Family Values: The Child Citizenship Act’s Ability to Protect the Foreign-Born Children of U.S. Citizens from Deportation

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FAMILY VALUES: THE CHILD CITIZENSHIP ACT’S ABILITY TO PROTECT THE FOREIGN-BORN CHILDREN OF U.S. CITIZENS FROM DEPORTATION

Abstract: On March 19, 2019, the Fourth Circuit Court of Appeals in *Duncan v. Barr* held, as a matter of first impression, that the physical custody requirement of the Child Citizenship Act of 2000 is a mixed question of law and fact and thus requires more than clear error review by an appellate body. In so doing, the court rejected broad deference to immigration judges on the question of physical custody and permitted greater independent judgment by appellate bodies. This Comment argues that, although the Fourth Circuit correctly ruled on the proper standard of review, it missed an opportunity to correct a line of precedent and regulation misinterpreting the language of the Child Citizenship Act of 2000 and its original intent.

INTRODUCTION

The values driving immigration policy in the United States have shifted throughout history.¹ At the founding of the country and into the early nineteenth century, a need to fill the vast countryside resulted in a more welcoming stance toward immigration.² This stance was followed by a history of pendulum swings.³ Attitudes have shifted between desires to exclude immigrants, often because of their perceived negative effects on the country’s ethnic

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¹ See SUSAN F. MARTIN, A NATION OF IMMIGRANTS 1–3 (2011) (providing a framework for seeing the history of immigration in the United States through four waves and three models based on colonial justifications for welcoming immigrants).

² See T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 4–7 (8th ed. 2016) (discussing how the desire for more immigrants was a platform of the Declaration of Independence and that labor was needed to settle the frontier and push out the American Indians). Immigrants were largely welcomed until the immigrant makeup shifted Catholic with the arrival of Irish and German Catholics in the 1830s. *Id.* at 6–7.

³ See *id.* at 7–10, 17–18, 19–21 (providing examples of shifts in attitudes between anti-immigrant rhetoric and more welcoming views). A more open stance towards immigrants at the country’s founding was followed by an anti-immigrant period fueled by Protestant-Catholic divisions and the arrival of German and Irish Catholic immigrants. *Id.* at 7. This anti-immigrant view gave way to a more open posture in the mid-to-late nineteenth century as the need for labor increased with the rise of the railroads. *Id.* at 9. Reactive sentiments followed as U.S. society viewed the new wave of immigrants as even more different, and thus more undesirable, than the prior ones. *Id.* Attitudes again shifted around World War II as labor needs increased during the war and humanitarian sentiments towards refugees increased when the war ended after uncovering Nazi atrocities. *Id.* at 17–18. These positive attitudes, however, quickly contended with rising Communism fears that extended to immigrants. *Id.* at 19.
makeup, and being welcoming towards immigrants, because of labor needs or growing acceptance of an immigrant group. The Immigration and Nationality Act (INA) Amendments of 1965 established the foundation of the modern regime of U.S. immigration policy. The INA Amendments eliminated quotas based on maintaining the existing ethnic makeup in the country and emphasized welcoming immigrants with trade skills or with family members already in the United States. Immigration policy since 1990 has retained this preference for supporting family reunification by reserving 480,000 of the annual cap of 675,000 immigrant visas for family-sponsored immigrants. Advocates of an immigration system based on family ties specifically recognize the valuable support structure that family provides in allowing immigrants to flourish when they arrive in the United States. The Child Citizenship Act of 2000 (CCA or the Act) built on this policy preference by easing the process by which adopted children and children born to U.S. citizens outside of the United States became citizens upon entering the country.

In the late 2010s, as attacks on “chain migration” and birthright citizenship have coincided with public outcry against family separations and detention at the southern border, questions arise of how much valuing families informs U.S. immigration policy and whether it is in the midst of another pendulum swing. Amid this backdrop, the Fourth Circuit Court of Appeals in Dun-
can v. Barr confronted the issue of citizenship for Howard Duncan, the son of a Nigerian mother and U.S. citizen father. Duncan came to the United States when he was six to live with his father and, at the age of twenty-seven, faced deportation.

Part I of this Comment discusses recent changes to the standard of review applied to immigration decisions, provides an overview of the CCA, and reviews the United States Court of Appeals for the Fourth Circuit’s decision in 2019 in Duncan. Part II dives deeper into the reasoning of the Fourth Circuit’s decision and explores the rationale behind the outcome of the ruling. Lastly, Part III asserts that the Fourth Circuit’s ruling was appropriate, but that it reveals the shortcomings of the CCA, and argues for legislative changes to better equip the Act to serve its intended purpose.

I. REVIEWING IMMIGRATION DECISIONS AND A CHILD’S CLAIM TO CITIZENSHIP

The Board of Immigration Appeals (BIA) provides the function of an appellate body to individuals challenging rulings from an immigration judge (IJ). As such, the BIA and the regulations that govern it set the basis for review of immigration decisions. Section A of this Part discusses the standards...
of review that the Fourth Circuit Court of Appeals has applied to immigration decisions and whether courts apply state or federal law to issues pertaining to domestic affairs.¹⁸ Section B provides an overview of the CCA and the facts and decision of Duncan’s case.¹⁹

A. Standards Applied to the Review of Immigration Decisions

Beginning in 2002, federal regulation 8 C.F.R. § 1003.1(d)(3) began requiring the BIA, the highest administrative appellate body on immigration matters, to review all factual matters with the more deferential clear error standard.²⁰ Prior to this change, the BIA reviewed all matters, both factual and legal questions, with a de novo standard of review.²¹

This change is reflected in the 2012 decision, Turkson v. Holder, where the Fourth Circuit examined the BIA’s review of an IJ’s decision to defer an immigrant’s deportation on the grounds that he would likely face torture in his home country of Ghana.²² The BIA overturned this determination after disregarding specific testimony that the immigrant and his brother gave to the IJ.²³

¹⁸ See infra notes 20–31 and accompanying text.
¹⁹ See infra notes 32–52 and accompanying text.
²⁰ Turkson v. Holder, 667 F.3d 523, 527 (4th Cir. 2012); 8 C.F.R. § 1003.1(d)(3)(i)–(ii) (2019). Promulgated in 2002, the new rule replaced long-standing precedent that the BIA had the authority to review factual determinations of IJs using its own reasoning, also known as a de novo standard of review. See Matter of B-, 7 I. & N. Dec. 1, 1 (BIA 1955) (stating that the BIA had the authority to determine matters of fact only subject to potential qualifications by the Attorney General); Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,888 (Aug. 26, 2002) (codified at 8 C.F.R. pt. 3) (discussing how the BIA recognized its power to review entire immigration decisions de novo, including factual determinations, in cases since Matter of B-).
²¹ Turkson, 667 F.3d at 527. The regulation instructs the BIA to continue to review legal questions de novo but to review factual matters with a clear error standard. Id.; 8 C.F.R. § 1003.1(d)(3)(i)–(ii). De novo review refers to an appellate body exercising independent judgment over a matter. Turkson, 667 F.3d at 527 (distinguishing between the two standards of review addressed in the regulation). Meanwhile, a clear error standard provides a high degree of deference to a prior determination. Id. In other words, under clear error review, an appellate body cannot exchange the lower court’s reasoning for its own and can only overrule the lower court in instances of unambiguous mistake. Easley v. Cromartie, 532 U.S. 234, 242 (2001).
²² See Turkson, 667 F.3d at 524, 527 (holding that the BIA erred by not reviewing the IJ’s decision according to the appropriate regulations). James Turkson immigrated to the United States in 1995, fleeing state violence and torture in response to his activities supporting a political party that his father led. Id. Since coming to the United States, Turkson married and began to reside in a legal, permanent status. Id. Turkson was then convicted of a drug possession charge and faced deportation. Id. Turkson invoked the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) provisions as a defense against his removal because of the likelihood that he would again face torture by the hand of the state if he returned to Ghana. Id. at 524–25. The United Nations Commission on Human Rights drafted the CAT to more effectively combat torture and other inhumane punishments globally. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, S. Treaty Doc. 100-20, 1465 U.N.T.S. 85.
²³ Turkson, 667 F.3d at 525.
The Fourth Circuit held that this constituted a de novo review of the IJ’s legal and factual determinations and thus violated federal regulations requiring a clear error standard for the review of factual determinations.\(^\text{24}\) In particular, the court explained that applying the clear error standard to factual determinations appropriately reflects the IJ’s proximity to the facts of the case, including the witnesses and evidence.\(^\text{25}\) The Fourth Circuit reasoned that the BIA should have used a clear error standard of review because it mirrors the standard applied to any factfinder and was reflected in the new federal regulation.\(^\text{26}\)

On the other end of the spectrum, in 2017 in *Upatcha v. Sessions*, the Fourth Circuit held that the BIA inappropriately applied only the clear error standard when reviewing a “mixed question of fact and law.”\(^\text{27}\) The court held that to determine whether a marriage was in “good faith” requires an appellate body to examine the facts for clear error but to use a de novo standard to review how those facts apply to the law.\(^\text{28}\)

In both *Turkson* and *Upatcha*, the Fourth Circuit faced mixed questions of law and fact.\(^\text{29}\) In *Turkson*, the court held that the BIA contravened federal regulations pertaining to BIA standards of review by applying a de novo standard to the mixed question, and in *Upatcha* the court held that the BIA’s use of only a clear error standard violated the federal regulations.\(^\text{30}\) Accordingly, federal regulations pertaining to the review of immigration decisions frequently re-

\(^\text{24}\) *Id.* at 528.
\(^\text{25}\) *Id.* at 527.
\(^\text{26}\) *Id.* (citing 8 C.F.R. § 1003.1(d)(3)(i)–(ii)).
\(^\text{27}\) *Upatcha v. Sessions*, 849 F.3d 181, 182 (4th Cir. 2017) (holding that when reviewing whether a marriage was in good faith for immigration purposes, the BIA must review the evidence for clear error but can review de novo the ultimate legal judgment based on that evidence).
\(^\text{28}\) *Id.* at 184. The petitioner, Juraluk Upatcha, sought to prove her marriage was in “good faith” for the purposes of gaining a hardship petition to prevent deportation. *Id.* at 183. Upatcha immigrated to the United States in 2008 as the fiancé of Sergio Gonzalez, a U.S. citizen. *Id.* at 182. By marrying Gonzalez, Upatcha obtained conditional legal residence status for two years, after which she could make the status permanent only if she and her husband petitioned that their marriage was still intact and was not for immigration purposes. *Id.* at 182–83. Unfortunately, three months after their marriage, Upatcha filed for divorce and, as a result, could be removed from the United States. *Id.* at 183. To avoid removal, she applied for a hardship waiver, which the Department of Homeland Security can issue at its discretion to allow individuals like Upatcha to stay in the United States if removal would cause the individual “extreme hardship” and the couple married in good faith, rather than on false pretenses. *Id.*; see 8 U.S.C. § 1186a(c)(4) (delineating the requirements for a hardship waiver as showing that extreme hardship would result if the individual was removed and that the marriage was entered into in good faith but terminated or that the spouse or child was subject to physical abuse or “extreme cruelty”).
\(^\text{29}\) *Upatcha*, 849 F.3d at 182; *Turkson*, 667 F.3d at 528.
\(^\text{30}\) *Upatcha*, 849 F.3d at 182, 184; *Turkson*, 667 F.3d at 528; see 8 C.F.R. § 1003.1(d)(3)(i)–(ii) (requiring the BIA to review factual determinations with a clear error standard and matters of law de novo).
quire applying a blended clear error and de novo review to mixed questions of law and fact.31


The CCA, which went into effect in 2001, created an easier path for children of U.S. citizens born abroad, including adopted children, to become citizens when they meet specific criteria.32 More specifically, if a child permanently lives in the United States, is under eighteen years old, has at least one parent who is a U.S. citizen, and is in the legal and physical custody of that parent, then the child automatically derives citizenship from that parent.33 Congress originally drafted the bill as the Adopted Orphans Citizenship Act with the specific goal of eliminating the bureaucratic processes that often left adopted children as noncitizens even though the biological children of their adopted parents were citizens.34 Concerns for lack of fairness in how the law

31 See Upatcha, 849 F.3d at 184 (noting how federal regulations require a two-part approach that uses a clear error and de novo standard when analyzing an issue with questions of fact and law); Turkson, 667 F.3d at 527 (same); 8 C.F.R. § 1003.1(d)(3)(i)–(ii) (explaining the requirement that questions of law be reviewed de novo and question of fact be reviewed for clear error).


33 8 U.S.C. § 1431(a); FACT SHEET, supra note 32, at 1.

34 See H.R. REP. NO. 106-852, at 12 (2000) (highlighting that the grant of automatic citizenship to foreign-born children of U.S. citizens via the CCA corrects the disparity that the immigration system created between the children of U.S. citizens born domestically versus those born abroad); 146 CONG. REC. H7778 (daily ed. Sept. 19, 2000) (statement of Rep. Schakowsky) (referring to the CCA by its original name, the Adopted Orphans Citizenship Act, and explaining its intent to address the unfairness of the immigration system’s failure to grant automatic citizenship to the adopted children of U.S. citizen parents). In the most extreme and concerning cases, parents would forget or not realize that they needed to go through the final process of naturalization for their adopted children, only to have them face serious consequences including deportation. See H.R. REP. NO. 106-852, at 5; 146 CONG. REC. H7777 (daily ed. Sept. 19, 2000) (statement of Rep. Delahunt) (acknowledging the burden created by the added bureaucratic step of naturalizing a newly adopted child and the complications that arise for the child later in life if this step is overlooked or mishandled); see also 8 U.S.C. § 1101(a)(23) (defining “naturalization” as “the conferring of nationality of a state upon a person after birth, by any means whatsoever”); 8 U.S.C. § 1427 (explaining the requirements for naturalization). Specifically, Representative Delahunt shared the story of Joao Herbert, a boy who was adopted by U.S. parents from his birth-country of Brazil and grew up in Ohio. 146 CONG. REC. H7777 (daily ed. Sept. 19, 2000) (statement of Rep. Delahunt). At age twenty-two, Herbert was deported for a relatively minor drug offense because he never naturalized when he was under eighteen years old. Id.; Mari-
would create an easier path to citizenship for foreign-born adopted children but not the biological children of U.S. citizens who were born abroad led to the law’s extension to all children who were born abroad, brought to the United States, and in the “legal and physical custody” of the U.S. citizen parent.35

Prior to its 2019 decision in Duncan v. Barr, the Fourth Circuit had not ruled on the standard of review or whether to apply state or federal law to the CCA’s physical custody requirement.36 Howard Duncan, the son of a U.S. citizen father and a Nigerian mother, challenged the standard of review that the BIA used when determining whether he met the physical custody requirement.37 When Duncan was six years old, he and his grandmother moved to the United States from Nigeria to live with his father.38 Three months later, Duncan’s father became incarcerated and remained so until 2011, at which point Duncan was twenty years old.39 Duncan’s grandmother assumed legal guardi-
anship shortly after his father’s imprisonment, but his father remained involved in his life.\textsuperscript{40} Particularly, while his father was incarcerated, Duncan visited him once a month and spoke with him on the phone multiple times a week.\textsuperscript{41} Additionally, his father participated in various life decisions, small and large, and provided some financial support to the family.\textsuperscript{42} 

In February 2015, the Department of Homeland Security brought removal proceedings against Duncan for crimes he previously committed.\textsuperscript{43} Duncan moved to dismiss the deportation proceedings on the grounds that he was a U.S. citizen.\textsuperscript{44} The IJ found that Duncan was not a U.S. citizen because he was not in his father’s custody during the time required by the statute and therefore entered a final removal order.\textsuperscript{45} 

Following the IJ’s decision, Duncan appealed to the BIA.\textsuperscript{46} The BIA held that the IJ did not clearly err in finding that Duncan failed to meet the physical custody requirement of the CCA.\textsuperscript{47} Duncan then appealed to the Fourth Cir-
cuit, challenging the BIA’s use of clear error review for determining whether he was in his father’s physical custody.48

In a matter of first impression, the Fourth Circuit concluded that the BIA applied the wrong standard to a review of the CCA’s physical custody requirement.49 The court reasoned that, because physical custody is a question of both law and fact, the BIA should have reviewed the factual determination with a clear error standard and the legal application de novo pursuant to 8 C.F.R. § 1003.1(d)(3).50 Moreover, the court concluded that state law, rather than federal law, should provide the legal meaning of “physical custody.”51 Accordingly, the Fourth Circuit remanded Duncan’s case to the BIA with instructions to review the IJ’s factual decision for clear error and the legal determination with de novo review, using Maryland’s definition of “physical custody.”52

II. THE FOURTH CIRCUIT DEMANDS MORE FROM BIA REVIEWS, BUT LESS FROM THE CHILD CITIZENSHIP ACT

In 2019, in Duncan v. Barr, the United States Court of Appeals for the Fourth Circuit decided as a matter of first impression that the physical custody requirement of the CCA is a blended question of fact and law.53 The court further held that the BIA should look to the applicable state’s law for the definition of “physical custody.”54 The Fourth Circuit’s reasoning reflects previous decisions on similar questions, such as the legitimacy of a good-faith marriage and the definition of “torture” in relation to an immigration-status determination.55 Section A of this Part provides an in-depth analysis of the Fourth Cir-

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48 Id. at 213–14.
49 Id. at 214.
50 Id.; see also 8 C.F.R. § 1003.1(d)(3)(i)–(ii) (defining the standard of review protocols for the BIA). The BIA previously reviewed all determinations de novo, but in 2002, new regulations established the review of facts for clear error, whereas all other issues remained subject to de novo review. See Turkson v. Holder, 667 F.3d 523, 527 (4th Cir. 2012) (discussing the 2002 shift in review standards); 8 C.F.R. § 1003.1(d)(3)(i)–(ii).
51 Duncan, 919 F.3d at 216. The Fourth Circuit looked to its decision in Ojo v. Lynch, where the court held that federal immigration law should interpret adoption issues in accordance with state law because, as a principle of federalism, determinations on domestic matters belong in the realms of the states. Id.; see Ojo, 813 F.3d at 540–41 (holding that, given the judiciary’s long tradition of looking to state law for determinations on domestic issues, Congress would have had to explicitly provide a definition for “adoption” in the immigration statute if it intended for courts to ignore state law in determining the applicable definition of “adopted”). Accordingly, the court in Duncan held that the definition of “custody” is a domestic matter, and federal law should defer to the states for legal interpretation of the term. 919 F.3d at 216.
52 Duncan, 919 F.3d at 217.
54 Id. at 216.
55 See id. at 215 (explaining that the two-part review standard for mixed questions of law and fact parallels the approach taken in other immigration cases); Upatcha v. Sessions, 849 F.3d 181, 183–84 (4th Cir. 2017) (holding that the details of a couple’s relationship—including their dating, the nature
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Section B reviews the court’s decision to maintain the interpretation that the CCA’s automatic grant of citizenship only applies to individuals who met the requirements after February 26, 2001.57

A. The Fourth Circuit’s Decision Extended Previous
Immigration Standard of Review Reasoning

Before Duncan v. Barr, the Fourth Circuit had never decided the standard of review that the BIA should apply to the CCA’s physical custody requirement.58 Accordingly, the Fourth Circuit relied on cases with similar issues to determine the approach that the BIA should have followed in reviewing the IJ’s decision.59

The court first looked to its 2014 decision in Turkson v. Holder.60 The issue in Turkson was whether the BIA acted in accordance with federal regulations when it reviewed the IJ’s decision to grant deportation relief to petitioner James Turkson under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.61 The BIA overturned the IJ’s decision and made its own determination on what conditions

of their shared finances, and their credibility related to these details—are factual determinations, whereas applying them to determine whether the couple entered a good-faith marriage is a legal judgment; Turkson v. Holder 667 F.3d 523, 528–29 (4th Cir. 2012) (holding that what happened to an immigrant in Ghana, the state of political affairs in Ghana, and what conditions the immigrant would likely face if he returned there were factual determinations, whereas whether the treatment he faced in Ghana amounted to torture was a legal question).

56 See infra notes 58–84 and accompanying text.
57 See infra notes 85–95 and accompanying text.
58 See Duncan, 919 F.3d at 214 (stating that the appropriate review standard for the CCA’s physical custody requirement was a matter of first impression for the court).
59 See id. at 215 (citing Upatcha, 849 F.3d at 184; Turkson, 667 F.3d at 529) (discussing other immigration cases in which there was a mixed question of law and fact). See generally Upatcha, 849 F.3d at 184 (holding that whether a marriage was in good faith was a mixed question); Turkson, 667 F.3d at 529 (holding the same for the question of whether an individual faced a threat of torture in his country of origin).
60 See Duncan, 919 F.3d at 215 (noting that when the IJ faces a mixed question of law and fact, such as whether actions amount to torture, the BIA must review the facts at issue with a clear error standard and the legal question of whether those facts amount to torture under CAT de novo (citing Turkson, 667 F.3d at 529)).
61 Turkson, 667 F.3d at 525, 527; see 8 C.F.R. § 1003.1(d)(3)(i)–(ii) (delineating how, when the BIA reviews a decision, it must look at factual determinations with a clear error standard and legal questions with a de novo standard). As a party to the CAT, the United States has agreed not to deport anyone who is likely to face torture at the hands of or direction of a government officer in the country to which the individual would be deported. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, S. TREATY DOC. 100-20, 1465 U.N.T.S. 85; Turkson, 667 F.3d at 525–26.
Turkson would likely face if deported to Ghana.\textsuperscript{62} The Fourth Circuit overturned the BIA’s approach, highlighting that 8 C.F.R. § 1003.1(d)(3) divides the BIA’s review into a de novo standard for matters of law and a clear error standard for matters of fact.\textsuperscript{63} Further, the court explained that the regulation parallels the procedures of other courts in that the trial judge, or in this case the IJ, is closest to the facts and the testimony.\textsuperscript{64} Therefore, the reviewing body should defer to the IJ’s factual determinations.\textsuperscript{65} Accordingly, the BIA erred by making its own factual determinations regarding witness testimony and the likelihood of future events.\textsuperscript{66} According to the Fourth Circuit, in reviewing an IJ decision, the BIA should have exercised a two-part approach.\textsuperscript{67} First, it should examine factual determinations, such as credibility or predictions, and ask only if a clear error was made.\textsuperscript{68} Second, it can apply the facts to the questions of law and make its own judgment de novo.\textsuperscript{69} The court applied this two-part approach in a new context in Duncan.\textsuperscript{70}

The Fourth Circuit’s 2017 decision in \textit{Upatcha v. Sessions} followed Turkson’s two-part approach and applied it to a ruling more similar to that in Duncan.\textsuperscript{71} There, the court held that the BIA erroneously reviewed the entire IJ decision with a clear error standard even though a question of law existed.\textsuperscript{72} In 2009, after the dissolution of her marriage, Petitioner Juraluk Upatcha applied for a hardship waiver as a defense to her removal.\textsuperscript{73} To be successful, she had

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\textsuperscript{62} Turkson, 667 F.3d at 528. In its reasoning, the BIA rejected the credibility of Turkson’s testimony, found other evidence more credible, and drew its own conclusions on what Turkson would likely face if forced to return to Ghana. \textit{Id.}

\textsuperscript{63} \textit{Id.} at 527, 530–31 (remanding the case to the BIA to conduct the appeal in accordance with the appropriate review standard).

\textsuperscript{64} \textit{Id.} at 527.

\textsuperscript{65} See \textit{id.} (noting that the IJ is in a better position to determine factual questions because the IJ observes witnesses and the BIA only reviews a paper transcript of the proceedings).

\textsuperscript{66} See \textit{id.} at 528 (explaining that the BIA made its own factual determinations, including rejecting witness testimony, determining that certain written evidence lacked credibility, and drawing conclusions about the conditions Turkson would face in Ghana).

\textsuperscript{67} \textit{Id.} at 527.

\textsuperscript{68} \textit{Id.} at 530.

\textsuperscript{69} \textit{Id.}

\textsuperscript{70} See Duncan, 919 F.3d at 215.

\textsuperscript{71} See \textit{id.} (noting similarities with the ruling in \textit{Upatcha}); \textit{Upatcha}, 849 F.3d at 184 (ruling that the BIA should have looked at the IJ’s factual determinations with only a clear error, but applied its own reasoning, de novo, to the application of those facts to the legal question of whether a marriage was in good faith).

\textsuperscript{72} \textit{Upatcha}, 849 F.3d at 184.

\textsuperscript{73} \textit{Id.} at 182–83. Upatcha came to the United States as a conditional lawful permanent resident based on her engagement to a U.S. citizen. \textit{Id.} at 182. She and her U.S. citizen partner married shortly after her arrival, permitting her to make her conditional resident status permanent after two years of marriage if they could show the marriage was legal, they remained together, and they did not marry for immigration reasons. \textit{Id.} at 182–83. Unfortunately, the couple divorced after three months, causing Upatcha to lose her conditional status and opening the possibility of her deportation. \textit{Id.} at 183. A hardship waiver granted by the Secretary of Homeland Security would have allowed Upatcha to stay
to show that her marriage to a U.S. citizen was in good faith.\textsuperscript{74} The IJ denied the waiver and found that the marriage was not in good faith.\textsuperscript{75} On appeal, the BIA applied the clear error standard and upheld the IJ’s decision, holding that whether a good-faith marriage existed was a question of fact, not law.\textsuperscript{76} The Fourth Circuit held that the BIA appropriately looked for clear error regarding determinations of credibility, but that it should have then analyzed the legal question de novo by exercising discretion and asking how the factual determinations applied to the legal question of good faith.\textsuperscript{77} Thus, in contrast to Turkson, where the BIA applied its discretion too liberally, the Fourth Circuit in Upatcha held that the BIA fell short in its appellate capacity.\textsuperscript{78}

Reviewing a determination of definitional questions invokes the second portion of the two-part inquiry, a de novo review of what the court deems a legal question.\textsuperscript{79} The Fourth Circuit in Upatcha saw the definition of a good-faith marriage as a legal question, similar to the definition of torture in Turkson.\textsuperscript{80} Likewise, in Duncan, the Fourth Circuit saw the definition of physical custody as a legal question.\textsuperscript{81} The definition of custody depends on state law, and the court’s example of how two states, Nevada and Montana, view the question distinctly highlighted how custody is more than a simple question of fact.\textsuperscript{82} Accordingly, like in Turkson and Upatcha, the court ruled that the BIA
should have taken a two-part approach to its review. First, the BIA should have examined the facts related to the father’s physical custody for clear error, and then it should have examined the definition of physical custody to which the facts applied with a de novo standard.

B. The Fourth Circuit Reaffirmed That Meeting the Requirements of the CCA Prior to Its Effective Date Does Not Grant Automatic Citizenship

In the three months that Duncan lived with his father in the United States prior to his father’s incarceration, he arguably met all of the requirements for automatic citizenship under the CCA. The Fourth Circuit, however, held that it was only relevant if Duncan met the requirements between February 27, 2001, when the law went into effect, and October 17, 2009, when Duncan turned eighteen years old. Federal regulations after the passage of the CCA indicated that the law was not meant to apply to individuals who met the requirements for citizenship prior to the law’s effective date.

The analysis of the CCA’s applicability to individuals who met the requirements prior to the law’s effective date centers on the statute’s “as in effect” clause. In June 2001, in Nehme v. I.N.S., the Fifth Circuit Court of Appeals held that the CCA explicitly conveyed Congress’s intent and that to apply the law retroactively would make the “as in effect” clause meaningless. Further, the court stated that no evidence existed indicating that Congress intended the law to apply to individuals who met the requirements prior to the

from the other for a period of time, Nevada law is unlikely to view the child as in the custody of the parent. See id. at 216–17 (presenting the example of a child who spends the school year with one parent and summer vacation with another to show that Nevada law will no longer consider the parent with whom the child lives during the school year to have custody over the child during the summer).

83 Id. at 215; see Upatcha, 849 F.3d at 185; Turkson, 667 F.3d at 527.
84 Duncan, 919 F.3d at 215.
85 See 8 U.S.C. § 1431(a) (requiring a child to have at least one parent that is a U.S. citizen, to be in the legal and physical custody of that parent, and to be under eighteen years old); Duncan, 919 F.3d at 211–12 (describing Duncan’s father as an American, and later confirming that his U.S. citizenship status was not in dispute and that when Duncan was six years old, he lived with his father in the United States for three months). Duncan lived with his father for the three months preceding April 1998. Duncan, 919 F.3d at 211. The CCA went into effect on February 27, 2001. Id. at 212.
86 8 C.F.R. § 320.2; Duncan, 919 F.3d at 212.
87 8 C.F.R. § 320.2; see Nehme v. I.N.S., 252 F.3d 415, 430–33 (5th Cir. 2001) (holding that the plain language of the statute and legislative intent clearly show that the CCA sought only to provide citizenship to individuals who met the criteria after the law’s effective date); In re Rodriguez-Tejedor, 23 I. & N. Dec. 153, 159–61 (BIA 2001) (holding that the language of the statute is ambiguous but that the legislative history shows Congress did not intend the CCA to apply retroactively).
88 See Child Citizenship Act of 2000, Pub. L. No. 106-395, § 104, 114 Stat. 1631 (2000) (stating that the provisions of the Act apply to individuals who meet the “requirements of Section 320 or 322 of the Immigration and Nationality Act, as in effect on such effective date” (emphasis added)); Nehme, 252 F.3d at 431 grounding the analysis in the “as in effect” language of the CCA); Rodriguez-Tejedor, 23 I. & N. Dec. at 167 (same).
89 Nehme, 252 F.3d at 431.
law going into effect.\textsuperscript{90} Then, in July 2001, in \textit{In re Rodriguez-Tejedor}, the BIA agreed with the Fifth Circuit’s holding but distinguished its reasoning.\textsuperscript{91} The BIA held that the statutory language is ambiguous and thus looked to the legislative history, but still found no evidence that the drafters intended for the law to apply to those who had previously met the elements for automatic citizenship.\textsuperscript{92} Accordingly, the BIA held in line with the Fifth Circuit, and the Immigration and Naturalization Service subsequently issued a rule aligning with these interpretations.\textsuperscript{93} This left a portion of the population targeted by the CCA—adults who met its requirements as children but not on the effective date—outside of its reach.\textsuperscript{94} Duncan, having met the requirements for automatic citizenship three years prior to the effective date, but not after, represents one such individual.\textsuperscript{95}

III. THE FOURTH CIRCUIT SET THE APPROPRIATE STANDARD FOR REVIEW BUT EXPOSED FLAWS IN THE IMPLEMENTATION OF THE CCA

In 2019, in \textit{Duncan v. Barr}, the Fourth Circuit Court of Appeals appropriately ruled that the BIA erroneously used a clear error standard to review whether Duncan was in his father’s physical custody and that it should have used a blended standard based on the mixed question of fact and law.\textsuperscript{96} This ruling reflects the standards that non-immigration appellate courts use when reviewing trial court determinations and thus ensures the protections that motivate these review standards.\textsuperscript{97} An IJ, like a trial judge, is closest to the testimony and evidence presented, and therefore is in the best position to make factual determinations.\textsuperscript{98} Moreover, the purpose of an appellate body, like the BIA, is to provide an independent determination on legal matters, such as whether a

\begin{itemize}
\item \textsuperscript{90} \textit{Id.} at 432.
\item \textsuperscript{91} \textit{See Rodriguez-Tejedor, 23 I. & N. Dec.} at 155, 159. (recognizing that the decision in Nehme was binding and holding in accordance with it, but offering different reasoning, namely that the language pertaining to the effective date is ambiguous).
\item \textsuperscript{92} \textit{Id.} at 160–61.
\item \textsuperscript{93} 8 C.F.R. § 320.2 (codifying the Immigration and Naturalization Service (INS) regulation that an individual must meet the requirements of the CCA after its effective date to qualify for automatic citizenship); \textit{see Rodriguez-Tejedor, 23 I. & N. Dec.} at 155–56 (recognizing that the Fifth Circuit already decided on the issue and that the INS issued an interim rule that required the BIA to hold that individuals must meet the CCA requirements after its effective date).
\item \textsuperscript{94} \textit{See Rodriguez-Tejedor, 23 I. & N. Dec.} at 168–69 (citing to statements by the bill’s key drafters, Representative Delahunt, that emphasize that the problem the bill sought to address was adults facing deportation because their parents, unbeknownst to them, failed to naturalize them when they were children).
\item \textsuperscript{95} \textit{Duncan}, 919 F.3d at 211–12.
\item \textsuperscript{96} \textit{Duncan v. Barr, 919 F.3d} 209, 217 (4th Cir. 2019).
\item \textsuperscript{97} \textit{See Turkson v. Holder, 667 F.3d} 523, 527 (4th Cir. 2012) (describing how the BIA’s de novo and clear error review standards protect the IJ’s role as a factfinder given the IJ’s proximity to the case in a role that mirrors that of a trial judge).
\item \textit{Id.}
\end{itemize}
set of facts amounts to physical custody. By deciding this question in accordance with similar immigration decisions, as well as with basic appellate principles, the Fourth Circuit ensured custody determinations within the CCA receive fair and adequate review on appeal.

Less discussed in the Fourth Circuit’s reasoning, but prominent in its effect, is the validity of past interpretations regarding the CCA’s retroactive application, which have since been formalized into regulation. In construing the CCA to only apply to individuals who met its requirements on or after it went into effect on February 27, 2001, case law and regulations that give the statute effect misinterpret it and contravene its original purpose. In 2001, in *Nehme v. I.N.S.*, the petitioner argued before the Fifth Circuit Court of Appeals that legislative history shows Congress intended relief for children and adults who met the requirements for automatic citizenship as children. The Fifth Circuit disagreed and held that the statutory language clearly establishes that

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99 See id. (describing how the BIA, as an appellate body, should only overturn factual determinations if an unambiguous error was made, although it can make independent determinations on legal matters); see also Duncan, 919 F.3d at 217 (depicting examples of how the BIA would have to take the same set of facts and make different legal determinations in its appellate capacity based on the relevant law in a given state).

100 See Salve Regina Coll. v. Russell, 499 U.S. 225, 231–32 (1991) (discussing the role of appellate courts and how, by considering legal questions de novo, they improve the accuracy of courts’ decisions); Duncan, 919 F.3d at 217 (holding that the BIA should have analyzed the legal components of the physical custody question de novo, and the factual components with a clear error standard).

101 See 8 C.F.R. § 320.2 (codifying that individuals must have established all of the CCA’s requirements after February 26, 2001, or, in other words, on or after the law’s effective date of February 27, 2001); see also Nehme v. I.N.S., 252 F.3d 415, 430–33 (5th Cir. 2001) (holding that the statute’s language and intent indicate that the CCA was only meant to automatically provide citizenship to individuals who established its requirements on or after its effective date); In re Rodriguez-Tejedor, 23 I. & N. Dec. 153, 159–61 (BIA 2001) (holding that the legislative history shows Congress did not intend the CCA to apply to individuals over eighteen after the effective date).

102 See 8 C.F.R. § 320.2 (stating that an individual must meet the delineated conditions on or after February 27, 2001); see also Duncan, 919 F.3d at 212 (following 8 C.F.R. § 320.2 and holding that the CCA would have only applied to Duncan if he met the conditions on or after February 27, 2001 and before his eighteenth birthday); Nehme, 252 F.3d at 430–33 (holding that the language of the CCA is not ambiguous and clearly requires that an individual meet its conditions on or after February 27, 2001, to qualify for citizenship); Rodriguez-Tejedor, 23 I. & N. Dec. at 159 (holding that the language of the CCA is ambiguous, but that legislative intent confirms an individual cannot be older than eighteen on or after February 27, 2001, and receive automatic citizenship). In contrast to these determinations, the Congressional Record shows that the bill’s supporters intended to address the problem of adults who were not naturalized as children and that it should apply “automatically and retroactively.” See 146 CONG. REC. H7774, 7776–78 (daily ed. Sept. 19, 2000) (statements of Rep. Smith and Rep. Delahunt) (highlighting stories of adults who faced deportation because of the previous administrative hurdles for gaining citizenship for children born abroad as the problem that the CCA’s grant of automatic citizenship seeks to address). Further, the only objection to retroactive application concerned granting citizenship retroactively to the time of an individual’s birth, not allowing individuals to have met the bill’s requirements prior to February 27, 2001. See H.R. REP. NO. 106-852, at 5 (2000) (expressing concerns by the Department of State and the Department of Justice that retroactively granting citizenship to the time of an individual’s birth could cause legal and foreign relations issues).

103 Nehme, 252 F.3d at 431.
an individual must meet the requirements after the effective date.\textsuperscript{104} The statute’s clarity, however, is questionable.\textsuperscript{105} The phrase “as in effect” may mean that an individual must meet the requirements at or after February 27, 2001, or merely that citizenship becomes in effect after that date.\textsuperscript{106}

When the statutory language contains ambiguity, such as that presented in the “as in effect” clause, courts should look to Congress’s intent.\textsuperscript{107} In this instance, legislative history shows that Congress only intended citizenship to go into effect on February 27, 2001, but that it would apply to individuals who met the requirements as of the effective date as well as those who met them in the past.\textsuperscript{108} In \textit{In re Rodriguez-Tejedor}, decided shortly after the CCA’s passage, the BIA noted that Congress incorporated the “as in effect” provision because of clear concerns about the law operating retroactively that the Department of State and the Department of Justice raised.\textsuperscript{109} The legislative histo-

\textsuperscript{104} Id.; see 114 Stat. 1631 (2000) (stating that the Act applies to individuals who meet its criteria “as in effect on such effective date”).

\textsuperscript{105} See Child Citizenship Act of 2000, Pub. L. No. 106-395, § 104, 114 Stat. 1631 (2000) (stating that an individual receives automatic citizenship if the individual meets the “requirements of Section 320 or 322 of the Immigration and Nationality Act, as in effect on such effective date”); \textit{Rodriguez-Tejedor}, 23 I. & N. Dec. at 159 (holding in accord with the Fifth Circuit in \textit{Nehme}, but rejecting the argument that the plain language of the statute is clear).

\textsuperscript{106} 114 Stat. 1631 (2000). \textit{Compare Nehme}, 252 F.3d at 431–32 (holding that an individual must meet all requirements of the CCA on or after the effective date in order for that individual to gain automatic citizenship), with \textit{Rodriguez-Tejedor}, 23 I. & N. Dec. at 167–68 (Rosenberg, concurring in part and dissenting in part) (asserting that an individual may have met the Act’s requirements prior to the effective date and that the individual still gains citizenship under the Act, but that it only goes into effect on or after the effective date).

\textsuperscript{107} See Blum v. Stenson, 465 U.S. 886, 896 (1984) (holding that, when interpreting a statute, a court must first look to the statute’s plain language, but if it remains unclear, then the court can look to the legislature’s intent); \textit{Rodriguez-Tejedor}, 23 I. & N. Dec. at 159–60 (explaining that when the plain language of a statute is not clear, courts must look to other tools of statutory interpretation, including legislative history).

\textsuperscript{108} See \textit{Rodriguez-Tejedor}, 23 I. & N. Dec. at 168–69 (Rosenberg, concurring in part and dissenting in part) (arguing that both a plain language reading of the statute and the legislative history supported granting citizenship as of the effective date to individuals who met the statute’s criteria in the past, and clarifying that this is distinct from granting citizenship retroactively to begin on the date in which all of the criteria were met); H.R. Rep. No. 106-852, at 5, 9–13 (highlighting that the Executive Departments’ only concerns were with granting citizenship to retroactively begin at the individual’s date of birth); 146 CONG. REC. H7774, 7776–78 (daily ed. Sept. 19, 2000) (statements of Rep. Smith and Rep. Delahunt) (emphasizing that a focus of the Act was correcting the injustices towards adult children of U.S. citizens who failed to obtain citizenship as children because of unknown technicalities).

\textsuperscript{109} See \textit{Rodriguez-Tejedor}, 23 I. & N. Dec. at 161 (noting that the legislative history shows Congress adapted the bill to conform with concerns that the Department of State and the Department of Justice raised (citing to H.R. Rep. No. 106-852 at 5, 9–13)). The Department of State and Department of Justice expressed concerns about the CCA granting citizenship to begin retroactively at the time of an individual’s birth. H.R. Rep. No. 106-852, at 5. Specifically, these fears included individuals claiming reimbursement for rights they would have had as citizens, but were denied because they were not citizens at the time. \textit{Id.} at 10. Additionally, they were concerned about conflicts that the retroactive
ry, however, shows that their concern was narrower. The congressional intent behind the “as in effect” clause was to ameliorate the Executive Departments’ concerns by ensuring that people did not retroactively become citizens at birth and that their citizenship only goes into effect at the time the bill did, or anytime thereafter when the CCA’s requirements were met. Further, the statements of Representative Delahunt, a key drafter of the bill, show that the overall statutory scheme aimed to help the foreign-born children of U.S. citizens, adopted or biological, who faced deportation as adults because, unknownst to them, their parents did not take the final steps to naturalize them.

On the House floor, Representative Delahunt told the story of John Gaul who, at twenty-five years old, faced deportation to a country he had never known because his parents never naturalized him, as they were unaware that it was necessary in light of all the administrative actions they had taken to adopt John and bring him to the United States. The CCA aimed to grant individuals like Gaul citizenship to prevent horrible consequences coming from mere bureaucratic error or parental oversight. Likewise, had Duncan come to live with his father after February 27, 2001, he would have automatically acquired citizenship upon residing with him. The parallels between John Gaul and Howard Duncan are stark, and the proposition that the CCA was written without granting of citizenship might create with the countries who claimed these individuals as citizens at the time of their birth.

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110 See H.R. REP. NO. 106-852, at 5, 9–13 (detailing that the Executive Departments were only concerned with declaring individuals who met the requirements later in life to be U.S. citizens from the time of their birth, rather than from the time that they met the requirements).

111 See id.; Rodriguez-Tejedor, 23 I. & N. Dec. at 161 at 168–69 (Rosenberg, concurring in part and dissenting in part) (explaining that legislative intent shows that Congress added the “as in effect” clause to address the concerns of the Executive Departments and members of Congress regarding retroactively granting citizenship to the time of birth).


113 Id. The Gaul family adopted John from Thailand when he was four years old. Id. His adopted parents obtained a U.S. birth certificate for him, and he grew up in Florida. Id. After serving prison time for auto theft and bounced checks, however, he was deported back to Thailand when he was twenty-five years old. Schmitt, supra note 32. He never knew Thailand as his home and could not even speak Thai. Id. For all intents and purposes, the United States was his home, yet because his parents failed to naturalize him, he lacked the protections of a full U.S. citizen. 146 CONG. REC. H7777 (daily ed. Sept. 19, 2000) (statement of Rep. Delahunt).

114 See 146 CONG. REC. H7777 (daily ed. Sept. 19, 2000) (statement of Rep. Delahunt) (asserting that individuals like John Gaul have faced “heartbreaking injustices” and that “[t]hey are our children, and we are responsible for them”).

115 See Duncan, 919 F.3d at 211–12 (implying that had Duncan first come to the United States after the CCA’s effective date, he would have been in the legal and physical custody of his father during the relevant time period and thus obtained automatic citizenship).
out the intent of helping the very cases cited as motivating its passage borders on absurd.\textsuperscript{116}

Although the Fourth Circuit appropriately viewed the CCA’s physical custody requirement as a mixed question of law and fact, this would not have been necessary if the CCA was applied as it was intended.\textsuperscript{117} Unfortunately, the regulations and decisions preceding \textit{Duncan}, which give the statute effect, contravene its original purpose.\textsuperscript{118} In \textit{Duncan}, the Fourth Circuit had the opportunity to address the issue of the misinterpreted and misapplied effective date provision but failed to do so.\textsuperscript{119} The CCA was meant to grant citizenship to the children of U.S. citizens automatically in order to protect them from being blindsided by discovering they lacked citizenship later in life.\textsuperscript{120} The Act sought to remove entirely the technicalities that unfairly left U.S. citizens’ children without citizenship, not remove one technicality and replace it with another.\textsuperscript{121} Because Duncan was in his father’s physical custody for three

\textsuperscript{116} See id. at 211–12; 146 CONG. REC. H7777 (daily ed. Sept. 19, 2000) (statement of Rep. Delahunt) (citing Gaul’s story as an example of the motivation for the CCA). Both John Gaul and Howard Duncan came to the United States as young children, the former as an adopted child of a U.S. citizen and the latter as a biological child of a U.S. citizen. \textit{Duncan}, 919 F.3d at 211; 146 CONG. REC. H7777 (daily ed. Sept. 19, 2000) (statement of Rep. Delahunt). Both grew up with the United States as their homes and only upon the commission of crimes as young adults did their lack of citizenship emerge to add unforeseen severity to the consequences of their crimes—deportation to countries largely unknown to them. See \textit{Duncan}, 919 F.3d at 212 (discussing the facts of Duncan’s case); 146 CONG. REC. H7777 (daily ed. Sept. 19, 2000) (statement of Rep. Delahunt) (discussing the facts of Gaul’s case). John Gaul was deported in 1999. Schmitt, \textit{supra} note 32. His story is cited as a reason for drafting the CCA, yet the regulation that enables the law prevents it from helping him, Howard Duncan, and others like them from the injustice of deportation to homes that they have never known. See 8 C.F.R. § 320.2 (requiring that individuals meet all prongs of the CCA after February 26, 2001, in order to qualify for automatic citizenship); \textit{Rodriguez-Tejedor}, 23 I. & N. Dec. at 161 at 168–69 (Rosenberg, concurring in part and dissenting in part) (arguing, in opposition to 8 C.F.R. § 320.2, that the plain language of the CCA supports granting citizenship to individuals with situations similar to those for whom Representative Delahunt expressed concern); 146 CONG. REC. H7777 (daily ed. Sept. 19, 2000) (statement of Rep. Delahunt) (citing the injustices against John Gaul as motivating the drafting and passage of the CCA).

\textsuperscript{117} See \textit{Duncan}, 919 F.3d at 217 (analyzing the standard of review that the BIA should have applied to the “physical custody” question rather than recognizing that Duncan met the requirements under an appropriate reading of the CCA).

\textsuperscript{118} Compare 8 C.F.R. § 320.2 (stating that an individual must meet all conditions of the CCA after February 26, 2001 to qualify for citizenship under the Act), with 146 CONG. REC. H7777 (daily ed. Sept. 19, 2000) (statement of Rep. Delahunt) (describing the bill as addressing the “heartbreaking injustices” similar to those that befell two men aged twenty-five and twenty-two who faced deportation because they were not naturalized when brought to the United States after their adoption). Under the reading adopted in 8 C.F.R. § 320.2, these individuals who represent the problem the bill sought to address would not benefit from it, because they were over eighteen as of February 26, 2001. See 8 C.F.R. § 320.2; 146 CONG. REC. H7777 (daily ed. Sept. 19, 2000) (statement of Rep. Delahunt).

\textsuperscript{119} See \textit{Duncan}, 919 F.3d at 212 (citing 8 C.F.R. § 320.2) (dismissing implicitly that Duncan could derive citizenship from meeting the CCA’s requirements prior to February 26, 2001).


\textsuperscript{121} See id. (explaining the purpose of the Act as streamlining the citizenship process for the children of U.S. citizens).
months before his father was arrested, he should have citizenship under the CCA and therefore be ineligible for removable. 122

Given the flawed interpretation of the CCA in its corresponding regulations and subsequent case law, Congress should correct and clarify the Act. 123 Legislative efforts introduced in 2019 focus on correcting this loophole, but because of their emphasis on adoptees and those who did not meet the age requirement by the effective date, individuals in situations like Duncan’s remain at risk. 124 Fair legislation would ensure that all “our foreign-born sons and daughters . . . have the benefits of citizenship when they arrive on our shores” in accordance with the original intention of the bill’s drafters and the bipartisan support it received. 125

CONCLUSION

Family reunification and family-focused policies have been a bedrock of the U.S. immigration system for much of the past half century. Both humanitarian justifications and more practical reasons support such policies. Individuals often value family above all else, and for recent arrivals, family serves as a powerful support system in their transition into life in a new country.

The value our country has historically placed on the family unit in the immigration system is reflected in the Child Citizenship Act of 2000, which sought to better safeguard families from separation due to oversight or bureaucratic missteps from decades prior. Unfortunately, the size of the population who could benefit from the legislation was sharply curtailed by an arguably erroneous interpretation and subsequent rule passage that left many of the individuals the law sought to protect without recourse. Howard Duncan is one such individual. The Fourth Circuit Court of Appeals rightly held that the BIA

122 See 8 U.S.C. § 1227(a)(2) (stating that deportation as the punishment for committing criminal offenses applies to aliens, not citizens); Duncan, 919 F.3d at 212 (showing that Duncan met all requirements of the CCA when he first moved to the United States with his father but not after February 26, 2001).
123 See supra note 102 and accompanying text.
124 See H.R. 2731, 116th Cong. (2019) (as referred to the Subcomm. on Immigration and Citizenship, June 26, 2019) (proposing that the CCA’s grant of automatic citizenship apply to individuals who met all requirements before the effective date, but were over eighteen years old as of that date); Simons, supra note 35 (describing how the proposed legislation would allow individuals who met all of the CCA’s requirements but were adults at the time of its passage to take advantage of its grant of automatic citizenship). Duncan was under eighteen when the bill passed, but he was no longer in his father’s physical custody. Duncan, 919 F.3d at 212. As a result, he met the age requirement under the current interpretation of the Act but not the physical custody requirement. Id. The new bill specifically focuses on individuals who met the age requirement in the past but no longer did at the time of the bill’s passage. H.R. 2731; Simons, supra note 35. It does not, however, address those who no longer met other attendant circumstances, such as the physical custody requirement, even though they also had met them in the past. H.R. 2731; Simons, supra note 35.
applied the wrong standard of review and that it should have analyzed the mixed question of fact and law with a two-part clear error and de novo standard of review. The court appropriately remanded Duncan’s case to the BIA in light of its holding. But, because of how case law and regulations have interpreted the Child Citizenship Act, his path remains highly uncertain and susceptible to deportation to a country he has never known. In a moment when family separation at the U.S.-Mexico border and heated debates about chain migration prompt questions about the degree to which the United States values and respects families in the context of immigration, Congress should take this opportunity to strengthen the Child Citizenship Act and ensure that it meets its original purpose: to protect the children of citizens, regardless of age, and ensure that this country remains their home.

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