No. 13-2129

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ROGELIO BLACKMAN HINDS,
Petitioner,

v.

ERIC H. HOLDER, Jr., Attorney General,
Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS
File No. A 035-197-709

BRIEF OF AMICUS CURIAE THE CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae the Center for Constitutional Rights, has no parent corporation, and no publicly-owned corporation owns any of its stock.

/s/
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STATEMENT OF INTEREST[1]

The Center for Constitutional Rights ("CCR") is a national non-profit legal, educational and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international law. CCR has been responsible for some of the most significant advancements in the recognition of international law in federal courts over the last three decades. CCR attorneys pioneered the use of the Alien Tort Statute in holding individuals accountable for violations of international law in U.S. courts, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

CCR has several times litigated cases deciding whether retroactive application of mandatory inadmissibility standards was limited by international law. CCR served as amicus curiae in *Beharry v. Reno* before the district court at Judge Weinstein's invitation, 183 F. Supp. 2d 584 (E.D.N.Y. 2002), and represented Beharry before the Second Circuit panel, 329 F.3d 51, and in the partially successful motion for reconsideration directed to that panel, 2003 U.S. App. LEXIS 8279 (2d Cir. 2003). The Center was also co-counsel in *Lake v. Ashcroft*, 02-cv-4345 (E.D.N.Y.), and amicus curiae in *Gordon v. Mulé*, 153 Fed. Appx. 39, No. 02-2051 (2d Cir. 2005), cases raising similar issues.

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[1] No party's counsel authored this brief in whole or part, and no party's counsel or other person contributed money intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

Congress's power to regulate immigration is not enumerated anywhere in the text of the Constitution; instead, the Supreme Court has consistently characterized it as a power "inherent in sovereignty," created by—and therefore limited by—international law. International law norms therefore serve as fundamental restrictions on Congress's power (so often described with a facile incantation of the term "plenary") to act in this field.

Existing international law norms regarding the right to family integrity and association—the right to live together as a family—already provide significant protections to aliens facing deportation who have strong family ties to the United States. The right to family integrity in international law subsumes at least three norms: first, that the hardship to the individual deported and those left behind be proportional to the state interest served by removal; second, in cases involving dependent children the best interests of the child should have primacy; and third, the necessary corollary to the first two norms: that the state must adjudicate proportionality and the interests of children on a case-by-case basis in a process that provides some possibility of discretionary relief.

By mandating automatic removal without taking account of proportionality, the Board of Immigration Appeals (BIA) interpreted the Immigration and Nationality Act (INA) to have an effect that exceeded Congress' power in the field of

immigration. The simplest remedy would be for this Court to apply standard avoidance principles by interpreting the INA to permit discretionary relief in cases involving family separation, and remanding for case-specific application of standards consistent with international law.

ARGUMENT

I. International Law Places Certain Fundamental Limitations on Congress's Power to Legislate in the Field of Immigration

Most discussions of Congress's powers begin with the text of Article I. It is a commonplace of legal education to assume that there are no federal powers that are not specifically enumerated in the Constitution.[2] If that were true, however, we might have no federal immigration law—because the power to regulate immigration generally[3] is nowhere described in the Constitution's text. There is a Naturalization Clause, allowing Congress to set uniform standards for naturalization[4]—but there is no corresponding immigration clause.

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[2] *See, e.g.*, *McCullogh v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all, to be one of enumerated powers.").

[3] Of course, the Slave Migration Clauses are an exception to the *general* absence of an immigration power in the Congress. U.S. CONST. art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year [1808].")

[4] *Id.* art. I, § 8, cl. 4 ("The Congress shall have power . . . [t]o establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.").

Given today's pervasive control of immigration by the federal government, this simple point seems astonishing to most lawyers who encounter it for the first time. It might not have been so surprising prior to the Civil War: Until 1875 there was almost no direct federal regulation of immigration, and at the time of the founding, the federal government generally encouraged free immigration,[5] leaving only occasional and very limited state regulation throughout our first century of nationhood.[6]

The question whether Congress had power over immigration under the Commerce Clause—a question tied up as much with the debates over slavery as with concerns over general immigration—was for a long time unresolved. One of

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[5] *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 98–99 (2002) ("Federal activity in the immigration area was minimal during the pre–Civil War period. The federal government's express policy was to encourage settlement in the new nation…. No meaningful federal restrictions on immigration were imposed." (footnotes omitted)); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1834 (1993) (prior to the 1870s "U.S. legal policy warmly welcomed certain kinds of immigration, and restrictive laws were often poorly enforced. Neither Congress nor the states attempted to impose *quantitative* limits on immigration." (footnote omitted)).

[6] *See* Neuman, *supra* note 5, at 1841 ("State opposition to the immigration of persons convicted of crime continued a longstanding dispute of the colonial period. …such legislation was frequently vetoed by the British government. Independence released the states from that control…."). Limitations on the migration of slaves—and of free blacks as well—were imposed by many states as well. *See* Cleveland, *supra* note 5, at 98.

the early cases touching on the issue was *New York v. Miln*,[7] a challenge to a New York State statute requiring reporting of all foreign passengers on board ships brought into the port of New York. The state defended the law as a valid exercise of the police powers, claiming that to invalidate it would affect many southern states' restrictions on entry and passage of free blacks. George Miln, a ship captain, argued that the reporting requirement affected foreign commerce, a field where Congress held exclusive power. The Court rejected this "dormant" international Commerce Clause argument.[8] However, a decade later, a sharply divided Supreme Court held by a five-to-four vote[9]—with no majority opinion, and several lengthy concurrences—that state head taxes trenched on dormant federal Commerce Clause powers (and/or other dormant federal powers, based in the Taxation, Migration, or Naturalization Clauses as well) in a field Congress had occupied with

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[7] 36 U.S. (11 Pet.) 102 (1837).

[8] *Miln*, 36 U.S. (11 Pet.) at 136–37 ("But how can this apply to persons? They are not the subject of commerce; and not being imported goods, cannot fall within a train of reasoning founded upon the construction of a power given to congress to regulate commerce . . . ."). In the *Passenger Cases*, Justice James Moore Wayne later argued that this language did not enjoy the support of a majority of the Court. *See The Passenger Cases*, 48 U.S. (7 How.) 283, 410–11 (1849) (Wayne, J., concurring).

[9] *See The Passenger Cases*, 48 U.S. (7 How.) at 406 (McLean, J., concurring); *id*. at 426, 428 (Wayne, J., concurring); *id*. at 457 (Grier, J., concurring). The majority all agreed that nothing they said limited the ability of states to exclude blacks.

legislation.[10] As late as 1884, federal head taxes were upheld on Commerce Clause grounds.[11]

Curiously, perhaps, the federal government—which until the *Head Money Cases* had never been party to an immigration case before the Supreme Court[12]—chose not to defend its power to legislate over the field of immigration on the ground that this power was part of the Commerce Clause. Instead, the government relied on the theory that the federal power over immigration was part of a set of powers inherent in sovereignty—that is, the power to regulate immigration of al-

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[10] *Id.* at 408 (McLean, J., concurring) (arguing that passengers are the subjects of commerce and that Congress has exclusive power to regulate them); *id*. at 426 (Wayne, J., concurring) (arguing that state immigration laws are inconsistent with the Naturalization Clause); *id*. at 440–42 (Catron, J., concurring) (concluding that "Congress has covered, and has intended to cover, the whole field of legislation over this branch of commerce").

[11] *See The Head Money Cases*, 112 U.S. 580, 600 (1884) ("[C]ongress [has] the power to pass a law regulating immigration as a part of [the] commerce of this country with foreign nations...."). Previous cases had come to the same result, finding that Congress had *exclusive* power over the field under the Commerce Clause. *See People v. Compagnie Générale Transatlantique*, 107 U.S. 59, 60, 63 (1883) (holding that "[i]t has been so repeatedly decided by this court that such a tax . . . is a regulation of commerce with foreign nations"); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) ("The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States."); *Henderson v. Mayor of N.Y.*, 92 U.S. 259, 270 (1875) ("[T]he transportation of passengers from European ports …has become a part of our commerce with foreign nations, of vast interest to this country.").

[12] Cleveland, *supra* note 5, at 110.

iens was "implied in [the] very existence of independent government anterior to the adoption of a constitution...."[13] As the Solicitor General told the Court:

> It cannot be a valid objection [to the statute] that... it does not come within any phrase in the... Constitution. ...As to foreign Governments and non-resident foreigners the United States is not of merely enumerated powers. ...As to them, it has all the powers which *according to international law any sovereign society possesses*….[14]

While the Supreme Court declined to rely on this argument in the *Head Money Cases*, the Court showed its willingness to rely on the notion of "powers inherent in sovereignty" in other cases of this era that grew out of challenges to the expansion of national powers in the wake of the Civil War.[15] At the same time, the Court was paring back the scope of the federal government's Commerce Clause powers over areas other than immigration.[16] Within the course of a decade, the Court would make a permanent turn away from grounding federal immigration power in

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13 *Id.* at 111.

14 *Id.* (quoting Brief for the United States, *Edye v. Robertson* (No. 772) at 3 (opinion reported at 112 U.S. 580 (1884)) (third and fourth ellipses added; emphasis added; footnotes and internal quotation marks omitted).

15 *Juilliard v. Greenman*, 110 U.S. 421, 450 (1884) (Congress could exercise "powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution"); *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 555–56 (1870) (Bradley, J., concurring) ("The United States …is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such….").

16 *See, e.g., United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (limiting federal antitrust powers); *Kidd v. Pearson*, 128 U.S. 1 (1888) (no federal preemption of state prohibition laws).

the Commerce Clause, instead finding that it was among those powers that "according to international law any sovereign [nation] possesses."

The Chinese Exclusion Cases marked this turn. In a series of cases decided between 1889 and 1893, the Court rejected the notion that the immigration power was part of the Commerce Clause power and instead held that Congress's power over immigration derived from "powers inherent in sovereignty." In the first of these cases, *Chae Chan Ping v. United States*,[17] "the United States made no effort to defend the federal action"—retroactive termination of a right to renter the United States for a Chinese national who had been a resident here before the change in law—"under the Commerce Clause."[18] But unlike in the *Head Money Cases*, the Court took up the gambit and held unanimously that Congress's power over immigration was rooted in the inherent powers of sovereign nations:

> Jurisdiction over its own territory to [exclude aliens] is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power....
> ...[T]he United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations....
> ...[Such power is] too clearly within the essential attributes of sovereignty to be seriously contested.[19]

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17 130 U.S. 581 (1889).

18 Cleveland, *supra* note 5, at 126.

19 *Chae Chan Ping*, 130 U.S. at 603–04, 607.

"In sum, the power [to exclude aliens] derived from international law."[20] (Of course, the *Chae Chan Ping* Court "did not leave Congressional power [to exclude] unbridled,"[21] but rather stated it was restricted by "the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations," 130 U.S. at 604—in other words, by international law.)

Three years later, *Nishimura Ekiu v. United States*[22] reached the Court. Speaking for an eight to one majority, Justice Horace Gray spelled out in the clearest possible words what had been implicit in *Chae Chan Ping*—the principle that Congress's power over aliens was an incident of international law:

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States this power is vested in the national government…. .[23]

The petitioner in *Nishimura Ekiu* was an alien without prior connection to the United States—she was arriving for the first time, seeking out her husband who

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[20] Cleveland, *supra* note 5, at 132. Indeed, as a source of international law (for the practice of other nations), *Chae Chan Ping* itself would be cited by a court in the United Kingdom two years later as a ground for a power to exclude returning aliens. *Id*. at 132–33, 133 n.910 (citing *Musgrove v. Chun Teeong Toy*, [1891] A.C. 272 (P.C.) (appeal taken from Sup. Ct. of Vict.)).

[21] James A.R. Nafziger, *The General Admission of Aliens under International Law*, 77 AM. J. INT'L L. 804, 825 (1983)

[22] 142 U.S. 651 (1892).

[23] *Id*. at 659 (citations omitted).

was here. In May of 1892, the draconian Geary Act was passed, mandating that previously lawful Chinese residents carry a certificate of residency, register, or be subject to expulsion. "[T]he first expulsion measure adopted since the 1798 Alien Act," it provoked massive civil disobedience, and the test cases that went before the Supreme Court[24] divided the Court. Nonetheless, the Court reaffirmed *Nishimura Ekiu*'s holding that Congress's power over immigration was rooted in the law of nations—in those provisions of international law outlining the powers of sovereign states.

That holding was never rejected by the twentieth-century Court; indeed, it was restated explicitly in *Harisiades v. Shaughnessy*.[25] Federal power over immigration, then, is derived from powers inherent in sovereignty, and those powers inherent in sovereignty are defined by and grounded in international law. But the law of nations is (and always has been) flexible, susceptible to change, as new norms emerge. As Judge Weinstein put it in *Beharry*, "it should come as no shock

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[24] *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

[25] 342 U.S. 580, 587–88 (1952) (describing the "traditional power of the Nation over the alien," "confirmed by international law"); *see also Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) ("ancient principles of the international law of nation-states" justify measures against excludible aliens); *Tiaco v. Forbes*, 228 U.S. 549, 556 (1913) ("It is admitted that sovereign states have inherent power to deport aliens . . . .").

that [Congressional power over immigration] may be limited by changing international law norms."[26]

II. International Law Protects Family Integrity by Mandating Proportionality and Discretion in Removal Cases

International law has established a number of principles that limit the power of states to remove aliens beyond the familiar context of asylum claims. A variety of international law instruments recognize a right to family integrity and association. That right is recognized as fundamental and nonderogable. The general family integrity principle translates into several specific restrictions on national power. The most significant of these is the "proportionality principle"—the principle that family separation is so burdensome to the individuals involved that the state may justify it only with the strongest of countervailing interests. In application, the proportionality principle means that adjudicators must weigh the public interest asserted by the state to make sure it is proportional to the hardship entailed in an individual case. In cases involving dependent children, international law also mandates that state interests must frequently yield to the primacy of the best interests of the child.

As a practical matter, these principles in turn mandate a third restriction: states cannot interfere with the right of immigrants to live together with their fami-

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[26] *Beharry v. Reno*, 183 F. Supp. 2d 584, 598 (E.D.N.Y. 2002), *rev'd on other grounds*, 2003 U.S. App. LEXIS 8279 (2d Cir. 2003).

ly—typically, with citizen children or spouses—by deporting them without at least a hearing allowing individualized consideration of the hardships this would present to their families, and some chance at relief. The existence of some procedural opportunity for application of individualized discretion is so essential to implementation of the proportionality principle that the two rights are closely intertwined in the various sources of international law discussed below, including the case law.

A. *The Right to Family Integrity is a Fundamental and Nonderogable Human Right Recognized by Customary International Law*

The right to family life, or more accurately the right to family integrity and association—that is, the right to live together as a family—is a fundamental right well-established as part of customary international law. The Universal Declaration of Human Rights (UDHR),[27] unanimously adopted by the General Assembly of the United Nations in 1948, expressly states that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State,"[28] and that "[n]o one shall be subjected to arbitrary interference with his ...family."[29] Although the declaration is not a treaty, its provisions have been

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[27] Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

[28] *Id.* art. 16(3).

[29] *Id.* art. 12.

widely recognized as binding customary international law,[30] and federal courts have treated it as such.[31] The International Covenant on Civil and Political Rights (ICCPR),[32] a treaty ratified by the United States,[33] codifies the rights of the Universal Declaration in treaty form. The ICCPR reiterates the UDHR provisions, and firmly prohibits "any arbitrary or unlawful interference" with individuals' right to family life.[34] Article 11 of the American Convention on Human Rights[35] likewise prohibits "arbitrary or abusive interference" with the right to family.

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[30] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 701, reporters' note 6 (1987) ("[T]he Declaration has become the accepted general articulation of recognized rights.").

[31] *See, e.g., Filártiga v. Peña-Irala*, 630 F.2d 876, 883 (2d Cir. 1980).

[32] International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

[33] The United States ratified the ICCPR on September 8, 1992. The Covenant is a binding treaty obligation and is indicative of customary international law. In proceedings before the Human Rights Committee, the U.S. Representative indicated that U.S. courts "could refer to the Covenant and take guidance from it even though it was not self-executing." U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: United States of America*, ¶ 8, U.N. Doc. CCPR/C/SR.1405 (Nov. 28, 1995); Executive Order, No. 13107, 63 Fed. Reg. 68,991 (Dec. 10, 1998), Section 1(a) ("[i]t shall be the policy and practice of the Government of the United States… fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the [Covenant].").

[34] ICCPR, *supra* note 32, art. 23(1); *id.* art. 17.

[35] Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. The American Convention signed by the United States in 1977, is not directly binding on the United States, but federal courts have held the American Convention to be indicative of customary international law. *See Filártiga v. Peña-Irala*, 630 F.2d 876, 883–84 (2d Cir.

The right to family life is nonderogable; it cannot be subject to selective application depending on the immigration status of an individual. The U.N. General Assembly has declared that it applies to citizens and noncitizens equally.[36] The U.N. Human Rights Committee (the international body overseeing implementation of the ICCPR by its states parties) has held that the ICCPR's provisions "apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness…. [E]ach one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens."[37] The Inter-American Commission on Human Rights, which adjudicates petitions alleging violations of the American Convention, has stated that the right to family life "is a right so basic to the Convention that it is considered to be non-derogable even in extreme circumstances."[38]

B. ***Proportionality***

International law demands that interference with family integrity and association cannot be arbitrarily imposed. Courts addressing the issue have found it in-

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1980) (citing American Convention and European Convention as sources of customary international law); *Fernandez v. Wilkinson*, 505 F. Supp. 787, 797 (D. Kan. 1980), *aff'd sub nom. Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981) (ICCPR, European Convention).

[36] *See* Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, G.A. Res. 40/144, Annex, art. 5(1), U.N. Doc. A/RES/40/144 (Dec. 13, 1985) (aliens enjoy right to family).

[37] U.N. Human Rights Comm., *General Comment No. 15: The Position of Aliens under the Covenant*, ¶¶ 1–2, U.N. Doc. CCPR/C/21/Rev.1 (Apr. 11, 1986).

[38] *X & Y v. Argentina*, Case 10.506, Inter-Am. C.H.R., Report No. 38/96, OEA/Ser.L./V/II.95, doc. 7 rev. ¶ 96 (1996).

sufficient that interference with family life simply pass some threshold of procedural regularity. Rather, they have held that a state's interference with an individual's right to family integrity is legitimate only when it is a response to a lawful state interest and when the interference with the individual's rights is outweighed by that state interest. Moreover, the reasonableness and proportionality of measures interfering with family integrity and association must necessarily be evaluated on a case-by-case basis.

The 1953 European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)[39] was implemented in order to encourage collective enforcement of the fundamental human rights recognized by the UDHR. It has been recognized by federal courts to be one of the "principle sources of fundamental human rights,"[40] along with the ICCPR, and the Convention and its interpretations by the European Court of Human Rights (ECHR) have been held to be "indicative of the customs and usages of civilized nations."[41] The ECHR has

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[39] Convention for the Protection of Human Rights and Fundamental Freedoms art. 8(1), Nov. 4, 1950, 213 U.N.T.S. 222.

[40] *Fernandez v. Wilkinson*, 505 F. Supp. 787, 797 (D. Kan. 1980), *aff'd sub nom. Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981); *see also Filártiga*, 630 F.2d at 883–84.

[41] *Fernandez*, 505 F. Supp. at 797; *see also Lawrence v. Texas*, 539 U.S. 558, 573, 576 (2003) (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981), and subsequent decisions of the ECHR); *Filártiga*, 630 F.2d at 884 & 884 n.16 (recognizing that judicial decisions constitute a source of customary interna-

held that the European Convention establishes a right of family integrity and association,[42] and Article 8 of the Convention states that this right may not be interfered with unless necessary to further one of a number of compelling state interests. The ECHR has elaborated this to mean that any interference must be "justified by a pressing social need and ...*proportionate* to the legitimate aim pursued."[43]

The ECHR has applied this proportionality test to the expulsion of noncitizens with strong family ties to the deporting nation and/or very few links to the country to which they would be sent. In *Moustaquim v. Belgium*,[44] for instance, the European Court held that it was disproportionate to deport a Moroccan national who had arrived in Belgium when he was two years old and had lived there with all of his immediate family including his parents and seven siblings until age twen-

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tional law and citing a decision issued by the ECHR); *Beharry v. Reno*, 183 F. Supp. 2d 584, 597 (E.D.N.Y. 2002).

[42] *Scozzari & Giunta v. Italy* 2000-VIII Eur. Ct. H.R. 471, 503, 524; *see also* Johansen v. Norway 1996-III Eur. Ct. H.R. 966, 1001–02 ("[T]he mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and . . . domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8.").

[43] *Ciliz v. Netherlands*, 2000-VII Eur. Ct. H.R. 267, ¶ 52; *see also Berrehab v. Netherlands*, 138 Eur. Ct. H.R. (ser. A) at 15–16 (1988) ("[T]he legitimate aim pursued has to be weighed against the seriousness of the interference with the applicants' right to respect for their family life."); *see also Ciliz v. Netherlands*, 2000-VIII Eur. Ct. H.R. 265, 284.

[44] 193 Eur. Ct. H.R. (ser. A) (1991).

ty-one. Despite Moustaquim's lengthy record of petty criminality,[45] the court, applying the proportionality test, found that the balance of equities weighed against deportation given his strong family ties to Belgium, his exclusively-French language education, and almost complete lack of ties to Morocco.[46] This reasoning was upheld in several other ECHR cases.[47]

In *Slivenko v. Latvia*,[48] the ECHR found a violation of Article 8 despite the fact that the state interest cited touched on national security. The case involved a Russian family resident in Latvia for many years. The husband was posted to Latvia as a Soviet military officer in 1977; he married in Latvia and raised his child

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45 *Id.* at 10.

46 *Id.* at 19–20.

47 *See, e.g.*, *Yildiz v. Austria*, 36 Eur. H.R. Rep. 553 (2003) (violation of the right to family life where deportation imposed for shoplifting and traffic offenses on father with small child born in Austria); *Boultif v. Switzerland*, 2001-IX Eur. Ct. H.R 119 (despite a robbery conviction, petitioner did not pose a danger to society proportionate to the hardship of removing him after eight years of marriage to a Swiss woman who was unlikely to be able to follow him to Algeria); *Mokrani v. France*, 40 Eur. H.R. Rep. 123 (2003) (concluding that, since drug trafficker lived his entire life in France, was seriously involved with a French woman, and had no ties with his country of origin other than his nationality, his expulsion was disproportionate to the legitimate state interest); *Mehemi v. France*, 1997-VI Eur. Ct. H.R. 1959 (barring deportation of Algerian national whose parents, brothers, sisters, wife, and three minor children were all French citizens); *Beldjoudi v. France*, 234 Eur. Ct. H.R. (ser. A) 3 (1992) (noting that the presence of Algerian national's spouse, parents, and four siblings in France and lack of any links to Algeria outweighed state interest in removal, despite serious criminal convictions).

48 2003-X Eur. Ct. H.R. 229.

there.[49] Although the Latvian government asserted a national security interest in expelling all former military personnel of the occupying Soviet army upon independence, the court held that to do so, given the family's ties, violated the right to family life.[50]

In *Üner v. Netherlands*, [2006] ECHR 873, the ECHR set forth the standards to be considered at great length: the nature of the offense, the length of time spent in the host country and the sociocultural ties thereto, the lapse of time since the offense, intervening conduct, the strength of the family relationship, the difficulties the spouse and children would experience if forced to follow the expelled parent, and the best interests of the children. *Id.*, ¶¶ 57-58. Finding Üner had a weak relationship with his children and at least some ties to his native country, the ECHR rejected his proportionality challenge.

The U.N. Human Rights Committee has examined the implications of deportation on the right to family life in several cases. It has determined that a state must make a reasonable determination whether the interference with family life is proportionate to the state's interests in removing a specific individual.[51] For example,

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49 *Id.* at 237–38.

50 *See id.* at 258–67.

51 *See, e.g.*, *Winata v. Australia*, U.N. Human Rights Comm., Commc'n No. 930/2000, ¶ 7.3, U.N. Doc. CCPR/C/72/D/930/2000 (2001) (in light of petitioners' fourteen-year residence in Australia and the Australian citizenship of their thirteen-

in *Aumeeruddy-Cziffra v. Mauritius*,[52] the Mauritian government had amended its immigration law so that "alien husbands of Mauritian women lost their residence status in Mauritius" and could remain only at the grace of the Interior Minister.[53] Although the petitioners' husbands were not facing immediate deportation, the Human Rights Committee noted that "not only the future *possibility* of deportation, but the existing precarious residence situation of foreign husbands [constitutes] an interference... with the family life of the Mauritian wives and their husbands."[54] Accordingly, "the exclusion of a person from a country where close members of his family are living can amount to an interference [with the right to family integrity] within the meaning" of ICCPR Articles 17(1) and 23(1).[55]

Finally, the Inter-American Commission on Human Rights has "concurred with the finding of many international bodies that there must be a balancing test…

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year-old child, Australian government did not achieve a proper balance between its interest in the enforcement of immigration law and its duty to refrain from arbitrary interference with petitioners' family life); *Madaferri v. Australia*, U.N. Human Rights Comm. Doc. CCPR/C/81/D/1011/2001 (2001); *Canepa v. Canada*, U.N. Human Rights Comm., Commc'n No. 558/1993, U.N. Doc. CCPR/C/59/D/558/1993 (1997); *Hopu & Bessert v. France*, U.N. Human Rights Comm., Commc'n No. 549/1993, U.N. Doc. CCPR/C/60/D/549/1993/Rev.1 (1997); *Stewart v. Canada*, U.N. Human Rights Comm., Commc'n No. 538/1993, U.N. Doc. CCPR/C/58/D/538/1993 (1996).

[52] *Aumeeruddy-Cziffra v. Mauritius*, U.N. Human Rights Comm., Commc'n No. 35/1978, U.N. Doc. CCPR/C/12/D/35/1978 (1981).

[53] *Id* ¶ 1.2.

[54] *Id*. ¶ 9.2(b)(2)(i)(3).

[55] *Id*. ¶ 9.2(b)(2)(i)(2).

weigh[ing] a State's legitimate interest[s]… against a noncitizen's… right[]… to family life." *Armendariz v. United States*, Inter-Am. C.H.R. No. 57/06, OEA/ Ser.L/V/II.127 Doc. 4 rev. 1 ¶ 51 (2010). "'[W]here decision-making involved the potential separation of a family, [it] may only be justified where necessary to meet a pressing need to protect public order, and where the means are proportional to that end. …[T]his balancing must be made on a case by case basis, and… the reasons justifying [deportation] must be very serious indeed.'" *Id*. (quoting *Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System*, Inter-Am. C.H.R., OEA/Ser.L/V/II.106, Doc. 40 rev. (2000) at ¶ 166).

C. *The Proportionality Inquiry Must Take into Account the Best Interests of the Child*

The "best interests of the child" has become the guiding principle underlying legislative policy making and adjudication in almost all matters concerning child welfare,[56] shifting the focus "away from earlier conflicts rules that had been premised solely on the …rights of parents."[57] The best interests principle is now embod-

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[56] *See Beharry v. Reno*, 183 F. Supp. 2d 584, 600 (E.D.N.Y. 2002); *see also Tenenbaum v. Williams*, 193 F.3d 581, 594 (2d Cir. 1999); 59 AM. JUR. 2D *Parent and Child* § 1 (1987) (noting that the general tenets of family law include the best interests of the child).

[57] Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213, 216–17 (2003).

ied in international law in the U.N. Convention on the Rights of the Child (CRC).[58] "The CRC has been adopted by every organized government in the world except the United States,"[59] which has not ratified it primarily due to concerns over juvenile military recruitment. "Given its widespread acceptance, to the extent that it acts to codify longstanding, widely-accepted principles of law, the CRC should be read as indicative of customary international law."[60]

The CRC provides that "[i]n all actions concerning children, whether [judicial or] administrative, …the best interests of the child shall be a primary consideration."[61] It thus requires at a minimum that the interests of any children of petitioners be taken into account as a primary consideration at some stage during the deportation process. Various regional human rights bodies,[62] foreign courts, and commentators who have recognized that deportation proceedings directed at a parent clearly amount to an "action concerning children" for purposes of the CRC.[63]

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58 Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/Res/44/25 (Nov. 20, 1989).

59 *Beharry*, 183 F. Supp. 2d. at 600.

60 *Id*. at 601.

61 Convention on the Rights of the Child, *supra* note 58, art. 3, ¶ 1.

62 *See, e.g.*, African Charter on the Rights and Welfare of the Child, art. 19, ¶ 1, OAU Doc. CAB/LEG/24.9/49 (1990).

63 *See, e.g.*, *Minister of State for Immigration & Ethnic Affairs v. Teoh* (1995) 183 C.L.R. 273, 289 (Austl.); *see also* Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its*

As such, the state must affirmatively take the interests of affected children into account in immigration proceedings, rather than viewing removal of a parent as a stand-alone dispute between two parties (the alien parent and the government).

Courts have applied the CRC to require that the best interests of the child be given primary consideration in the context of deportation. The European Court of Human Rights has stated that "it is an interference of a very serious order to split up a family. Such a step must be supported by sufficiently sound and weighty considerations in the interests of the child."[64] Canadian and Australian courts, relying on the CRC, have reached similar conclusions.[65] Domestically, in *Beharry v. Ashcroft*[66] and *Mojica v. Reno*,[67] Judge Weinstein held that the categorical denial of hearings to aliens convicted of certain crimes would violate principles of custom-

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Early Case Law, 30 COLUM. HUM. RTS. L. REV. 159, 172, 172 n.59 (1998) (listing cases).

[64] *Olsson v. Sweden*, 130 Eur. Ct. H.R. (ser. A) at 33–34 (1988); *see also Scozzari & Giunta v. Italy*, 2000-VIII Eur. Ct. H.R. 471, 506 (quoting *Olsson*).

[65] *Baker v. Canada* (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, ¶¶ 69–70, 76 (Can.) (reading statute in light of CRC to allow alien mother of four citizen children relief); *Teoh*, 183 C.L.R. at 290–91 (Austl.) (administrative decisions must conform with CRC).

[66] 183 F. Supp. 2d 584 (E.D.N.Y. 2002) (finding that international law places limitations on the ability of immigration officials to remove aliens, notwithstanding a statute that arguably removes official discretion to do otherwise), *rev'd on other grounds*, 2003 U.S. App. LEXIS 8279 (2d Cir. 2003).

[67] 970 F. Supp. 130 (E.D.N.Y. 1997).

ary international law which require balancing of equities and, where the noncitizen has a citizen child, of the best interests of that child as well.[68]

The Inter-American Commission has also applied the best interests principle in the immigration context. In a 2000 report on the status of asylum seekers in Canada,[69] the Commission held that "the absence of any procedural opportunity for the best interests of the child to be considered in proceedings involving the removal of a parent or parents raised serious concerns,"[70] and that state interests "must be balanced against the harm that may result to the rights of the individuals concerned in the particular case."[71]

D. *The Process Must Necessarily Provide a Case-by-Case Evaluation and Allow the Possibility of Relief*

Implicit in this proportionality analysis is a recognition that some procedural opportunity to argue for application of discretion must be available during the process of adjudicating removal. Many of the cases cited above expressly hold as much: The ECHR in *Slivenko* criticized Latvia's process for providing "no possi-

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68 *See Beharry*, 183 F. Supp. 2d at 604.

69 *See* Inter-Am. Comm'n on Human Rights, *Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System*, OEA/Ser.L./V/II.106, doc. 40 rev. (Feb. 28, 2000).

70 *Id.* ¶ 159.

71 *Id.* ¶ 166; *see also Armendariz v. United States*, Inter-Am. C.H.R. No. 57/06, OEA/Ser.L/V/II.127 Doc. 4 rev. 1 ¶¶ 56-57 (2010) (American Declaration "requires that... proceedings duly consider the best interests of the child"); *Mortlock v. United States*, Inter-Am. C.H.R. No. 63/08 ¶ 78 (2008).

bility of taking into account personal circumstances,"[72] and in *Armendariz*, where statutory changes had withdrawn all discretionary relief formerly available under INA § 212(c), the Inter-American Commission held the United States to have violated petitioners' rights under the "American Declaration by failing to hear their humanitarian defense and duly consider their right to family and the best interest of their children on an individualized basis in their removal proceedings." *Armendariz, supra* note 71, ¶ 60; *see also Mortlock, supra* note 71, at ¶ 78 ("immigration policy must guarantee to all an individual decision" accounting for family integrity and interests of child). (Three district court decisions have come to the same conclusions. *See Maria v. McElroy*, 68 F. Supp. 2d 206, 234 (E.D.N.Y. 1999) (mandating availability of hearing on humanitarian relief from removal despite statutory change seemingly removing possibility of such discretionary relief); *Mojica v. Reno*, 970 F. Supp. 130, 168 (E.D.N.Y. 1997) (same; mandating "fairness hearing"); *Beharry, supra* note 66 (same) (all Weinstein, J.).)

Article 13 of the ICCPR generally requires an individualized review before a state may expel a person legally present in its territory: "An alien [must] *be allowed to submit the reasons against his expulsion* and to have his case reviewed by [a] competent authority."[73] In both *Hammel v. Madagascar*[74] and *Giry v. Domini-*

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72 *Slivenko, supra* note 48, at ¶ 122.

73 ICCPR, art. 13 (emphasis added).

can Republic,[75] the Human Rights Committee held that the Covenant had been violated because aliens were not afforded an opportunity to submit the reasons against their expulsion. The European Convention similarly recognizes the right of lawfully resident aliens to submit reasons against their expulsion in fair proceedings.[76] Eminent legal scholars in the United States and abroad agree.[77]

CONCLUSION

Because Congress' power over immigration derives from international law, it is subject to limitations established by international law. International law bars removal where the impact on the affected parties would be disproportionate to the state interest served by the removal. Automatic deportation based on a prior conviction, without any opportunity for a hearing to present evidence of the hardship that such an expulsion would inflict on an individual's family, or any possibility of

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[74] U.N. Human Rights Comm., Commc'n No. 155/1983, ¶¶ 19.2, 20, U.N. Doc. CCPR/C/29/D/155/1983 (1987).

[75] U.N. Human Rights Comm., Commc'n No. 193/1985, ¶ 5, U.N. Doc. CCPR/C/39/D/193/1985 (1990).

[76] *See* Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art.1, Nov. 22, 1984, Europ. T.S. No. 117 (entered into force Nov. 1, 1998); *cf.* European Convention, *supra* note 39, art. 3.

[77] Starr & Brilmayer, *supra* note 57, at 286 ("involuntary family separation [presumptively] violates international law"); *id*. at 259 (summary deportation "violate[s] the United States' international obligations to protect families."); *see also* 1 OPPENHEIM'S INTERNATIONAL LAW 940 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) ("by customary international law [the state] must not abuse its right[s] by acting arbitrarily in taking its decision to expel an alien").

relief based on an adjudicator's evaluation of that hardship, violates clearly-established norms of international law.

In Petitioner's case, the immigration court and BIA should have considered his relationship to his citizen wife and children—and especially to his disabled dependent child—within the framework of this proportionality analysis. Petitioner's family will be permanently torn apart by his removal, with no individualized consideration of the harm this will cause those left behind, and no opportunity for discretionary relief by the immigration judge from the draconian application of the mandatory removal provision of 8 U.S.C. § 1227(a)(2)(A)(iii).

So interpreted, this section of the INA would be in excess of Congress' power to enact legislation in the field of immigration. But this Court need not go so far. Instead it should adopt the "saving construction"[78] urged by Petitioner, holding that 8 U.S.C. § 1229a(c)(1)(A) (which provides that "[a]t the conclusion of the [removal] proceeding the immigration judge shall decide whether an alien is removable from the United States") "require[s] an individualized proportionality analysis"[79] that did not happen below. This result would satisfy the well-established avoidance canons mandating that "[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with

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78 Pet. Br. at 36.

79 Pet. Br. at 12.

an international agreement of the United States."[80] As the fount of Congress's supposedly "plenary" power over aliens, international law also provides fundamental limitations on that power—protections which this Court should direct the BIA to apply on remand.

Respectfully submitted,

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[80] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 114 (1987); *see also Talbot v. Seeman*, 5 U.S. (1 Cr.) 1, 43-45 (1801) (holding that Congressional statute providing, as salvage bounty, half the value of ship was beyond what "the law of nations" would permit, but allowing one-sixth salvage as a "reasonable allowance"); *Murray v. The Schooner* Charming Betsy, 6 U.S. (2 Cr.) 64, 118 (1804); *United States v. Lachman*, 387 F.3d 42, 55 (1st Cir. 2004).

[81] Counsel gratefully acknowledge the contributions of law student Tamara Morgenthau to this brief.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is in compliance with Rule 32(a)(7) of the Federal Rules of Appellate Procedure. The brief contains 6,960 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief has been prepared in 14-point Times New Roman font using Microsoft Word 2010.

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