

19-3956(L)

20-2427(CON)

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

OUSMAN DARBOE,

Petitioner,

—v.—

WILLIAM P. BARR, UNITED STATES ATTORNEY GENERAL,

Respondent.

ON PETITION FOR REVIEW OF A FINAL DECISION
OF THE BOARD OF IMMIGRATION APPEALS,
NO. A 201 119 754

**BRIEF OF *AMICUS CURIAE*
MOVEMENT FOR FAMILY POWER
IN SUPPORT OF PETITIONER**

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IDENTITY AND INTEREST OF *AMICUS CURIAE*¹

Amicus Curiae Movement for Family Power (MFP) is a fiscally sponsored grassroots organization that works to end the policing and punishing of families in order to create a world where the dignity and integrity of all families is valued and supported. MFP supports community healing, and works tirelessly to end the government's inhumane use of forced family separation as a tool of punishment and control, particularly in the child welfare system.

MFP has substantial experience advocating for and with individuals affected by family separation policies. Based on that experience, MFP has witnessed firsthand the irreparable harm that results when state and federal officials rip families apart. Although MFP's principal area of focus and expertise is the child welfare system, MFP sees that family separation is a destructive tactic that the government has employed (and continues to employ) in many carceral settings—including, as relevant here, the immigration system.

MFP respectfully submits this *amicus* brief to situate the practice of family separation within its broader historical context, and to offer this Court a deeper

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than *amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of the brief. All parties have consented to the filing of this brief.

understanding of how family separation policies have been deployed over the years as a means to devalue, punish, and police Black families and communities. This is a case in point: deporting Petitioner Ousman Darboe to The Gambia would have devastating consequences for his wife, his young child, and the community they call home. The Immigration Judge and Board of Immigration Appeals failed to properly account for those hardships in denying Mr. Darboe's request for a waiver of inadmissibility. This Court should not follow the agency down that mistaken path.

PRELIMINARY STATEMENT

The government of the United States is seeking to permanently separate a Black man from his loving wife and two-year-old daughter and remove him to a country he barely knows based on a crime for which he has been unconditionally pardoned. That is an astonishing position, but it is not a new one.

For centuries, our government has sanctioned or employed family separation policies to punish, police, and devalue Black families. Of all the horrors that slavery wrought, few were as horrific as the systematic eradication of Black families. Black babies were stolen from the arms of their parents; Black families were permanently ripped apart on the auction block; and Black mothers were unjustly cast as the villains in all of this and blamed for the deaths and ill health of their children. Our government permitted, endorsed, and actively facilitated that repugnant practice of separating Black parents from Black children. And, even though the bonds of slavery

have since been cast aside, the dangerous logic of family separation has become so engrained in our country's psyche that it persists in our modern-day institutions.

It persists in the child welfare system, which systematically removes Black children from their homes under the pretext of protecting them from their “unfit” parents. It persists in the criminal legal system, which disproportionately incarcerates Black people at higher rates than white people with little regard to the devastating consequences that mass incarceration has on the Black children that are left behind. It persists in the immigration system, which structurally disadvantages immigrants from non-white countries and (at least in recent years) deliberately separates families of color to deter migration to the United States. And it persists through the ease with which these institutions collectively ignore the suffering, pain, and trauma that family separation policies inflict on Black families.

These interlocking systems of family separation have devastating consequences—financial, physical, psychological—on Black mothers, Black fathers, and Black children. They impose stress on Black communities, perpetuate harmful stereotypes about Black parents, collide with our nation's most deeply held values of equality and justice under the law, and betray this country's promise as a land of immigrants and refugees.

The upshot of this history and these harms is straightforward: family separation policies have historically been used as a tool to destroy Black families. In

discounting the pain and suffering caused by Petitioner Ousman Darboe's deportation, the decisions below twist the facts, err on the law, and threaten to replicate the horrors of a dangerous past. This Court should correct those grievous errors and grant Mr. Darboe's petitions for review.

ARGUMENT

I. Forced Family Separation Has Been Used Throughout History as a Tool to Punish and Police Black Families

A. The Scourge of Slavery Tore Apart Black Families.

Family separation has a long and sordid history that dates back to our nation's founding. The United States of America was born out of a profound commitment to principles of liberty and equality, but was built on the backs of enslaved Black people. Slavery devastated Black families. It cruelly severed the familial bonds between Black parents and their children and replaced those bonds with chains.² The threat of family separation was an "essential feature[]" of slavery and used as a tool of coercion to render enslaved people compliant.³ Enslaved parents and children were regularly sold to different buyers at government-sanctioned auctions.⁴ Between

² Heather Andrea Williams, *Help Me to Find My People: The African American Search for Family Lost in Slavery* (2016).

³ Laura Briggs, *Taking Children: A History of American Terror* 19 (2020).

⁴ Kenneth M. Stampp, *Peculiar Institution: Slavery in the Ante-Bellum South* 239 (1989); Paul A. David et al., *Reckoning with Slavery: A Critical Study in the Quantitative History of American Negro Slavery* 94 (1976); Michael Tadman, *Speculators and Slaves: Masters, Traders, and Slaves in the Old South* (1989).

1820 and 1860, roughly 200,000 enslaved people were sold each decade, resulting in the forced separation of approximately one in every three children born into enslavement.⁵

Moreover, the law did not recognize the relationship between an enslaved mother and her child. Black parents had no “custody” rights over their own children. Children born into slavery were considered property of the white people who enslaved them.⁶ Courts meanwhile played a central role in safeguarding (and facilitating) the domestic trade of enslaved people.⁷ Indeed, one nineteenth-century South Carolina court opined that enslaved children could be sold from their families at any age because they “stand on the same footing as other animals.” *M’Vaughers v. Elder*, 4 S.C.L. (2 Brev.) 307, 314 (1809).

The conditions of slavery were brutal and inhumane. But they were especially grim for Black mothers,⁸ who were not given time off from hard labor to nurture and care for their infants.⁹ Black mothers were forced to either leave their children for long hours or bring their infants with them as they worked in the fields.¹⁰ As a result,

⁵ Tadman, *supra* note 4.

⁶ Dorothy E. Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* 58 (1999).

⁷ Thomas D. Russell, *South Carolina’s Largest Slave Auctioneering Firm*, 68 Chi.-Kent L. Rev. 1241, 1241 (1993).

⁸ Angela Y. Davis, *Women, Race, and Class* 4 (1983).

⁹ Roberts, *Killing the Black Body*, *supra* note 6, at 62.

¹⁰ *Id.*

the infant mortality rate among enslaved children in 1850 was twice that of white children, with fewer than two out of three Black children surviving to age ten.¹¹ Black mothers, in turn, were unfairly blamed for the deaths of their own children and were portrayed as innately bad caretakers.

The horrors of slavery thus created, reinforced, and perpetuated a repugnant canard: the myth of the “bad Black mother.” That gravely inaccurate view of Black motherhood permeated popular discourse in the early nineteenth century. In the words of one contemporary white writer:

When [Black children] are little, [a Black mother] indulges them blindly when she is in good humor, and beats them cruelly when she is angry; and once past their childhood her affection for them appears to be exhausted. She exhibits none of the brooding mother-love and anxiety which the white woman sends after her children as long as they live. Infanticide is not regarded as a crime among negroes, but it is so appallingly common that if the statistics could be obtained on this subject they would send a shudder through the world.¹²

That toxic mythology meaningfully influenced governmental policies and public officials. For instance, U.S. census mortality schedules during the nineteenth century commonly attributed Black infant deaths to the carelessness of Black mothers.¹³ In 1849, census marshal Charles M. Pelot explained: “I wish it to be distinctly

¹¹ *Id.* at 30.

¹² *Id.* (citing Beverly Guy-Sheftall, *Daughters of Sorrow: Attitudes Toward Black Women, 1880-1920 (Black Women in United States History)* 44 (1990)).

¹³ *Id.* at 29.

understood that nearly all the accidents [involving infant deaths] occur in the negro population, which goes clearly to prove their great carelessness [and] total inability to take care of themselves.”¹⁴

Regrettably, the historical myth of the “bad Black mother” (and other similar tropes rooted in racist beliefs about the innate inferiority of Black people) became firmly ingrained in the American psyche, persisted long after emancipation, and, as explained further below, shaped modern-day policies and institutions.¹⁵

B. Modern-Day Government Institutions and Policies Have Systematically Separated Black Families.

The abolition of slavery did not end the government-sanctioned separation of Black families. It merely ushered in a new era in which modern-day institutions have disproportionately and systematically separated Black children from their parents.

1. The Child Welfare System. Our country’s child welfare system is the paradigmatic example of this dynamic. From the late eighteenth century until the 1950s, the foster care system was used to police and control childrearing in communities considered to be troublesome: the urban poor and immigrants who were then racialized as non-white (Irish, Italians, and other Southern and Eastern

¹⁴ *Id.* (citing Michael P. Johnson, *Smothered Slave Infants: Were Slave Mothers at Fault?*, 47 J. of S. Hist., 493 (1981) (quoting South Carolina Mortality Schedules, 1950, Abbeville District)).

¹⁵ *Id.* at 19-20.

Europeans).¹⁶ This was justified by the theory that, without state intervention, these children would learn the negative behaviors and values of their parents and would eventually become a drain on society.¹⁷ William Pryor Letchworth, a famous advocate of children's causes at the time, declared in 1877, "If you want to break up pauperism, you must transplant [the child] When parents cannot protect their child, cannot feed, cannot clothe it, cannot keep it from evil influence, and are perhaps degrading it by their own example, it is the duty of every true man to step forward to save it."¹⁸ In an effort to fight against "pauperism," charities in New York, Boston, and other East Coast cities sent thousands of poor children on "orphan trains" to towns in the Midwest, where they were assigned to foster families—some of whom used the children as unpaid farm laborers.¹⁹ The foster system was therefore, from its inception, a system designed to separate children from their parents.

¹⁶ Tina Lee, *Processes of Racialization in New York City's Child Welfare System*, 28 *City & Soc'y* 276, 279 (2016).

¹⁷ Elisa Minoff, *Systemic Racism + Poverty = Neglect: How the Child Welfare System Targets, Surveils, and Punishes Poor Families of Color* (forthcoming) [hereinafter *Systemic Racism*].

¹⁸ Michael B. Katz, *In the Shadow of the Poorhouse: A Social History of Welfare in America* 111 (1986).

¹⁹ Dan Scheuerman, *Lost Children: Riders on the Orphan Train*, *Humanities* (2007); Elisa Minoff, *Entangled Roots: The Role of Race in Policies that Separate Families*, *Ctr. for Study of Soc. Pol'y* 17 (2018).

Black children were initially excluded from this system altogether and suffered even harsher mistreatment. Instead of being channeled into the foster system, Black children whose parents could not care for them and who were not supported by their extended kin were sent to juvenile detention facilities.²⁰ That de facto imprisonment of young Black children (particularly in the South) lasted well into the twentieth century and resulted in countless Black children being sent to adult jails or reform schools, even when they had not been charged with a crime.²¹

The child welfare system underwent a paradigm shift in 1962, when (in response to hard-fought battles won by Black communities and activists) Congress increased federal funding for foster care services and other public benefits through Title IV of the Social Security Act.²² That new source of federal funding expanded the child welfare services available to Black families. But it came with important (sometimes coercive) strings attached. For one thing, the federal funding prioritized out-of-home placements—i.e., removing children from their homes—because funding was limited to supporting children in foster care. For another, only families with the lowest incomes could have foster care services covered by federal funds.

²⁰ Minoff, *Systemic Racism*, *supra* note 17.

²¹ *Id.*

²² Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 *Yale L.J.* 1563, 1564-65, 1571 (1996) (reviewing Linda Gordon, *Pitied But Not Entitled: Single Mothers and the History of Welfare* (1994) & Jill Quadagno, *The Color of Welfare: How Racism Undermined the War on Poverty* (1994)); Minoff, *Systemic Racism*, *supra* note 17.

And finally, the federal funding required court orders to remove children, encouraging adversarial removals rather than voluntary and cooperative services.²³

This revamped foster care system was a double-edged sword for Black families. While federal funding opened up for certain public benefits, it subjected those Black families to constant governmental surveillance and draconian punishment—often driven by the same anti-Black stereotypes that originated during slavery. In particular, child welfare agencies began heavily scrutinizing the childrearing practices of Black families to determine whether Black parents (especially Black mothers) were fit to raise their children. And on many occasions, those agencies pursued judicial findings of neglect in order to have their foster care services covered by the new source of federal funding.²⁴

What emerged over the course of the nineteenth and twentieth centuries was a child welfare system that disproportionately separated (and continues to separate) Black families under the guise of protecting Black children from their “unfit” parents.²⁵ Indeed, recent data from Fiscal Year 2019 confirm that this troubling racial disparity remains: nationwide, Black children constitute 21 percent of the children

²³ Catherine E. Rymph, *Raising Government Children: A History of Foster Care and the American Welfare State* 157-76 (2017).

²⁴ Minoff, *Systemic Racism*, *supra* note 17.

²⁵ *Id.*

entering foster care, despite representing only 14 percent of the overall population of children.²⁶

2. The Criminal Legal System & Mass Incarceration. Our country’s criminal legal system follows the same disturbing pattern: ripping apart Black families under the pretext of protecting the community at large. In the same way that the myth of the “bad Black mother” justified the separation of Black women from their children through the foster care system, the myth of the “criminal Black man” has led to the widespread separation of Black fathers from their families through mass incarceration. And, like the child welfare system, the criminal legal system’s disproportionate impact on Black families finds its historical roots in slavery. Antebellum laws criminalized certain conduct—such as learning to read, walking with a cane, or defending oneself from assault—only when performed by enslaved people.²⁷ For instance, antebellum Virginia had 73 crimes that could garner the death

²⁶ Children’s Bureau, *The AFCARS Report*, U.S. Dep’t of Health and Hum. Servs. (June 23, 2020) (Report No. 27), <https://www.acf.hhs.gov/cb/resource/afcars-report-27>. For data on race of child population in 2019, see Kids Count Data Center, “Child Population by Race,” Annie E. Casey Found., <https://datacenter.kidscount.org/data/tables/103-child-population-by-race#detailed/1/any/false/1729/68,69,67,12,70,66,71,72/423,424>. For an analysis of the overrepresentation of African American children specifically, see *African American Children in Foster Care: Additional HHS Assistance Needed to Help States Reduce the Proportion in Care*, U.S. Gov’t Accountability Off. (2007), <https://www.gao.gov/new.items/d07816.pdf>.

²⁷ Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, Atlantic (Oct. 2015), <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/> (quoting Randall Kennedy, *Race, Crime, and the Law* 76 (1998)).

penalty for Black people—and only one for white people.²⁸ These laws reflected the widely held view of enslaved people as “highly prone to criminality, and generally beyond the scope of rehabilitation.”²⁹

After emancipation, Black Codes and Jim Crow laws replaced the formal practice of slavery, making the criminal legal system central to new strategies of racial control.³⁰ These schemes created oppressive rules, which dictated how Black people were permitted to live, work, and travel, and criminalized acts such as seeking employment without a note from a former enslaver. The convicted were “leased” to businesses and farms, where they were subjected to brutal working conditions. “[B]lack people, once seen as less than fully human ‘slaves,’ were seen as less than fully human ‘criminals.’”³¹

Over the past few centuries, our country has made progress in ridding itself of the lingering badges and incidents of slavery. But racism continues to plague our criminal legal system. In 1971, President Richard Nixon proclaimed that drugs were “public enemy number one,” and incarceration rates (particularly of Black men)

²⁸ *Id.*

²⁹ *Id.*

³⁰ Bryan Stevenson, *Slavery Gave America a Fear of Black People and a Taste for Violent Punishment. Both Still Define Our Criminal-Justice System.*, N.Y. Times Mag. (Aug. 14 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/prison-industrial-complex-slavery-racism.html>.

³¹ *Id.*

began to rise exponentially during his second term as president.³² As pregnant Black mothers were being prosecuted for drug addiction, their fetuses were vilified in the womb. “The inner-city crack epidemic is now giving birth to the newest horror,” the *Washington Post* columnist Charles Krauthammer wrote in 1989: “A bio-underclass, a generation of physically damaged cocaine babies whose biological inferiority is stamped at birth.”³³

Then, in 1996, during the Clinton Administration, the so-called “super-predators” theory took hold: “America is now home to thickening ranks of juvenile “superpredators”—radically impulsive, brutally remorseless youngsters, including ever more preteenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs and create serious communal disorders At core, . . . the problem is that most inner-city children grow up surrounded by teenagers and adults who are themselves deviant, delinquent or criminal.”³⁴ This dehumanizing logic rested on the deeply flawed assumption that separating poor

³² For prison populations and demographics from 1970 to 2019, see Bureau of Justice Statistics, *Publications & Products: Prisoners*, Off. Just. Programs, <https://www.bjs.gov/index.cfm?ty=pbse&sid=40>; see also, Ruth Delaney et al., *American History, Race, and Prison*, Vera Inst. Just., <https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison>.

³³ Charles Krauthammer, *Children of Cocaine*, Wash. Post (July 30, 1989), <https://www.washingtonpost.com/archive/opinions/1989/07/30/children-of-cocaine/41a8b4db-dee2-4906-a686-a8a5720bf52a/>.

³⁴ Elizabeth Becker, *As Ex-Theorist on Young “Superpredators,” Bush Aide Has Regrets*, N.Y. Times (Feb. 9, 2001), <https://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html> (internal quotations omitted).

Black children from their parents was necessary to protect the community from latent juvenile delinquency.

Even as crime rates declined by 22 percent between 1991 and 1998, incarceration rates skyrocketed, with the number of state and federal prisoners increasing by 59 percent, from approximately 790,000 people in 1991 to 1.25 million people in 1997.³⁵ In 1997, approximately 50 percent of prisoners under state or federal jurisdiction were Black Americans, who made up approximately 13 percent of the population.³⁶ In a report published in 2003, the Justice Department found that if incarceration rates remained unchanged, one out of every three Black men born in 2001 would go to prison at some point during their lifetime.³⁷ And according to that same report, one out of every nineteen Black women born in 2001 would face incarceration.³⁸ Today, 2.3 million people are incarcerated, with Black Americans making up 40 percent of that population despite still representing only 13 percent of

³⁵ Jenni Gainsborough and Marc Mauer, *Diminishing Returns: Crime and Incarceration in the 1990s*, 3 (Sept. 2000), <https://www.prisonpolicy.org/scans/sp/DimRet.pdf>; U.S. Dept. of Justice, Bureau of Justice Statistics Bulletin, *Prisoners in 1998*, 2 (Aug. 1999), <https://www.bjs.gov/content/pub/pdf/p98.pdf>.

³⁶ U.S. Census Bureau, *Selected Social Characteristics of the Population, by Sex, Region, and Race: March 1997* (Jul. 1998), <https://www2.census.gov/programs-surveys/demo/tables/race/1997/black-97/tab01.txt>.

³⁷ U.S. Dept. of Justice, Bureau of Justice Statistics Special Report, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, 1 (Aug. 2003), <https://www.bjs.gov/content/pub/pdf/piusp01.pdf>.

³⁸ *Id.*

the total population.³⁹ These numbers paint a grisly portrait of our criminal legal system, one that systematically shatters Black families by disproportionately incarcerating Black people.⁴⁰

3. The Immigration System. Our country's immigration system has followed a similar trajectory. Immigration laws over the first half of the twentieth century were designed principally to promote the immigration of families that fit the existing mold of desirability: mainly, white families from Northern and Western Europe. Prior to 1965, U.S. immigration law was structured around a quota system, which allocated immigration slots based on a candidate's national origin.⁴¹ These quotas heavily favored immigration from Northern and Western Europe. Under the Immigration and Nationality Act of 1952 (INA), for example, Asian, African, and Middle Eastern countries were each allocated barely a hundred immigrant visas per year, whereas Germany, the United Kingdom, and other countries in Northern and

³⁹ Wendy Sawyer and Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, Prison Policy Initiative (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html>.

⁴⁰ See William J. Stuntz, *The Collapse of American Criminal Justice* (2011) (on the effects of centralized control of the criminal legal system); Michelle Alexander, *The New Jim Crow: Mass Incarceration in an Age of Colorblindness* (2010) (on the history of mass incarceration); Bruce Western, *Punishment and Inequality in America* (2006) (on the social and economic effects of mass incarceration); see also The Sentencing Project, *Fact Sheet, Incarcerated Women and Girls* (Nov. 2020), <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/> (noting that in 2019, the imprisonment rate of Black women was over 1.7 times the rate of imprisonment for white women).

⁴¹ Tom Gjelten, *A Nation of Nations: A Great American Immigration Story* (2015).

Western Europe each received thousands of reserved slots.⁴² There was a statutory exception for spouses and children of U.S. citizens (who could immigrate independently of quotas), but since most U.S. citizens were from Northern and Western Europe at the time, that exception merely reinforced the strong racial bias toward white immigrants. Indeed, as the legislative history made clear, the animating goal of the INA was to preserve “the sociological and cultural balance in the population of the United States.”⁴³

By the mid-twentieth century, certain policymakers grew eager to cast aside the overt racism embodied in the INA’s national origin quota system. To that end, in 1965, Senator Philip Hart of Michigan and Representative Emmanuel Celler of New York cosponsored an immigration bill that did away with the national origin quotas and instead provided a preference for immigrants with desirable skills and education.⁴⁴ But immigration restrictionists wanted to discourage immigration from Asia and Africa and reserve immigration for white Europeans. Those who feared non-white immigrants became convinced that the existing profile of the United States could be preserved if immigration policy favored the families of those already in the country. Led by Representative Michael Feighan, an Ohio Democrat who chaired the House

⁴² *Id.*

⁴³ Senate Report No. 1515, 81st Congress, 2nd Session, 1950, 455.

⁴⁴ Gjelten, *supra* note 41.

Immigration Subcommittee, immigration restrictionists won a last-minute concession to prioritize family unification over employment qualifications, believing that this amendment would preserve the country's predominantly Anglo-Saxon, European base.⁴⁵ In a February 1965 speech, Congressman Feighan said U.S. immigration policy should be dedicated above all to the unification of those families that are "split and divided by peculiarities of law rather than free choice."⁴⁶ An article praising Feighan's work said that by redesigning the administration's immigration reform proposal to emphasize family unification, he "devised a naturally operating national-origins system," because it would favor immigration from the Northern and Western European countries.⁴⁷ Feighan's plan ultimately backfired, however, as European interest in immigration to the United States waned, while immigration from countries in Asia, Africa, and Latin America swelled.

In the latter half of the twentieth century, immigration became increasingly associated with people of color, including Black immigrants from African countries.⁴⁸

Immigration restrictionists shifted gears, deprioritizing family unification in favor of

⁴⁵ Muzaffar Chishti et al., *Fifty Years On, the 1965 Immigration and Nationality Act Continues to Reshape the United States* (Oct. 15, 2015), <https://www.migrationpolicy.org/article/fifty-years-1965-immigration-and-nationality-act-continues-reshape-united-states>.

⁴⁶ Gjelten, *supra* note 41.

⁴⁷ *Id.*

⁴⁸ Pew Research Center, *Modern Immigration Wave Brings 59 Million to U.S., Driving Population Growth and Change Through 2065: Views of Immigration's Impact on U.S. Society Mixed*. (Sept. 28, 2015), <https://www.pewresearch.org/hispanic/2015/09/28/modern-immigration-wave-brings-59-million-to-u-s-driving-population-growth-and-change-through-2065/>.

broader immigration reform targeted at severely curtailing the burgeoning influx of immigrants (most of whom were people of color).⁴⁹ Family-based immigration, once celebrated as a means to facilitate immigration of white Europeans, was pejoratively redubbed “chain migration” with respect to immigrants of color.⁵⁰ In the context of asylum for refugees, family migration was discouraged, and taking children from their parents and placing them in jail-like conditions of confinement became a strategy used to deter parents from lawfully seeking asylum in the United States.⁵¹

These restrictive immigration policies have had a disproportionate effect on Black immigrants. Because Black people are far more likely than any other population to be arrested, convicted, and imprisoned in the U.S. criminal legal system, *see supra* Part I.B.2, immigration enforcement policies that target immigrants with criminal records result in Black immigrants facing detention and deportation at higher rates than other populations. The numbers reflect this bias: Although Black immigrants comprise just 5.4 percent of the unauthorized population

⁴⁹ See, e.g., FAIR, <https://www.fairus.org/issues/legal-immigration>; Otis L. Graham, *An Outline of a Rational Immigration Policy*, FAIR (Jan. 31, 1981); Otis L. Graham Papers cited in Tom Gjelten, *A Nation of Nations: A Great American Immigration Story* (2015).

⁵⁰ See *It's Time To End Chain Migration*, The White House (Dec. 15 2017), <https://www.whitehouse.gov/articles/time-end-chain-migration/>; see also *We Need to End Unchecked Chain Migration and Eliminate the Reckless Visa Lottery to Secure the Nation and Protect the American Worker*, DHS (Feb. 15, 2018), <https://www.dhs.gov/news/2018/02/15/we-need-end-unchecked-chain-migration-and-eliminate-reckless-visa-lottery-secure>.

⁵¹ See Briggs, *supra* note 3; see also Stipulated Settlement Agreement, *Flores v. Reno*, No.CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997).

in the United States,⁵² and 7.2 percent of the total noncitizen population,⁵³ they made up 10.6 percent of all immigrants in removal proceedings between 2003 and 2015,⁵⁴ and 20.3 percent of immigrants facing deportation on criminal grounds.⁵⁵

The government's antipathy towards immigrants of color has only intensified in recent years. The Trump administration has implemented a series of anti-immigrant policies designed to hamper immigration from African, Asian, Middle Eastern, and South American countries. For instance, President Trump has issued a series of travel restrictions and visa bans on foreign nationals from various African countries, including Eritrea, Libya, Nigeria (Africa's most populous country), Somalia, Sudan, and Tanzania.⁵⁶ Furthermore, in late 2017 and 2018, the Trump administration also terminated Temporary Protected Status (TPS) designations—a form of humanitarian immigration relief afforded to individuals in countries facing armed conflict, natural disasters, or other crises—for countries in Latin America, the

⁵² *The State of Black Immigrants*, Black Alliance for Just Immigration and NYU School of Law Immigrant Rights Clinic, <http://www.stateofblackimmigrants.com/assets/sobi-fullreport-jan22.pdf>.

⁵³ 2013 Yearbook of Immigration Statistics, Department of Homeland Security, https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2013_0.pdf. (Of 22,407,056 foreign-born noncitizens in the U.S. in FY 2014, 1,738,870 were Black immigrants).

⁵⁴ *The State of Black Immigrants*, *supra* note 52.

⁵⁵ *Id.*

⁵⁶ See Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 27, 2017); Proclamation No. 9983, 85 Fed. Reg. 6699 (Jan. 31, 2020).

Caribbean, and Africa.⁵⁷ In discussions leading up to that determination, President Trump reportedly complained to his advisors that TPS protections enabled “people from shithole countries [to] come here.”⁵⁸

Finally, and perhaps most relevant here, the Trump administration adopted its “zero-tolerance” policy in 2018 to curb unauthorized immigration.⁵⁹ As part of that policy, unauthorized immigrant parents traveling with their children were criminally prosecuted and separated from their children at the U.S. border, on the theory that forcible separation of parents from their children would deter illegal entry into the United States.⁶⁰ All told, thousands of children were separated from their parents before President Trump bowed to public pressure and halted the government’s draconian family separation policy.⁶¹

⁵⁷ See 83 Fed. Reg. 2648, 2650 (Jan. 18, 2018) (terminating Haiti’s TPS); 82 Fed. Reg. 47228, 47230 (Oct. 11, 2017) (terminating Sudan’s TPS); 82 Fed. Reg. 59636, 59637 (Dec. 15, 2017) (terminating Nicaragua’s TPS); 83 Fed. Reg. 2654, 2655-56 (Jan. 18, 2018) (terminating El Salvador’s TPS).

⁵⁸ Josh Dawsey, *Trump Derides Protections for Immigrants from “Shithole” Countries*, Wash. Post (Jan. 12, 2018), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html.

⁵⁹ U.S. Dept. of Justice, *Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry*, Department of Justice (April 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>.

⁶⁰ ABA Commission on Immigration, *Background on Separation of Families and Prosecution of Migrants at the Southwest Border* (Jul. 31, 2018), https://www.americanbar.org/content/dam/aba/administrative/immigration/final_background_family_separation_073118.pdf.

⁶¹ Human Rights Watch, *Q&A: Trump Administration’s “Zero-Tolerance” Immigration Polic*, (Aug. 16, 2018), <https://www.hrw.org/news/2018/08/16/qa-trump-administrations-zero-tolerance-immigration-policy>.

* * *

At bottom, the foregoing history reveals a simple, but ugly truth: our government's most important institutions—including those intended to assist and protect the public—have systematically destroyed Black families by forcibly separating Black children from their parents.

II. Forced Family Separation Has Devastating Consequences for Black Children, Black Families, and the Country as a Whole

The harms of family separation are well-documented, particularly in the child welfare context. Research has shown that removing a child from his or her parents is disruptive, traumatic, and likely to have long-lasting negative consequences on the child.⁶² One study, which examined posttraumatic stress symptoms among children referred to child welfare agencies for abuse and neglect investigations, found that there were higher rates of symptoms among children placed in out-of-home care than those who received in-home services.⁶³ Surveys have found that nearly one-third of homeless youth and well over half of victims of child trafficking had experience in foster care, suggesting that the foster care system is at least an

⁶² Children's Bureau, Child Welfare Information Gateway, *In-Home Services in Child Welfare* (Mar. 2014), https://www.childwelfare.gov/pubPDFs/inhome_services.pdf.

⁶³ David J. Kolko et al., *Posttraumatic stress symptoms in children and adolescents referred for child welfare investigation: A national sample of in-home and out-of-home care*. *Child Maltreatment*, 15(1), 48-63 (2010).

important entry point for youths entering into homelessness and human trafficking.⁶⁴

In the long term, former foster youths are significantly less likely to be employed, have health insurance, and have a college degree than peers who had not been in foster care, and they are significantly more likely to experience economic hardship and be incarcerated at some point in their lives.⁶⁵

These multifaceted harms are no less acute in the immigration context. In the immigration system, family separation occurs in different forms. Children who lose the care of a parent because of immigration detention and deportation often experience effects like those seen in children with incarcerated parents. These harms include psychological trauma, unstable caregiving in the aftermath of an arrest, and parental depression.⁶⁶ They also include economic hardship, particularly if the deported parent was the breadwinner of the family. And that economic hardship is

⁶⁴ Chapin Hall and Voices of Youth Count, *Missed Opportunities: Youth Homelessness in America*, 10 (Nov. 2017), <https://voicesofyouthcount.org/wp-content/uploads/2017/11/VoYC-National-Estimates-Brief-Chapin-Hall-2017.pdf>.

⁶⁵ Mark E. Courtney et al., *Midwest Evaluation of the Adult Function of Former Foster Youth: Outcomes at Age 26* (2011), <https://www.chapinhall.org/wp-content/uploads/Midwest-Eval-Outcomes-at-Age-26.pdf>; Mark E. Courtney et al., *Midwest Evaluation of the Adult Functioning of Former Foster Youth: Conditions of Your Prepare to Leave State Care. Executive Summary* (2004), <https://www.chapinhall.org/wp-content/uploads/Midwest-Study-Youth-Preparing-to-Leave-Care.pdf>; Thom Reilly, *Transition from Care: Status and Outcomes of Youth Who Age Out of Foster Care*, *Child Welfare* 82(6):727-46 (2003); Tina Lee, *Processes of Racialization in New York City's Child Welfare System*, *City & Society*, 28: 276-297 (2016).

⁶⁶ Randy Capps et al., *Implications of Immigration Enforcement Activities for the Well-Being of Children in Immigrant Families: A review of the Literature* (Sept. 2015), <https://www.migrationpolicy.org/sites/default/files/publications/ASPE-ChildrenofDeported-Lit%20Review-FINAL.pdf>.

often prolonged by the long wait for deportation cases to be resolved in administrative and court proceedings. To make matters worse, if the remaining parent is unable to provide for their child either economically or emotionally, the child runs the risk of entering the foster care system, and thereby being subjected to the many harms inflicted by that system (as discussed above). *See supra* p. 21. These harms are not merely theoretical or speculative. They are painfully real. Consider, for instance, the following anecdote from a U.S. citizen daughter whose father was recently deported to The Gambia (a situation strikingly similar to this case):

My dad got deported on January 3, 2018. My friends don't really know. I don't want them to see me in a vulnerable way. What hurts the most is to think about the future. He's never gonna see me walk down the aisle and finally meet the guy who was enough for me. He's never gonna see me in a hospital room giving birth to my kid. I know I can always go visit him in Africa. It's not that he's dead, but it's just not the same. Here with my dad, that's where I belong. In the living room, watching *Judge Judy*.⁶⁷

The psychological, economic, and physical toll of family separation is reason enough to eschew governmental policies and decisions that result in the separation of Black children from their parents. But the systematic removal of children from Black homes also inflicts “collateral damage” on Black communities.⁶⁸

⁶⁷ *City of Fear*, NY Magazine, <https://nymag.com/intelligencer/2018/07/undocumented-new-yorkers-living-in-fear-ice-deportation.html>.

⁶⁸ Dorothy E. Roberts, *Shattered Bonds: The Color of Child Welfare* 243 (2002).

A child welfare system that is “marked by pronounced and disturbing racial disparities” and that subjects Black families to heightened and sustained government surveillance sends a dangerous and corrosive message to Black communities and the rest of the country.⁶⁹

It says that Black parents are unfit to raise their children and that Black children are better off in the state’s custody. It reinforces long-held stereotypes about Black mothers’ and fathers’ irresponsibility and corrupting influence on their children. It replicates the notion created in chattel slavery that there is no such thing as a Black family. In fact, placing so many Black children in the state’s custody implements the quintessential racist insult—that Black people are incapable of governing themselves and need white supervision.⁷⁰

A criminal legal system that disproportionately targets and punishes Black people presents a direct threat to “the fundamental principle of racial equality” and betrays our most sacred commitments to liberty and justice for all. *United States v. Black*, 750 F.3d 1053, 1055 (9th Cir. 2014) (Reinhardt, J., dissenting from denial of rehearing en banc). It conveys the message that, in this country, Black people are not “citizens of a democracy but the subject of a carceral state, just waiting to be cataloged.” *Utah v. Strieff*, 136 S. Ct. 2056, 2070-71 (2016) (Sotomayor, J., dissenting). It “risk[s] treating members of our communities as second-class

⁶⁹ Dorothy E. Roberts, *The Community Dimension of State Child Protection*, 34 Hofstra L. Rev. 23, 23 (2005).

⁷⁰ Roberts, *Shattered Bonds*, *supra* note 68, at 244.

citizens.” *Id.* at 2070. And it sends a dangerous signal to the public that Black pain, Black families, and Black children do not matter.

Finally, an immigration system that is infected by antagonism toward immigrants and refugees from non-white countries (including many in Africa) and that permits government officials to callously rip apart families forsakes this country’s heritage as a nation of immigrants. Such a system runs “contrary to the values of this nation and its legal system” and “diminishes not only our country but our courts, which are supposedly dedicated to the pursuit of justice.” *Ortiz v. Sessions*, 857 F.3d 966, 968 (9th Cir. 2017) (Reinhardt, J., concurring).

III. This Case Illustrates the Pain and Suffering Caused by Family Separation

Amici respectfully submit that the history and harms outlined above should inform the Court’s assessment of the central question in this appeal: namely, whether the Immigration Judge (IJ) and Board of Immigration Appeals (BIA) erred in concluding that Mr. Darboe was not entitled to a § 212(h) waiver because he was unable to demonstrate “exceptional and extremely unusual hardship to his qualifying family members to warrant a favorable exercise of discretion.” CAR 152-55. The answer to that question is yes. *See* Petitioner’s Opening Br. 44-69.

The IJ and BIA failed to properly account for the extreme pain and suffering that would befall Mr. Darboe’s wife and two-year old daughter (S) if he were deported from the country. Indeed, the record here compels the conclusion that Mr.

Darboe's deportation would destroy his loving family. It would force them to make an impossible choice: live apart (with Ms. Darboe and their daughter remaining in the United States) or stay together (with the entire family moving to a country none of them consider home). In either scenario, Ms. Darboe and S would be subject to exceptional hardship warranting an exercise of discretionary relief.

If Ms. Darboe remained in the United States with S, they would suffer severe financial, psychological, and physical harm. *See* CAR 103; 413-14; 493-94; 858-892; 896; *see* Petitioner's Opening Br. 44-47. In fact, many of those harms have already been realized during the pendency of Mr. Darboe's immigration proceedings. While Mr. Darboe was in immigration detention, Ms. Darboe and S struggled to survive. They were homeless for almost a year; Ms. Darboe, who suffers from a significant mental health condition, lost her job due to absences related to her childcare responsibilities and attending her husband's court appearances; and S has spent most of her life away from the arms of her loving father. CAR 486; 493; 500; 504-07; 539; 870-74; 876-92. Mr. Darboe's deportation would exacerbate these existing harms and undoubtedly introduce new ones. For instance, the permanent removal of Mr. Darboe will cause economic and psychological ruin to his family, placing them at an increased risk of surveillance and separation under the child welfare system. If that were to happen, S would suffer the trauma of losing both of her parents and would be subject to the well-documented long-term harms associated

with the foster care system itself, as noted above. *See supra* Part II. Ms. Darboe, in turn, would suffer the psychological trauma of losing her only child.

Alternatively, if Ms. Darboe and S chose to move to The Gambia to remain with Mr. Darboe, the entire family (and especially S) would be subject to undue and extreme hardship. They would have to uproot their lives and move to an unknown country, where S will very likely be subject to female genital mutilation/cutting (FGM/C)—an “extremely painful” procedure that “permanently disfigures the female genitalia . . . expos[ing] the girl or woman to the risk of serious, potentially life-threatening complications.” *In re Kasinga*, 21 I. & N. Dec. 357, 361 (BIA 1996). Compounding these issues, S would face fewer educational opportunities, a loss and lack of community ties, language barriers, and other adverse country conditions in The Gambia. *See* CAR 909-1010.

Despite all these harms, and the mountain of evidence and testimony substantiating them, the IJ and BIA reached the untenable conclusion that Mr. Darboe’s permanent removal from the country would not lead to exceptional hardship for his wife and young daughter. That decision was grievously wrong. *See* Petitioner’s Opening Brief 44-49. It stands at odds with substantial evidence in the record and fails to properly consider the severe implications that permanent family separation would have on Mr. Darboe’s family.

Left undisturbed, the decisions below will join the legions of other cases in which loving Black families are ripped apart by our government institutions. Our country and our communities deserve better. Our government officials should ensure that their discretionary decisions do not extend the legacy of devaluing or diminishing Black pain and suffering. They should acknowledge and understand that family separation policies have a long and troubled history, rooted in slavery, racism, and the dehumanization of Black people. They should strive to make decisions that are consistent with our country's most cherished principles of equality and justice under the law. And this Court should hold those officials to account when they fail to do so.

CONCLUSION

For these reasons, and those set forth in Petitioner's brief, the Court should grant Mr. Darboe's petitions for review.

Respectfully Submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Local Rule 29.1(c) because it contains 6,614 words.

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