

*Before the*

**INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

Wayne Smith and Hugo Armendariz,

vs.

The United States of America

**Case No. 12.561**

**FINAL OBSERVATIONS REGARDING THE MERITS OF THE CASE  
December 7, 2006**

*Presented on Behalf of Wayne Smith and Hugo Armendariz by Petitioners:*

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## **I. INTRODUCTION**

Mr. Wayne Smith and Mr. Hugo Armendariz, lawful permanent residents of the United States for 25 and 35 years respectively, were deported from the United States under a mandatory deportation regime established during the 1996 comprehensive U.S. immigration reform. Under this regime, Mr. Smith and Mr. Armendariz were deemed deportable by U.S. authorities and denied any opportunity to present arguments at the administrative and judicial level about why their deportations were in violation of their fundamental rights. The refusal of the trial and appellate level tribunals to consider this evidence violated Mr. Smith's and Mr. Armendariz' fundamental procedural protections enshrined in Articles XVIII (the right to a fair trial) and XXVI (the right to due process of law) of the American Declaration on the Rights and Duties of Man ("American Declaration"). These procedural violations led to the substantive violations of Mr. Smith's, Mr. Armendariz', and their families' rights to private and family life and therefore constitute violations of Article V (the right to protection against abusive attacks on family life) and Article VI (the right to establish a family) of the American Declaration. These violations were also compounded by the United States government's disregard for the special protections that should be accorded to children who are affected by deportation proceedings as established in Article VII (the right to protection for mothers and children) of the American Declaration. Petitioners present, herein, our final allegations on the merits of the case, including all relevant facts and legal arguments necessary for the Inter-American Commission on Human Rights ("Inter-American Commission", "Honorable Commission" or "Commission") to find the United States in violation of Articles V, VI, VII, XVIII and XXVI of the American Declaration.

## II. BACKGROUND AND CONTEXT

Immigrants in the United States, whether documented or undocumented, were tolerated in the 1970s and 1980s in part because they met the large labor demand of the country. However, as the U.S. economy slowed early in the 1990s, the tolerance for the large immigrant population began to fade. Immigrants were perceived as the source of a “myriad of ills, including the high unemployment, drug abuse, and crime rates, as well as for the rising costs for services such as social welfare and medical programs.”<sup>1</sup> In 1996, an election year, reacting to nationwide anti-immigrant sentiments created by the 1993 World Trade Center bombing in New York and the 1995 Oklahoma City bombing, the U.S. Congress enacted the Antiterrorism and Effective Death Penalty Act (“AEDPA”),<sup>2</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”).<sup>3</sup> These statutes amended the Immigration and Nationality Act (“INA”),<sup>4</sup> the laws governing, *inter alia*, the admission and removal of non-citizens to and from the United States.

Although the stated purpose of these laws was to protect American citizens from terrorist attacks, their anti-immigrant tone was manifest and their repressive function was instantly apparent. Even President William Jefferson Clinton, who signed the bills into law, admitted that they made “a number of major, ill-advised changes in our [U.S.] immigration laws having nothing to do with fighting terrorism.”<sup>5</sup> Further, it was apparent

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<sup>1</sup> Bruce Robert Marley, Comment, Exiling the New Felons: The Consequences of the Retroactive Application of Aggravated Felony Convictions to Lawful Permanent Residents, 35 San Diego L. Rev. 855, 857 (1998).

<sup>2</sup> Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996).

<sup>3</sup> Pub. L. No. 104-208, 110 Stat. 3009 (September 30, 1996).

<sup>4</sup> 8 U.S.C. §1101, *et seq.*

<sup>5</sup> Anjali Parekh Prakash, Note, Changing the Rules: Arguing Against Retroactive Application of

to many that the IIRIRA and the AEDPA introduced reforms that would negatively impact family unity. For example, California Supreme Court Justice Stanley Mosk observed that “the practical consequences of AEDPA and IIRIRA are that some immigrants are torn away from their families after decades in the United States and sent to countries where they know no one and do not speak the language.”<sup>6</sup>

### **A. Mandatory Deportation under U.S. Immigration Law**

The current system of mandatory deportation under U.S. immigration law has been emphatically shaped by IIRIRA and AEDPA. These laws not only eliminated the major form of relief available to non-citizens facing deportation because of a criminal conviction, but also broadly expanded the list of crimes termed “aggravated felonies”—the commission of which can trigger a non-citizen’s mandatory removal from the United States.

#### **1. Major form of Relief from Deportation Revoked**

Prior to the enactment of IIRIRA in 1996, permanent residents who were convicted of a crime were able seek “212(c) relief,” a humanitarian waiver established under section 212(c) of the INA of 1952.<sup>7</sup> This form of relief enabled non-citizens to apply for a waiver of deportation from an immigration judge in order to continue their family life in

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Deportation Statutes, 72 N.Y.U. L. Rev. 1420 (1997) (citing President William J. Clinton, Statement Upon the Signing of AEDPA (Apr. 24, 1996) (White House press release) (on file with the New York University Law Review)).

<sup>6</sup> Rob A. Justman, The Effects of AEDPA and IIRIRA on Ineffective Assistance of Counsel Claims for Failure to Advise Alien Defendants of Deportation Consequences of Pleading Guilty to an ‘Aggravated Felony,’ 2004 Utah L. Rev. 701, 705-6 (2004).

<sup>7</sup> Pub. L. No. 82-414; 66 Stat. 163 (1952) (codified at INA § 212(c), 8 U.S.C. §1182(c)). Section 212(c) replaced and roughly paralleled the so-called “Seventh Proviso” of § 3 of the Immigration Act of 1917, which allowed excludable individuals with a U.S. domicile of at least seven years to continue living in the United States in the discretion of the Secretary of Labor.

the United States. Prior to IIRIRA, section 212(c) waivers were the most common form of relief from deportation. Half of all applications for the waiver were granted.<sup>8</sup> The significance of this waiver is undeniable: in the six-year period between 1989 and 1995 more than 10,000 non-citizens were granted relief from deportation for equitable reasons under section 212(c).<sup>9</sup>

To qualify for a 212(c) waiver, a non-citizen must have resided in a lawful and unrelinquished domicile in the U.S. for at least seven years, and must not have been convicted of any of a class of crimes known as “aggravated felonies” for a term of imprisonment of more than five years.<sup>10</sup> The immigration judge had authority to make a discretionary decision whether or not to grant the 212(c) waiver. The immigration judge arrived at the decision by balancing the evidence of the non-citizen’s anti-social behavior against the “humane and social considerations” in the non-citizen’s favor.<sup>11</sup> The judge’s determination incorporated factors such as “history of employment, existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation effort if a criminal record exists, family ties within the U.S., residence of long duration, evidence of hardship to her family if deportation occurs, service in the U.S. Armed Forces, [and/or] other evidence attesting to good moral character.”<sup>12</sup> If the humanitarian waiver was denied and the non-citizen was ordered deported, he or she could appeal the deportation order to the Board of Immigration Appeals. If the Board of Immigration Appeals affirmed the order, the non-citizen could then seek judicial review

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<sup>8</sup> Justman, supra note 8, at 707.

<sup>9</sup> Id.; INS v. St. Cyr, 533 S.Ct. 289, 296 (2001).

<sup>10</sup> INA §212(c), 8 U.S.C. §1182(c) (1995).

<sup>11</sup> Matter of Marin, 16 I & N Dec. 581 (BIA 1978).

<sup>12</sup> Id.

in the U.S. Circuit Court of Appeals that had jurisdiction.

Eighty years after its enactment,<sup>13</sup> this humanitarian waiver was eliminated by IIRIRA. IIRIRA was designed to remove whole classes of individuals from the United States “as soon as possible”, without regard to their family ties, service to their communities, or any other equitable and humane considerations.<sup>14</sup> In place of the 212(c) waiver, IIRIRA introduced a very narrow form of relief called “cancellation of removal.”<sup>15</sup> Unlike the 212(c) waiver, this new form of relief does not apply to non-citizens convicted of an “aggravated felony.”<sup>16</sup> Therefore, during a hearing before an immigration judge, a non-citizen convicted of an aggravated felony has no recourse to a humanitarian waiver and may be torn apart from his family and deported without the possibility of any other form of relief.<sup>17</sup>

Thus, for a large and growing number of non-citizens in the U.S., humanitarian considerations no longer bear on the final order of removal. The IIRIRA has amended U.S. immigration laws to eliminate any possible humanitarian considerations in favor of an individual who is classified as having been convicted of an “aggravated felony.”<sup>18</sup> As a result, legal residents who have lived in the United States for many years, who support family members (including U.S. citizen and lawful permanent resident family members),

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<sup>13</sup> A humanitarian waiver for long-term permanent residents was first established as the “Seventh Proviso” in the Immigration Act of 1917, and was incorporated as a “section 212(c) waiver” in the Immigration and Nationality Act of 1952. See note 7, *supra*.

<sup>14</sup> Sen. Jud. Comm. Rep., No. 104-249 at 7, ([available at](#) 1996 WL 180026 at 15), 104th Cong, 2d Sess. (1996).

<sup>15</sup> Prakash, *supra* note 5, at 1420.

<sup>16</sup> INA § 240A(a)(3); 8 U.S.C. § 1229b(a)(3) (1997).

<sup>17</sup> A person convicted of an aggravated felony is able to apply for protection under the Convention Against Torture.

<sup>18</sup> The amended waiver petition provision is codified at 8 U.S.C. § 1229b(a)(3).

and who have proven records of rehabilitation, are subject to mandatory removal without any possible consideration given to their private rights or the repercussions on their families.

In order to understand the severity of the mandatory deportation regime created when the 1996 reforms abolished the 212(c) waiver, it is important to understand the realities of the people that this regime is applied to, specifically, non-citizens convicted of “aggravated felonies.”

## **2. The Expansion of the “Aggravated Felony” Category**

The term “aggravated felony” is a creation of the U.S. immigration laws and therefore applies only to non-citizens.<sup>19</sup> While the list of crimes contemplated by the aggravated felony provision of the INA has steadily grown over time, the 1996 expansion was the most severe yet. “In recent years,” Justice Mosk observed, “the immigration consequences of criminal convictions have verged on the monstrously cruel in their harshness compared to many of the crimes on which they are imposed.”<sup>20</sup>

The U.S. Congress first introduced the notion of an “aggravated felony” in the Anti-Drug Act of 1988 (ADAA).<sup>21</sup> The ADAA listed as “aggravated felonies” the following crimes: murder, any drug trafficking crime, and any illicit trafficking in firearms.<sup>22</sup> The Immigration Act of 1990 expanded the list to include crimes of violence in which the

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<sup>19</sup> Justman, *supra* note 8, at 705.

<sup>20</sup> *In re Resendiz*, 25 Cal. 4th 230, 255 (2001) (Mosk, J., concurring and dissenting).

<sup>21</sup> Subtitle J, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (Nov. 18, 1988).

<sup>22</sup> INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (1989).

sentence imposed is at least five years and certain money laundering offenses.<sup>23</sup> In 1994, the aggravated felony definition expanded once again under the Immigration and Nationality Technical Corrections Act (INTCA), which added certain offenses established by the Racketeer Influenced and Corrupt Organization Act (RICO), theft and burglary for which a term of imprisonment of at least five years is imposed, income tax evasion and fraud where the loss exceeded \$200,000, and alien smuggling for commercial advantage.<sup>24</sup>

In 1996, the IIRIRA changed the tenor of the aggravated felony category completely. IIRIRA broadened the definition of aggravated felony to include crimes that, under most U.S. criminal law codes,<sup>25</sup> constitute misdemeanors, including minor non-violent criminal infractions.<sup>26</sup> The list now includes, *inter alia*, theft offenses for which the term of imprisonment imposed is at least one year; any “crime of violence” for which the term of imprisonment imposed is at least one year; “drug trafficking” offenses; gambling offenses; helping others to enter the United States unlawfully; document fraud where the term of imprisonment is at least 18 months; failure to appear for trial where the underlying offense is punishable by a term of two or more years; and reentry into the United States after deportation.

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<sup>23</sup> Section 501, Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990).

<sup>24</sup> Section 222(a) of the Immigration Nationality Technical Corrections Act, Pub. L. No. 103-416, 108 Stat. 4305 (Oct. 25, 1994).

<sup>25</sup> See Dawn Marie Johnson, The AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes, 27 J. Legis. 477, 478-79 (2001). In most U.S. state criminal law codes, a misdemeanor is a crime of lesser seriousness than a felony and is usually punishable by a fine, forfeiture or detention in a place other than a prison. The term of imprisonment for misdemeanors cannot exceed one year. A felony, on the other hand, in most U.S. criminal law codes, is a more serious crime punishable by imprisonment for more than one year. A felony can be considered aggravated if it includes violence, the use of a deadly weapon or intent to commit another crime. Therefore, only serious felonies are considered “aggravated.”

<sup>26</sup> See 8 U.S.C. § 1101(a)(43).

Given this extremely broad definition, the aggravated felony category has come to include crimes that are neither aggravated nor felonious.<sup>27</sup> For example, shoplifting and petty larceny—misdemeanors under state criminal laws—can be characterized as “aggravated felonies” for immigration purposes if the sentence imposed is 365 days.<sup>28</sup> Similarly, a non-serious misdemeanor domestic violence offense can turn out to be an “aggravated felony” if the sentence imposed is one year.<sup>29</sup> A person convicted twice of simple possession of a controlled substance, a misdemeanor offense for which no jail time is served, may be classified as an “aggravated felon” for immigration purposes.<sup>30</sup> On balance, as one critic has observed, under the new regime of mandatory deportation “marijuana use leads to the same result as an espionage offense.”<sup>31</sup> Crimes as heinous as murder and as common as petty larceny bear the same result: mandatory deportation.<sup>32</sup> Plainly, in many cases IIRIRA and AEDPA impose unreasonably harsh penalties that inordinately punish both the non-citizen and their families—for offenses that, when committed by U.S. citizens, draw nothing more than a fine or community service.

Furthermore, the statute singles out for mandatory deportation individuals who have not even been convicted of an offense. According to IIRIRA, the term “conviction” is

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<sup>27</sup> Robert Pauw, Plenary Power: An Outmoded Doctrine that Should Not Limit IIRIRA Reform, 51 Emory L.J. 1095, 1099 (2002).

<sup>28</sup> United States v. Christopher, 239 F.3d 1191, 1193 (11th Cir. 2001); United States v. Graham, 169 F.3d 787, 791 (3d Cir. 1999).

<sup>29</sup> INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F). See, e.g. In re Palafox, A91-660-370 (BIA 2001) (respondent deported as an “aggravated felon” for having been convicted of a misdemeanor domestic violence offense).

<sup>30</sup> INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B).

<sup>31</sup> Lisa C. Solbakken, The Anti-Terrorism and Effective Death Penalty Act: Anti-Immigration Legislation Veiled in an Anti-Terrorism Pretext, 63 Brook. L. Rev. 1381 (1997).

<sup>32</sup> Justman, supra note 8, at 702.

defined to cover cases in which the criminal prosecution has been put on hold because the court determines that it does not make sense to treat the defendant as having a conviction on his record. For example, many states allow “deferred prosecution” or a “stipulated order of continuance” in criminal cases, and if the defendant complies with the terms ordered by the court then the case is dismissed without further prosecution. For purposes of state law there is no conviction.<sup>33</sup> However, IIRIRA defines a conviction as follows:

The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where  
(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and  
(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.<sup>34</sup>

Thus, a person can be deemed to be “convicted” for purposes of immigration laws even though he never served a day in jail and even though there is no conviction as a matter of state law. A non-citizen’s deportability arises once there has been a “conviction” for immigration purposes—regardless of whether the state court judge has found that a conviction is inappropriate and regardless of whether the non-citizen can show rehabilitation and is capable of leading a productive life in support of his or her family.<sup>35</sup>

To make matters worse, the extremely broad definitions of “aggravated felony” and “conviction” are applied retroactively. According to IIRIRA, the new definition of “conviction” applies to “convictions and sentences entered before, on, or after the date of

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<sup>33</sup> Many states have an “expungement” or “vacation” procedure whereby a defendant pleads guilty and then the court orders some form of probation or community service. If the defendant complies with the court’s orders, then he or she is allowed to return to court to withdraw the guilty plea, and the case is then dismissed. Under state law, this disposition is not a conviction. See, e.g. *In re Ringnald*, 48 F.Supp. 975, 978 (S.D.Cal. 1943).

<sup>34</sup> INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A).

<sup>35</sup> Marley, *supra* note 1, at 869.

the enactment of this Act.”<sup>36</sup> Similarly, the new definition of “aggravated felony” applies “regardless of whether the conviction was entered before, on, or after September 30, 1996.”<sup>37</sup> Consequently, minor offenses that had no immigration consequences at the time they occurred and may not have been vigorously contested now result in mandatory deportation. Lawful residents have been deported and continue to be deported from the United States because of convictions that occurred years before, even though they are fully rehabilitated, have not committed any other criminal acts, and lead productive lives living with and supporting their families.

#### **B. Limitations on the Application of Mandatory Deportation**

Since IIRIRA and AEDPA were passed in 1996, some judicial and legislative developments have specified and altered the impact of those reforms. In order to understand the effects of these developments, it is necessary to first understand the basic deportation procedures adhered to in the United States.

As noted earlier, if the Department of Homeland Security (DHS) believes that a person is deportable from the United States, it initiates removal proceedings before an immigration judge.<sup>38</sup> Both the Immigration Court and the Board of Immigration Appeals are administrative tribunals under the control of the Attorney General, the same person who is in control of enforcing deportation laws against non-citizens. Judicial appeals to decisions of these tribunals are either made directly to the Federal Circuit Court of Appeals with jurisdiction over the case or in the form of a petition for habeas corpus in

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<sup>36</sup> IIRIRA, *supra* note 3, § 322(c).

<sup>37</sup> *See* 8 U.S.C. § 1101(a)(43).

<sup>38</sup> 8 U.S.C. § 1229.

the Federal District Court with jurisdiction over the case.

IIRIRA purported to eliminate any further review in cases where the non-citizen has been convicted of an aggravated felony, including any review by an independent federal court.

According to section 242(a)(2)(C) of the INA:

Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in . . . 8 U.S.C. §1227(a)(2) [including an ‘aggravated felony’].<sup>39</sup>

The U.S. Department of Justice interpreted this provision to mean that a person convicted of an “aggravated felony” is subject to mandatory deportation from the United States and is unable to present any challenge to that action either to an administrative or judicial tribunal. The Department of Justice’s interpretation meant that the 1996 reforms not only eliminated any opportunity for a balancing of the social and humane considerations in the individual’s favor against the seriousness of the offense and the danger that he or she presents to the community, but any appeal of any sort in any pending or future case. Further, the U.S. Department of Justice understood the 1996 reforms to require the retroactive application of the above cited provision. However, in 2001, the U.S. Supreme Court found the U.S. Department of Justice’s interpretation to be too severe.

In INS v. St. Cyr, the U.S. Supreme Court held that federal courts do have jurisdiction in habeas corpus proceedings to decide constitutional claims and “pure questions of law” raised by non-citizens who are subject to a final order of removal, where judicial review

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<sup>39</sup> 8 U.S.C. § 1252(a)(2)(C).

is precluded under INA § 242(a)(2)(C).<sup>40</sup> After St. Cyr, a non-citizen was able to seek judicial review of the order of removal in habeas corpus proceedings, although in such a lawsuit judicial review was limited to constitutional claims and “pure questions of law.” This decision effectively limited the application of the mandatory deportation regime as it was implemented by the U.S. Department of Justice directly after 1996.

In May 2005, the U.S. Congress enacted the REAL ID Act.<sup>41</sup> According to the REAL ID Act, habeas corpus is eliminated as a basis for judicial review of removal orders; instead, all such challenges are transferred to the Federal Circuit Court of Appeals, which has jurisdiction to hear constitutional claims and questions of law that would otherwise have been heard in the form of a habeas petition before the Federal District Court. In other words, a non-citizen who has been convicted of an aggravated felony who is seeking review of an order of removal must file an appeal to the Federal Circuit Court of Appeals, and that appeal is limited to constitutional claims and questions of law.

In St. Cyr, the Supreme Court also limited the retroactive application of IIRIRA. The Court held that the §212(c) waiver of deportation remains available to non-citizens who, prior to 1996 pled guilty to a criminal offense, if they would have been eligible for §212(c) relief at the time of their guilty plea.

While extremely significant for many non-citizens, the relief afforded by St. Cyr is a very limited form of relief. It does not apply to individuals who were deported before the

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<sup>40</sup> St. Cyr, 533 S.Ct. at 305.

<sup>41</sup> REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005).

Court issued its decision and those individuals continue to have no way to apply for a humanitarian waiver of deportation and are unable to rejoin their families in the United States.<sup>42</sup> In addition, the holding in St. Cyr has been limited to situations in which the non-citizen was convicted by guilty plea. Where a non-citizen has been convicted after a jury trial the provisions of IIRIRA that eliminate 212(c) relief can be applied retroactively and those individuals can be deported without being given an opportunity to apply for a humanitarian waiver.<sup>43</sup> Finally, it is important to note that in St. Cyr the Supreme Court addressed only the problem of retroactive elimination of the 212(c) waiver for people who were eligible for 212(c) relief before IIRIRA was enacted. Non-citizens who are convicted of an aggravated felony after April 1, 1997 (IIRIRA's effective date) are ineligible for any form of humanitarian consideration.

### **C. Impact of Mandatory Deportation on Families**

Under the rules adopted in IIRIRA, all of the social and humane factors weighing in favor of the family are ignored. As one commentator has recently stated:

The deepest problem with these laws is not their retroactivity or even their preclusion of judicial review. It is their brutal inhumanity, their disproportionality, their lack of consideration of the cruelty of deporting persons who may have grown up in the U.S., who have all their family here as U.S. citizens or permanent legal residents, and who may well know no other country. This harshness is all the more difficult to accept as deportation law and practice have focused on an increasingly minor array of offenses.<sup>44</sup>

The reality of the regime of mandatory deportation is totally divorced from the underlying purpose of deportation, i.e. to remove from the United States people who pose a threat to the community. One mother whose adopted son was deported noted quite

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<sup>42</sup> This is the case of Wayne Smith described below.

<sup>43</sup> This is the case of Hugo Armendariz described below.

<sup>44</sup> Daniel Kanstrom, St. Cyr or Insincere: The Strange Quality of Supreme Court Victory, 16 Geo. Immigr. L.J. 413 (Winter 2002).

accurately: “The purpose of the original legislation was to combat terrorism. It was not to tear families apart. We’re all part of an American family, and this is the total rejection.”<sup>45</sup>

More often than not, these mandatory deportations impact individuals who are living peaceful and productive lives, making contributions to their families and their communities.<sup>46</sup> In thousands of cases across the United States, U.S. deportation policies are disrupting lives and destroying families, even though there is no legitimate justification for doing so. People who are married lose their spouses;<sup>47</sup> U.S. citizen children lose their non-citizen parents;<sup>48</sup> and U.S. citizen parents lose their non-citizen

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<sup>45</sup> See Maureen Master, United States Conference of Catholic Bishops Office of Migration and Refugee Policy, Due Process for All: Redressing Inequities in the Criminal Provisions of the 1996 Immigration Laws, Staff Paper, July 2003, available at <http://www.usccb.org/mrs/dueprocessforall.shtml> [Annex 1].

<sup>46</sup> See Annexes 1-15.

<sup>47</sup> Gerardo Anthony Mosquera came to the United States from Colombia in 1969 as a lawful permanent resident, along with his five siblings and his parents. He grew up in the United States, married a U.S. citizen, had U.S. citizen children here, and was struggling to support his family. He worked as a forklift operator, earning about \$300 per week. His immigration problems arose from the fact that in 1989 he was convicted for selling a small bag of marijuana – worth \$10 – to a paid police informant. Based on this conviction in December 1997, he was torn apart from his family and deported to Colombia. The impact on his family was devastating. The family lost a crucial source of financial and emotional support. The oldest child, Gerardo Anthony Mosquera, Jr., a 17-year old high school student, was unable to cope with the loss of his father. He committed suicide by shooting himself in the head. See Maureen Master, Due Process for All, supra note 45. The problem of deportation-related suicides is not isolated. Of 500 individuals deported to the Azores after IIRIRA was enacted, 11 committed suicide. See Randall Richards, Banned for Life: Jailed at 17, Kim Ho Ma Can Never Live in America, THE ASSOCIATED PRESS, Nov. 21, 2003 [Annex 2].

<sup>48</sup> Claudette Etienne fled from Haiti as a refugee in June 1980 and later became a lawful permanent resident of the United States. She had two sons, both U.S. citizens, and lived with them and her common-law husband in Florida. In June 1999 a Miami undercover officer alleged that he purchased cocaine from Claudette. She was found guilty of the offense, but the judge did not sentence her to serve time in jail. In light of her compelling family equities, the judge sentenced her to one year of probation so that she could remain at home caring for her children and her husband. The Immigration Service ignored these compelling humanitarian considerations. In February 2000 Claudette was arrested by INS officials and for the next seven months she was imprisoned in the Krome Detention Center in Miami while removal proceedings went on. The Immigration Judge ordered deportation, and on September 6, 2000 she was deported to Haiti. Upon her arrival in Haiti, Claudette was imprisoned in a filthy, overcrowded and unsanitary jail cell. She died in prison four days later. See Mother of Two, Deported to Haiti, Dies in Haitian Jail, HAITI PROGRES, Sept. 27, 2000 [Annex 3]; See also Crossing Continents: Haiti’s Desperate Deportees (BBC Radio programme broadcast January 10, 2002) [Annex 4].

children.<sup>49</sup> The deportation of non-citizen family members is especially devastating for low-income individuals,<sup>50</sup> who lose crucial financial support and who are not able to afford to fly family members to foreign countries to visit their loved ones. In effect, deportation means financial as well as emotional misery: the family member being deported is permanently banished from the United States and will never be able to return. Indeed, it is difficult to exaggerate the trauma and suffering inflicted on the thousands of immigrants and their families by mandatory deportation provisions of IIRIRA.

According to one study done by the Transactional Records Access Clearinghouse (TRAC), from mid-1997 (when IIRIRA took effect) through May 2006 the Immigration

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<sup>49</sup> John Gaul was born in Thailand and spent his first year in an orphanage. He was adopted by a U.S. citizen couple when he was two years old and grew up in the United States. As a teenager he was convicted of writing bad checks and stealing a car. Several years later the Immigration Service, acting pursuant to the mandatory deportation policies of IIRIRA, arrested him and deported him to Thailand. This occurred in spite of the fact that he had not been to Thailand since he was an infant and he had a family in the United States who loved him and was ready to help care for him. John Gaul's family is devastated. See Master, supra note 46.

Joao Herbert was eight years old when he was adopted from an orphanage in Brazil. He grew up in the United States and attended schools in the United States. In 1997, when he was 18 years he was convicted, along with two friends, of selling 7.5 ounces of marijuana to an undercover agent. As a result of the criminal prosecution, he was put on probation and ordered into drug treatment. It was clear that he presented no threat to anyone: after the Immigration Service put him in removal proceedings, the Parole Board in the State of Ohio unanimously recommended that he be granted clemency so that he could continue to live with his family in the United States. Nevertheless, his request for humanitarian consideration fell on deaf ears. In 2000, the Immigration Service deported him to Brazil, a country he had not seen since he was eight years old. Joao did not speak the language, he had no family or support network in Brazil, and he struggled to survive in a land he did not understand. On May 25, 2004, his body was found on a street in Brazil. He had been shot and killed. See A Young Man's Homecoming To a Brazil He Does Not Know, WASHINGTON POST, November 29, 2000 [Annex 5]; See also Dead in Brazil: Joao Herbert Should Never Have Been Deported, AKRON BEACON J., May 28, 2004 [Annex 6]; and DRUG WAR CHRONICLE No. 339, available at <http://stopthedrugwar.org/chronicle-old/339/full.shtml#joaoherbert>.

<sup>50</sup> In another case, Mr. E- came to the United States in 1969 as an agricultural worker, married a U.S. citizen and had four children, all U.S. citizens by birth. After his wife left him, he had to care for the four children by himself. Desperate for income, he agreed to transport marijuana for a friend from Texas to Florida. He was caught and subsequently, in April 1998, he was convicted of possession of less than one kilogram of marijuana. In August 1998, after serving a short sentence, Mr. E- was turned over to INS custody for deportation. He was held in detention in Oakdale, Louisiana, and in December 1998 was deported from the United States. Mr. E-'s children have been left to fend for themselves, without the support of either parent. The oldest daughter had to quit high school and began to work to support the family. The second daughter graduated from high school, but has had to drop out of technical school in order to care for the two younger children. See CATHOLIC LEGAL IMMIGRATION NETWORK, INC., PLACING IMMIGRANTS AT RISK: THE IMPACT OF OUR LAWS AND POLICIES ON AMERICAN FAMILIES (2000) [Annex 7].

Service brought removal proceedings against 156,713 individuals who were charged with the aggravated felony ground of deportation.<sup>51</sup> For the most part, these deportation proceedings are being brought against long term residents of the United States. On average, the persons subject to deportation have been living in the United States for more than 15 years, and in over 18,000 cases the person being deported had lived in the United States for more than 25 years. Although the most common country of deportation is Mexico, people who have been classified as “aggravated felons” are being deported all over the world.<sup>52</sup> These people are from all walks of life: persons who came to the United States as infants and were adopted by U.S. citizen parents; persons who came to the United States as refugees; persons who immigrated to the United States through family relationships; and persons who have been granted permanent resident status because their work is needed in the United States. In all of these scenarios, long term permanent residents – individuals who have overcome their past and can show rehabilitation, individuals who are working hard to support their families – are being arrested, sent to remote prisons, and banished from the United States. One thing is certain: current deportation policies inflict excruciating pain and suffering on the families who live under the regime. In the words of one child: “I know that I would fall apart. . . . How can I have a future without my father?”<sup>53</sup> A young man who was deported at 22 years of age described how he was torn apart from his family: “I barely had time to give them a hug before I left. It hurt, it hurt, it hurt.”<sup>54</sup>

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<sup>51</sup> TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE IMMIGRATION REPORT, HOW OFTEN IS THE AGGRAVATED FELONY STATUTE USED? (2006) [Annex 8].

<sup>52</sup> Id.

<sup>53</sup> Immigration Lawmakers Try to Amend Law Regarding Criminals that Critics Say Is Too Harsh, ORANGE COUNTY REG., Sept. 3, 1999.

<sup>54</sup> A Young Man’s Homecoming To a Brazil He Does Not Know, supra note 45.

#### IV. SPECIFIC FACTS

##### A. Individual Petitioner, Wayne Smith

Mr. Wayne Smith first entered the United States from Trinidad in 1967 as a ten-year old dependent of a diplomatic visa holder.<sup>55</sup> His parents separated a few years after coming to the United States, and Mr. Smith stayed with his mother. He obtained permanent resident status in 1974.<sup>56</sup> Mr. Smith's mother had to work multiple jobs, and he, to his great regret, fell in with the wrong crowd and began using drugs. On February 22, 1990, Mr. Smith was convicted of possession of cocaine and attempted distribution of cocaine.<sup>57</sup> He pleaded guilty to the charges and served three years in state prison, after which he was paroled and released from detention due to his good behavior and demonstrated rehabilitation from his drug addiction.

While in prison, Mr. Smith completed a Narcotics Anonymous program. He also attended classes through the University of the District of Columbia and became a coordinator of the Christian Services at the chapel of the Lorton Reformatory where he was incarcerated. Mr. Smith grew to understand that both his family and community needed him and that he had a responsibility to make sure that his children had a strong father figure who would work to make sure that they did not stray down the wrong path as he had.

After his release, Mr. Smith became very involved in his community. He continued to volunteer with the prison ministry and obtained a scholarship from Action to

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<sup>55</sup> Smith v. Ashcroft, 295 F.3d 425, 427 (4th Cir.(Md.)(2002).

<sup>56</sup> Id.

<sup>57</sup> Order to Show Cause and Notice of Hearing, March 14, 1996 [Annex 16].

Rehabilitate Community Housing to continue his studies at the University of the District of Columbia. He volunteered in drug counseling and various other community outreach programs such as the Community for Creative Non-Violence, an outreach program for the homeless. His bi-monthly drug screenings were always negative, and he met regularly with his parole officer. Along with his wife, Ann Smith, Mr. Smith started “H & S New Construction Cleaning,” a small business which provided jobs to over fifteen individuals, most of whom were recovering addicts. He also purchased a house for his family and paid taxes on all of his earnings.

Mr. Smith became the pillar of his family.<sup>58</sup> His wife, children, and much of his extended family depended on him for moral and material support.<sup>59</sup> He was a role model to young people, whom he encouraged to continue their education.<sup>60</sup> His community looked up to him and learned from him.

### **1. Mr. Smith’s Deportation Proceedings**

On March 14, 1996, prior to the enactment of the IIRIRA and the AEDPA, the Immigration and Naturalization Service<sup>61</sup> initiated deportation proceedings against Mr. Smith.<sup>62</sup> On March 11, 1997, Mr. Smith appeared before an immigration judge and

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<sup>58</sup> Declaration of Portia Morris, November 12, 2006, ¶¶ 2 and 7 [Annex 17].

<sup>59</sup> *Id.* ¶ 2; Declaration of Marlene Smith, November 11, 2006, ¶¶ 4-7 [Annex 18]; Declaration of Ann Smith, November 11, 2006, ¶¶ 2 and 6 [Annex 19].

<sup>60</sup> Declaration of Ann Smith, *supra* note 59, ¶ 8.

<sup>61</sup> On November 25, 2002, the United States Congress created a new agency, the Department of Homeland Security, which took over the responsibility for implementing and enforcing U.S. immigration laws. The Immigration and Naturalization Service ceased to exist in March 2003, and the DHS took over the responsibilities previously tasked to the INS.

<sup>62</sup> *Smith*, 295 F.3d at 427.

requested the Section 212(c) humanitarian waiver of deportation.<sup>63</sup> The immigration judge held that Mr. Smith was not eligible for a humanitarian waiver because the AEDPA had abolished the availability of a humanitarian waiver for non-citizens convicted of an aggravated felony and thereby ordered his deportation to Trinidad.<sup>64</sup>

On August 24, 1998, Mr. Smith appealed the denial of an application for a humanitarian waiver to the Board of Immigration Appeals.<sup>65</sup> The Board of Immigration Appeals dismissed the case on the theory that Mr. Smith was “statutorily ineligible” for relief under the AEDPA and also held that the court had no jurisdiction to rule on the constitutionality of Congressional acts.<sup>66</sup> Mr. Smith was then taken into immigration detention pending his deportation.

On November 9, 1998, Mr. Smith filed a petition for habeas corpus in the U.S. District Court for the District of Maryland arguing that his deportation under the IIRIRA and the AEDPA would violate the U.S. Constitution because he would be separated from his family without being given an opportunity to apply for a humanitarian waiver of deportation.<sup>67</sup> On November 10, 1998, the District Court transferred the case to the U.S. Court of Appeals for the 4th Circuit on the ground that it lacked jurisdiction to hear habeas petitions in deportation proceedings.<sup>68</sup>

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<sup>63</sup> Order of United States Department of Justice Executive Office for Immigration Review, March 11, 1997 [Annex 20].

<sup>64</sup> Id.

<sup>65</sup> Decision of the Board of Immigration Appeals, August 24, 1998 [Annex 21].

<sup>66</sup> Id.

<sup>67</sup> Order of Transfer to Cure Want of Jurisdiction, November 10, 1998 [Annex 22]; see also Smith, 295 F.3d at 427.

<sup>68</sup> Id.

On November 25, 1998, the Court of Appeals dismissed Mr. Smith's habeas petition and denied his motion for a stay of deportation.<sup>69</sup> Mr. Smith was deported to Trinidad on December 7, 1998.

On January 1999, Mr. Smith panicked because of the precarious situation in which his family was forced to live and reentered the United States through Detroit by presenting his driver's license and joined his family in Maryland where he continued to care for his ailing wife and resumed their family business.<sup>70</sup> On March 15, 2001, Mr. Smith was stopped for a routine traffic violation while taking his employees to a worksite. He was then turned over to the Immigration and Naturalization Service ("INS") and held in jail without bond. On March 16, 2001, the INS reinstated the deportation order without affording him the opportunity for a hearing before an immigration judge.<sup>71</sup>

On July 9, 2001, Mr. Smith filed a habeas petition<sup>72</sup> in the United States District Court for the District of Maryland arguing that his previous deportation order in 1998 and the denial of an application for a humanitarian waiver violated his right to due process under the United States Constitution. On July 31, 2001, the District Court dismissed the petition without elaboration but granted a sixty-day stay of deportation.<sup>73</sup>

On October 3, 2001, in the U.S. Court of Appeals for the 4th Circuit, Mr. Smith filed a

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<sup>69</sup> Order of the United States Court of Appeals for the Fourth Circuit, November 25, 1998 [Annex 23].

<sup>70</sup> Smith, 295 F.3d at 427.

<sup>71</sup> Notice of Intent/Decision to Reinstate Prior Order, March 16, 2001 [Annex 24].

<sup>72</sup> Smith, 295 F.3d at 427.

<sup>73</sup> Order of United States District Court for the District of Maryland, July 31, 2001 [Annex 25].

motion for a stay of deportation, which the court denied.<sup>74</sup> He then appealed the denial of his habeas petition to the same Court of Appeals.<sup>75</sup> On July 1, 2002, the Court of Appeals affirmed the dismissal of the habeas petition and the order of deportation.<sup>76</sup> Mr. Smith was deported to Trinidad on December 13, 2001.

## **2. The Effects of Mr. Smith's Deportation on his Family**

The deportation of Mr. Smith has adversely affected all members of his family. With his deportation, Mr. Smith left behind in the United States a young business enterprise, an ailing wife and two-year old daughter of two, his older children, and other extended family members who depended on him for material and moral support.

As a result of her husband's deportation, Mrs. Smith lost her health insurance.<sup>77</sup> She had overcome breast cancer with chemotherapy and needs periodical examinations to ensure that the cancer is not returning.<sup>78</sup> More importantly, she was prescribed and started aggressive regional radiation therapy as an attempt to cure her breast cancer.<sup>79</sup> Without the help and support of her husband and lacking health insurance, Mrs. Smith has not attended therapy sessions regularly and risks a devastating impact on her health. For the same reasons, she sometimes has been unable to take their young daughter to the doctor.<sup>80</sup> Without Mr. Smith's financial support, Mrs. Smith has fallen behind in rent

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<sup>74</sup> Smith, 295 F.3d at 428.

<sup>75</sup> Id.

<sup>76</sup> Id. at 431.

<sup>77</sup> Declaration of Ann Smith, supra note 59, ¶ 2.

<sup>78</sup> Id.

<sup>79</sup> Id.

<sup>80</sup> Id. ¶ 4.

payments and other utility bills and is under the constant threat of cut-off notices.<sup>81</sup> She must rely on the aid of family members who are themselves struggling financially.<sup>82</sup>

Mr. Smith's young daughter is growing up without her father and cries whenever she speaks with him on the phone.<sup>83</sup> She walks around the house holding his picture and calling his name.<sup>84</sup> She also calls her uncles by her father's name—Wayne—in an attempt to fill the void left by her father's deportation.<sup>85</sup>

Mr. Smith's mother, Marlene Smith, is close to retiring but continues to help her son and his family financially.<sup>86</sup> She misses her son, who used to be a main support for her both emotionally and materially.<sup>87</sup>

Since Mr. Smith's deportation, his older children, Lathea Stevenson and Nikya Stevenson, worry about something happening to their father in Trinidad where he has no one to support him.<sup>88</sup> Lathea's children miss their grandfather and are always asking whether he is coming back.<sup>89</sup> Mr. Smith was of great help to his two older daughters in raising their children; his absence has made things more difficult for them.<sup>90</sup>

Mr. Smith's deportation has affected other extended family members like his aunts

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<sup>81</sup> Id. ¶ 7.

<sup>82</sup> Id.

<sup>83</sup> Id. ¶ 5.

<sup>84</sup> Declaration of Marlene Smith, supra note 59, ¶ 5.

<sup>85</sup> Declaration of Ann Smith, supra note 59, ¶ 5.

<sup>86</sup> Declaration of Marlene Smith, supra note 59, ¶ 2.

<sup>87</sup> Declaration of Marlene Smith, supra note 59, ¶¶ 2 and 4.

<sup>88</sup> Id. ¶ 6.

<sup>89</sup> Id.

<sup>90</sup> Id.

Marva Telemaque and Portia Morris. As a single mother, Ms. Telemaque depended on Mr. Smith for many things, including rides to the grocery store and doctors appointments.<sup>91</sup> Mr. Smith also generously played the role of father figure for Ms. Telemaque's son, whom Mr. Smith provided guidance and leadership.<sup>92</sup> Ms. Telemaque tries her best to help her nephew by regularly sending him, even though she is herself struggling to make ends meet and has lost her house.<sup>93</sup> Likewise, Mrs. Morris also sacrifices to help her nephew by sending him money.<sup>94</sup> She is also financially supporting Mrs. Smith and their daughter.<sup>95</sup>

**B. Individual Petitioner, Hugo Armendariz**

Hugo Armendariz is a 37-year old native and citizen of Mexico. He first entered the United States in June 1972,<sup>96</sup> at age two, and became a lawful permanent resident of the United States six years later, in 1978,<sup>97</sup> at age eight. He lived in the United States until March 2006, when he was deported to Mexico

Mr. Armendariz has a 17-year old U.S. citizen daughter, who is living in San Diego, California. He is married to a U.S. citizen and has a 5-year old U.S. citizen stepdaughter. He has a brother and two sisters, also U.S. citizens. His mother is a U.S. citizen and his father is a permanent resident of the United States.

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<sup>91</sup> Id. ¶ 7.

<sup>92</sup> Id.

<sup>93</sup> Id.

<sup>94</sup> Declaration of Portia Morris, supra note 58, ¶ 3.

<sup>95</sup> Declaration of Ann Smith, supra note 59, ¶ 7.

<sup>96</sup> Armendariz-Montoya v. Sonchik, 291 F.3d 1116, 1118 (9th Cir. 2002).

<sup>97</sup> Id.

Mr. Armendariz was convicted by jury trial on September 15, 1995 of possession of cocaine for sale, possession of drug paraphernalia, and hindering prosecution.<sup>98</sup> He was sentenced to serve five years and eight months. The sentencing court specifically noted “the defendant’s potential for rehabilitation, based on his age and employment and letters received on the defendant’s behalf.”<sup>99</sup> Mr. Armendariz served his sentence at a minimum security work camp in Picacho, Arizona, from September 15, 1995, to September 6, 1999.

### **1. Mr. Armendariz’ Deportation Proceedings**

On or about April 5, 1996, while Mr. Armendariz was still serving time at the minimum security work camp in Picacho, the INS issued an Order to Show Cause alleging that Mr. Armendariz was deportable from the United States as a person convicted of an aggravated felony.<sup>100</sup> At the time of his conviction, and at the time the Order to Show Cause was issued, Mr. Armendariz was eligible for the Section 212(c) waiver of deportation. At his deportation hearing, he requested an opportunity to pursue a waiver application.<sup>101</sup> However, in April 1997, by the time the Immigration Judge considered his case, the AEDPA and the IIRIRA had taken effect.<sup>102</sup> On those grounds, the Immigration Judge held that the 212(c) waiver was no longer available for Mr. Armendariz,<sup>103</sup> and on April 16, 1997, having refused to consider the waiver application, the Immigration Judge ordered Mr. Armendariz’ deportation to Mexico.<sup>104</sup>

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<sup>98</sup> Sentence of Imprisonment, September 15, 1995, 3-5 [Annex 26].

<sup>99</sup> Id.

<sup>100</sup> Order to Show Cause and Notice of Hearing, April 5, 1996 [Annex 27].

<sup>101</sup> Armendariz-Montoya, 291 F.3d at 1118.

<sup>102</sup> Id.

<sup>103</sup> Id.

<sup>104</sup> Order of the Immigration Judge, April 16, 1997 [Annex 28].

Mr. Armendariz filed an appeal from the Immigration Judge's decision to the Board of Immigration Appeals.<sup>105</sup> On October 23, 1997, the Board of Immigration Appeals dismissed the appeal and affirmed the Immigration Judge's decision.<sup>106</sup> As a result, Mr. Armendariz was ordered to be deported to Mexico without any consideration of his family ties, his rehabilitation, or any other social and humanitarian considerations.

After the Board of Immigration Appeals issued its decision, Mr. Armendariz filed a Petition for Review with the Ninth Circuit Court of Appeals, arguing, *inter alia*, that his deportation from the United States without an opportunity to apply for the Section 212(c) waiver would constitute a violation of the statute and the Due Process Clause of the United States Constitution.<sup>107</sup> While this appeal was pending, on September 6, 1999, Mr. Armendariz completed serving his sentence at Picacho. However, he was not released from custody, but was instead transferred to INS for further detention. The INS continued to detain Mr. Armendariz for almost one year, even though he was clearly not a danger to the community or a flight risk.

On February 29, 2000, the Ninth Circuit Court of Appeals dismissed Mr. Armendariz's petition for lack of jurisdiction.<sup>108</sup> Mr. Armendariz then filed a habeas corpus petition in

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<sup>105</sup> Armendariz-Montoya, 291 F.3d at 1118.

<sup>106</sup> Order of the Board of Immigration Appeals, October 23, 1997 [Annex 29].

<sup>107</sup> Armendariz-Montoya v. INS, No. 97-71305 (9th Cir. Feb. 29, 2000).

<sup>108</sup> Order of the United States Court of Appeals for the Ninth Circuit, February 29, 2000 [Annex 30]. (Relying on §309(c)(4)(G) of IIRIRA, a provision that, like INA §242(a)(2)(C), 8 U.S.C. §1252(a)(2)(C), strips the federal courts of appeals of jurisdiction in cases in which the non-citizen is deportable because of a criminal offense. Section 309(c)(4)(G) of IIRIRA was a "transitional provision", in effect for a short period of time before the "permanent provision", INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) came into effect. Both IIRIRA § 309(c)(4)(G) and INA § 242(a)(2)(C) prohibit the federal courts of appeals from

the federal District Court for Arizona, arguing that deportation without an opportunity to apply for the 212(c) waiver would violate the statute and his rights under the Equal Protection Clause of the United States Constitution.<sup>109</sup> The District Court agreed with Mr. Armendariz, finding that because the deportation proceedings against Mr. Armendariz had commenced prior to the enactment of AEDPA and IIRIRA, those amendments did not apply to him and he was therefore eligible to apply for the 212(c) waiver.<sup>110</sup> However, the government appealed this decision to the Ninth Circuit Court of Appeals.<sup>111</sup>

The Ninth Circuit Court of Appeals issued its decision in Mr. Armendariz' case on May 30, 2002. The Ninth Circuit reversed the District Court's decision and held that Mr. Armendariz was not eligible for a 212(c) waiver. According to the Ninth Circuit, the amendments made by AEDPA and IIRIRA applied retroactively to Mr. Armendariz, and he was therefore subject to mandatory deportation without the possibility of a 212(c) waiver because he did not plead guilty but, rather, was convicted after a jury trial.<sup>112</sup> The court also rejected Mr. Armendariz' constitutional arguments against retroactivity.<sup>113</sup>

Mr. Armendariz filed a petition for certiorari to the United States Supreme Court seeking review of the Ninth Circuit's decision. On June 2, 2003, the Supreme Court denied the

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reviewing a deportation case where the non-citizen has been found deportable on the basis of certain criminal offenses, including an aggravated felony.)

<sup>109</sup> Armendariz-Montoya, 291 F.3d at 1119.

<sup>110</sup> Id.

<sup>111</sup> It should be noted that, on August 28, 2000, INS released Mr. Armendariz from custody pending a decision from the Ninth Circuit Court of Appeals.

<sup>112</sup> Id. at 1121-22.

<sup>113</sup> Id. at 1121.

petition for certiorari.<sup>114</sup>

After Mr. Armendariz was released from detention in August 2000, he took steps to prove rehabilitation. At first he lived with his parents, found employment, and helped to support his family. While he was in prison, Mr. Armendariz' daughter, Cassandra, and her mother moved to San Diego, and Cassandra's mother re-married. After Mr. Armendariz was released from INS detention and found employment, he began making child support payments to help support Cassandra.

Mr. Armendariz met Natalie Porter in 1994. After he was released from detention in August 2000, their relationship developed and they fell in love and began making plans to marry. In May 2004, Mr. Armendariz and Natalie bought a house together in Tucson, Arizona, and they moved in together with Natalie's daughter, Destry. Mr. Armendariz worked hard to help support his fiancé and step-daughter. During all this time Mr. Armendariz lived in the United States as a productive and law-abiding citizen. He ran a successful business; he paid taxes; he paid child support for his U.S. citizen daughter and helped support his stepdaughter Destry. He spent time with his parents and brothers and sisters. He committed no further violation of any U.S. law. He did everything possible to establish that he is a better person and able to live lawfully and successfully in the United States with his family.

If any immigration official had taken the time to look at the facts and circumstances of his case, it would have been clear that a humanitarian 212(c) waiver should be granted in

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<sup>114</sup> Order of the Supreme Court of the United States, Office of the Clerk, June 2, 2003 [Annex 31].

his case. Nevertheless, Mr. Armendariz was given no opportunity under U.S. law to pursue a humanitarian waiver of deportability. He was deported from the United States on March 16, 2005, without consideration of any of the compelling humanitarian equities in his favor, without consideration of whether deportation was proportional to the offense for which he had been convicted ten years earlier and without consideration of the rights of his family to live and prosper together.

## **2. The Effects of Mr. Armendariz' Deportation on His Family**

The deportation of Mr. Armendariz from the United States was brutally inhumane, considering both the way U.S. authorities treated him and the effect that it had on his family.<sup>115</sup> At the time of his deportation, he had been out of jail and had been working steadily and living lawfully in his community for almost five years. He owned a home; he was helping to support two U.S. citizen children; and he was helping to care for his elderly parents. He and his fiancé were planning for a wedding celebration, to be held on March 19, 2005.

On March 4, 2005, six Immigration and Customs Enforcement (“ICE”) agents swept down on Mr. Amendariz while he was at work and arrested him. He was given no warning. He had no chance whatsoever to prepare for the deportation or make any arrangements to leave his family. ICE agents took him to Davis-Monthan Air Force Base in Tucson, where he was held in a warehouse with about 50 other individuals who were being deported. At the warehouse, there were no beds, no mattresses, no blankets and no

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<sup>115</sup> The information in this section is supported by Declarations from Hugo Armendariz [Annex32], his mother Blanca Armendariz [Annex 33], and his sister Norma Ballesteros [Annex 34].

food for the detainees. The warehouse was filthy; no cleaning had been done; and dirty toilet paper was strewn about the floor. The detainees were crowded together in the detention facility for two days and then late at night dumped in Mexico.

During the two days after ICE agents arrested Mr. Armendariz and while he was held in detention, he had no opportunity whatsoever to make any telephone calls. He was not able to call his family or his lawyer. As far as his family knew, he had simply disappeared.

ICE agents dumped Mr. Armendariz in Nogales, Mexico, about 2:00 at night. When Mr. Armendariz arrived in Mexico he had nothing but the clothes on his back and about fifty cents in his pocket. He had no food, no baggage, and no way to survive – not even a jacket to protect against the cold. All ICE gave him was a notice stating that he had been deported and that he was never allowed to return to the United States.

For the first three months after his deportation, Mr. Armendariz struggled to survive in Nogales. Unable to read or write Spanish, he could not find employment; he had no income to support himself. He was able to survive only because his fiancé sent money to him for his food and shelter.

Mr. Armendariz and Natalie were married in Mexico on October 8, 2006. After the wedding Natalie and Destry moved to Mexico to live with Mr. Armendariz. They have now settled in Mexico. Mr. Armendariz has found employment and he works to support

his wife and stepdaughter.

Mr. Armendariz is not allowed to cross the border to visit his parents. Due to health problems, his parents rarely travel, they are able to see their son only infrequently. His mother's heart is broken, her family incomplete, and she suffers the sadness of having lost a son. The family relationship has been effectively destroyed, and the entire family grieves deeply because of the loss.

#### **V. PROCEEDINGS BEFORE THE INTER-AMERICAN COMMISSION**

The Inter-American Commission received a petition on behalf of Wayne Smith on December 27, 2002.<sup>116</sup> On December 23, 2003, the State responded to the petition, and on March 22, 2004, the Petitioners delivered a reply to the State's response. After several grants of extensions of time by the Commission, the State delivered its additional response on February 24, 2005.

The Commission received a petition on behalf of Hugo Armendariz on July 17, 2003.<sup>117</sup> This petition included a request for precautionary measures pursuant to Article 25 of the Rules of Procedure; that is, a recommendation that the State refrain from taking steps to deport Mr. Armendariz in light of the coincident hardships the deportation would exact on the Armendariz family. On August 18, 2003, the Commission declined to authorize any precautionary measures. On receiving the State's response to the petition, the Petitioners requested extended time to reply to the State's observations. The Commission

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<sup>116</sup> Petition on behalf of Wayne Smith to the Inter-Am. C.H.R., No. 08-03, December 27, 2003.

<sup>117</sup> Petition on behalf of Hugo Armendariz to the Inter-Am. C.H.R., No. 526-03, July 14, 2003.

granted a 45-day extension on February 4, 2004. Accordingly, the Petitioners submitted a final response on March 19, 2004.

The Petitioners brought the following claims on Mr. Smith's behalf: (i) that Mr. Smith had exhausted domestic remedies or, alternatively, was excused from the exhaustion requirement; (ii) that the State, in its removal of Mr. Smith according to proceedings under the IIRIRA, has violated Mr. Smith's right to life, liberty and security of the person, his right to protection against abusive attacks on family life, his right to establish a family life, the right to protection for mothers and children, the right to inviolability of the home, the right to resort to courts, and the prohibition against cruel, infamous or unusual punishment, enshrined in Articles I, V, VI, VII, IX, XVII, and XXVI of the American Declaration.<sup>118</sup> In its response, the State asserted that the Petitioners' claims were inadmissible on the following grounds: (i) that the American Declaration does not create legally binding obligations on the State; (ii) that the Petitioners have failed to meet the requirement of exhaustion of domestic remedies; (iii) and that, in any event, the petition does not state facts that would amount to a violation of the Declaration.<sup>119</sup>

On behalf of Mr. Armendariz, the Petitioners claimed that the State, with respect to his imminent deportation, had violated the rights of Mr. Armendariz and his family under the following articles of the American Declaration: I, V, VI, VII, IX, XVII, and XXVI.<sup>120</sup> In reply, the State argued for inadmissibility on the following grounds: (i) that the Declaration does not create legally binding obligations on the State; (ii) that the case is

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<sup>118</sup> Petition 08-03, supra note 115.

<sup>119</sup> Id.

<sup>120</sup> Petition 526-03, supra note 116.

moot in view of the fact of Mr. Armendariz deportation; (iii) that even if a state could violate the Declaration, the petition had not stated facts that would amount to a violation; (iv) that there is no basis under the Declaration or international law for the Petitioner's argument that immigration enforcement should be nullified by the impact on families; and (v) that the Petitioners lack standing in as far as the petition challenges state laws fully consistent with the Declaration rather than bringing forth an individual human rights claim.<sup>121</sup>

The Commission declared Wayne Smith's and Hugo Armendariz' cases admissible on July 20, 2006 with respect to Articles V, VI, VII, XVIII, and XXVI of the American Declaration and consolidated them.<sup>122</sup>

The Petitioners requested a 30-day extension to file their final merits brief on October 20, 2006 and the Commission awarded the extension on November 13, 2006.

## **VI. VIOLATIONS OF THE AMERICAN DECLARATION**

### **A. The Mandatory Deportation of Mr. Smith and Mr. Armendariz under the Provisions of the AEDPA and the IIRIRA Violated Their Rights to a Fair Trial (Article XVIII) and Due Process of Law (Article XXVI).**

Article XVIII of the American Declaration states:

Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

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<sup>121</sup> Response of the Government of the United States of America to the July 24, 2004 Petition to the Inter-Am. C.H.R., p 1.

<sup>122</sup> Inter-Am. C.H.R., Wayne Smith v. United States, Admissibility Report, July 20, 2006, No. 56/06, ¶ 54.

Additionally, Article XXVI of the American Declaration states in its relevant part:

Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

The inter-American human rights bodies have gone to great lengths to develop the rights to a fair trial and due process enshrined in Articles XVIII and XXVI of the American Declaration. The Commission, for its part, has held that the right to resort to the courts set forth in Article XVIII implies a “right of access to judicial protection” which requires an available and effective recourse to ensure respect for rights protected under international or domestic law.<sup>123</sup>

In “interpreting and applying the Declaration,” and its individual protections like those enshrined in Articles XVIII and XXVI, the Commission has reiterated on numerous occasions that “it is necessary to consider its provisions in light of developments in the field of international human rights law since the Declaration was first composed.”<sup>124</sup>

Following this reasoning, the Commission has found that the American Convention on

<sup>123</sup> Inter-Am. C.H.R., Report on the Situation of Human Rights of Asylum Seeker within the Canadian Refugee Determination System, OEA/Ser.L/V/II.106, Feb. 28, 2000, ¶ 95; see generally, IACHR, Resolutions N° 3/84, 4/84 and 5/85, Cases N° 4563, 7848 and 8027, Paraguay, published in Annual Report of the IACHR 1983-84, OEA/Ser.L/V/II.63, doc. 10, Sept. 24, 1984, at pp. 57, 62, 67 (addressing lack of access to judicial protection in proceedings involving expulsion of nationals; linking right to freely enter and remain in one’s own country under Article VIII of the Declaration to the rights to a fair trial and due process under Articles XVIII and XXVI). See also, Case 11.436, Report N° 47/96, Cuba, in Annual Report of the IACHR 1996, OEA/Ser.L/V/ II.95, Doc. 7 rev., March 14, 1997, ¶ 91 (citing Annual Report of the IACHR 1994, “Cuba,” at p. 162, and addressing failure of State to observe freedom of movement of nationals under Article II via denial of exit permits from which no appeal is allowed).

<sup>124</sup> Inter-Am. Ct. H.R., Solidarity Statehood Committee v. United States, Case 11.204, Report N° 98/03, Dec. 29, 2003, ¶ 87, note 79. See, e.g., Inter-Am. Ct. H.R., Juan Raul Garza v. United States, Case 12.243, Annual Report of the IACHR 2000, ¶¶ 88, 89 (citing Inter-Am Ct. H.R., Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89 of July 14, 1989, Inter-Am. Ct. H. R. (Ser. A) N° 10 (1989), para. 37. See also IACHR, 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. (February 28, 2000), para. 38 (confirming that while the Commission clearly does not apply the American Convention in relation to member states that have yet to ratify that treaty, its provisions may well be relevant in informing an interpretation of the principles of the Declaration).

Human Rights (“American Convention” or “Convention”) “may be considered to represent an authoritative expression of the fundamental principles set forth in the American Declaration.”<sup>125</sup> This is particularly relevant in the case at bar in as much as the Inter-American Court of Human Rights (“Inter-American Court” or “Court”) has gone to great lengths to expound on the rights to judicial protection and the due process of law enshrined in Articles 8 and 25 of the American Convention respectively.<sup>126</sup> The Court has reiterated on numerous occasions that these rights constitute one of the basic pillars of the rule of law in a democratic society,<sup>127</sup> and that:

States have the responsibility to embody in their legislation, and ensure proper application of, effective remedies and guarantees of due process of law before the competent authorities, which protect all persons subject to their jurisdiction from acts that violate their fundamental rights or that lead to the determination of the latter’s rights and obligations.<sup>128</sup>

The Court has established that “[t]he inexistence of an effective recourse against the violation of the rights recognized by the Convention constitutes a transgression” by the State. The Court has further emphasized that in order to be truly effective, a recourse must both “be truly appropriate to establish whether there has been a violation of human

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<sup>125</sup> Id.

<sup>126</sup> Here, it is important to note that Articles XVIII and XXVI of the Declaration are analogous to Articles 8 and 25 of the Convention and the jurisprudence under the latter is an expression of the rights protected by the former. Supra note [?]

<sup>127</sup> Inter-Am. Ct. H.R., Ivcher-Bronstein case, Judgment of September 24, 1999, Series C No. 54, ¶ 135; cf. Constitutional Court case, Judgment of September 24, 1999, Series C No. 55, ¶ 90; Bámaca Velásquez case, Judgment of November 25, 2000, Series C No. 70, ¶ 191; Cantoral Benavides case, Judgment of August 18, 2000, Series C No. 69, ¶ 163; Durand and Ugarte case, Judgment of August 16, 2000, Series C No. 68, ¶ 101; Villagrán Morales et al. (the “Street Children” case), Judgment of November 19, 1999, Series C No. 63, ¶ 234; Cesti Hurtado case, Preliminary Objections, Judgment of January 26, 1999, Series C No. 49, ¶ 121; Castillo Petruzzi et al. case, Judgment of September 4, 1998, Series C No. 41, ¶ 184; Paniagua Morales et al. case, Judgment of March 8, 1998, Series D No. 37, ¶ 164; Blake case, Judgment of January 24, 1998, Series C No. 36, ¶ 102; Suárez Rosero case, Judgment of November 12, 1997, Series C No. 35, ¶ 65; and Castillo Páez case, Judgment of November 3, 1997, Series C No. 34, ¶¶ 82 and 83.

<sup>128</sup> Inter-Am. Ct. H.R., Herrera-Ulloa case, Judgment of July 2, 2004, Series C No. 107, ¶ 145; cf. Case of Baena-Ricardo et al., Judgment of November 28, 2003, Series C No. 104, ¶ 79; Case of Cantos, Judgment of November 28, 2002, Series C No. 97, ¶ 59; and Case of Mayagna (Sumo) Awas Tingni Community, Judgment of August 31, 2001, Series C No. 79, ¶ 135.

rights and [] provide everything necessary to remedy it.” Finally, the Court has held that “[t]hose recourses that are illusory, owing to the general conditions in the country or to the particular circumstances of a specific case, shall not be considered effective.”<sup>129</sup>

While the majority of the jurisprudence articulating these fundamental rights refers to the penal context, the Inter-American Court has clearly established that due legal process refers to all procedures in which an individual must protect his or her rights vis-à-vis any act of the State.<sup>130</sup> “That is to say, due process of law must be respected in any act or omission on the part of the State bodies in a proceeding, whether of an administrative, punitive or jurisdictional nature.”<sup>131</sup> In essence, “[i]t is a human right to obtain all the guarantees which make it possible to arrive at fair decisions.”<sup>132</sup>

In assessing the nature of due process guarantees in the administrative context, the Court has found that a failure on the part of a State to take this right into consideration could result in the arbitrary denial of other rights,<sup>133</sup> and that those judicial decisions that affect human rights that are not well reasoned and explained are in turn arbitrary.<sup>134</sup>

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<sup>129</sup> Inter-Am. Ct. H.R., Ivcher-Bronstein, *supra* note 116, ¶ 136; cf. Constitutional Court case, *supra* note 116, ¶ 89; and Judicial Guarantees in States of Emergency (Articles 27(2), 25 and 8, American Convention on Human Rights), Advisory Opinion OC-8/87 of Jan. 30, 1987, Series A No. 8, ¶ 23.

<sup>130</sup> Inter-Am. Ct. H.R., Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03 of Sept. 17, 2003, Series A No. 18, ¶ 123; Baena Ricardo et al. case, Judgment of November 18, 1999, Series C No. 61, ¶ 124; and cf. Ivcher Bronstein, *supra* note 116, ¶ 102; Constitutional Court case, *supra* note 116, ¶ 69; and Judicial Guarantees in States of Emergency, *supra* note 118, ¶ 27.

<sup>131</sup> Juridical Condition and Rights of the Undocumented Migrants, *supra* note 119.

<sup>132</sup> Id. ¶ 123; cf. Baena Ricardo et al., *supra* note 119, ¶ 127.

<sup>133</sup> Inter-Am. Ct. H.R., Case of Claude Reyes et al., Judgment of September 19, 2006, Series C No. 151, ¶ 119; cf. Yatama v. Nicaragua, Judgment of June 23, 2005, Series C No. 127, ¶ 149; Ivcher-Bronstein, *supra* note 116, ¶ 105; and Baena Ricardo et al., *supra* note 119, ¶ 124.

<sup>134</sup> Case of Claude Reyes, *supra* note 122, ¶ 120; cf. Palamara-Iribarne v. Chile, Judgment of November 22, 2005, Series C No. 135, ¶ 216; and Yatama, *supra* note 122, ¶ 152. See also García Ruiz v. Spain [GC], no. 30544/96, § 26, ECHR 1999-I; and Eur. Ct. H.R., Case of H. v. Belgium, Judgment of November 30, 1987, Series A No. 127-B, ¶ 53.

The inter-American human rights bodies have applied the notion of administrative due process squarely to the case of migrants and in its evaluations of immigration policies and practices. Indeed, the Inter-American Court has held that “due process of law should be recognized within the framework of the minimum guarantees that should be provided to all migrants, irrespective of their migratory status.”<sup>135</sup> The Inter-American Court has further established that States must guarantee that access to justice for migrants is genuine, and not merely formal, and that they must consider the risk run by migrants in administrative and judicial systems in which they are not guaranteed the right to counsel, and take the necessary steps to protect their fundamental rights.<sup>136</sup>

The Inter-American Commission, for its part, has drawn upon the guarantees in Protocol VII of the European Convention on Human Rights (“European Convention”) that explicitly prohibit arbitrary expulsion. In exploring the standard of arbitrariness established by said Protocol, the Commission has observed that it “stipulates that a foreigner has the right to present arguments against his being expelled, to obtain a revision of his case, and to be represented to that end before the competent authority.”<sup>137</sup>

It is clear from a review of the facts in the case at bar that Mr. Smith and Mr. Armendariz were denied the opportunity to present significant arguments against their expulsion. Indeed, the administrative and judicial tribunals that heard their cases considered the only relevant question to be whether they had committed a crime included in the “aggravated

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<sup>135</sup> Juridical Condition and Rights of the Undocumented Migrants, *supra* note 119, ¶ 121.

<sup>136</sup> Id. ¶ 126.

<sup>137</sup> Inter-Am. C.H.R., Loren Laroye Riebe Star, Jorge Alberto Baron Guttlein and Rodolfo Izal Elorz v. Mexico, Report N° 49/99, Case 11.610, April 13, 1999, ¶ 55.

felony” provision of the INA. They were denied any possibility to present evidence of extenuating circumstances, beyond their mere conviction of those crimes, which would argue for a waiver of their deportation, and it is that denial that violated their rights to a fair trial and due process enshrined in Articles XVIII and XXVI of the American Declaration.

The record clearly shows that while Mr. Smith was permitted a hearing and a variety of administrative and judicial appeals, he was not permitted to present arguments about the violation of his fundamental rights before any of those tribunals. Indeed, on March 11, 1997, Mr. Smith appeared before an immigration judge who found him deportable based solely on his conviction of an “aggravated felony.”<sup>138</sup> On August 24, 1998, the administrative appeals court both affirmed the denial of any relief from deportation, citing AEDPA as the basis for this denial, and held that it could “[n]ot rule on the constitutionality of laws enacted by Congress.”<sup>139</sup> Mr. Smith appealed that decision through a writ of habeas corpus to the Federal District Court, which was the proper court to hear such a challenge, however, on November 9, 1998, that court also found that “its jurisdiction to act [was] lacking and that any constitutional challenge of the sort Mr. Smith attempt[ed] to raise should be heard directly by the Fourth Circuit.”<sup>140</sup> Mr. Smith followed the instructions of the District Court and filed his challenge to his deportation in the United States Court of Appeals of the Fourth Circuit, but that court summarily denied the challenge on November 25, 1998.

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<sup>138</sup> Order to Show Cause, *supra* note 57 (noting grounds for deportability are commission of an aggravated felony as defined by Section 101(a)(43) of the INA), read in conjunction with Decision of the Board of Immigration Appeals, *supra* note 65 (denying request for a 212(c) hearing).

<sup>139</sup> Decision of the Board of Immigration Appeals, *supra* note 65.

<sup>140</sup> Wayne Smith v. Janet Reno, et al., Civil No. PJM 98-3742, District Court of MD, November 18, 1998.

Mr. Smith understood from the beginning of the process that his only chance to defend against his deportation was to present compelling evidence to demonstrate the vigorousness of his private and family life and the interests of his children. He tried to access the only procedural mechanism available at that time to make those arguments, known as the 212(c) waiver. Each tribunal refused to hear his arguments, as it was their understanding that the 1996 reforms abolished any administrative or judicial mechanism for them to consider those rights. Mr. Smith argued insistently that the understanding of those tribunals was incorrect; incidentally, his position that was later upheld by the U.S. Supreme Court in St. Cyr.<sup>141</sup> However, that decision of the highest U.S. court came much too late for Mr. Smith to benefit from the remedy it guaranteed as his deportation had already been carried out. Fortunately for Mr. Smith, the determination of whether the United States violated his rights to a fair trial and due process of law does not depend on the mere existence of a recourse, rather it depends on whether the recourse was effective,<sup>142</sup> and it is clear from the facts of this case that it was not.

While the U.S. Supreme Court's decision in St. Cyr was not handed down in time to save Mr. Smith from his first deportation on December 7, 1999,<sup>143</sup> that ruling should have provided him a remedy when he was faced with deportation a second time. Instead, the United States ignored established U.S. law and deported him again without assuring him an effective recourse to defend his fundamental rights.

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<sup>141</sup> INS v. St. Cyr, 533 U.S. 289 (2001).

<sup>142</sup> Ivcher-Bronstein, supra note 117, ¶ 136; cf. Constitutional Court case, supra note 117, ¶ 89; and Judicial Guarantees in States of Emergency (Articles 27(2), 25 and 8, American Convention on Human Rights), supra note 119, ¶ 23.

<sup>143</sup> Notice of Intent/Decision to Reinstate Prior Order, March 16, 2001[Annex 26].

As was described above, Mr. Smith's frustration with his inability to help his family, which desperately needed him most when he was taken from them, led him to re-enter the United States illegally in January 1999, to aid his ailing wife. After he was captured during a routine traffic stop and his order of deportation was reinstated against him, he filed a habeas petition to vindicate his rights that had previously been denied. When the District Court dismissed the case for lack of jurisdiction, Mr. Smith appealed once again to the Fourth Circuit claiming that his due process rights had been violated under the U.S. Constitution. The Appeals Court disagreed, however, finding that because Mr. "Smith ha[d] no liberty or property interest in a discretionary waiver of deportability, [and] the petition must be denied on the merits."<sup>144</sup>

It is difficult to understand why, after the United States violated Mr. Smith's rights in 1998 and was informed of this by the Supreme Court's decision in St. Cyr in 2001, it would not take the opportunity to correct its mistake. For the purposes of this submission, the relevant fact is that it did not, and the United States therefore violated Mr. Smith's rights to judicial protection and due process of law enshrined in Articles XVIII and XXVI of the American Declaration by arbitrarily deporting him back to Trinidad a second time on December 13, 2001.

Like Mr. Smith, Mr. Armendariz went to great lengths to present his claims pertaining to the potential violation of his fundamental rights during his deportation proceedings, but to no avail. When he was issued his Order to Show Cause, which deemed him

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<sup>144</sup> Smith, *supra* note 54.

deportable, the 1996 laws had not yet been passed.<sup>145</sup> However, by the time he got before an immigration judge in April 1997, the laws had been passed and his arguments for a humanitarian waiver of deportation fell on deaf ears.<sup>146</sup> Like Mr. Smith, Mr. Armendariz expected the confusion to be resolved at the appellate level, but on October 23, 1997, the Board of Immigration Appeals affirmed the immigration judge's decision, finding that AEDPA had abolished any means of arguing a waiver of deportation and that it could "[n]ot rule on the constitutionality of laws enacted by Congress."<sup>147</sup>

Mr. Armendariz continued to appeal this injustice, following the statutorily established avenue for appeal from the immigration courts to the Federal Circuit Court with jurisdiction over the claim. He argued in that appeal that his inability to present evidence that would mitigate against his deportation, which had previously existed in the form of "212(c) relief" was a violation of the Due Process Clause of the United States Constitution. On February 29, 2000, the Ninth Circuit Court of Appeals dismissed Mr. Armendariz' petition, stating that IIRIRA had stripped its jurisdiction to hear claims of that nature.<sup>148</sup> The recourse that was supposed to be available to him to defend his fundamental rights in the deportation proceedings was clearly ineffective in as much as the immigration courts considered themselves incapable of hearing the arguments and the federal courts considered themselves without jurisdiction to hear the appeals.

In the face of this failure in his immigration proceedings, Mr. Armendariz filed a petition

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<sup>145</sup> Order to Show Cause and Notice of Hearing, supra note 100.

<sup>146</sup> Order of the Immigration Judge, supra note 104.

<sup>147</sup> Order of the Board of Immigration Appeals, supra note 106.

<sup>148</sup> Order of the United States Court of Appeals for the Ninth Circuit, supra note 108.

for habeas corpus, the only other available recourse to challenge the legality of his deportation. Unlike Mr. Smith, Mr. Armendariz had exercised his constitutional right to a defense in his criminal proceedings and was not eligible for St. Cyr relief. He based his challenge on the Equal Protection Clause of the U.S. Constitution, and while the District Court decided in his favor, the Ninth Circuit Court of Appeals reversed the lower court's decision<sup>149</sup> and the U.S. Supreme Court denied his request to review the Circuit Court's decision.<sup>150</sup>

This clearly violates the right to “resort to the courts” set forth in Article XVIII of the American Declaration in as much as it fails to “ensure respect for a legal right” through an “available and effective recourse”,<sup>151</sup> and fails to meet “the guarantees of due process of law before the competent authorities, which protect all persons subject to their jurisdiction from acts that violate their fundamental rights,”<sup>152</sup> a right enshrined in Article XXVI of the American Declaration. The unavailability of any recourse for Mr. Armendariz to bring the potential violation of his fundamental rights before a tribunal, administrative or judicial, is therefore a manifest violation of his rights to judicial protection and access to courts enshrined in Articles XVIII and XXVI of the American Declaration.

Both Mr. Smith and Mr. Armendariz suffered these violations in the form of arbitrary

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<sup>149</sup> Armendariz-Montoya, *supra* note 96.

<sup>150</sup> Order of the Supreme Court of the United States, *supra* note 114.

<sup>151</sup> Inter-Am. C.H.R., Report on the Situation of Human Rights of Asylum Seeker within the Canadian Refugee Determination System, *supra* note 115, ¶ 95.

<sup>152</sup> Herrera-Ulloa case, *supra* note 118, ¶ 145; *cf.* Case of Baena-Ricardo et al. *supra* note 118, ¶ 79; Case of Cantos, *supra* note 118, ¶ 59; and Case of Mayagna (Sumo) Awas Tingni Community, *supra* note 118, ¶ 135.

decisions by the United States to deport them without any chance of returning and remaking their life in the only country he knew. As is often the case with the violation of procedural rights, fundamental substantive rights were implicated in the decision of the U.S. government to deport Mr. Smith and Mr. Armendariz. Indeed, the procedural violations committed against Mr. Smith and Mr. Armendariz were compounded by violations of their rights to private and family life and resulted in violations of their family members' fundamental rights as well.

**B. The Mandatory Deportation of Mr. Smith and Mr. Armendariz under the Provisions of the AEDPA and the IIRIRA Violated Their Rights and Their Families' Rights to Protection against Abusive Attacks on Private and Family Life (Article V) and to Establish a Family (Article VI).**

Article V of the American Declaration states:

Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.

Additionally, Article VI of the American Declaration states:

Every person has the right to establish a family, the basic element of society, and to receive protection therefore.

The Inter-American Commission has established that Articles V and VI of the American Declaration, taken together, “prohibit arbitrary or illegal interference with family life” by the State.<sup>153</sup> However, this fundamental right is not absolute. In that vein, the Commission has stated that “interference with family life may only be justified where necessary to meet a pressing need to protect public order, and where the means are

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<sup>153</sup> Inter-Am. C.H.R., Report on the Situation of Human Rights of Asylum Seeker within the Canadian Refugee Determination System, *supra* note 115, ¶ 162.

proportional to that end.”<sup>154</sup>

It is significant that the Commission developed this doctrine of necessity and proportionality in the context of a discussion of human rights obligations that bind a State in its definition of its deportation policies and procedures. While the Commission has recognized the State’s “right and duty to maintain public order through the control of entry, residence and expulsion of removable aliens,” it has also recognized the limits of the exercise of this sovereign right where it may conflict with the State’s human rights obligations enshrined in Articles V and VI of the American Declaration.<sup>155</sup>

To assess the public necessity and proportionality of the interference in family life in the deportation context, the Commission has articulated a balancing test: “the state’s right and duty in maintaining public order” through expulsion of removable non-citizens “must be balanced against the harm that may result to the rights of the individuals concerned in the particular case.”<sup>156</sup>

The Commission has never balanced these interests in the context of a contentious case, which means that the relevant considerations are still unclear in the inter-American context. However, these considerations have been taken up by other international and regional bodies, and the Commission should engage in its long-established practice of looking to other international tribunals for aid in interpreting relevant human rights standards enshrined in the Inter-American instruments.

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<sup>154</sup> Id. ¶ 166.

<sup>155</sup> Id.

<sup>156</sup> Id.

The European Court for Human Rights (“European Court”) has developed the most significant body of jurisprudence on the right to private and family life in the immigration context. While the European Court’s analysis is tailored specifically to the requirements of Article 8 of the European Convention,<sup>157</sup> its extensive efforts to explore the essence of this right should provide guidance for the Inter-American Commission.

The first consideration of the European Court when it evaluates challenges to deportation policies and procedures under Article 8 of the European Convention is whether the nature of the personal or family life alleged by the petitioner warrants protection.<sup>158</sup> With respect to “private life,” the European Court has held that it “encompasses the right for an individual to form and develop relationships with other human beings,”<sup>159</sup> and that this concept should be interpreted broadly.<sup>160</sup> With respect to “family life,” the European Court has taken it to include: “the relationship that arises from a lawful and genuine marriage”<sup>161</sup>; the ties between a parent and his or her child, whether or not the child is legitimate and even where there is no cohabitation<sup>162</sup>; and the ties between near

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<sup>157</sup> Article 8.1 establishes the protection of private and family life, and Article 8.2 creates an exception to this rule.

<sup>158</sup> E.g. Eur. Ct. H.R., Boughanemi v. France, Judgment of April 24, 1996, No. 22070/93, Rep. 1996-II, Fasc. 8., ¶ 32.

<sup>159</sup> Eur. Ct. H.R., Case of C. v. Belgium, Judgment of July, 8, 1996, No. 21794/93, Rep. 1996-III, ¶ 25.

<sup>160</sup> Eur. Ct. H.R., Niemietz v. Germany, Judgement of Dec. 16, 1992, No.13710/88, ¶ 25.

<sup>161</sup> See Eur. Ct. H.R., Abdulaziz, Cabales and Balkandali v. the United Kingdom, Judgment of May 28, 1985, 9214/80;9473/81;9474/81, ¶ 62.

<sup>162</sup> See Eur. Ct. H.R., Boughanemi, *supra* note 153, ¶ 35; see also Eur. Ct. H.R., Gül v. Switzerland, Judgment of Feb.19, 1996, No. 23218/94, Rep. 1996-I, fasc. 3, ¶ 32 (where Court recognized the existence of family life from the visits between petitioner and his eight-year old son whom he had left in Turkey as an infant).

relatives.<sup>163</sup> Findings of private and family life as protected under the European Convention have been supported by the duration of the petitioner's residence in the State, the nature of the petitioner's education or employment within the state, and the existence and nature of the petitioner's family ties in the State.<sup>164</sup> Another relevant consideration of the European Court when analyzing the right enshrined in Article 8.1 of the European Convention is whether obstacles exist to prevent the petitioner from continuing a normal family life elsewhere, including in his or her country of origin.<sup>165</sup>

After establishing that the case concerns the right contemplated in Article 8.1 of the European Convention, the European Court performs an analysis to determine whether the interference with this right occurred along the lines of the exception carved out in Article 8.2 or whether, in contrast, it was an arbitrary interference. Article 8.2 states there shall be no interference with private or family life unless it

“is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

The European Court therefore focuses its analysis on three questions: first, whether the State's action was in accordance with clear and certain domestic law; second, whether the interference was directed toward one of the eight legitimate aims set forth in the above

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<sup>163</sup> See Eur. Ct. H.R., Marckx v. Belgium, Judgment of June 13, 1979, No. 6833/74; Eur. Ct. H.R., see also Nsona v. the Netherlands, Judgment of Nov. 28, 1996, No. 23366/94, Rep. 1996-V, fasc. 23, ¶ 144 (where Court implicitly recognized that family life existed between an orphan child and her aunt).

<sup>164</sup> See, e.g., Eur. Ct. H.R., Bouchelkia v. France, Judgment of Jan. 1, 1997, No. 23078/93, Rep. 1997-I, fasc. 28; Eur. Ct. H.R., Boujlifa v. France, Judgment of Oct. 21, 1997, 122/1996/741/940, Rep. 1997-VI, fasc. 54; Eur. Ct. H.R., El Boujaïdi v. France, Judgment of Sept. 26, 1997, Rep. 1997-VI, fasc. 51; Eur. Ct. H.R., Mehemi v. France (no. 2), Judgment of April 10, 2003, No. 53470/99 (Sect. 3) (bil.), ECHR 2003-IV.

<sup>165</sup> See, e.g., Eur. Ct. H.R., Beldjoudi v. France, Judgment of March 26, 1992, No. 12083/86, ¶67; Eur. Ct. H.R., Berrehab v. the Netherlands, Judgment of June 21, 1988, No. 10730/84, ¶ 23; Boughanemi, *supra* note 153, ¶ 35.

cited portion of Article 8 of the European Convention; and third, whether the interference was necessary in a democratic society.<sup>166</sup>

Because the cases before the European Court have always challenged deportation carried out under established immigration laws, and because these same immigration laws can generally be justified by one of the broad social aims listed in article 8.2; the crux of the European Court analysis relates to the question of whether a policy or procedure is “necessary in a democratic society.”<sup>167</sup>

In determining whether a policy or procedure is necessary in a democratic society the European Court engages in a balancing test most like the one that has been suggested by the Inter-American Commission. According to the European Court, States must show that the impact of the challenged policy or procedure on private or family life is proportionate to the legitimate aim pursued.<sup>168</sup>

This determination takes on the characteristics of the Inter-American balancing test in as much as the European Court jurisprudence has generally held that the greater the strength of the family ties and the lengthier the duration of the petitioner's residence in the deporting State, the more deportation is disproportionate to the legitimate aim pursued.<sup>169</sup>

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<sup>166</sup> See, e.g., Beldjoudi, *supra* note 160; Berrehab, *supra* note 160; Eur. Ct. H.R., Moustaquim v. Belgium, Judgment of Feb. 18, 1991, no. 12313/86; Eur. Ct. H.R., Nasri v. France, Judgment of July 13, 1995, No.19465/92

<sup>167</sup> Id.

<sup>168</sup> Berrehab, *supra* note 160, ¶ 29. See also Abdulaziz, Cabales and Balkandali v. the United Kingdom, *supra* note 156; Beldjoudi, *supra* note 160, Moustaquim, *supra* note 161.

<sup>169</sup> E.g. Beljoudi, *supra* note 160; Berrehab, *supra* note 160; Moustaquim, *supra* note 161.

A notable trend in the jurisprudence of the European Court is that it has increasingly weighed elements of the petitioner's private and family life in combination.<sup>170</sup> Beyond length of stay, these elements have included the extent to which private and family life was or will be ruptured,<sup>171</sup> the existence and nature of the petitioner's links with his or her origin country,<sup>172</sup> the retention of the nationality of his or her country of origin,<sup>173</sup> and the political exigencies in the State, such as immigration control.<sup>174</sup> Of growing importance to the court are the gravity of the petitioner's offense, persistence of his or her offending behavior, his or her age at time of offense, and his or her medical and psychological status.<sup>175</sup>

Like the European Court, the United Nations Human Rights Committee (hereinafter, the “Human Rights Committee” or “Committee”) has established a two-prong analysis to determine whether state interference reaches a level of arbitrariness that violates the right to family life enshrined in Articles 17 and 23 of the International Covenant on Civil and Political Rights (“the Covenant”). In carrying out this analysis, the Committee asks first whether the deportation of the petitioner “was made under law and in furtherance of a legitimate state interest,” and second, whether “due consideration was given in the

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<sup>170</sup> E.g. Boughanemi, supra note 153; Nasri, supra note 161.

<sup>171</sup> See Beldjoudi, supra note 160, Berrehab, supra note 160, and Mehemi, supra note 159 (where Court found the family ties of respective petitioners to be strong). Compare Boughanemi, supra note 153, and Boujlifa, supra note 159 (where Court found the family ties of respective petitioners too weak to overcome state’s interest).

<sup>172</sup> See El Boujaïdi, supra note 159; contra Mehemi, supra note 159.

<sup>173</sup> See Boughanemi, supra note 153; contra Beldjoudi, supra note 160.

<sup>174</sup> See Boughanemi, supra note 153; Cruz Varas and Others v. Sweden, Judgment of March 20, 1991, No. 15576/89.

<sup>175</sup> See, e.g., Case of C., supra note 154 (in which petitioner was convicted for drug possession), and Moustaquim, supra note 161 (in which petitioner was a minor when he committed the crime); contra Bouchelkia, supra note 159 (in which petitioner was convicted of rape); but compare Nasri, supra note 160 (in which Court found petitioner’s conviction for rape mitigated in part by his mental disability).

deportation proceedings to the deportee's family connections.”<sup>176</sup>

In its early application of this analysis, the Human Rights Committee found that criminal deportation constitutes a fair means to achieve the state's legitimate interest in public order so long as there had been “ample opportunity [for the petitioner] to present evidence of his family connections” to the state's immigration court.<sup>177</sup>

In more recent cases, the Committee has developed a number of inquiries to determine whether the State has fulfilled its obligation of “due consideration.” One inquiry is whether the deportation proceedings result in “extraordinary circumstances” to the family life.<sup>178</sup> Another is whether the State has provided justifications for the deportation “that go beyond a simple enforcement of immigration law.”<sup>179</sup>

In articulating its own analysis of immigrant deportation cases under Articles V and VI of the American Declaration, the Honorable Commission should follow the basic inquiries established by the European Court and the UN Human Rights Committee. First, the Commission should establish whether or not the State’s interference is directed toward a legitimate aim. Secondly, to establish whether the state’s interference is arbitrary and unlawful, the analysis should balance the legitimate interests of the state and the rights of the individual. Thus, the Commission should, on the one hand, require the state to

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<sup>176</sup> U.N. C.C.P.R. Human Rights Committee, Stewart v. Canada, Judgment of Dec. 16, 1996, No. 538/1993, ¶ 12.10.

<sup>177</sup> Id.

<sup>178</sup> E.g. U.N. C.C.P.R. Human Rights Committee, Winata v. Australia, Judgment of Aug. 16, 2001, No. 930/2000 (holding that state party would have interfered arbitrarily in petitioner's family life by forcing the petitioner and his wife to leave their 13-year old son alone in his birth country).

<sup>179</sup> Id., ¶ 7.3.

demonstrate factors justifying deportation beyond bald enforcement of immigration laws; and, on the other hand, weigh various facts of the petitioner's case to determine whether there has been due consideration in the State's proceedings of the petitioner's private and family life and whether the deportation would or has already inflicted extraordinary circumstances upon the petitioner and his or her family.

The relevant facts to weigh on this latter determination have been amply contemplated by the Commission's regional and international counterparts. Factors favorable to the individual being deported may include: his or her lengthy residence within the State; demonstrated intention to acquire legal status or citizenship in the State; his or her lack of ties to the country of origin; his or her extensive social participation in the State, particularly efforts to work lawfully and advance in employment, to acquire additional or higher education, or to contribute to religious, cultural, political, or other communities and groups; the minor, petty, nonviolent, rare or irregular, or otherwise inconsiderable nature of his or her criminal offense; his or her age and mental or emotional state at the time he or she committed the criminal offense; rehabilitation from substance abuse or other addictions that may have played a role in his or her criminal behavior; the extent to which the his or her family life has been or would be ruptured, particularly with regards to separation of parents and children and the hardship imposed by separation upon the individual being deported and his or her other family members; and the availability of administrative and judicial review of the individual's personal and family life under the laws and proceedings of the State. Applying these considerations to the case at bar, the Commission should find the United States in clear violation of Articles V and VI of the

American Declaration.

Under the AEDPA and the IIRIRA, the United States established a mandatory deportation scheme that, as described above, violates the procedural rights of deportees, and specifically violated the rights to judicial protection and due process of Mr. Smith and Mr. Armendariz. From these procedural violations, run substantive violations; specifically, these laws fail to provide the opportunity for the State to consider the extent and effect of deportation on the family. This failure of the United States to duly consider these rights in each of the cases before the Commission resulted in the violation of those rights. Indeed, while the State's interference in the Petitioners' personal and family life was directed toward an ostensibly legitimate aim—whether it be public order and safety, the prevention of crime, or the protection of morals—the measure used to achieve that aim belied the type of disproportionality indicative of arbitrary interference.

First, in evaluating Mr. Smith's case, several facts of Mr. Smith's private and family life illustrate the extraordinary circumstances exacted upon him by the State's interference. A legal resident of the State from age ten to age 46, Mr. Smith had made substantial personal ties to the country. His entire family resides in the United States, and he has no remaining ties to his birth country. He is married to a U.S. citizen and he is the father of three U.S. citizen children. At the time of his deportation, Mr. Smith owned and operated a small, successful business while also pursuing university level education with the hopes of becoming a nurse. His criminal offense for drug possession marks the last time that he has been involved with drugs. Further, no violence was involved in the crime nor was it

part of a larger pattern of criminal behavior. Had the State reviewed these facts, it would likely have found Mr. Smith's criminal offense to be the least defining feature of his life. Rather, Mr. Smith is most notable for the personal growth he achieved through rehabilitation and his drive to support recovering drug addicts in his community.

While these factors highlight the strength of Mr. Smith's personal life in the State, the impact of deportation on his family life fully establishes the extraordinary circumstances that mark arbitrary interference. Without a hearing or review of Mr. Smith's family ties, the State failed to recognize that his deportation would pose immense challenges for Mr. Smith's wife Ann, a recovering cancer patient, and their daughter Karina, who was just an infant at the time of Mr. Smith's deportation. Not only have they and the entire family lost their main provider and emotional support, but they also have had to bear the financial and emotional strain of supporting Mr. Smith as he copes with stigmatization, discrimination, and poverty in Trinidad. Coincident with these struggles, Mr. Smith has also suffered alone from physical ailments and depression. Overall, eight years since his initial deportation, Mr. Smith has been unable to rebound from the loss of his personal and family life in the United States.

When all of these individual, family and community interests are balanced with the State interest in removing non-citizens convicted of criminal offenses from society, a manifest disproportionality between the stated legitimate aim and the measure used to achieve it becomes clear. The Commission must therefore find that the deportation amounted to an arbitrary interference in Mr. Smith's private and family life and that the State has violated

Articles V and VI of the American Declaration.

Similarly, the interference analysis also clarifies the State's violations with regard to Mr. Armendariz. The United States deported Mr. Armendariz to Mexico on the grounds of a drug conviction, and while the State's interference in his personal and family life may have been directed toward a legitimate aim, a balancing of the interests shows that the measure itself of mandatory deportation was disproportionate to that aim.

As in Mr. Smith's case, a review of Mr. Armendariz' situation reveals the many factors that tilt the balance of interests in his favor. Mr. Armendariz' family legally immigrated to the United States when he was just two years old. His parents became lawful permanent residents of the United States, as did he at age eight. He is married to a U.S. citizen, Natalie, and has a U.S. citizen step-daughter, Destry. He is also the father of another U.S. citizen child, Casandra, for whom he was paying child support. Two years before his deportation, Mr. Armendariz bought a house and was running his own business. The involvement with drugs that lead to his criminal conviction was completely behind him by the time immigration enforcement officers raided his workplace and took him into custody pending deportation.

The virtually over-night deportation exacted extraordinary circumstances upon both Mr. Armendariz and his family. His two-day detention before the deportation not only exposed Mr. Armendariz to deplorable conditions, but also prevented him from contacting his family members, who had no idea what had happened to him. With

absolutely no familial support, Mr. Armendariz found himself in Mexico, left there in the middle of the night by immigration officers. Immediately, he entered a life of desperation. He had no food, money or clothes. He did not know how to read or write Spanish, which made finding employment in Mexico next to impossible. This drastic situation forced Natalie to move to Mexico to be with Mr. Armendariz. They have settled there and have had to raise Destry, a citizen of the United States, in a country that lacks the considerable benefits and advantages that she otherwise would have enjoyed in her own country. Worse, she is growing up without her paternal grandparents, who cannot visit Mexico due to health problems. Indeed, Mr. Armendariz' parents, too, are suffering in the United States as they advance through their twilight years and cope with various health conditions without their son's support.

Given the extraordinary circumstances visited upon Mr. Armendariz and his family, there is no doubting the disproportionality between the State's legitimate aim and the measure used to achieve it. The mandatory deportation here, as in Mr. Smith's case, constitutes an arbitrary interference and violates Articles V and VI of the American Declaration.

The deportations of Mr. Smith and Mr. Armendariz violated their rights to private and family life enshrined in Articles V and VI of the American Declaration. In both of these cases, the interests of children were implicated in the decisions made by the United States to deport their parents. While the best interest of the child should certainly factor into the determination of whether the right to a family life was violated, a failure to consider the interests of the child should also be understood as an independent violation of the United

States' international obligations under the American Declaration.

**C. The Deportation of Mr. Smith and Mr. Armendariz under the Provisions of the AEDPA and the IIRIRA Violated their Children's Right to Special Protection and Aid under the American Declaration (Art. VII).**

Article VII of the American Declaration, states in its pertinent part that:

...all children have the right to special protection, care and aid.

The Commission has stated with regard to Article VII that it:

establishes special measures of protection for children corresponding to their vulnerability as minors, and the implementation of this obligation must be accorded special importance. Respect for this duty of special protection necessarily requires that the interests of the child be taken into account in State decision-making which affects him or her, and that such decisions look to the protection of the best interests of the child.<sup>180</sup>

The Honorable Commission has interpreted Article VII protections in conjunction with the United Nations Convention of the Rights of the Child (hereinafter the "CRC") within the immigration context and found 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 raises serious concerns."<sup>181</sup> In that same vein, the Inter-American Commission has established that a State's full compliance with its obligations under the American Declaration entails a humanitarian or compassionate review process in deportation proceedings that weighs not only the interests of the deportee, but also the interests of his or her children.<sup>182</sup>

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<sup>180</sup> Inter-Am. C.H.R., Report on the Situation of Human Rights of Asylum Seeker within the Canadian Refugee Determination System, supra note 115, ¶ 163.

<sup>181</sup> Inter-Am. C.H.R., Report on the Situation of Human Rights of Asylum Seeker within the Canadian Refugee Determination System, supra note 115, ¶ 159.

<sup>182</sup> Id., ¶¶ 159-60.

The Inter-American Court has also explored the nature of these rights as they are protected under Article 19 of the American Convention, which establishes that “[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.” The Inter-American Court has understood this to mean that “cases in which the victims of human rights violations are children are particularly serious,”<sup>183</sup> and that “[t]he prevalence of the child’s superior interest should be understood as the need to satisfy all the rights of the child.”<sup>184</sup>

The Inter-American Court has also understood the need for children’s “special protection due to their physical and emotional development,” and that central to the process of a child’s development is the “right to live with his or her family, which is responsible for satisfying his or her material, emotional, and psychological needs.”<sup>185</sup> Further, the Court has held that “children's rights require the State not only abstain from unduly interfering in the child's private or family relations, but also that, according to the circumstances, it take positive steps to ensure exercise and full enjoyment of those rights....”<sup>186</sup> Indeed, in cases in which a child is separated from his or her family, the Court has advised that a substantial analysis should include the related international human rights instruments, including Article 17 of the Covenant and Article 8 of the European Convention,<sup>187</sup> discussed at length in the previous section.

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<sup>183</sup> Cf. Villagrán Morales et al. (the “Street Children” case), *supra* note 119, ¶ 146; Inter-Am. Ct. H.R., Case of Gómez Paquiyauri Brothers, Judgment of July 8, 2004, Series C No. 110, ¶ 162; Inter-Am. Ct. H.R., Case of Bulacio, Judgment of September 18, 2003, Series C No. 100, ¶ 133.

<sup>184</sup> Cf. Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17, ¶¶ 56, 57, 60.

<sup>185</sup> Id. ¶ 71.

<sup>186</sup> Id. ¶ 88.

<sup>187</sup> Id.

The Commission has also noted specific provisions of the United Nations Convention of the Rights of the Child (“CRC”) that should be considered in the immigration context, namely: Article 3, which indicates the “best interests of the child shall be a primary consideration in all State-sponsored action involving children”; Article 9 which “indicates that measures involving the separation of parent and child must be extremely exceptional;” and Article 12, which provides that “where a child is capable of forming his or her own views, those should be given due weight, in particular in any judicial proceedings affecting him or her.”<sup>188</sup>

On the basis of these provisions, the United Nations Committee on Rights of Children has clarified in country reports that the CRC supports greater consideration of the rights of children by administrative bodies<sup>189</sup> and law enforcement agencies that make deportation related decisions.<sup>190</sup> Additionally, as the CRC creates a presumption against the separation of children from their parents, the Committee has specifically recommended that States seek “to avoid expulsions causing the separation of families, in the spirit of Art[icle] 9 of the Convention.”<sup>191</sup>

The decisions of the administrative and judicial tribunals in the deportation of Mr. Smith and Mr. Armendariz afforded no opportunity to consider evidence about the best interests

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<sup>188</sup> Id. ¶ 165.

<sup>189</sup> U.N. C.R.C., Concluding Observations of the Committee on the Rights of the Child: Canada, June 20, 1995, CRC/C/15/Add.37, ¶ 13 (finding “regretful” the inadequate weight given to the views of children by administrative bodies dealing with immigrant children—specifically with Canadian-born immigrant children who face separation from their deportable parents).

<sup>190</sup> U.N. C.R.C., Concluding Observations of the Committee on the Rights of the Child: Norway, April, 25, 1994, CRC/C/15/Add.23, ¶ 11 (raising concern that law enforcement agencies were not “instructed to delay the expulsion of some members of the family in order to ensure that the whole family remains together and that undue strain on the children is avoided.”).

<sup>191</sup> U.N. C.R.C., supra note 193, ¶ 24; U.N. C.R.C., supra note 194, ¶ 24.

of their children, and the children suffered as a consequence. Therefore, guided by the principles established in the CRC and incorporated into Article VII of the American Declaration, the Commission should find that the U.S. Government's deportation of Mr. Smith and Mr. Armendariz violated its international responsibility to assure their children their rights to special protection and aid.

Mr. Smith's youngest daughter, six-year old Karina, a citizen of the United States, has been separated from her father for most of her young life. She has been denied both the financial and emotional support of someone who has proved in his life to be an outstanding father. In the years when she has most needed regular pediatric care, Karina has also lacked health insurance. She also competes for her mother's attention as Mrs. Smith juggles full-time work and health problems with the duties of a single-parent and provider. The developmental toll on Karina and the strain on her mother are unquantifiable, yet these circumstances could easily have been prevented by a judge's discretion during Mr. Smith's deportation proceedings. Under current U.S. law no judge even had an opportunity to consider these factors.

In the case of Mr. Armendariz, the fact that he now lives with his step-daughter Destry in Mexico does not change the fact that her interests were completely ignored in the decision of the United States to deport him. Indeed, the decision to move her to Mexico was forced upon the family by the United States' interference. While she is a citizen of the United States, Destry is now deprived of the resources, benefits, and advantages that other U.S. citizen children enjoy. Destry was taken away from her friends and the social

support network that existed for her in the United States. Her education and economic and social opportunities will be forever changed, unless her parents decide, under the duress of the situation, to send Destry back to the United States, thereby separating the family. Meanwhile, as Mr. Armendariz' biological daughter Cassandra continues to reside in the United States and must suffer the widely known psychological impact of growing up without that important parental connection.

In causing these hardships, the United States has interfered arbitrarily in the private and family lives of Karina, Destry and Cassandra in violation of Article VII of the American Declaration.

## **VI. CONCLUSION AND PRAYER FOR RELIEF**

In consideration of the foregoing, Petitioners request that the Honorable Commission provide the following relief:

1. Find the United States internationally responsible for violations of the rights enshrined in Article V (the right to protection against abusive attacks on family life), Article VI (the right to establish a family), Article VII (the right to protection for mothers and children) Articles XVIII (the right to a fair trial) and XXVI (the right to due process of law) of the American Declaration;
2. Issue a report in accordance with Article 43.2 of the Commission's Rules of Procedure in the most expedited manner possible, and incorporate into that report the findings in point (1) of this section and recommend that the United States provide proper remedies for the violations of human rights committed in this case,

including, but not limited to the following:

- a. Providing Wayne Smith and Hugo Armendariz a hearing with procedural guarantees sufficient to consider evidence relevant to the respect for the rights to family life and special protections for children, and permitting them to return to the United States if the determination is favorable.
- b. Reforming the current mandatory deportation regime by amending immigration laws and policies to comport with standards of international human rights law on private and family life, special protections of children, fair trial and due process; and
- c. Adopting an effective way to repair the damage that has already been caused to thousands of individuals and their families under the current mandatory deportation regime.

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