAL EFFECTS ON FAMILIES AND CHILDREN 20 (2016), <https://www.migrationpolicy.org/sites/default/files/publications/DAPA-Profile-FINALWEB.pdf> [<https://perma.cc/LG7M-GA3S>]

³²⁵ AM. IMMIGR. COUNCIL, *supra* note 39, at 1.

³²⁶ CAPPS ET AL., *supra* note 324, at 17.

³²⁷ CAPPS ET AL., *supra* note 39, at VII.

³²⁸ U.S. IMMIGR. AND CUSTOMS ENF’T, DEPORTATION OF PARENTS OF U.S.-BORN CHILDREN: FIRST HALF, CALENDAR YEAR 2019 3 (2020), https://www.dhs.gov/sites/default/files/publications/ice_-_deportation_of_parents_of_u.s.-born_children_first_half_cy_2019.pdf [<https://perma.cc/H3RY-92ST>];

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track whether U.S. citizen children stay in the United States or leave with a deported parent, both scenarios pose a difficult decision for the affected families.³²⁹ These are just some of the adversities that an undocumented immigrant and his family endure by virtue of a looming deportation, and should incite the Biden administration to reform existing forms of relief from deportation in light of the difficulties to pass comprehensive immigration reform.

Former Attorney General Alberto Gonzales deemed the referral authority to be “an appropriate and efficacious mechanism for advancing a wide variety of legal interpretations and policy initiatives, even if an administration would utilize additional mechanisms in order to fully implement its vision on immigration” and “an important path through which executive branch immigration policy has been and should continue to be advanced.”³³⁰ The Trump administration projected this outlook strongly: the administration’s Attorneys General used the referral and review power more than any Attorneys General under any prior administration to make substantive changes to asylum law, court procedures, and IJ docket management.³³¹ Just as the Trump administration used this bureaucratic tool to aggressively push its anti-immigrant agenda, the Biden administration should be equally as zealous to push for immigration reform especially in light of the BIA’s shift to an anti-immigrant stance.³³²

VI. CONCLUSION

The number of undocumented immigrants in the United States, their inability to legalize their immigration status, and their abundant contributions to the U.S. economy reinforce the importance of comprehensive immigration law. Providing lawful status and a pathway to citizenship for millions of undocumented persons will not fix unauthorized immigration moving forward, but it will take undocumented persons who have spent a substantial portion of their lives in the United States out of the

U.S. IMMIGR. AND CUSTOMS ENF’T, DEPORTATION OF PARENTS OF U.S.-BORN CHILDREN: SECOND HALF, CALENDAR YEAR 2019 3 (2020), https://www.dhs.gov/sites/default/files/publications/ice_-_deportation_of_parents_of_u.s.-born_children_second_half_cy_2019.pdf [<https://perma.cc/SHK8-X6G4>].

³²⁹ AM. IMMIGR. COUNCIL, *supra* note 39, at 4.

³³⁰ Hon. Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through The Attorney General’s Review Authority*, 101 IOWA L. REV. 841, 897 (2016)

³³¹ PIERCE, *supra* note 316, at 1. One example is *Matter of A-B-*, a 2016 BIA decision granting asylum to a Salvadoran woman who fled her abusive ex-husband. Attorney General Jeff Sessions self-referred the case and vacated the BIA’s decision, instead holding that “generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by nongovernmental actors will not qualify for asylum.” *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

³³² See Felipe de la Hoz, *The Shadow Court Cementing Trump’s Immigration Policy*, NATION (June 30, 2020), <https://www.thenation.com/article/society/trump-immigration-bia/>.

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shadows. The forms of status and relief from removal currently available are insufficient and keep noncitizens in a state of uncertainty and with no pathway to citizenship.

Recognizing that the politics of immigration are complicated with varying degrees of nativism and cultural conservatism, this Note proposes reforms to non-LPR cancellation of removal as an alternative to comprehensive immigration reform: eliminating the cap on grants of the relief, transforming it into an affirmative form of relief, and amending the hardship standard. Given the disfunction and polarization that the Trump administration reinforced, comprehensive immigration reform will be a difficult goal for the Biden administration to achieve but which immigrants and advocates hope for and support, nonetheless.

By failing to provide lawful status to millions of undocumented immigrants, the United States federal government subjects undocumented immigrants and their families to fear and uncertainty. Millions of undocumented immigrants, just like B, have spent a great part of their lives in this country, giving much and receiving little, and have no plans to abandon their lives and their children here. It is time that the United States ceases to treat undocumented immigrants as invisible and inferior and ensures that this country can truly be their home.