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What is Extreme Cruelty? Judicial Review of Deportation Cancellation Decisions for Victims of Domestic Abuse

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NOTES

What is Extreme Cruelty? Judicial Review of Deportation Cancellation Decisions for Victims of Domestic Abuse

I. INTRODUCTION

In the 1990s, Congress began to devote increased attention to the problem of domestic violence,[1] a rampant national problem with social and economic costs.[2] At the same time, concerns about immigrants draining the social welfare service system and taking jobs away from U.S. citizens gave rise to an interest in more stringently monitoring and eradicating the illegal alien population in the United States.[3] As part of the 1994 Violence Against Women Act ("VAWA"), Congress passed the battered spouse provision, attempting to reconcile its desires to address domestic violence and tighten immigration laws.[4]

Illegal immigrants are subject to removal procedures. However, because of the harshness of deportation, Congress passed statutes creating safe havens for aliens seeking to escape that fate. Aliens may apply to the Attorney General for cancellation of removal in one of two ways. First, and most commonly, aliens may invoke 8 U.S.C. § 1229b(b)(1)(D), which allows the Attorney General to cancel the removal of an alien who "establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence."[5] Litigation has settled the boundaries of the "extreme hardship" provision.[6]

Second, aliens may invoke the battered spouse provision. Pursuant to 8 U.S.C.S. § 1229b(b)(2)(A)(i)(I), part of the Violence Against Women Act, the Attorney General may cancel removal if an alien proves that she "has been battered or subjected to extreme cruelty by a spouse or parent who is or was a United States citizen."[7]

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1. *See* H.R. REP. NO. 103-395, at 25-27 (1993) (addressing the "rising tide of violence" directed against American women).

2. *See* Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture's Diminishment, but Not Its Demise*, 24 N. ILL. U. L. REV. 153, 162-65 (2004).

3. *See* S. REP. NO. 104-249, at 2-4 (1996) (discussing the drain on social welfare created by illegal immigration and the availability of jobs as the primary magnet for most illegal immigrants). The Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1997) (codified at 8 U.S.C. § 1182 (2000)), was enacted in part to monitor illegal immigration more stringently. *See also* Aaron G. Leiderman, Note, *Preserving the Constitution's Most Important Human Right: Judicial Review of Mixed Questions Under the REAL ID Act*, 106 COLUM. L. REV. 1367, 1369 (2006) (calling the enactment of the IIRAIRA Congress's "tougb stand" on illegal immigration).

4. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1902 (codified as amended in scattered sections of 8, 18, 28, and 42 U.S.C.).

5. 8 U.S.C. § 1229b(b)(1)(D) (2000).

6. *See infra* Part IV.A.

7. 8 U.S.C. § 1229b(b)(2)(A)(i)(I).

An alien who applies for removal cancellation pursuant to this statute will be granted a hearing before an Immigration Judge.[8] The alien may appeal the Immigration Judge's decision to the Board of Immigration Appeals ("BIA"), also within the agency.[9] However, circuit courts have split as to whether a federal court may review the BIA's determination that an alien has not been subjected to "extreme cruelty."[10]

As a general matter, courts cannot review a "discretionary" removal decision by the Attorney General.[11] However, courts disagree whether a finding of "extreme cruelty" constitutes a discretionary decision. Most courts regard the determination that an alien's family would suffer "extreme hardship" due to deportation as discretionary.[12] On the other hand, courts view the determination that a family member "battered" an immigrant as a non-discretionary factual decision reviewable by the courts.[13] "Extreme cruelty" lies between these two tests, and courts disagree as to whether it should be treated as discretionary, and therefore non-reviewable, or non-discretionary, and therefore reviewable. The courts' interpretation of "extreme cruelty" is significant especially because it implicates domestic abuse issues and the legal defense of battered woman syndrome.

In *Hernandez v. Ashcroft*, the Ninth Circuit held that determining whether an act constitutes "extreme cruelty" is a non-discretionary decision.[14] The Tenth and Fifth Circuits disagreed with the Ninth Circuit, holding that "extreme cruelty" is a subjective determination requiring balancing multiple factors.[15] These divergent holdings reflect the courts' attitudes towards domestic violence and

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8. *Id.* § 1229a(a)(1).

9. 8 C.F.R. § 1003.1(b)(3) (2007).

10. *See infra* Part III.

11. 8 U.S.C. § 1252(a)(2)(B) (2000 & Supp. V 2005).

12. *See, e.g.*, INS v. Jong Ha Wang, 450 U.S. 139, 144 (1981) (holding that the Board of Immigration Appeals, operating as a delegate of the Attorney General, acted within its authority in construing the term "extreme hardship" under federal deportation provisions); Moosa v. INS, 171 F.3d 994, 1012-13 (5th Cir. 1999) (holding that the discretionary nature of an "extreme hardship" interpretation precludes subsequent court review of that interpretation); Kalaw v. INS, 133 F.3d 1147, 1152 (9th Cir. 1997) (finding that the Attorney General's determination of "extreme hardship" is "clearly a discretionary act").

13. *See, e.g.*, Hernandez v. Ashcroft, 345 F.3d 824, 834-35 (9th Cir. 2003) (holding that determinations requiring the application of law to fact, including whether an immigrant has been subjected to battery, are non-discretionary, and therefore reviewable by the courts).

14. *Id.* at 834.

15. *See* Perales-Cumpean v. Gonzales, 429 F.3d 977, 983 (10th Cir. 2005) (" '[E]xtreme cruelty' is just the sort of non-algorithmic decision that requires a non-reviewable 'judgment call' by the Attorney General."); *see also* Wilmore v. Gonzales, 455 F.3d 524, 528 (5th Cir. 2006) (describing and agreeing with the Tenth Circuit's characterization).

opinions concerning how immigration law should respond to allegations of abuse in the home. Although the Ninth Circuit errs on the side of protecting a vulnerable demographic, the Fifth and Tenth Circuits have chosen a solution that bolsters the efficiency of the judicial system and helps prevent abuses of immigration law, even if it may sometimes result in harsh application of an otherwise ameliorative law. To resolve the conflict between the circuits, the Supreme Court should consider holding that, although extreme cruelty generally is a discretionary determination, there are certain categories of "per se" abuses that, when present, render the decision non-discretionary. The "per se" category would include cycles of violence between spouses or between a parent and child. However, the Court should leave cases involving verbal abuse or assault to the Attorney General's discretion.

Part II of this Note discusses the history of agency immigration decisions and the intersection of immigration law with domestic violence concerns in the 1990s. It then discusses how these concerns prompted Congress to add the battered spouse provision to the Violence Against Women Act of 1994—an addition that led to the current circuit split over whether "extreme cruelty" decisions should be afforded judicial review. Part III of this Note analyzes the circuit split, and Part IV proposes a compromise between the two all-or-nothing approaches that the appellate courts have taken. Although courts should view extreme cruelty decisions as generally discretionary, certain per se categories of abuses should warrant eliminating agency discretion, thus rendering these decisions reviewable by the federal courts.

II. BACKGROUND

A. A History of Agency Immigration Decisions

Prior to 1996, the Immigration and Nationality Act ("INA") entitled noncitizens to judicial review of any BIA deportation, as well as any subsequent agency decision to deny deportation relief.[16] Parties who wished to appeal a BIA decision "would file a petition for review

16. Immigration and Nationality Act (INA) § 106(a) (formerly codified at 8 U.S.C. § 1105a (repealed 1996)); *see* Shaughnessy v. Pedreiro, 349 U.S. 48, 50-52 (1955) (holding that enactment of the INA rendered the Administrative Procedure Act's judicial review provisions applicable to deportation decisions).

in the court of appeals for the circuit in which the administrative proceedings had been held."[17]

In response to perceived abuses by immigrants trying to delay deportation, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA").[18] This legislation narrowed dramatically the federal courts' jurisdiction to review final deportation orders.[19] Section 106 of the INA, which formerly provided for judicial review procedures, was replaced by section 242, later codified at 8 U.S.C. § 1252(a)(2)(B).[20] This new provision effectively "vest[s] the BIA with final appellate jurisdiction for most Immigration and Natrualization Service ("INS") deportation proceedings."[21] It does so by prohibiting judicial review of any decision committed to the Attorney General's discretion.[22] This legislation has left lower courts confused as to whether other decisions by the Attorney General are "discretionary."

In 2005, Congress enacted the REAL ID Act, which repealed the writ of habeas corpus for noncitizens challenging agency removal orders and replaced it with "what Congress believed to be a constitutionally adequate alternative: direct circuit court review of 'constitutional claims or questions of law.' "[23] However, the Act is silent about whether mixed questions of law and fact are reviewable. Therefore, in situations where the facts and the applicable legal standard are undisputed, but there is a question as to whether the standard was applied to the facts correctly, the REAL ID Act offers no guidance as to whether federal courts have jurisdiction.

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17. *Kalaw*, 133 F.3d at 1149; *see* INA § 106(a).

18. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.); *see* Leiderman, *supra* note 3 ("Congress has periodically adjusted the judicial review scheme for removal orders to rein in perceived abuses of the system by non-citizens attempting to delay their removal from the United States."). Congress also passed other legislation to toughen the country's stance on illegal immigration, including section 440(a) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.), which "precluded from judicial review the final deportation orders of non-citizens deportable for certain criminal convictions." Leiderman, *supra* note 3, at 1370.

19. *Kalaw*, 133 F.3d at 1149 (noting the "specific repeal of the judicial review procedures" previously available under INA § 106).

20. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 306, 110 Stat. at 3009-607 (codified as amended at 8 U.S.C. § 1252 (2000 & Supp. V 2005)).

21. *Kalaw*, 133 F.3d at 1149, 1152.

22. 8 U.S.C. § 1252(a)(2)(B)(ii) ("[N]o court shall have jurisdiction to review [any decision] the authority for which is specified . . . to be in the discretion of the Attorney General . . . .").

23. Leiderman, *supra* note 3, at 1367 (quoting REAL ID § 106(a)(1)(A)(iii) (as codified at 8 U.S.C. § 1252(a)(2)(D) (amending INA § 242(a)(2)(D)))).

B. *The Intersection of Immigration Law and Domestic Violence Concerns*

In the early 1990s, Congress began to increase its focus on the problem of domestic violence in the United States.[24] Congress found the problem's prevalence shocking:

> In 1991, at least 21,000 domestic crimes were reported to the police every week; at least 1.1 million reported assaults—including aggravated assaults, rapes, and murders—were committed against women in their homes that year; unreported domestic crimes have been estimated to be more than three times this total.
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> Every week, during 1991, more than 2,000 women were raped, and more than 90 women were murdered—9 out of 10 by men. Women are six times more likely than men to be the victim of a violent crime committed by an intimate; estimates indicate that more than one of every six sexual assaults a week is committed by a family member.
>
> Violence is the leading cause of injuries to women ages 15 to 44, more common than automobile accidents, muggings, and cancer deaths combined. As many as 4 million women a year are the victims of domestic violence. Three out of four women will be the victim of a violent crime sometime during their life.[25]

Moreover, the number of crimes against women was rapidly increasing. A 1990 Senate Report found that over the previous 10 years, the number of reported rapes had risen four times faster than the national crime rate. Over the previous fifteen years, assaults against young women had risen fifty percent.[26] Although the victims of domestic violence were overwhelmingly female (according to some reports at the time, approximately 95% of victims of spousal abuse were women),[27] the problem was not limited to one particular socio-economic, racial, ethnic, or religious group.[28]

Congress concluded that spousal abuse was a chronic problem, national in scope, and affected not only women, but also children in homes where domestic violence occurred, imposing heavy costs on society.[29] Domestic violence contributes to homelessness, employee absenteeism, and sick time.[30] Society also pays heavily for domestic violence in health care costs.[31] Congressional Reports explored the role of the law, law enforcement, and public attitudes in perpetuating

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24. *See* Calvo, *supra* note 2, at 162-63 (noting Congress's recognition that "the legal system historically failed to address violence against women with appropriate seriousness," and its resolve that the nation's law "must change").

25. S. REP. NO. 103-138, at 37-38 (1993) (internal citations omitted).

26. S. REP. NO. 101-545, at 30-31 (1990).

27. H.R. REP. NO. 103-395, at 26 (1993).

28. *See* S. REP. NO. 101-545, at 37.

29. *Id.* ("In homes where there is domestic violence, children are abused or seriously neglected at a rate 1500 percent higher than the national average.").

30. *Id.*

31. S. REP. NO. 103-138, at 41-42 (1993).

family violence.[32] Congress recognized that "the legal system has historically failed to address violence against women with appropriate seriousness, and has even accepted it as legitimate."[33]

Later Congressional studies discovered that domestic violence affected immigrant women at a much higher rate than the general populace.[34] In 1999, Congress found that in the United States, 34% to 49.8% of all immigrant women had been victims of domestic violence, and approximately 59.5% of married immigrant women had been abused.[35] Immigrant women often were dependent upon their spouses to file petitions for residency and citizenship status.[36] Existing immigration law fostered domestic violence by "placing control of the alien spouse's ability to gain permanent legal status in the hands of the spouse who was a citizen or legal permanent resident."[37] A battered spouse might not avail herself of help from government resources for fear of deportation.[38] In 1990, Congress passed an amendment allowing an alien spouse to self-petition for conditional residence status under certain circumstances—for example, if she had suffered extreme cruelty, or if she would suffer extreme hardship if deported.[39] The House Judiciary Committee Report stated that the purpose of the change was to " 'ensure' that neither a spouse nor a child would be 'entrapped in the abusive relationship by the threat of losing their [sic] legal resident status.' "[40]

Congress ultimately passed the Violence Against Women Act of 1994 ("VAWA"),[41] "the first comprehensive federal legislation to

32. *See id.* at 42.

33. H.R. REP. NO. 103-395, at 27 (1993).

34. Lauri J. Owen, Commentary, *Forced Through the Cracks: Deprivation of the Violence Against Women Act's Immigration Relief in San Francisco Bay Area Immigrant Domestic Violence Survivors' Cases*, 21 BERKELEY J. GENDER L. & JUST. 13, 16 (2006) (citing Karyl Alice Davis, Comment, *Unlocking the Door by Giving Her the Key: A Comment on the Adequacy of the U-visa as a Remedy*, 56 ALA. L. REV. 557, 557 (2004)).

35. *Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 3083 Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 106th Cong. 60 (2000) (statement of Leslye Orloff, Director, Immigrant Women Program, NOW Legal Defense and Education Fund).

36. Calvo, *supra* note 2, at 165.

37. *Id.* Moreover, the exceptions that allowed for an alien spouse to "self-petition" for resident status were narrow. *Id.* at 156-57.

38. *See id.* at 165 ("A battered spouse could be deterred from taking action to protect herself, such as filing for a civil protection order, filing criminal charges, or calling the police, because of the threat or fear of deportation.").

39. *See* 8 U.S.C. § 1186a(c)(4) (2000) (listing three exceptions under which an alien spouse could self-petition).

40. Calvo, *supra* note 2, at 167 (quoting H.R. REP. NO. 101-723, pt. 1, at 51, 78 (1990)).

41. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1902 (codified as amended in scattered sections of 8, 18, 28, and 42 U.S.C.).

address specifically the issue of violence against women."[42] This sweeping litigation acknowledged the particular problems that immigrant women faced in the home and included a subtitle called "Protections for Battered Immigrant Women and Children."[43] This section allowed victims of domestic violence to petition to have their deportation order excused if they had been battered or subjected to extreme cruelty by a spouse or parent who is or was a citizen or lawful permanent resident.[44] In addition to proving extreme cruelty or battery, the statute asked the petitioning alien to demonstrate: (1) that she had been physically present in the United States for at least three years immediately preceding the date of the application; (2) that she was a person of good moral character during that period; and (3) that removal would result in extreme hardship to herself, her child, or her parent.[45]

Congress did not define "extreme cruelty," compelling courts to turn to the agency's definition in the Code of Federal Regulations.[46] That definition states that battery or extreme cruelty includes, but is not limited to:

> [B]eing the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, *including acts that, in and of themselves, may not initially appear violent but that are part of an overall pattern of violence.*[47]

Even though Congress enacted increasingly stringent legislation in an effort to crack down on the illegal immigrant population, the battered spouse provision has remained intact. For example, Congress intended for the IIRAIRA of 1996 to toughen the country's stance on illegal immigration as a whole, but Congress made an effort to carve out exceptions for the domestically abused from the harsh effects of the new legislation.[48] For example, the IIRAIRA

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42. Deanna Kwong, *Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protection under VAWA I & II*, 17 BERKELEY WOMEN'S L.J. 137, 137 (2002).

43. *See* Violence Against Women Act of 1994, tit. IV, subtit. G, 108 Stat. at 1953; *see also* Calvo, *supra* note 2, at 172-74 (discussing the section's reforms).

44. 8 U.S.C.A. § 1229b(b)(2)(A)(i)(I)-(II).

45. *Id.* § 1229b(b)(2)(A)(i), (ii), (iii), (v).

46. *See, e.g.*, Hernandez v. Ashcroft, 345 F.3d 824, 828 (9th Cir. 2003) (giving deference, in a case concerning deportation, to an INS regulation defining the term "extreme cruelty").

47. 8 C.F.R. § 204.2(c)(1)(vi) (2007) (emphasis added).

48. *See, e.g.*, 8 U.S.C. § 1182(a)(9)(B)(iii)(IV) (granting clemency to battered women and children seeking readmission to the United States); *id.* § 1182(a)(6)(A)(ii) (exempting battered women and children from the strictures of quotas for skilled and unskilled workers petitioning to come into the country); 8 U.S.C.A. § 1229b(b)(2) (West 2005 & Supp. 2007) (allowing for

classified a conviction for domestic violence as a deportable offense.[49] Additionally, the Violence Against Women Act of 2000 allowed for even broader self-petitioning to make the battered spouse provision more helpful and accessible to alien women.[50]

C. *Judicial Interpretations of the Reviewability of the Battered Spouse Provision*

Although the battered spouse provision remains helpful to immigrant women petitioning to stop deportation at the agency level, the passage of IIRAIRA limited an alien's right to judicial review by federal courts. The IIRAIRA eliminates judicial review of discretionary decisions.[51] For aliens whose petition to stay deportation is rejected by the BIA, it is critical to know whether the BIA's extreme cruelty determination is discretionary or not. If the decision is discretionary, then they are not entitled to judicial review. If it is non-discretionary, then they are. The following Section examines the circuit split on this issue and the various approaches courts have taken.

The first appellate court to address the issue, the Ninth Circuit, held that extreme cruelty was a non-discretionary decision and granted review. In *Hernandez v. Ashcroft*, the petitioner alien sought review of a BIA decision affirming the Immigration Judge's refusal to suspend deportation under the battered spouse provision of VAWA.[52] While living in Mexico, the petitioner, Laura Luis Hernandez, had experienced life-threatening violence at the hands of her husband, a legal permanent resident of the United States.[53] She fled to the United States, but her husband tracked her down, promised not to hurt her again, and begged her to return to Mexico with him.[54] After Hernandez acquiesced and returned to Mexico, the physical

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cancellation of a removal order for battered women and children); 8 U.S.C. § 1367 (2000) (preventing the government from making adverse immigration decisions based solely on evidence provided by batterers).

49. *See* 8 U.S.C. § 1227(a)(2)(E)(i).

50. *See* Violence Against Women Act (VAWA) of 2000 § 1503(b)(1)(A)(iii)(II)(BB) (codified at 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(BB)) (alleviating the battered petitioner's burden of proof that the batterer was a U.S. citizen); *see also* Kwong, *supra* note 42, at 145-48 (providing an in-depth analysis of Congress's attempt to make self-petitioning easier for battered women under VAWA of 2000).

51. 8 U.S.C. § 1252(a)(2)(B) (2000 & Supp. V 2005).

52. 345 F.3d 824, 831-32 (9th Cir. 2003).

53. *Id.* at 827.

54. *Id.* at 830.

abuse began again.[55] Laura Hernandez escaped from her husband a second time and lived in the United States without legal status until the state arrested her and scheduled her deportation.[56] The immigration judge denied her suspension of deportation application because Hernandez could not show that she had been battered or subjected to extreme cruelty "*in the United States*," as the statute required.[57] The BIA affirmed the decision; however, the Ninth Circuit reversed the BIA, holding that Hernandez had been subjected to extreme cruelty in the United States because she was in the "well-recognized stage within the cycle of violence, one which is both psychologically and practically crucial to maintaining the batterer's control."[58] Thus, the court held that she had suffered extreme cruelty while in the United States.[59] The court noted that the determination of extreme cruelty by the BIA was non-discretionary.[60] The court explained that the decision whether a person was subject to extreme cruelty is a clinical one, similar to whether or not someone is a drunk.[61]

Since *Hernandez*, two additional circuits, the Fifth and the Tenth, faced the same question and reached the opposite conclusion—the Attorney General's extreme cruelty determination is discretionary.[62] In *Perales-Cumpean v. Gonzales*, the petitioner claimed that her husband, a United States citizen, called her names, used derogatory language, and raped her (though the BIA did not find the rape claim credible).[63] The BIA denied her cancellation of removal request, finding that she failed to show that her husband subjected her to extreme cruelty.[64] The Tenth Circuit declined to hear the petitioner's appeal of the BIA's extreme cruelty determination, reasoning that it lacked jurisdiction to review a discretionary decision.[65] The court held that the determination of whether a particular decision of the agency is discretionary or not should be made on a case-by-case basis.[66] Relying on Tenth Circuit case law, the

55. *Id.*
56. *Id.* at 831.
57. *Id.* at 828 (emphasis supplied by the court).
58. *Id.*
59. *Id.* at 841.
60. *Id.* at 835.
61. *Id.* at 834.
62. The other circuit courts have yet to rule on this issue.
63. 429 F.3d 977, 980-81 (10th Cir. 2005).
64. *Id.* at 980.
65. *Id.* at 981-84.
66. *Id.* at 982.

court stated, "Decisions that involve a 'judgment call' by the agency, or for which there is 'no algorithm' on which review may be based, are considered discretionary."[67] According to the Tenth Circuit, extreme cruelty decisions are examples of such judgment calls.[68]

Initially, the Fifth Circuit declined to decide whether extreme cruelty determinations were discretionary.[69] In *Garnica-Villarreal v. Ashcroft*, the petitioner, Garnica, petitioned for a cancellation of his removal order, arguing that the parental neglect he suffered constituted extreme cruelty.[70] The court avoided the issue by holding that regardless of whether parental neglect constitutes "extreme cruelty," the petitioner was not entitled to relief.[71] The court reasoned that any decision interpreting a phrase containing terms that were not self-explanatory necessarily would be a discretionary determination and thus outside of its jurisdiction.[72] On the other hand, if the terms were self-explanatory, then the lower court did not err in finding that parental neglect was not within the self-explanatory meaning of extreme cruelty.[73] The court implied that even if extreme cruelty is a non-discretionary term, plaintiffs must meet a high threshold to demonstrate "extreme cruelty."

The Fifth Circuit ultimately answered the question definitively in its next case on the issue, *Wilmore v. Gonzales*. There, the court held that a finding of "extreme cruelty" is discretionary because the term is not self-explanatory and reasonable men could differ as to its meaning.[74] The BIA denied Wilmore's petition for cancellation of removal pursuant to the battered spouse provision because she failed to show that she had been subjected to extreme cruelty.[75] She appealed this decision to the Fifth Circuit.[76] Her case arose after passage of the 2005 REAL ID Act, which guaranteed that any question of law decided by the agency should be reviewable by federal courts.[77] The Fifth Circuit, however, found that the provision had no impact on the way that the court handled these cases and merely

67. *Id.* (quoting Sabido Valdivia v. Gonzales, 423 F.3d 1144, 1149 (10th Cir. 2005)).
68. *Id.* at 982-83.
69. Garnica-Villarreal v. Ashcroft, 123 F. App'x 625, 626-27 (5th Cir. 2005).
70. *Id.* at 626.
71. *Id.* at 626-27.
72. *Id.*
73. *Id.*
74. 455 F.3d 524, 527 (5th Cir. 2006).
75. *Id.* at 526.
76. *Id.* at 525.
77. 8 U.S.C. § 1252(a)(2)(D) (Supp. V 2005).

codified the court's previous existing practice.[78] The court held that it lacked jurisdiction, considering the approaches of the Ninth and Tenth Circuits, but ultimately focusing (like the Tenth Circuit) on the multiple and indistinct factors that must be considered when determining whether certain conduct rises to the level of extreme cruelty.[79] Because such a determination requires consideration of many discrete factors, the Fifth Circuit concluded that the decision as to whether extreme cruelty had occurred was discretionary.[80]

III. ANALYSIS

The Fifth and Tenth Circuits have split with the Ninth Circuit over the reviewability of a determination that an alien petitioner has been subjected to extreme cruelty. The Ninth Circuit, the first to address the issue, held that it was a non-discretionary decision and therefore reviewable.[81] The Ninth Circuit relied heavily on new, but increasingly accepted, theories of the psychology of domestic abuse and referenced the intent of Congress in passing the battered spouse provision.[82] It therefore adopted a view of the issue that is more favorable to the alien petitioner who, in most cases, is an abused immigrant woman.

While the Fifth and Tenth Circuits had the benefit of the Ninth Circuit's view when deciding the issue as a matter of first impression in their respective circuits, the two circuits ultimately disagreed with the Ninth. Both courts focused more on the text of the statute than the Congressional intent underlying its passage. The Tenth Circuit, however, emphasized the multiplicity of factors that a court should consider, while the Fifth Circuit emphasized that the phrase "extreme cruelty" was not self-explanatory, partly because so many factors would have to be considered to ascertain its exact meaning. Both Circuits agreed that the reasoning in the "extreme hardship cases" (which is, in all but a few circumstances, a discretionary decision) is persuasive in the context of the extreme cruelty cases.

A quick comparison of the decisions by the various circuit courts reveals a split on the following issues:

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78. *See id.* at 526-29 (discussing the consensus among the circuits that 8 U.S.C. § 1252(a)(2)(B)(i) (2000 & Supp. V 2005), which otherwise strips the courts of jurisdiction to review decisions regarding the granting of relief, does not curtail jurisdiction over purely legal questions).

79. *Id.* at 528.

80. *Id.*

81. Hernandez v. Ashcroft, 345 F.3d 824, 834 (9th Cir. 2003).

82. *See id.* at 835-37.

	The Ninth Circuit: Extreme Cruelty is Non-discretionary and Reviewable	**The Fifth and Tenth Circuits: Extreme Cruelty is Discretionary and Non-reviewable**
Discretionary or Non-discretionary	Clinical determination, objective as opposed to subjective, and therefore non-discretionary	Discretionary determination because there is no algorithm, many factors to consider, and the pbrase is not self-explanatory
Position on domestic violence theory	Informed by new theories of domestic violence	More reluctant to utilize new theories of domestic violence
Mixed question of law and fact	Determinations that require application of law to factual determinations are non-discretionary	Determinations that require application of law to factual determinations are discretionary
Canons of Construction	Ameliorative rules should be interpreted and applied in an ameliorative fashion	No mention of lenient canons of construction
Extreme Hardship	Distinguishes the "extreme hardship" line of cases	Applies the reasoning of "extreme hardship" cases to extreme cruelty cases
Facts	Extremely sympathetic facts	Less sympathetic facts

This Part will analyze the two differing approaches circuit courts have taken in addressing the reviewability of extreme cruelty decisions. It will then evaluate the decisions in the context of Congressional action and intent, and compare cases on extreme cruelty to those on the similar issue of extreme hardship in an attempt to shed some light on the meaning of extreme cruelty.

A. The Ninth Circuit: Non-discrctionary and Reviewable

1. Reliance upon Battered Woman Syndrome

The Ninth Circuit was the first court to consider whether an extreme cruelty finding is discretionary, and its analysis of the issue remains the most thoroughly reasoned. The Ninth Circuit dealt with extremely sympathetic facts in *Hernandez*. The court carefully documented the horrific abuses that the petitioner suffered at the

hands of her husband. If ever Congress had in mind a battered woman, it was the petitioner, Laura Luis Hernandez. The court described her husband's brutal attacks with great particularity in the opinion. His abuses included breaking a chair over her head, attacking her with a knife, badly cutting her hand when she tried to block his attempt to stab her, smashing a fan over her head, and beating her.[83] The court noted that his refusal to let her seek medical attention and his attempts to lock her in the house after the attacks led to complications from her injuries, including permanent nerve damage.[84] The court also mentioned that Hernandez carries scars on her head and hand, and that her hand is permanently disabled and in constant pain from the knife attack.[85] These episodes of violence devolved into a pattern: petitioner would try to escape, sometimes successfully, and her husband would persuade her to return with expressions of regret and promises of better behavior, only to repeat his physical abuse.[86]

Despite her suffering, testimony about which the Immigration Judge found credible, the BIA decided she had not satisfied the extreme cruelty requirement because she had not been subject to any attacks by her husband while she was in the United States.[87] Hernandez would flee to the United States, become scared that her husband would find her, and then return to Mexico with her husband when he acted in a conciliatory manner.[88] Thus, the court concluded that because Hernandez's husband did not physically abuse her in the United States, she should be denied relief from deportation.

The extremity of these facts helps to explain why the Ninth Circuit decided the case as it did. The most striking element of the Ninth Circuit's decision is that the court classified extreme cruelty as non-discretionary, finding that such a determination was clinical in nature.[89] The court noted, "[U]ltimately, the question of whether an individual has experienced domestic violence in either its physical or psychological manifestation is a clinical one, akin to the issue of whether an alien is a 'habitual drunkard.' "[90] The decision does not rest on how a person acts or how others act toward that person; it rests on an assessment of the person's state of being, which is merely informed by how the person acts.

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83. *Id.* at 829-30.
84. *Id.* at 830-31.
85. *Id.* at 829-31.
86. *Id.*
87. *Id.* at 827, 829.
88. *Id.* at 829-30.
89. *Id.* at 834.
90. *Id.*

The court's use of the word "clinical" and its analogy to alcoholism imply that the court views the extreme cruelty decision as a diagnosis. For example, a doctor can diagnose a person as an alcoholic. It is a clinical, chemical diagnosis of a disease. The body may become physically dependent on alcohol, which indisputably distinguishes an alcoholic from a social drinker.[91] Reasoning by analogy, the court's interpretation implies that a court could "diagnose" the state of having suffered extreme cruelty in a domestic violence context.

The Ninth Circuit's opinion reflects the judicial system's growing incorporation of new understandings about the consequences of repeated domestic violence.[92] The Ninth Circuit accepted the theory that "[a]buse within intimate relationships often follows a pattern known as the cycle of violence."[93] This cycle "consists of a tension building phase, followed by acute battering of the victim, and finally by a contrite phase where the batterer's use of promises and gifts increases the battered woman's hope that violence has occurred for the last time."[94] The court also adopted the view that "although a relationship may appear to be predominantly tranquil and punctuated only infrequently by episodes of violence, abusive behavior does not occur as a series of discrete events, but rather pervades the entire relationship."[95] The court concluded that abuse is not confined to the minutes, hours, or days where physical or verbal abuse actually occurs; it creates a cloud of fear and control over the victim that is constant and continuous such that the abuse, though it may appear episodic, "can be viewed as a single and continuing entity."[96]

The court cited scholarship addressing battered woman syndrome, a prominent theory of domestic abuse, to support its

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91. *See* Mental Health—Alcoholism, http://www.mayoclinic.com/health/alcoholism/DS00340 (last visited Nov. 9, 2007) (discussing physical dependence on alcohol as a characteristic of alcoholism); *see also* Cynthia Mascott, An Introduction to Alcoholism (Oct. 4, 2006), http://psychcentral.com/lih/2006/alcoholism-and-its-treatment (distinguishing social drinkers from alcoholics on the basis of physical dependence).

92. *See* DEP'T OF JUSTICE ET AL., NCJ 160972, THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS: REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT ix (1996) (finding that expert testimony on battering and its effects is admissible, at least to some degree, in each of the fifty states plus the District of Columbia, with three quarters of the states allowing such testimony to prove that a woman is a battered woman).

93. *Hernandez*, 345 F.3d at 836.

94. *Id.* (quoting Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1208 (1993)).

95. *Id.* at 836-37 (quoting Dutton, *supra* note 94).

96. *Id.* at 837 (quoting Dutton, *supra* note 94).

expansive understanding of domestic violence.[97] The scholarship notes that battered woman syndrome occurs in the three stages outlined above: tension, battering, and contrition.[98] Additionally, the theory posits that a woman suffering from the syndrome subjectively believes that she is unable to leave her husband because he will harm her if she does, though to others it may appear that escape is possible.[99] Defendants use battered woman syndrome as a defense against manslaughter charges.[100] In that context, it is used to show that an abused woman reasonably believes that she is in constant danger and is acting in self-defense when she kills her abusive partner, though he may not actively be harming her when the retributive violence occurs.[101]

Despite reference to scholarship on the topic, the Ninth Circuit never uses the term "battered woman syndrome" in the *Hernandez* opinion. Though the court's medical terminology seems to reference battered woman syndrome, the court neither cites the syndrome specifically nor argues that Hernandez suffered from it. Battered woman syndrome remains controversial,[102] and though many courts accept the theory[103]—most famously to support a self-defense claim in homicide cases[104]—it is not a universally accepted legal defense. That

97. *See* Bess Rothenberg, *The Success of the Battered Woman Syndrome: An Analysis of How Cultural Arguments Succeed*, 17 SOC. F. 81, 81 (2002) (calling battered woman syndrome the "most recognized explanation for why abusive relationships continue").

98. *See* LENORE WALKER, THE BATTERED WOMAN 55-70 (1980) (discussing the three stages and the repetitive nature of the cycle).

99. *See id.* at 42-54 (discussing the psychosocial theory of learned helplessness, in which battered women learn and believe over time that no matter what their reaction to the violence is, the battery will not stop, even though to others it seems like the women could escape).

100. *See, e.g.*, State v. Kelly, 478 A.2d 364, 368 (N.J. 1984) (determining that expert testimony regarding battered woman syndrome is admissible to help establish a claim of self-defense in a homicide case).

101. *See id.* at 375-77 (discussing the relevance of expert testimony on the battered woman syndrome in establishing the reasonableness of the defendant's belief that she was in imminent danger of death or serious bodily injury).

102. *See* DEP'T OF JUSTICE ET AL., *supra* note 92, at iv, x (1996) (noting the common criticism of the defense as "tantamount to an acquittal"); Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 70-87 (1994) (criticizing battered woman syndrome as patriarchal and hurtful to women); David L. Faigman, Note, *Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619, 622 (1986) (arguing against the admission of expert testimony on battered woman syndrome to support a self-defense claim); Norman J. Finkel, *Haute Couture, Poorly Tailored Crimes, and Ill-Fitting Verdicts*, 10 DUKE J. GENDER L. & POL'Y 173, 183-208 (2003) (debating the proper legal use of battered woman syndrome).

103. DEP'T OF JUSTICE ET AL., *supra* note 92 (finding that over three quarters of the states have found expert testimony admissible to prove the defendant is a battered woman).

104. For one of the first and most well known cases allowing expert testimony about battered woman syndrome to support a claim of self-defense in a homicide case, see *Kelly*, 478 A.2d at 368.

the Ninth Circuit avoided the term "battered woman syndrome" implies that the court did not want to base its "extreme cruelty" determination upon a controversial theory. The court incorporates the understanding of the pattern of violence and continuous psychological entrapment that comes from battered woman syndrome literature, but does not seek to limit the ability of women to introduce evidence of these psychological effects if they are not diagnosed officially with the syndrome but have suffered from similar patterns of domestic abuse.[105]

Thus, by omitting an explicit reference to battered woman syndrome, the court avoids using a controversial term and thus eases the evidentiary burden for a petitioner claiming domestic violence. Not all women subjected to extreme cruelty suffer from battered woman syndrome specifically. Moreover, a petitioning alien woman may lack the resources to hire a psychiatrist to testify in an agency hearing that she suffers from battered woman syndrome. By shying away from the "syndrome" while endorsing the theories underlying it, the court eases the evidentiary burden of the petitioning alien woman. Such a position is in line with Congress's intent (examined in the following Section) that petitioning alien women claiming domestic abuse should be subject to a lower evidentiary burden,[106] because crimes such as marital rape and violence inside the home are notoriously difficult to prove.

2. Legislative Intent and Purpose

The Ninth Circuit was not alone in incorporating controversial theories of domestic violence into the law: it followed Congress's example. In *Hernandez*, the court looked to the Congressional intent underlying VAWA and to the Immigration and Naturalization Service ("INS") regulation defining battery and extreme cruelty in the context

105. Hernandez v. Ashcroft, 345 F.3d 824, 836 (9th Cir. 2003) (citing scholarship pertaining to battered woman syndrome, including Mary Ann Dutton, *supra* note 94, and Evan Stark, *Re-Presenting Women Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 985-86 (1995)). The court's refusal to limit itself by using the term "battered woman syndrome" is consistent with a report from the Department of Justice, which found a "strong consensus among the researchers, and also among the judges, prosecutors, and defense attorneys interviewed for the assessment, that the term 'battered woman syndrome' does not adequately reflect the breadth or nature of the scientific knowledge now available concerning battering and its effects." DEP'T OF JUSTICE ET AL., *supra* note 92, at i-ii.

106. *See* 8 U.S.C. § 1154(a)(1)(J) (2000) (applying the "any credible evidence" standard to aliens making allegations of abuse by a U.S. citizen).

of VAWA self petitions.[107] The court determined that both Congress and the INS meant to liberalize the legal understanding of domestic violence in federal law.[108] These bodies intended to remedy past governmental insensitivity and integrate new understandings of domestic violence into the new statute and regulations.[109]

The Ninth Circuit referenced Congress's understanding of domestic violence when passing VAWA in an attempt to discern what kinds of behavior Congress believed constituted extreme cruelty.[110] The Act's legislative history suggests that Congress intended courts to approach domestic violence progressively in order to combat misconceptions surrounding domestic violence and our culture's long disregard of violence against women.[111] Congress recognized that "lay understandings of domestic violence are frequently comprised of 'myths, misconceptions, and victim blaming attitudes,' and that background information regarding domestic violence may be crucial in order to understand its essential characteristics and manifestations."[112] Legislative history further demonstrates Congress's understanding that "current [immigration] law fosters domestic violence."[113] As a result, Congress intended that courts interpret VAWA to "remedy the widespread gender bias and ignorance that have resulted in governmental harm, rather than help, for survivors of domestic violence."[114]

The regulation promulgated by the INS that defines "battery and extreme cruelty" together adopts a broad understanding of domestic violence, including battered woman syndrome. The *Hernandez* court conceded that the statutory terms at issue, "battery" and "extreme cruelty," are ambiguous, and therefore the court accorded the agency definition *Chevron* deference.[115] The court focused

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107. *See Hernandez*, 345 F.3d at 838-40 (noting that no court had yet interpreted the meaning of "extreme cruelty," and therefore looking to principles of statutory construction, legislative history, and agency interpretation).

108. *See id.* (citing H.R. REP. NO. 103-395, at 26 (1993), which enumerates Congress's intent that VAWA be interpreted to remedy the effects of past gender bias and ignorance to survivors of domestic violence).

109. See *id.* at 827, 838-40 (citing H.R. REP. NO. 103-395, at 26, and noting that the INS definition of extreme cruelty carries out congressional intent and complies with clinical understandings of domestic violence).

110. *Id.* at 836, 838-39.

111. *See* H.R. REP. NO. 103-395, at 22-24 (advocating that judges receive training to handle cases involving domestic abuse more effectively, given the history of insufficient law enforcement efforts in domestic abuse cases).

112. *Hernandez*, 345 F.3d at 836 (quoting H.R. REP. NO. 103-395, at 24).

113. H.R. REP. NO. 103-395, at 26.

114. *Hernandez*, 345 F.3d at 838-39 (citing H.R. REP. NO. 103-395, at 26).

115. *Id.* at 839.

particularly on INS language noting that "other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are part of an overall pattern of violence."[116] Citing the canon of construction that a statute should be read to avoid redundancy, the court concluded that "extreme cruelty" is a broad enough term to encompass nonphysical aspects of domestic violence, as well as physical ones.[117] Moreover, the court held that claims should be evaluated in the context of domestic violence theory, such that acts of conciliation, which on the surface may not appear violent, are viewed as an integral part of the cycle of violence and contrition that psychologically controls and traps victims.[118] Thus, the court concluded that, like Congress, the INS intended for courts to interpret "extreme cruelty" broadly.[119]

Of course, the Ninth Circuit's conclusion that "extreme cruelty" should be interpreted broadly does not itself indicate whether the "extreme cruelty" decision was intended to be discretionary or non-discretionary. However, in the opinion of the Ninth Circuit, Congress's intent to broaden domestic violence and extreme cruelty to include a pattern or cycle of violence makes the term "extreme cruelty" an objective, rather than a subjective, determination.[120] Extreme cruelty, therefore, like its partner "battery," becomes an objective, non-discretionary determination.[121] Battery is a straightforward factual finding. A determination that someone is trapped within a cycle of violence is a similarly objective finding. Objective determinations, by definition, are non-discretionary.

A finding that extreme cruelty occurred is thus a mixed question of law and fact. The fact-finder first must determine what the facts are, then must apply the law to decide whether extreme cruelty occurred. In assessing whether a particular element is discretionary or non-discretionary, the Ninth Circuit considered a number of factors, including whether the question is one of law or fact, or is a mix of the

116. *Id.* (quoting 8 C.F.R. § 204.2(c)(1)(vi) (2007)).

117. *Id.* at 838.

118. *Id.* at 836-37, 840.

119. *Id.* at 840.

120. *Id.* at 834, 839-40 (combining "Congress's goal of protecting battered immigrant women" and the "clinical understanding of domestic violence" to conclude that patterns of extreme violence constitute, objectively, "extreme cruelty").

121. *See id.* at 833-34 (discussing Congress's inclusion of "battery" and "extreme cruelty" as alternatives of one another, and acknowledging the "clearly factual determination" that applies to questions of battery).

two.[122] The court noted that determinations that require application of law to factual determinations are non-discretionary.[123] For example, the requirement that an alien be able to demonstrate a continuous physical presence in the United States is a non-discretionary mixed question of law and fact, similar to extreme cruelty because it "must be determined from the facts, not through an exercise of discretion."[124] Unfortunately, it remains unclear whether the Ninth Circuit believes that all mixed questions of law and fact are non-discretionary.

The court distinguished "extreme cruelty" determinations from "extreme hardship" determinations, which it held were discretionary in a previous case, *Kalaw v. Immigration & Naturalization Service.*[125] *Hernandez* found that hardship and cruelty are fundamentally different in nature.[126] Like good moral character, hardship is by nature a discretionary determination that guides the INS in "its limitation of a scarce and coveted status to those applicants deemed particularly worthy."[127] By contrast, extreme cruelty is, like duration of physical presence, a "threshold inquiry into whether an individual possesses the minimum attributes necessary to qualify for certain types of relief."[128]

Finally, the Ninth Circuit characterized the battered spouse provision as "a generous enactment, intended to ameliorate the impact of harsh provisions of immigration law on abused women."[129] It reasoned that because of this generosity, its liberal interpretation of extreme cruelty, which strongly favors petitioners in allowing them both to meet the extreme cruelty requirement and to obtain meaningful judicial review in the federal courts, was justified.[130] The court therefore applied the general rule of construction that "when the legislature enacts an ameliorative rule designed to forestall harsh results, the rule will be interpreted and applied in an ameliorative fashion," finding such an interpretive presumption particularly

122. *Id.* at 833-34.

123. *Id.*

124. *Id.* at 834 (quoting Kalaw v. INS, 133 F.3d 1147, 1151 (9th Cir. 1997)).

125. *Id.* at 833-34 (discussing *Kalaw*, 133 F.3d at 1151).

126. *Id.* at 835.

127. *Id.*

128. *Id.* The Ninth Circuit also engaged in statutory construction in order to distinguish "extreme hardship" and "extreme cruelty." The court cited a provision, now repealed, which specifically left extreme hardship provisions to the Attorney General: "a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship." *Id.* at 834-35 (citing 8 U.S.C. § 1254(a)(1), 1254(a)(3), *repealed by* IIRAIRA, Pub. L. No. 104-208, 110 Stat. 3009 (1997)).

129. *Id.* at 840.

130. *Id.*

applicable in the immigrant context, "where doubts are to be resolved in favor of the alien."[131]

3. Limitations to the Ninth Circuit's Approach

The Ninth Circuit unfortunately does not elaborate on the multiplicity of factors that must be considered before making the determination of whether or not one is caught in a cycle of violence. It is more difficult to look at a pattern of domestic violence and call it "extreme cruelty" than to look at a punch to the face and call it "battery."

The court also left several other questions unanswered. It did not address whether extreme cruelty may be found only when the cycle of violence (and therefore psychological abuse) occurs between a man and woman who are partners, or the theory would also extend to nonromantic relationships, such as parent and child (a relationship in which there is no similarly accepted theory about patterns of domestic violence). Furthermore, the court did not address whether simple verbal abuse can constitute extreme cruelty, or physical abuse of some sort is necessary. Although the facts of *Hernandez* made these determinations unnecessary, courts deciding such issues in the future have little guidance to interpret the term "extreme cruelty" outside of the realm of physical abuse between spouses.

B. The Tenth and Fifth Circuits: Discretionary and Non-reviewable

The Tenth and Fifth the Circuits, in decisions published after *Hernandez*, both held that extreme cruelty determinations are committed to the discretion of the Attorney General, and therefore federal courts cannot review these decisions.[132] The Tenth and the Fifth Circuits highlight the statute's textual ambiguity and give short shrift to the legislative history of VAWA and the intent underlying the Act. Additionally, both courts appear reluctant to accept theories of domestic violence, such as the cycle of violence and contrition that provides the context in which to analyze actions alleged to constitute domestic violence. These circuits emphasize the statute's text without reference to Congress's intent or modern domestic abuse theory and thus interpret the battered spouse provision narrowly.

131. *Id.* (quoting United States v. Sanchez-Guzman, 744 F. Supp. 997, 1002 (E.D. Wash. 1990)).

132. *See* Wilmore v. Gonzales, 455 F.3d 524, 528 (5th Cir. 2006); Perales-Cumpean v. Gonzales, 429 F.3d 977, 981-82 (10th Cir. 2005).

1. The Tenth Circuit: No Algorithm to Apply

The Tenth Circuit, in *Perales-Cumpean v. Gonzales*, held that extreme cruelty determinations are discretionary and therefore not reviewable.[133] The facts in that case were not as dramatic as those in *Hernandez*. In *Perales*, the petitioner alleged extreme cruelty arising from insults, name-calling, and the use of derogatory language by her husband.[134] Moreover, because the Immigration Judge did not find the petitioner's claim of marital rape credible, there was no viable battery claim.[135] Thus, the court faced the question of whether merely verbal abuse amounted to extreme cruelty. The court held that because there was no algorithm to determine when actions rose to that level, the Attorney General's decision should be viewed as discretionary:

> [T]he decision whether the verbal abuse in a given case constitutes "extreme cruelty" is just the sort of non-algorithmic decision that requires a non-reviewable "judgment call" by the Attorney General. There is no hard-and-fast rule to distinguish "extreme cruelty" from other, less severe, forms of cruel behavior.[136]

The court found that, in this way, extreme cruelty determinations are akin to "extreme hardship" decisions.[137] The Tenth Circuit previously had announced that "extreme hardship" decisions were discretionary because "there is no algorithm for determining when a hardship is 'exceptional and extremely unusual.' "[138] Extreme hardship is a judgment call, and the court found the same to be true of extreme cruelty.[139] There is no formula to determine whether a given set of acts constitutes extreme cruelty; rather, the agency must advance the purposes of the statute and exercise its discretion accordingly.[140]

The Tenth Circuit noted that Congress chose not to define extreme cruelty. The court interpreted this Congressional silence as deliberate. Congress could have specified the standard under which verbal abuse would qualify as extreme cruelty, or it could have taken a more categorical approach and excluded verbal abuse from the definition of extreme cruelty altogether.[141] Because it did neither, Congress must have expected the Attorney General to make

133. 429 F.3d at 981-82.
134. *Id.* at 981.
135. *Id.* at 980.
136. *Id.* at 983.
137. *Id.* at 982.
138. *Id.* (quoting Morales Ventura v. Ashcroft, 348 F.3d 1259, 1262 (10th Cir. 2003)).
139. *Id.* at 982-83.
140. *Id.* at 982.
141. *Id.* at 982-83.

individualized decisions in defining the term on a case-by-case basis.[142]

The Tenth Circuit rejected the argument that the INS's definition of "battery and extreme cruelty" is sufficiently specific and clear to render the terms unambiguous. It found that the INS did not define extreme cruelty specifically enough to provide an algorithm.[143] The INS definition does not determine whether the petitioner's husband's "anger, jealousy, violent looks, verbal abuse, name calling, and making very derogatory remarks in front of the petitioner's friends and neighbors . . . qualified as 'threatened acts of violence that resulted or threatened to result in physical or mental injury' for purposes of the regulation."[144] In addition, it did not provide insight into whether the psychological trauma that the petitioner might suffer because of this verbal abuse is sufficient to rise to the level of extreme cruelty that stems from the acts mentioned in the definition: rape, molestation, incest, and forced prostitution.[145]

The Tenth Circuit made no mention of importing the algorithm derived from traditional models of battered woman syndrome to decipher the meaning of extreme cruelty within the context of domestic violence, despite its knowledge that the Ninth Circuit did so.[146] It gave no reason for this omission, but one possibility is that it did not bring up these ideas because the facts in this case do not suggest that a model derived from battered woman syndrome would apply to the petitioner. She suffered no pattern of physical violence, widely cited as a necessary element of battered woman syndrome, but only a pattern of verbal abuse.[147] Essentially, the abuse alleged did not rise to the level of abuse that suggests battered woman syndrome. This difference in fact pattern makes clear why the court found the Ninth Circuit's decision in *Hernandez* unpersuasive. Although the Ninth Circuit held that patterns of physical abuse would render the extreme cruelty decision non-discretionary, it left ambiguous whether cases of lesser abuse, such as purely verbal abuse, would be non-discretionary as well.

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142. *Id.* at 983.

143. *Id.* at 984.

144. *Id.* (quoting the petitioner's brief and the INS definition, 8 C.F.R. § 204.2(c)(1)(vi) (2007)).

145. *Id.*

146. *Id.* at 983 (citing Hernandez v. Ashcroft, 345 F.3d 824 (9th Cir. 2003)).

147. *See id.* at 981 (noting that the petitioner's testimony concerning marital rape was not credible, and that otherwise she only alleged abuse that consisted of "insults, name calling, and use of derogatory language").

Moreover, the Tenth Circuit highlighted that Congress did not exempt the battered spouse provision from the jurisdiction-stripping provision (which deprives federal courts of judicial review where the agency's determination is discretionary).[148] Congress could have exempted the battered spouse provision and did do so for other provisions, such as discretionary decisions on asylum applications.[149] For this reason, the Tenth Circuit refused to consider the liberal Congressional purpose in enacting VAWA (and, perhaps because of this, it neglected to mention any of the lenient canons of construction employed by the Ninth Circuit).[150] However, the court did not give a reason for linking an omission to exempt the battered spouse provision from the jurisdiction-stripping provision with a refusal to consider the purpose behind VAWA. The court seemed to imply that had Congress wanted battered women to seek appellate review, it would have provided for it specifically by vesting federal courts with the ability to review the agency's extreme cruelty determination.

However, the court fails to address the ample legislative history that suggests that Congress intended VAWA to protect petitioning victims to an extraordinary degree.[151] Moreover, if Congress considered the extreme cruelty decision non-discretionary in the first place, the argument that Congress should have explicitly provided for judicial review of the extreme cruelty decision is inapplicable; it already is exempted from the jurisdiction-stripping provision.

2. The Fifth Circuit: Not Self-Explanatory

The latest circuit court to address this issue, the Fifth Circuit, in *Wilmore v. Gonzales*, agreed with the Tenth Circuit, holding that extreme cruelty was discretionary and therefore not a reviewable decision.[152] Significantly, the court's recitation of facts downplays the petitioner's abuse by phrasing it in abstract terms, casting doubt on the merit of her claim. For example, the Fifth Circuit did not list specifically the acts that Wilmore alleged constituted extreme cruelty;

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148. *See id.* at 983 (analyzing 8 U.S.C. § 1252(a)(2)(B) (2000 & Supp. V 2005)).

149. *Id.*; *see* 8 U.S.C. § 1158(a)(3) (2000) (limiting judicial review of determinations made by the Attorney General under 8 U.S.C. § 1158(a)(2) regarding asylum applications); Wilmore v. Gonzales, 455 F.3d 524, 528 (5th Cir. 2006) (interpreting the interaction between the provisions in 8 U.S.C. § 1252(a)(2), the "jurisdiction-stripping provision," and 8 U.S.C. § 1229b(b)(2), the "battered spouse provision").

150. 429 F.3d at 983.

151. For a discussion of the Ninth Circuit's use of the legislative history of VAWA, see *supra* Part III.A.1.b.

152. *Wilmore*, 455 F.3d at 528.

the court simply mentioned that she alleged that her citizen husband had subjected her to a "pattern of mental and psychological abuse" (apparently, Wilmore made no claim of physical abuse).[153] The court briefly noted that Wilmore's husband filed for an adjustment in status to that of a lawful permanent resident on her behalf, withdrew the petition, filed for divorce, and then filed and withdrew her adjustment petition again.[154] At Wilmore's hearing, the Immigration Judge told her that she might try to obtain a grant of removal cancellation, after which she obtained counsel and filed for cancellation of removal pursuant to the battered spouse provision.[155]

The Fifth Circuit analyzed how 8 U.S.C.S. § 1252(a)(2)(B)(i) (VAWA) and the REAL ID Act interplay, such that the "Court lacks jurisdiction to review discretionary decisions under section 1229b(b)," the battered spouse provision, "but retains jurisdiction over purely legal and non-discretionary decisions."[156] The court concluded that the extreme cruelty decision is discretionary and not a legal question.[157] Thus, there is no review afforded the alien petitioner in the federal courts.

The court reasoned that viewing the extreme cruelty decision as discretionary is supported by the definition of "extreme cruelty" in the federal regulations, the persuasive reasoning of the Tenth Circuit, and the Fifth Circuit's own precedent.[158] The court agreed with the Tenth Circuit decision of *Perales-Cumpean v. Gonzales* that the equivocal language used by the INS when defining extreme cruelty suggested that the decision was discretionary: "Considerable discretion also is provided by the definition's phrases 'includes, but is not limited to' and 'may . . . be acts of violence under certain circumstances.' "[159] It also endorsed the Tenth Circuit's judgment that extreme cruelty determinations involved more than "simply plugging facts into a formula," instead requiring judgments that implicated the purposes of the statute.[160]

The Fifth Circuit also relied upon its own precedent in "extreme hardship" cases, which holds that extreme hardship is a discretionary decision because it is "not self-explanatory, and

153. *Id.* at 527-28.

154. *Id.* at 525-26.

155. *Id.* at 526.

156. *Id.* (quoting Mireles-Valdez v. Ashcroft, 349 F.3d 213, 215-16 (5th Cir. 2003)).

157. *Id.* at 528-29.

158. *Id.* at 528.

159. *Id.* (quoting Perales-Cumpean v. Gonzales, 429 F.3d 977, 984 (10th Cir. 2005) (quoting the INS definition of "extreme cruelty" defined in 8 C.F.R. § 204.2(c)(1)(vi))).

160. *Id.* (quoting *Perales-Cumpean*, 429 F.3d at 982).

reasonable men could easily differ as to [its] construction."[161] Without further reasoning, the court found that the term "extreme cruelty" is likewise not self-explanatory and that reasonable individuals could differ as to its meaning.[162] The court engaged in no further analysis explaining why courts should view extreme hardship and extreme cruelty similarly.

Like the Tenth Circuit, the Fifth Circuit also concluded that the REAL ID Act did not affect whether extreme cruelty is reviewable because such a decision is not a legal question. The REAL ID Act provides that questions of law decided by agencies are reviewable in federal courts.[163] The court determined that the case at issue did not raise a legal question, and therefore the REAL ID Act did not provide jurisdiction to review the BIA's determination of extreme cruelty.[164] However, the court did not mention whether the extreme cruelty determination was purely a question of fact or else a mixed question of fact and law, nor how it treats such questions for the purposes of judicial review.

The Fifth Circuit's cursory reasoning relies heavily on the Tenth Circuit's decision. However, *Wilmore* emphasizes that the term "extreme cruelty" is not self-explanatory, and therefore it must be discretionary. The brevity of the court's reasoning likely is a result of the weakness of the petitioner's claim that generic "abuse" was "extreme cruelty."

IV. SOLUTION

Though the Tenth and Fifth Circuits seem to disagree with the Ninth Circuit over whether a finding of "extreme cruelty" is a discretionary decision, the opinions can be reconciled. Should the Supreme Court grant writ, the Court should hold that extreme cruelty is a discretionary decision, except in cases where the plaintiff meets certain threshold factors. Because of reduced evidentiary burdens on petitioners claiming domestic violence and in light of the ameliorative intent of the battered spouse provision, a court should view a plaintiff's claims of cyclical violence as non-discretionary. However, if the plaintiff makes less egregious claims, or claims that require

161. *Id.* at 527 (quoting Moosa v. INS, 171 F.3d 994, 1013 (5th Cir. 1999)).

162. *Id.*

163. *Id.* at 528-29 (explaining that "the Real ID Act removes jurisdictional bars to direct review of questions of law in final removal, deportation, and exclusion orders" (citing INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D) (Supp. V 2005)) (internal quotation marks omitted)).

164. *Id.* at 529.

consideration of many factors (such as purely verbal abuse or assault), the decision should be discretionary and non-reviewable.

This solution can be analogized to the common law's resolution of "extreme hardship" determinations. For the most part, "extreme hardship" determinations are discretionary. However, in certain rare cases, where the determination depends on non-discretionary factors, the decision itself is said to be non-discretionary and therefore reviewable by the federal courts.

A. Analogizing to Extreme Hardship Cases

"Extreme hardship" cases can inform the interpretation of "extreme cruelty" because both terms are bases for cancellation of deportation. In addition, courts have looked to the more-litigated extreme hardship cases to inform their interpretation of extreme cruelty. The "extreme hardship" determination is discretionary, with notable exceptions.[165] Extreme hardship allows for cancellation of deportation if the alien (1) has been physically present in the United States for a continuous period of not less than ten years immediately preceding the date of such application; (2) proves that during such period he has been a person of good moral character; (3) has no convictions under certain statutes; and (4) can show exception and extremely unusual hardship to a spouse, parent, or child who is a U.S. citizen or lawful permanent resident.[166] As compared to the extreme cruelty determination, which requires petitioners to be present in the United States continuously for three years, the extreme hardship determination requires petitioners to be present ten years.[167] An earlier version of the extreme hardship provision explicitly committed the determination of extreme hardship to "the opinion of the Attorney General."[168] However, Congress repealed that section by IIRAIRA in 1996, and the current version contains no such language.[169]

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165. *See* Kalaw v. INS, 133 F.3d 1147, 1152 (9th Cir. 1997) (explaining that under 8 U.S.C. § 1101(f), certain categories of individuals, "including habitual drunkards. . . [and] anyone who at any time has been convicted of an aggravated felony," are per se considered not to have the good moral character required under the extreme hardship provision).

166. 8 U.S.C.A. § 1229b(b)(1) (West 2005 & Supp. 2007).

167. *Compare* U.S.C. § 1229b(b)(1)(A) (2000) (requiring nonpermanent residents seeking cancellation of removal under the extreme hardship provision to have been physically present in the United States for ten years), *with id.* § 1229b(b)(2)(A)(ii) (requiring only three years of physical presence in the United States for nonpermanent residents seeking cancellation of removal under the extreme cruelty provision).

168. INA § 244(a)(1) (formerly codified at 8 U.S.C. § 1254(a)(1) (repealed 1996)).

169. *See* 8 U.S.C.A. § 1229b(b)(1) (West 2005 & Supp. 2007). IIRAIRA also increased the physical presence requirement from seven years to ten, added the "no convictions" requirement,

Nonetheless, courts continue to look to this original language as evidence that Congress intended "extreme hardship" to be discretionary.

Examination of the other necessary elements of the extreme hardship provision sheds some light on how a decision that is discretionary can, at times, become non-discretionary. For example, "good moral character" is, by default, a decision appropriately left to the Attorney General's discretion because it is "almost necessarily a subjective question, dependent as it is upon the identity of the person or entity examining the issue."[170] However, Congress created certain per se categories that, if applicable, render the good moral character decision non-discretionary. For example, if a person has testified falsely to obtain benefits under the INA or has been convicted of an aggravated felony, he is not per se of good character.[171] If the BIA finds that a person falls within one of these enumerated categories, it lacks the discretion to grant the suspension of deportation application because the person is per se not of good moral character and cannot satisfy all the requirements of the "extreme hardship" provision. As the Ninth Circuit stated in *Kalaw*, "[D]etermination of per se ineligibility is not a discretionary matter. Consequently, direct judicial review is available under the transitional rules of a BIA denial of eligibility for suspension of deportation based on application of the per se exclusion categories."[172] Thus, although "good moral character" is usually a discretionary term, it can become non-discretionary (and therefore reviewable by the court) if it is based on certain factors enumerated by Congress.[173]

Additionally, two elements of the hardship determination are always non-discretionary: the physical presence requirement[174] and

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and made the alien show "exceptional and extremely unusual hardship" instead of just "extreme hardship." Overall, the IIRAIRA made it more difficult to win a reprieve under this provision. *See* INA § 244(a)(1) (formerly codified at 8 U.S.C. § 1254(a)(1) (repealed 1996)) (detailing the previous requirements for an alien to qualify for cancellation of deportation pursuant to the extreme hardship provision.)

170. *Kalaw*, 133 F.3d at 1151; *see also* Torres-Guzman v. INS, 804 F.2d 531, 534 (9th Cir. 1986) ("[A] statutory direction to determine the presence or absence of good moral character requires the fact finder to weigh and balance the favorable and unfavorable facts or factors, reasonably bearing on character, that are present in the evidence.").

171. 8 U.S.C.A. § 1101(f).

172. *Kalaw*, 133 F.3d at 1151.

173. *See* Sepulveda v. Gonzales, 407 F.3d 59 (2d Cir. 2005) (denying a motion to dismiss petitions under 8 U.S.C. § 1252(a)(2)(B) because a BIA decision holding that a petitioner was precluded from establishing that he was a person of "good moral character" under 8 U.S.C. § 1101(f) is reviewable).

174. 8 U.S.C. § 1229b(b)(1)(A) (2000).

the no-convictions requirement.[175] Such determinations are based on objective, independently confirmable facts. If an alien is denied relief because he or she failed to meet either of these requirements, judicial review is always available because these are non-discretionary decisions.[176]

Therefore, under the "extreme hardship" provision, there are two elements that are always non-discretionary (physical presence and lack of convictions), one element that is always discretionary (extreme hardship), and one element that is usually discretionary, but can be non-discretionary if the decision is based on facts that Congress has deemed per se non-discretionary (good moral character).

B. Applying the Extreme Hardship Analysis to Extreme Cruelty Cases

The extreme cruelty provision requires all the same elements as the extreme hardship provision, except that it adds the "extreme cruelty" requirement and requires fewer years in the United States to bring a claim.[177] Therefore, the analysis is the same, except that Congress never labeled the "extreme cruelty" finding as discretionary. This Note proposes that courts use a per se approach to determine whether the plaintiff was subject to extreme cruelty: for example, if the plaintiff was subject to a pattern of violence, then extreme cruelty occurred per se. This type of analysis is similar to the one used to determine whether a petitioner is of "good moral character."

For the most part, extreme cruelty determinations would remain discretionary. However, when plaintiffs are subject to certain categories of abuse, the decision would become non-discretionary and therefore reviewable by the federal courts. Though Congress has not created this type of category, as it did with "good moral character," the Ninth Circuit helped envision the types of categories Congress should create. The Ninth Circuit noted that when domestic violence rises to the level of battered woman syndrome, the court should treat even the periods of calm and reconciliation between the episodes of violence as "extreme cruelty." The Ninth Circuit articulated why this finding is necessary, and the wording of the INS definition of "extreme cruelty"

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175. 8 U.S.C.A. § 1229b(b)(1)(C) (West 2005 & Supp. 2007).

176. *See Sepulveda*, 407 F.3d at 62-63 (holding that courts have "jurisdiction to review nondiscretionary decisions regarding an alien's eligibility for relief" under the hardship principle, and noting that other circuits have held that "judicial review of nondiscretionary, or purely legal, decisions regarding an alien's eligibility for § 1229b relief" is not barred).

177. *See* 8 U.S.C.A. § 1229b(b)(2). Note that "extreme hardship" is one of the elements of the battered spouse provision. *Id.* § 1229b(b)(2)(A)(v).

further supports this viewpoint.[178] Therefore, if a petitioner can establish a pattern of violence and contrition akin to that exhibited by those suffering from battered woman syndrome, the court should find that the petitioner meets the extreme cruelty requirement.

Though not yet recognized by courts, a pattern of violence and calm also can exist between parent and child.[179] Therefore, similar to the spousal per se category, if a child can establish a pattern of violence and calm, he or she should be considered to have established the extreme cruelty requirement per se, even if the actual violence did not occur on U.S. soil.

Beyond these per se categories, the extreme cruelty decision should remain discretionary and therefore non-reviewable. A petitioner can prove her extreme cruelty claim with evidence of either battery or individual acts amounting to "extreme cruelty."[180] If the petitioner has experienced physical violence, she usually will satisfy the extreme cruelty requirement by providing evidence of battery. Thus, the term "extreme cruelty" will come to refer only to nonphysical abuse, such as extreme verbal, psychological, emotional abuse, or extreme assault. Although some may argue that courts should view assault as extreme cruelty per se, policy does not require extending the non-discretionary category this far. Whether a particular instance of assault rises to "extreme" levels is an inherently discretionary decision. Therefore, when the petitioner alleges assault or, similarly, psychological or emotional abuse, the decision will remain a discretionary one.

The Supreme Court has articulated several policy considerations that can be read to support a per se approach to the extreme cruelty determination. First, the Court has mandated that there is a "strong presumption in favor of judicial review of administrative actions."[181] The per se approach is thus appropriate because it broadens a petitioner's right to judicial review when she would not have that opportunity otherwise.

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178. *See* Hernandez v. Ashcroft, 345 F.3d 824, 840 (9th Cir. 2003) ("[D]efining extreme cruelty to encompass 'abusive actions' that 'may not initially appear violent but that are part of an overall pattern of violence,' [the INS definition] protects women against manipulative tactics aimed at ensuring the batterer's dominance and control." (quoting 8 C.F.R. § 204.2(c)(1)(vi) (2007))).

179. *See* LUNDY BANCROFT & JAY G. SILVERMAN, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS 6-7 (2002) (stating that batterers often replicate their abusive behavior toward their spouses in their interactions with their children).

180. 8 U.S.C. § 1229b(b)(2)(A)(i) (2000).

181. INS v. St. Cyr, 533 U.S. 289, 298 (2001).

Second, the Supreme Court recognizes the "long-standing principle of construing any lingering ambiguities in deportation statutes in favor of the alien."[182] Therefore, the ambiguous extreme cruelty decision should be resolved in a way that allows for judicial review whenever it is feasible, which the per se approach allows. The circuit split is evidence of confusion among courts about whether the extreme cruelty determination is discretionary or not. In the face of this ambiguity, the courts should grant judicial review by ruling that extreme cruelty is non-discretionary.

C. Why Extreme Cruelty Merits a More Lenient Approach than Extreme Hardship

Though the "extreme hardship" determination does not allow for a per se approach to the element of extreme hardship, this does not imply necessarily that extreme cruelty should be precluded from such an interpretation. The two provisions, though similar, have not been treated the same by Congress. Congress has been more protective of the battered spouse provision than of the extreme hardship provision. For example, when Congress passed IIRAIRA in 1996, it reworked the extreme hardship provision to make it harder for petitioners to utilize.[183] However, Congress has never acted in a similar way to restrict the scope of the battered spouse provision. On the contrary, it has made it more accessible to petitioners by liberalizing self-petitioning laws for applicants under the provision.[184] Such changes indicate that the two provisions are not equal in the eyes of Congress. Moreover, the battered spouse provision is less amenable to abuse because it is harder to claim extreme cruelty than extreme hardship. Finally, petitioners claiming extreme cruelty are members of an acutely vulnerable demographic who do not have the support of their spouses when petitioning and thus likely are not well-represented at the agency level. Therefore, they warrant the highest levels of protection.

V. CONCLUSION

The circuit split over whether extreme cruelty is a discretionary or non-discretionary determination for the purposes of cancellation of deportation for battered spouses is largely a result of

182. *Id.* at 320 (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987)).

183. *See infra* Part IV.A.

184. *See id.*

the differences in the facts of the cases that the circuits have faced. Where the facts were extremely sympathetic, as in *Hernandez*, the circuit court decided the case favorably by incorporating current theories of the psychology of domestic violence to hold that extreme cruelty decisions were non-discretionary and reviewable. However, when later cases arose with less compelling facts, in which the abuse alleged was not sufficient for the courts to invoke theories of the psychology of domestic violence, the courts saw fit to defer to the agency's determination of extreme cruelty, calling it discretionary and non-reviewable.

Both approaches, though conflicting, are reasonable given the facts of the cases. Thus, courts considering this issue should implement a per se approach to extreme cruelty decisions. When the facts invoke theories of the psychology of domestic violence, such as battered woman syndrome, the court should hold that the extreme cruelty decision is non-discretionary and therefore reviewable. However, when the abuse does not rise to this threshold (i.e. is purely verbal abuse or assault) the court should hold that the extreme cruelty decision is discretionary and therefore not reviewable.

Although this solution keeps the extreme cruelty determination discretionary in most cases, it carves out an exception in cases where the abuse is "extreme." Congress intended the battered spouse provision to be an ameliorative law. As such, courts should apply the provision in a manner most favorable to the petitioner. A severely abused immigrant should be given a chance to appeal her deportation cancellation to the federal courts. This solution enables an applicant to do so while preserving efficiency and minimizing the abuse of immigration laws by limiting the right of appeal to cases in which the abuse is extreme. To vindicate Congress, Courts need discretion to help remedy the problem of domestic abuse, a problem not proved easily in court, often misunderstood by society, and historically left under-addressed by the legal system.

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