

FRIDA LUNA

Challenging the Constitutionality of the Zero-Tolerance Policy on Immigration

ABSTRACT. This paper discusses the “zero-tolerance policy” responsible for the mass separation of immigrant families, including those with children who hold birthright citizenship. Immigration legislation, including the zero-tolerance policy, was passed under the first Trump Administration to curtail illegal immigration. Despite attempts to restrict unlawful entry, the policy violates the fundamental rights of citizens and undocumented families. This paper analyzes the powers enumerated to the government over immigration as provided by the Constitution. It also examines the authority the executive branch has over immigration legislation through the Take Care and Vesting clauses, particularly after the enactment of the 2002 Homeland Security Act. Through an examination of the institutional framework governing the child removal process in states along the Southern border, I will assert that the separation of families by immigration authorities surpassed the scope of their legal jurisdiction. Children, regardless of immigration status, are entitled to proper custody protocol and the option to stay with family. Thus, I will argue how the due process and equal protection rights guaranteed to families under the Fifth and Fourteenth Amendments were violated by the enactment of the zero-tolerance policy.

AUTHOR. Frida Luna is a second-year undergraduate student at the University of California, San Diego. She plans to graduate with her Bachelor’s degree in Political Science, with an emphasis in Public Law. She aims to go to law school to further her studies in Human and Civil Rights. She would personally like to thank Laura Ortiz, Luciné Gezalian, Chloe Burrows, Rachel McChesney, and Professor Maysa Nichter for their dedication in editing this paper. She would also like to express her gratitude to her family for supporting her in her academic and professional endeavors.

INTRODUCTION

On April 6, 2018, Attorney General Jeff Sessions and the Office of Public Affairs within the United States Department of Justice (DOJ) implemented a “zero-tolerance policy” on immigration. This policy was designed to prohibit unauthorized illegal entry into the United States (US).¹ It serves as guidance for the US Attorney’s Office in regions that fall within the Southwest Border– the Southern District of California, the District of Arizona, the District of New Mexico, and both the Western and Southern Districts of Texas.² Any violation of Title 8 of the United States Code, Section 1325³, which defines illegal entry of an alien, is met with zero tolerance.⁴ This policy allows federal prosecutors to criminally charge any individual who attempts to cross or reside in the US without proper documentation, including those seeking asylum and first-time offenders.

In April 2018, the Trump Administration separated thousands of children from their immigrant parents on the US-Mexico border under the zero-tolerance policy in an attempt to limit illegal immigration.⁵ This impacted a large number of undocumented and citizen children born to unauthorized immigrant parents. Foreign-born children were put under the custody of government shelters, allowing them to be easily reunited with their parents without interference from state foster care.⁶ Children who identified as birthright American citizens were dispatched into the foster care system, making it difficult for child protective services agencies and state family courts to keep track of them.⁷

The process of placing separated children into the American foster care system varies in each district. No state bureaucracy or county child welfare agency immediately removes a minor, immigration status notwithstanding, from their parent or guardian unless their safety is imminently at risk. The removal process is often initiated when a Child Protective Services (CPS) caseworker obtains a court order that legalizes parent-child separation. US Immigration and Customs Enforcement (ICE)

¹ Press Release, U.S. Dep. of Justice Off. of Pub. Affairs, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018).

² *Id.*

³ 8 U.S.C. § 1325.

⁴ *Id.*

⁵ Miriam Jordan, *U.S.-Born Children, Too, Were Separated From Parents at the Border*, N.Y. Times, Apr. 11, 2023, <https://www.nytimes.com/2023/04/11/us/migrant-family-separations-citizens.html>.

⁶ *Id.*

⁷ *Id.*

CHALLENGING THE CONSTITUTIONALITY OF THE ZERO TOLERANCE POLICY ON IMMIGRATION

authorities were directed under the zero-tolerance policy to separate children with birthright citizenship from their undocumented immigrant parents and leave them in the custody of the Department of Health and Human Services (HHS).⁸ The Trump Administration justified these separations by stating that the decision to enact the policy was an initiative to enforce existing laws. It was also an approach to deter the mass influx of parents placing their children in danger by exposing them to treacherous and unlawful immigration journeys.⁹ However, this mainly targeted individuals in the process of crossing the border illegally, not those who already reside within national frontiers. Lawyers and immigrant advocates have stated that around a thousand children born to immigrant parents in the US were taken into temporary custody at the border, with a reported 226 American children sent to the Child Welfare Services Agency in San Diego County, California.¹⁰

Despite their legal US citizenship, the best interests of these children were not considered before they were separated. Additionally, regardless of citizenship status, parents have a fundamental right to make decisions about their children, and naturally inherit constitutionally protected parental rights.¹¹ The right of a family to remain together is a priority of the US government, which is supported through the reciprocal liberty, provided by due process, of both parents and children to avoid separation.¹² Nonetheless, law enforcement actions initiated by executive authority fundamentally jeopardized these protections.

The constitutionality of the zero-tolerance policy will be challenged throughout this paper. Understanding the authority of both the legislative and executive sectors of government will provide a basis for understanding the policy's implementation and the challenges it poses. By comparing the child removal process under the zero-tolerance policy to the standard CPS process, this article argues that the children of illegal immigrant parents born in the US are entitled to the same procedural protections before losing their custodial relationship. The zero-tolerance policy resulted in the placement of immigrant children in government facilities and citizen children in the custody of the foster care system. However, immigration officials neglected to protect children's safety and uphold state child removal processes. The differences between child removal under state statutes and the zero-tolerance policy constitute a clear

⁸ U.S. Immigration and Customs Enforcement, *ICE Directive 11064.3: Interests of Noncitizen Parents and Legal Guardians* (2022).

⁹ Jordan, *supra* note 5.

¹⁰ *Id.*

¹¹ *Troxel v. Granville*, 530 U.S. 57 (2000).

¹² *Chambers v. Sanders*, 63 F.4th 1092 (6th Cir. 2023).

violation of the Fourteenth Amendment’s Equal Protection, which protects against infringements on the rights of families regardless of each member’s citizenship status.¹³ The policy also infringes upon the rights of asylum seekers and due process protections, as found in *Ms. L. v. ICE*— a class-action lawsuit that contested the separation of families under the zero-tolerance policy.¹⁴

I. THE BASIS OF IMMIGRATION REGULATION

A. Federal Government’s Authority in Immigration Regulation

The US Constitution grants the federal government the authority to regulate immigration and enforce border security via the Naturalization Clause, the Commerce Clause, the Supremacy Clause, and the Necessary and Proper Clause. Supreme Court decisions have also been crucial in the formation and determination of the legality of immigration law enforcement as a means of border security. This section will dissect the constitutional and statutory framework that has constructed the history of government power over immigration. Additionally, it will examine how that power has been authenticated and curtailed through precedents set by the Supreme Court.

The Naturalization Clause in Article 1 of the US Constitution establishes the power of Congress to set uniform laws that govern how non-citizens become naturalized American citizens.¹⁵ As stated in the Immigration and Nationality Act (INA), naturalization means “the conferring of nationality of a state upon a person after birth, by any means whatsoever.”¹⁶ This procedure allows lawful permanent residents to become US citizens once they have satisfied the criteria outlined by Congress in the INA.¹⁷ The Naturalization Clause grants Congress the authority to prevent states from setting their own citizenship requirements.¹⁸ Naturalization laws apply to: (1) individuals who have spent designated periods in the US and submitted

¹³ U.S. Const. Amend. XIV, § 1.

¹⁴ *Ms. L. v. U.S. Immigration and Customs Enforcement (“ICE”)*, 330 F.R.D. 284, 103 Fed. R. Serv. 3d 246 (S.D. Cal. 2019).

¹⁵ U.S. Const. art. 1, § 8, cl. 4.

¹⁶ 8 U.S.C. § 1101(a)(23) (2018).

¹⁷ U.S. Citizenship and Immigr. Servs., *Citizenship and Naturalization* (2020),

<https://www.uscis.gov/citizenship/learn-about-citizenship/citizenship-and-naturalization>.

¹⁸ *U.S. v. Wong Kim Ark*, 169 U.S. 649 (1898) (“The power, granted to congress by the constitution, ‘to establish an uniform rule of naturalization,’ was long ago adjudged by his court to be vested exclusively in congress”).

CHALLENGING THE CONSTITUTIONALITY OF THE ZERO TOLERANCE POLICY ON IMMIGRATION

applications for naturalization; (2) those who acquired citizenship as a result of their parents becoming naturalized citizens in the US; and (3) people born abroad to US citizen parents.¹⁹ Despite Congress's broad scope of authority, some limits are imposed during the naturalization process. Congress is unable to decide whether a resident is eligible for citizenship acquisition, and they may not deny the right of a person to naturalization due to race, sex, or marriage status.²⁰ In the landmark case *Trop v. Dulles*, the Supreme Court emphasized that "the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct."²¹ These limitations prevent the arbitrary use of congressional power in matters of citizenship, ensuring that fundamental rights remain protected.

The Commerce Clause gives Congress the authority to regulate commerce with foreign nations.²² It has been used as a basis of justification for federal control over immigration, particularly regulating alien entry and exclusion.²³ In the nation's early history, this clause granted federal power over immigration by characterizing slaves and indentured servants as "articles of commerce."²⁴ This perspective collapsed in the mid-1800s because if immigrants and slaves were classified as articles of commerce, Congress would have the authority to ban the domestic slave trade.²⁵ Nevertheless, the Supreme Court continued to uphold that the Commerce Clause grants the federal government power over the transportation of immigrants.²⁶ States also attempted to regulate immigration during the 19th century by imposing per-passenger taxes on arriving immigrants.²⁷ However, courts decided these laws were fundamentally unconstitutional because state-level taxes on immigrants interfere with the Commerce

¹⁹ *Wong Kim Ark*, 169 U.S., *supra* note 18.; *Overview of Naturalization Clause*, Constitution Annotated, https://constitution.congress.gov/browse/essay/artI-S8-C4-1-1/ALDE_00013160/#ALDF_00019904 (last visited Apr. 23, 2024).

²⁰ 8 U.S.C § 1422.

²¹ *Trop v. Dulles*, 356 U.S. 86 (1958).

²² U.S. Const. art. 1, § 8, cl. 3.

²³ *Id.*

²⁴ Jennifer Gordon, *Immigration as Commerce: A New Look at the Federal Immigration Power and the Constitution*, 93, Ind. L.J., 654, 672 (2018).

²⁵ *Id.*

²⁶ *Id.* at 673.

²⁷ *Id.*

and Naturalization clauses,²⁸ upholding that only Congress holds the authority to “regulate commerce and establish a uniform rule of naturalization.”²⁹

The Supreme Court case *United States v. Hanigan* establishes immigration as a form of commerce by challenging the Hobbs Act³⁰ – a federal law outlawing robbery or extortion that affects either interstate or foreign commerce.³¹ In this case, the defendant was convicted under the Hobbs Act because they crossed into Arizona in search of work, directly involving them in commerce. Additionally, Hanigan was responsible for unlawfully detaining and assaulting undocumented Mexican agricultural enterprise laborers.³² Hanigan’s conviction was upheld, and the Court ruled that the “movement of undocumented alien laborers across a national boundary” falls within Congress’s implied constitutional powers under the Hobbs Act.³³ *United States v. Hanigan* not only provides a more direct definition of what constitutes commerce but also establishes broader legislative power over immigration.

The Supremacy Clause gives the federal government the ability to pass immigration legislation that supersedes state legislation. This provision declares that federal law is the “Supreme Law of the Land.”³⁴ Throughout history, the Court’s federalism jurisprudence has limited the involvement of states in immigration matters by applying this foundational principle. The decision in *Arizona v. United States* upheld Congress’s power to preempt Arizona statute S.B. 1070,³⁵ which was instituted to reduce illegal immigration by increasing the enforcement of federal immigration laws.³⁶ The district court aimed to curb the imposition of S.B. 1070 before its passing, but only successfully enjoined four provisions:

Section 2(B) provides that officers who conduct a stop, detention, or arrest must in some circumstances make efforts to verify the person’s immigration status with the Federal Government; Section 3 forbids the “willful failure to complete or carry an alien registration document ...

²⁸ *Smith v. Turner*, 48 U.S. 283 (1849).

²⁹ *Id.*

³⁰ Gordon, *supra* note 24, at 698.

³¹ The Hobbs Act, 18 U.S.C. § 1951.

³² *United States v. Hanigan*: US Court of Appeals for the Ninth Circuit – 681 F.2d 1127 (9th Cir. 1982).

³³ *Id.*

³⁴ U.S. Const. art. 4, cl. 2.

³⁵ *Arizona v. United States*, 567 U.S. 387 (2012).

³⁶ *Id.*

CHALLENGING THE CONSTITUTIONALITY OF THE ZERO TOLERANCE POLICY ON IMMIGRATION

in violation of 8 US Code section 1304(e) or 1306(a)”; Section 5(C) enacts a state criminal prohibition where no federal counterpart exists and made it a state misdemeanor for “an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor” in Arizona; Section 6 provides that a state officer, “without a warrant, may arrest a person if the officer has probable cause to believe ... [the person] has committed any public offense that makes [him] removable from the US.”³⁷

The Ninth Circuit US Court of Appeals affirmed the original decision, which led Arizona to file an appeal to the Supreme Court.³⁸ The court concluded that only Section 2(B) was constitutional, ruling that immigration enforcement is a federal responsibility.³⁹ If individual states were able to set their respective immigration policies, foreign relations would be at risk due to an undeveloped sense of interest or injury.⁴⁰ Therefore, the Court affirms that international relations should remain between nations as it involves the protection of a country’s citizens when abroad.

The Necessary and Proper Clause is the final constitutional provision that assigns Congress jurisdiction over immigration.⁴¹ This provision provides Congress with enumerated powers and the authority to make and carry out “necessary and proper” laws. The control implemented in this section carries significant weight in immigration regulation. The case of *Chae Chan Ping v. United States*—commonly referred to as the Chinese Exclusion Case—⁴² established Congress’s “plenary power” over immigration, enabling it to set the standards for foreign nationals entering the US.⁴³ The main argument of the case revolved around whether legislation targeting Chinese immigrants, preventing their entry and re-entry into the country, was within Congress’s constitutional powers.⁴⁴ In this case, the Court upheld the Scott Act of 1888, stating that the legislative immigration statutes are classified as an “incident of sovereignty” delegated by the Constitution.⁴⁵ In the ruling, the Court declared that

³⁷ *Arizona v. United States*, 567 U.S. 387 (2012).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ U.S. Const. art. I, § 8, cl. 18.

⁴² *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

⁴³ *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

⁴⁴ *United States*, 130 U.S., *supra* note 42.

⁴⁵ *Id.*

these laws are “conclusive upon the judiciary,” meaning they cannot be further challenged by the court.⁴⁶ Although the Chinese Exclusion Act was found to be unconstitutional, this case established Congressional Plenary Power over immigration.

B. Executive Power in Immigration

Although immigration policy and legislation primarily fall within Congress’s jurisdiction, limited control was delegated to the executive branch through the Homeland Security Act of 2002. Enacted after the 9/11 attacks, the Homeland Security Act established an executive department that combined several federal agencies to protect homeland security.⁴⁷ Authorities of the former Immigration and Naturalization Service (INS) were transferred to the Department of Homeland Security (DHS): the US Citizenship and Immigration Services (USCIS), the US Customs and Border Protection (CBP), and ICE.⁴⁸ USCIS handles legal immigration processes, the CBP enforces customs and immigration laws at ports of entry, and ICE mainly investigates immigration violations.⁴⁹

Article II of the Constitution grants enforcement power over immigration and naturalization laws through executive orders.⁵⁰ The Take Care Clause declares that the President “shall take Care that the Laws be faithfully executed,” meaning the President is in charge of ensuring Congress’s laws are strictly enforced.⁵¹ These orders are issued as a way to direct executive agencies on how to implement laws.⁵² The Vesting Clause states that “[t]he executive Power shall be vested in a President of the United States of America,”⁵³ meaning the President inherits broad executive authority, commonly interpreted to include the ability to issue orders.⁵⁴ Through the INA, the President was granted the power to suspend or restrict the entry of noncitizens if their presence was deemed to be detrimental to US interests.⁵⁵ An example of this is seen in the detention section of the Executive Order entitled Securing Our Borders, in which President

⁴⁶ *United States*, 130 U.S., *supra* note 42.

⁴⁷ Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ U.S. Const. art. II.

⁵¹ U.S. Const. art. II, cl. 3.

⁵² *Id.*

⁵³ U.S. Const. art. II, cl. 1.

⁵⁴ *Id.*

⁵⁵ 8 U.S.C. § 1182 (f) (Section 212(f)).

CHALLENGING THE CONSTITUTIONALITY OF THE ZERO TOLERANCE POLICY ON IMMIGRATION

Trump directed the DHS to terminate “catch and release” and detain “illegal aliens” until removal to the fullest extent permitted by law.⁵⁶ Though executive orders may be used to limit immigration, US Code 1324a, regarding the Unlawful Employment of Aliens, also allows the executive branch to grant employment authorization to noncitizens through executive action.⁵⁷ Former President Obama exercised this authority with the implementation of Deferred Action for Childhood Arrivals (DACA), which allowed individuals who entered the country as children to request consideration of deferred action and work authorization.⁵⁸

During President Trump’s first term in office, there was a rapid surge in immigration.⁵⁹ A large number of Central American migrant families arrived at the Southern border to request asylum,⁶⁰ with many immigrants requesting asylum after illegally entering the US.⁶¹ As a response, President Trump introduced changes to immigration law such as increasing the number of ICE agents, instituting limitations on asylum-seekers, building a wall along the American-Mexican border, and conducting more family separations.⁶² These laws, along with the zero-tolerance policy, changed government enforcement of immigration law.⁶³ The Trump Administration and other executive agencies adopted a 100 percent prosecution approach towards immigrants, even if they were accompanied by children or identified as asylum-seekers.⁶⁴ ICE officers were refocused on detaining all immigrants rather than just those who committed extreme offenses.⁶⁵ President Trump altered the objectives of immigration authorities, shifting the country’s stance on the issue.

II. CHILD REMOVAL AND FAMILY SEPARATION

⁵⁶ Exec. Order No. 14,165, 90 Fed. Reg. 8467 (Jan. 20, 2025).

⁵⁷ 8 U.S.C. § 1324a(h)(3) (Section 274A(h)(3)).

⁵⁸ U.S. Citizenship & Immigration Servs., *Consideration of Deferred Action for Childhood Arrivals (DACA)* (last updated Jan. 24, 2025), <https://www.uscis.gov/DACA>.

⁵⁹ William A. Kandel, *The Trump Administration’s “Zero Tolerance” Immigration Enforcement Policy*, Library of Congress (2025), <https://www.congress.gov/crs-product/R45266>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Kylee Verill, “Collateral” Damage: Implications of the Zero Tolerance Policy on Immigration, 25 *Quinnipiac Health L. J.* 333 (2022).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

A. Zero-Tolerance Policy Analysis

Former Attorney General Jeff Sessions implemented the zero-tolerance policy in the Spring of 2018 as a response to the rapid surge in illegal border crossings. The DOJ reported that there has been a reported 203 percent increase in unauthorized entries between 2017 and 2018, and a 37 percent growth rate from February 2018 to March 2018.⁶⁶ The DOJ claimed the zero tolerance policy was established because of Congress's inability to pass legislation aligning with the nation's priority of protecting citizens. The DOJ further emphasized the essential nature of these actions by funding a wall along the border to close "dangerous loopholes."⁶⁷ Consequently, the zero-tolerance policy was created to mitigate the number of illegal attempts to enter the US without proper documentation by criminalizing those who attempt. The policy defined what constitutes illegal entry by an alien and the legal consequences:

Any alien who (1) enters or attempts to enter the US at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the US by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under Title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under Title 18, or imprisoned for not more than 2 years, or both.⁶⁸

The term "alien" refers to any person who is not a citizen or national of the US.⁶⁹ Under this provision, a non-citizen that attempts to enter or successfully enters the US at any time or place other than those designated by immigration officials, evades any form of investigation initiated by those officials, or attempts to enter or obtain entry into the country by willfully misrepresenting facts or committing fraud, will be charged with a standard misdemeanor charge.⁷⁰ Under Title 18– the official national code that covers federal crimes and criminal procedure– a first-time offender will face a

⁶⁶ Press Release, U.S. Dep. of Justice Off. of Pub. Affairs, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018).

⁶⁷ *Id.*

⁶⁸ 8 U.S.C.A. § 1325(a).

⁶⁹ 8 U.S.C.A. § 1101.

⁷⁰ *Id.*

CHALLENGING THE CONSTITUTIONALITY OF THE ZERO TOLERANCE POLICY ON IMMIGRATION

less serious criminal charge, resulting in a fine or jail time.⁷¹ Any offenses made after the first infraction are treated more harshly, potentially resulting in a felony charge.⁷² To facilitate the enforcement of this policy, Attorney General Sessions announced the allocation of thirty-five new Assistant United States Attorney (AUSA) positions and the utilization of eighteen supervisory immigration judges along the Southwest border.⁷³ The objective, as announced by the DOJ and the Trump Administration, was to prioritize the security and protection of the American population. The duties of AUSA workers outlined in the zero-tolerance policy included aiding in the imposition of prosecutions of “illegal reentry,”⁷⁴ “alien smuggling,”⁷⁵ and “improper entry.”⁷⁶

The Trump Administration exacerbated tensions over illegal border crossings and undocumented immigrants by claiming that illegal aliens pose a hazard to the nation’s well-being. During former President Obama’s second term, ICE Legislative Affairs stated that foreign-born individuals who were not classified as public safety threats, suspected child and human traffickers, repeat offenders, and convicted felons were not considered enforcement priorities.⁷⁷ When immigrants were captured, they were rarely criminally prosecuted. Instead, they were sent to civil removal proceedings for invalid presence and entry.⁷⁸ If the individual was identified as an asylum-seeker and did not pose a threat to public safety, DHS officials employed a “catch and release” approach. Officials would place undocumented individuals into removal proceedings, direct them to immigration hearings, and discharge them inside the US.⁷⁹ The Trump Administration transformed the national perspective on immigration, classifying illegal aliens as a threat to the nation’s security.

B. Emergency Child Removal Process

Each state ensures that the best interests of the child are prioritized in juvenile dependency and custody laws. Though legislation varies within each state, there are

⁷¹ 8 U.S.C.A. § 1101.

⁷² *Id.*

⁷³ Press Release, U.S. Dep. of Justice Off. of Pub. Affairs, Justice Department Announces Additional Prosecutors and Immigration Judges for Southwest Border Crises (May 2, 2018).

⁷⁴ 8 U.S.C. § 1326.

⁷⁵ 8 U.S.C. § 1324.

⁷⁶ 8 U.S.C. § 1325.

⁷⁷ Kandel, *supra* note 59.

⁷⁸ *Id.*

⁷⁹ *Id.*

similar procedures regarding whether a governmental entity can possess temporary custody of a child and if they are eligible for removal. This section will focus on the child removal procedures in California, Texas, Arizona, and New Mexico– the border states impacted by the zero-tolerance policy. The California Rules of Court define the term “removal” as:

A court order that takes away the care, custody, and control of a dependent child or ward from the child’s parent or guardian, and the places of care, custody, and control of the child with the court, under the supervision of the agency responsible for the administration of child welfare or the country probation department.⁸⁰

The Welfare and Institutions Code (WIC), a statutory code enacted by the California State Legislature, established social services and programs for promoting the welfare of the general public within the state.⁸¹ It provides provisions for child welfare inside and outside of their household.⁸² WIC outlines the circumstances in which any peace officer– sheriffs, the Attorney General, and special agents and investigators of the Department of Justice⁸³– may take a minor into temporary custody.⁸⁴ ICE and CBP officers are not legally classified as California peace officers, barring them from taking a minor into temporary custody under state legislation.⁸⁵ Peace officers may only provisionally remove a minor from their home if:

(1) they have reasonable cause for believing that a minor identifies as a person stated in Section 300, (2) is in a hospital and is under immediate threat posed by the parent upon their release, (3) is a dependent child of the juvenile court or when the officer has reasonable cause for believing that the minor has violated an order or left placement ordered

⁸⁰ *Rule 5.502. Definitions and use of terms*, Cal. Rules of Court, 2025, https://courts.ca.gov/cms/rules/index/five/rule5_502

⁸¹ Chris Micheli, *What Is in California’s Welfare and Institutions Code?*, The California Code, Apr. 20, 2022, <https://californiaglobe.com/articles/what-is-in-californias-welfare-and-institutions-code/#:~:text=The%20California%20Welfare%20and%20Institutions,Institutions%20Code%20contains%2020%20Divisions.>

⁸² *Id.*

⁸³ Cal. Pen. Code § 8301.

⁸⁴ Cal. Welf & Inst Code § 305.

⁸⁵ Cal. Pen. Code § 830.85.

CHALLENGING THE CONSTITUTIONALITY OF THE ZERO TOLERANCE POLICY ON IMMIGRATION

by the juvenile court, and (4) is found suffering from sickness or injury requiring remedial care in any street or public place.⁸⁶

WIC outlines the conditions that allow juvenile courts to have jurisdiction over a child and label them as a dependent of the court, emphasizing the child's life must be at "substantial risk" of grave future injury.⁸⁷ This includes suffering from a lack of parental supervision, inadequate access to necessities, risk of sexual or physical abuse, and serious emotional damage.⁸⁸ Moreover, the WIC incorporates regulations that protect parental rights and limit the powers of welfare authorities. Children may not be taken under the custody of the juvenile court if they are:

(1) Homeless or lack emergency shelter for the family, (2) there is a failure of the child's parent or alleged parent in seeking court orders for the child's custody, and (3) there is indigence or other conditions of financial difficulty present, which includes but is not limited to poverty, the inability to provide or obtain clothing, home or property repair, or childcare.⁸⁹

Immigrant families in Texas have also been severely impacted by mass separations, in which the state's statutory guidelines for child removal were neglected. The Texas Family Code prioritizes protecting children, preventing further physical or emotional abuse.⁹⁰ It grants the court the ability to issue an emergency temporary order for the conservatorship of a child, a temporary restraining order, or an attachment that authorizes governmental custody of a child without prior notice or hearing. However, it must assess whether the child's life is in jeopardy and whether they are adequately protected in their homes.⁹¹ There must be an "immediate danger" to a child's physical health and safety such that allowing the child to continue living in the household is dangerous to their welfare. Additionally, children can be removed without forewarning if the removal of an alleged perpetrator does not provide adequate protection and the child cannot be placed with a relative or designated caregiver.⁹² A series of requirements

⁸⁶ Cal. Welf & Inst Code § 305.

⁸⁷ *Id.* at § 300.

⁸⁸ *Id.*

⁸⁹ *Id.* at § 300.

⁹⁰ Tex. Fam. Code § 262.102.

⁹¹ *Id.*

⁹² *Id.*

must be fulfilled for a governmental entity to conduct a child removal, which ultimately serves to protect children and parent-child relationships.

Arizona's set of juvenile dependency regulations has also been infringed upon by the parent-child separations resulting from the zero-tolerance policy. Title 8 outlines situations in which a child should be taken into temporary custody,⁹³ with a custodial arrangement pursued only when (1) the superior court files an order, (2) it is necessary to protect the child due to exigent circumstances, and (3) the parent or guardian grants consent.⁹⁴ Provision K outlines what qualifies as a circumstance in which there is "probable cause to believe that the child is likely to suffer serious harm in the time it would take to obtain a court order for removal."⁹⁵ Additionally, taking custody of a child must be done in the least intrusive way possible, especially when a child is the victim of sexual abuse or abuse involving serious physical injury.⁹⁶ Peace officers may also use reasonable force to enter a home while carrying out an order authorizing temporary custody.⁹⁷

Finally, Article 4 of New Mexico's Children's Code incorporates the guidelines under which a child may be taken into custody by a law enforcement officer or medical personnel.⁹⁸ They must have "reasonable grounds" to believe that the child is being abused or neglected and at risk of further injury.⁹⁹ A law enforcement officer may take a child into custody without conducting a protective services assessment under the following circumstances:

- (1) the child's parent, guardian or custodian has attempted, conspired to cause or caused great bodily harm to the child or death to the child's sibling;
- (2) the child's parent, guardian, or custodian has attempted, conspired to cause or caused great bodily harm or death to another parent, guardian or custodian of the child;
- (3) the child has been abandoned;
- (4) the child is need of emergency medical care;
- (5) the department is not available to conduct a safety assessment promptly; or
- (6) the child is in imminent risk of abuse.¹⁰⁰

⁹³ Ariz. Rev. Stat. § 8-821 (2015).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ N.M. Stat. § 32A-4-6 (2018).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

CHALLENGING THE CONSTITUTIONALITY OF THE ZERO TOLERANCE POLICY ON IMMIGRATION

According to Southern border state legislation, juvenile dependency courts and child welfare determine whether it is in a child's best interest to remain under the custody of their parents or guardians. States emphasize that there must be an imminent and substantial danger present to remove children temporarily. Each removal case must also respect the fundamental rights of parents in the companionship, care, custody, and management of their children."¹⁰¹ In contrast, citizen-born children were placed under the temporary custody of state foster care systems when their immigrant parents were detained for a standard misdemeanor charge.

C. Family Separation Under Zero Tolerance

During the six-week duration of the zero-tolerance policy, the DHS separated thousands of children from their parents or guardians. The methods of separation and removal varied case by case, as foreign alien minors were transferred to shelters operated by the Office of Refugee Resettlement (ORR), while children with American citizenship were automatically placed into foster care under state child welfare authorities.

By criminally prosecuting immigrant families for violating 8 U.S.C § 1325(a), adult parents of both immigrant and citizen children were detained in federal criminal facilities that prohibit the entry of minors.¹⁰² Both the DOJ and the DHS must follow a specific set of guidelines established under the *Flores Settlement Agreement* (FSA), the Homeland Security Act of 2002, and the Trafficking Protection Reauthorization Act of 2008 when detaining unaccompanied alien children (UAC) under the age of 18.¹⁰³ The 1997 FSA, which resulted from a class-action lawsuit that challenged the procedural detention of alien minors, set a nationwide standard for the detention, care, and release of non-citizen children.¹⁰⁴ The ORR is responsible for the temporary care of unaccompanied immigrant minors and placing them with sponsors suitable to have custody.¹⁰⁵ Moreover, the DHS was directed under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) to screen all unattended children to identify potential human trafficking victims.¹⁰⁶ Under the custody of the

¹⁰¹ *Routten v. Routten*, 374 N.C. 571, 843 S.E.2d 154 (2020).

¹⁰² Kandel, *supra* note 59.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

ORR, UACs from countries other than Mexico or Canada were also placed into formal removal proceedings, which allowed them to request immigration relief or asylum before an immigration judge.¹⁰⁷ Mexican and Canadian UAC must be screened by CBP personnel within 48 hours of apprehension to determine if they are at risk of becoming a trafficking victim, have a potential asylum claim, or are unable to independently decide whether or not to return to their country of nationality.¹⁰⁸ Moreover, as outlined in the FSA, immigration detention facilities cannot hold children accompanying apprehended adults for more than 20 days. The failure to release parents with their children would result in the classification of these children as UAC and referring them to the ORR.¹⁰⁹

According to the Migration Policy Institute, an estimated 4.4 million US-citizen children under the age of 18 have lived with at least one undocumented parent as of 2018.¹¹⁰ Despite the purpose of the child welfare spectrum to protect children and families, immigration enforcement under the zero-tolerance policy complicates the ability of non-citizen parents to defend their constitutional right to keep their children.¹¹¹ ICE implemented the Parental Interests Directive in 2013 to ensure that enforcement activities during the removal process did not unjustifiably disrupt parental rights.¹¹² This policy prevented ICE from taking custody of or transporting children unless they were taking enforcement action against their parents due to their citizenship status.¹¹³ It also allowed parents and guardians to create alternate care arrangements for their children before arrest or detainment.¹¹⁴ If care arrangements could not be made, ICE was required to contact local child welfare authorities or law enforcement to take custody.¹¹⁵ The 2017 Detained Parents Directive ultimately

¹⁰⁷ Kandel, *supra* note 59.

¹⁰⁸ William A. Kandel, *Unaccompanied Alien Children: An Overview*, Library of Congress (2025), <https://www.congress.gov/crs-product/R43599>

¹⁰⁹ Kandel, *supra* note 59.

¹¹⁰ Randy Capps et al., *Unauthorized Immigrants in the United States: Stable Numbers, Changing Origins*, 2 (Wash. DC: Mig. Pol. Inst., Dec. 2020).

¹¹¹ Press Release, American Immigration Council, U.S. Citizen Children Impacted by Immigration Enforcement (Jun. 24, 2021).

¹¹² *Id.*

¹¹³ Press Release, Immigrant Legal Resource Center, The ICE Parental Directive: How Child Welfare Agencies Can Advocate With ICE to Ensure Fair Treatment of Detained or Deported Parents (Aug. 2, 2022).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

CHALLENGING THE CONSTITUTIONALITY OF THE ZERO TOLERANCE POLICY ON IMMIGRATION

replaced this policy and terminated many provisions.¹¹⁶ Under the first version of this directive, ICE agents must “generally accommodate” the efforts of parents or legal guardians to make arrangements for the care of their children before contacting child welfare or law enforcement authorities.¹¹⁷ If they are unable to do so before deportation or detainment, ICE must take the children to the state’s CPS for placement in an emergency shelter, group home, or a foster home of relatives, friends, or strangers.¹¹⁸ CPS is required for case management, and children must remain in foster care for the duration of their custody battle.¹¹⁹

Under the zero-tolerance policy, citizen children with immigrant families experienced several rights violations. For example, the lack of coordination amongst agencies led to prolonged family separation and termination of parental rights due to the deportation or detainment of a parent.¹²⁰ In contrast to the treatment of foreign-born children under the custody of the ORR, these children did not have access to a system in which they were able to communicate with their parents via telephone.¹²¹ Additionally, the efforts to reunite children in the state foster care system with their parents became exceedingly complicated. Dependency courts were left to independently decide how to handle each case and “determine if it is in the child’s best interest to be reunited with their parent(s), despite whether their parent(s) was in the process of being removed or facing imminent removal.”¹²² If a judge rules against parent-child reunification and there are no citizen relatives available to assume custody, then the child is placed in foster care until they reach the age of maturity.¹²³ Moreover, identifying separated families took months for the government to accomplish, as official records were often unorganized and incomplete.¹²⁴ Disorganization also made it difficult to determine the children’s locations, necessary for tracking their cases.¹²⁵

Many of these immigrant families did not pose a threat to the US, as many immigrated to better the lives of their children and loved ones, or to seek asylum.

¹¹⁶ Press Release, *supra* note 111.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Miriam Jones, *U.S.-Born Children, Too, Were Separated From Parents at the Border*, N.Y. Times, Apr. 11, 2023,

<https://www.nytimes.com/2023/04/11/us/migrant-family-separations-citizens.html>.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

Despite this, the Trump Administration met them with violence simply because of their immigration status. It is important to note that these children, particularly those identifying as citizens, were not granted the opportunity to remain with their families. The separation of immigrant families over misdemeanor charges raises the question of second-class citizenship, as their children were never placed in immediate danger.

III. CONSTITUTIONAL RIGHTS OF IMMIGRANT FAMILIES

A. Ms. L. v. ICE

On February 26, 2018, a plaintiff identified as “Ms. L.,” a mother and a native of the Democratic Republic of Congo, filed a complaint alleging that the US government unlawfully initiated a forcible separation from her seven-year-old daughter, S.S.¹²⁶ Ms. L. alleged that she arrived at a US Port of Entry near San Diego on November 1, 2017, and was able to explain to border guards that the pair were seeking asylum.¹²⁷ She expressed her fear of returning to Congo and was granted an initial screening interview, in which an asylum officer must establish if she qualified for asylum status.¹²⁸ The officer ultimately determined that she did not qualify, and she was told to proceed to the next phase of the asylum process.¹²⁹ Both the plaintiff and her daughter were detained together upon their arrival for 4 days. However, they were separated when Ms. L. was sent to the Otay Mesa Detention Center in San Diego and her daughter was dispatched to a facility in Chicago.¹³⁰ They were separated without Ms. L. being made aware of the location where S.S. was sent, and without any indication of reunification.¹³¹ This resulted in emotional and psychological trauma for both mother and daughter, as Ms. L. claims that she could hear her daughter’s frantic screams during their separation.¹³² There was also no accusation of abuse or neglect of S.S. by

¹²⁶ Complaint at 3, *Ms. L. v. U.S. Immigration and Customs Enforcement (“ICE”)*, 330 F.R.D. 284, 103 Fed. R. Serv. 3d 246 (S.D. Cal. 2019) (No. 3:18-cv-00428).

¹²⁷ *Id.*

¹²⁸ Complaint, *supra* note 113.

¹²⁹ *Id.*

¹³⁰ Amended Complaint for Declaratory and Injunctive Relief with Class Action Allegations at 10, *Ms. L. v. U.S. Immigration and Customs Enforcement (“ICE”)*, 330 F.R.D. 284, 103 Fed. R. Serv. 3d 246 (S.D. Cal. 2019) (No. 3:18-cv-00428).

¹³¹ *Id.*

¹³² Amended Complaint for Declaratory and Injunctive Relief with Class Action Allegations, *supra* note 130, at 10.

CHALLENGING THE CONSTITUTIONALITY OF THE ZERO TOLERANCE POLICY ON IMMIGRATION

Ms. L., or evidence that she was an unfit parent.¹³³ She was unable to speak to her daughter on the phone for nearly four days after their separation, and was not able to see her for another four months after the complaint was filed.¹³⁴ Ms. L. and her daughter were in custody for purposes of habeas jurisdiction– the power a court inherits to hear and decide the legality of an individual’s detention. The court has authority to rule on the case under the federal question jurisdiction,¹³⁵ the habeas jurisdiction,¹³⁶ and the suspension clause.¹³⁷ The jurisdiction of the case *Ms. L. v. ICE* fell under the Fifth Amendment, federal asylum statutes, and the Administrative Procedure Act.¹³⁸

The respondents in this case include ICE, the DHS, CBP, USCIS, HHS, and the ORR. Once the American Civil Liberties Union amended the complaint, these agencies were accused under three counts: violation of due process, arbitrary and capricious practice, and violation of asylum statute.¹³⁹ Ms. L. joined with others similarly violated by these systems to represent the following adult parents nationwide class of individuals who:

(1) are or will be detained in immigration custody by the Department of Homeland Security, and (2) have a minor child who is or will be separated from them by DHS and detained in ORR custody, absent a demonstration in a hearing that the parent is unfit or presents a danger to the child.¹⁴⁰

Under the Due Process Clause of the Fifth Amendment, class members, such as Ms. L., and their children have a liberty interest in remaining together as a family. The case also claimed that these individuals’ substantive and procedural due process were infringed upon, as their separation furthered no legitimate purpose or a government

¹³³ Amended Complaint for Declaratory and Injunctive Relief with Class Action Allegations, *supra* note 130, at 10.

¹³⁴ *Id.*

¹³⁵ 28 U.S.C. § 1331.

¹³⁶ *Id.* at § 2241.

¹³⁷ U.S. Const. art. 1, § 9, cl. 2.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Amended Complaint for Declaratory and Injunctive Relief with Class Action Allegations, *supra* note 130.

interest.¹⁴¹ Procedural due process was violated because their separation was undertaken without any hearing.¹⁴² Furthermore, Ms. L. and the other plaintiffs stated that the defendants' separation from their children without legitimate justification breached the Administrative Procedure Act, which prohibits arbitrary and capricious agency action.¹⁴³ The court declared that the separation initiated by these agencies violated a federal asylum law that grants noncitizens with a "well-founded fear of persecution" the opportunity to claim asylum in the US.¹⁴⁴ The defendants stated that the division of family units "impede(d) their ability to pursue asylum claims."¹⁴⁵

The lawsuit eventually reached a settlement that focused on preventing future family separations, ensuring family reunification, and offering additional support to class members in the US.¹⁴⁶ The conditions under which children may be legally separated from their parents or legal guardians are limited under this decision.¹⁴⁷ The district court also issued a preliminary injunction that prevented any future separations, except in specified circumstances that involve national security, the safety of the child, certain criminal warrants, and medical emergencies.¹⁴⁸ Four types of support services have been provided to class members, including three years of behavioral health services, a 12-month medical assistance that covers costs and copayments for medical services at Federally Qualified Health Centers, temporary housing support and assistance, and access to immigration legal services and immigration processing.¹⁴⁹ On January 26, 2021, the DOJ finally rescinded the zero-tolerance approach.¹⁵⁰

B. Equal Protection for Families

¹⁴¹ Amended Complaint for Declaratory and Injunctive Relief with Class Action Allegations, *supra* note 130.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ 8. U.S.C. § 706.

¹⁴⁵ *Id.*

¹⁴⁶ Press Release, U.S. Department of Homeland Security, Fact Sheet: Overview of Proposed Ms. L Settlement Agreement (Oct. 16, 2023).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Press Release, U.S. Dep. of Justice Off. of Pub. Affairs, U.S. Government Reaches Settlement in Class Action Family Separation Case Seeking Injunctive Relief (Oct. 16, 2023).

CHALLENGING THE CONSTITUTIONALITY OF THE ZERO TOLERANCE POLICY ON IMMIGRATION

Although the lawsuit was based on the infringement of due process rights, equal protection under the Fourteenth Amendment was also threatened. The amendment declares that “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...; nor shall any State deny to any person within its jurisdiction the equal protection of the laws.”¹⁵¹ Persons who are subject to federal and state jurisdiction are “all persons born or naturalized in the United States.”¹⁵² Immigration authorities’ removal of American-born children from their immigrant parents and the government’s interference with a parent’s fundamental right to their children violated equal protection.

The child welfare system in the US, though composed of many individual state agencies, is tailored to the “best interests of the child,” serving as guidance for courts in determining custody. The quality of a child’s home environment, the guidance provided by a custodial parent, and the ability for each parent to contribute to their child’s emotional and intellectual progression are all factors that the court must consider when determining what is in the child’s best interests.¹⁵³ Under the zero tolerance policy, ICE agents, who do not classify as peace officers in child custody cases,¹⁵⁴ forced themselves into immigrant households without notice, moving citizen-born children into foster care.¹⁵⁵ Despite parents only being charged with a standard misdemeanor for illegally residing in the US, children were not provided with the standard protections when they were taken into temporary custody.

Immigration enforcement under the zero-tolerance policy also contradicts the “best interests of the child” principle.¹⁵⁶ The risk of developing mental health problems such as depression, anxiety, and other forms of severe psychological distress increases after a child witnesses the deportation or detention of their parents.¹⁵⁷ Children have exhibited behavioral changes caused by stress and anxiety, including symptoms of “toxic stress” from fearing the potential deportation of a family member.¹⁵⁸ When

¹⁵¹ U.S. Const. Amend. XIV, § 1.

¹⁵² *Id.*

¹⁵³ *Ross v. Ross*, 93 So. 3d 495, 2012 Fla. App. LEXIS 12087, 37 Fla. L. Weekly D 1755, 2012 WL 3023209 (Court of Appeal of Florida, Second District Jul. 25, 2012, Opinion Filed).

¹⁵⁴ Cal. Pen. Code § 830.85.

¹⁵⁵ Miriam Jordan, *U.S.-Born Children, Too, Were Separated From Parents at the Border*, N.Y. Times, Apr. 11, 2023,

<https://www.nytimes.com/2023/04/11/us/migrant-family-separations-citizens.html>.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

enduring family separations, several parents lost contact with their children and were not informed about where their children were relocated.¹⁵⁹ In September 2019, after creating a mental health assessment for children in their custody, the HHS found an influx in the number of children they were responsible for, many of whom had experienced significant trauma.¹⁶⁰

Unless deemed unfit, parents have a constitutional right to the custody of their children, regardless of immigration status, detention, or deportation.¹⁶¹ In the Supreme Court case *Troxel v. Granville*, the court declared that parents have a fundamental right under the Fourteenth Amendment's Due Process Clause to "oversee the care, custody, and control of a child."¹⁶² This conclusion was upheld in *Duchesne v. Sugarman*, as the Second Circuit decided that the "right of the family to remain together without the coercive interference of the awesome power of the state ... encompasses the reciprocal rights of both parent and child."¹⁶³ Family life is classified as a liberty protected by due process.¹⁶⁴ Parents are automatically responsible for the custody, care, and nurturing of their children, "whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."¹⁶⁵

In the case *In Re Interest of Angelica L.*, the Nebraska Supreme Court unanimously overturned a lower court decision to terminate Maria L.'s parental rights after being deported back to Guatemala when she failed to take her baby to a follow-up medical appointment.¹⁶⁶ Maria was detained by the DHS, and her children were placed into temporary emergency custody.¹⁶⁷ The court ultimately ruled that under due process, Maria had a constitutional right to the care and custody of her children, despite being an "illegal alien."¹⁶⁸ This case solidified that these rights apply to

¹⁵⁹ Kylee Verrill, NOTE: "Collateral" Damage: Implications of the Zero-Tolerance Policy on Immigration, 25 Quinnipiac Health L.J. 333 (2022), <https://advance.lexis.com/api/document?collection=analytical-materials&id=urn%3acontentItem%3a65G0-G261-JB7K-22YN-00000-00&context=1519360&identityprofileid=GRCCJV51394>.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Troxel v. Granville*, 530 U.S. 57 (2000).

¹⁶³ *Duchesne v. Sugarman*, 566 F.2d 817 (2nd Cir. 1977).

¹⁶⁴ *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974).

¹⁶⁵ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

¹⁶⁶ *In Re Interest of Angelica L.*, 767 N.W.2d 74 (2009).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

CHALLENGING THE CONSTITUTIONALITY OF THE ZERO TOLERANCE POLICY ON IMMIGRATION

undocumented, deported, or detained immigrant parents, and the “best interests” of a child must be accounted for.¹⁶⁹

The precedent set forth by a series of court cases and statutes to safeguard family rights was ultimately disregarded throughout separations initiated by the zero-tolerance policy. The reason for parent-child separation was not due to a suspected danger to the children’s well-being but rather the immigration status of their parents. Thus, equal protection was infringed upon as the fundamental right of parents and children to remain together was disregarded under the enactment of zero-tolerance.

CONCLUSION

The unlawful separation of families was never a necessary step in mitigating the number of individuals seeking illegal entry into the US. Historically, the imposition of 8 U.S.C. § 1325 has varied as other administrations opt for civil immigration proceedings rather than criminal prosecution, especially for first-time offenders. Arresting, detaining, and deporting all undocumented immigrants is fundamentally impossible, especially because of a lack of funding in immigration enforcement. Prior executive leadership has allocated this funding toward expelling immigrants with an extensive criminal record. The destruction of a parent-child relationship and the emotional and physical damages caused cannot be justified. The separation of powers within the government, Supreme Court precedent, and constitutional amendments all serve as evidence that the zero-tolerance policy on immigration is unlawful.

Though the legislative branch mainly controls immigration issues within the US, the executive branch still greatly influences their enforcement. The primary reason for the enactment of the zero-tolerance policy on immigration by the Department of Justice and the Trump Administration was Congress’s lack of initiative in addressing the increasing number of illegal immigrants at the Southern border. Their declaration of an immigration crisis shifted the focus of immigration agencies from protecting the country from foreign criminals to limiting entry for all immigrants.

Under the 14th Amendment, all children and families deserve to be treated equally under any type of removal process, including those with relatives who have been deported or detained. The Due Process Clause asserts that the best interests of any child must always be fulfilled and guarantees parents have the fundamental right to assume custodial rights. Children have a liberty interest in remaining with their family, and the court should only make an exception if the child is exposed to any form of

¹⁶⁹ *In Re Interest of Angelica L.*, 767 N.W.2d 74 (2009).

irreparable abuse by the parent. Thus, it is unfair that children, whether citizens or aliens, are immediately dispatched to the foster care system if they reside with immigrant parents.

Even though the zero-tolerance policy has been rescinded, family separation and deportation continue to remain relevant issues. As immigration policies evolve, the lasting impact of past enforcement measures underscores the need for ongoing reform and human rights considerations.