A Hard Pill to Swallow: The Abysmal Mental Health Standards of Detained Immigrant Children in the United States

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"DIEGO, GET UP!" a man in a dark green uniform shouted, startling a young boy awake. It was dinner time, which meant another cold, bland bowl of beans identical to those that he had been handed for the past five days. As Diego patiently stood in line behind hundreds of other kids, he thought to himself, "this is not what I envisioned coming to America would be like." Diego had risked his life on a harrowing week-long journey, running from the gangs, hiding in thorny bushes, and swimming across the treacherous Rio Grande River only to end up in a detention

* Rama Bankesly, J.D. Candidate 2024, Seattle University School of Law. To mama and baba, your boundless love has been the guiding light of my life. Your sacrifices fill me with deep gratitude and serve as a daily inspiration. I also extend heartfelt thanks to my dear siblings for their unwavering support and strong bond on this journey of life.

center with no help, no support, not even a blanket, but left with nothing but a bowl of brown pinto beans. Pinto beans had once been Diego's favorite meal, but they quickly grew to be something he despised. Sick and exhausted, Diego wondered when this nightmare would end.[1]

Sadly, for Diego, and for thousands of other unaccompanied children, a nightmare such as this is just the beginning of the arduous trek through the U.S. immigration system. In fiscal year 2022, more than 130,000 unaccompanied children entered the U.S.—setting an all-time record.[2] These children cross the border in search of a safe place to call home. Domestic abuse, violent gangs, corruption, and "rampant poverty, worsened by the pandemic and devastating hurricanes, have driven young people from Central America, with Guatemalans, Hondurans, and Salvadorans accounting for roughly two-thirds of apprehended unaccompanied children."[3] A large number of unaccompanied children are escaping Mexico—where drug cartels have driven the homicide rate to near-record levels.[4] These harrowing details show just how serious the issue is.

Even before these children step foot in the U.S., they are classified in a dehumanizing way. Specifically, the term "unaccompanied *alien* child" refers to a child who:

> (A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom—(i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.[5]

Referring to unaccompanied children as "alien" is unsettling as it connotes that these children do not belong here when, in fact, they have every right to seek asylum in the U.S. Because this term is degrading and humiliating, it will not be used in this Comment. Instead, in the interest of promoting trauma-informed lawyering,[6] the word "alien" will be omitted, and the term "unaccompanied children" will be employed throughout.

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1. *See generally* Anna Flagg & Julia Preston, '*No Place for a Child': 1 in 3 Migrants Held in Border Patrol Facilities Is a Minor*, POLITICO, (June 16, 2022), https://www.politico.com/news/magazine/2022/06/16/border-patrol-migrant-children-detention-00039291.

2. *Southwest Land Border Encounters*, U.S. CUSTOMS & BORDER PROT. (Oct. 13, 2022), https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters [https://perma.cc/89PU-37XX].

3. Amelia Cheatham & Diana Roy, *U.S. Detention of Child Migrants*, COUNCIL ON FOREIGN RELS. (Dec. 2, 2021), https://www.cfr.org/backgrounder/us-detention-child-migrants#chapter-title-0 [https://perma.cc/S9JS-JHF6].

4. *Id.*

5. 6 U.S.C. § 279(g)(2) (2009) (emphasis added).

6. A trauma-informed lawyer is defined as:

After setting foot into the U.S., unaccompanied children must learn to navigate academic and legal systems while receiving little support and carrying the heavy burden of effects of trauma on their mental health. They need access to mental health care from qualified professionals, but as this Comment will explain,[7] they systematically fail to receive care, as can be seen in cases like *Doe v. Shenandoah Valley Juv. Ctr. Comm'n.*[8] In *Shenandoah*, an unaccompanied child arrived in the U.S. and was placed in a facility that failed to provide remotely adequate mental health care and in fact was subjected to harsh disciplinary practices that further traumatized the child. Unfortunately, this child was one of many experiencing punitive punishment so, together, the child and others incarcerated at the facility filed a class action suit contending that the facility failed to provide a constitutionally adequate level of mental health care. Holding for a professional judgment standard, the Court's ruling in *Shenandoah* created a circuit split, as the Third Circuit had previously applied the deliberate indifference standard. The professional judgment standard "is based on experience as well as learned knowledge and skills. Relying on one's own professional judgment, sharing that judgment with others, and seeking consultation when necessary are foundational elements of practicing medicine."[9] The deliberate indifference standard is "Conscious disregard of the harm that one's actions could do to the interests or rights of another."[10] This Comment's main argument is that the Supreme Court should take on the issue presented in *Shenandoah*, solidifying the fact that the professional judgment standard prevails over the deliberate indifference standard. This Comment also argues that the agencies who have custody over unaccompanied children should take note of the reports published

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> [A] lawyer who practices law with a basic understanding of trauma and its effects on an individual's memory and emotional and behavioral functioning, who possesses the skills to provide a safer environment that contributes to a relationship of trust, and ultimately strives to promote and foster empowerment and self-determination by the client.

Ann E. Webb, Robin E. Gearing & Hope W. Baker, *Trauma-Informed Lawyering in the Asylum Process: Engagement and Practice in Immigration Law*, J. MENTAL HEALTH & SOC. BEHAV., 171, 182 (2022), https://gexinonline.com/uploads/articles/article-jmhsb-171.pdf [https://perma.cc/5Z6G-LS9C]. Some benefits of trauma-informed lawyering are that clients feel safer and more empowered, lawyers that are more effective advocates because of their greater empathy and emotional intelligence, and a legal system that educates opposing counsel, court staff, and judges about the implications of trauma. *Id.* at 182–83.

7. *See infra* Part II.

8. 985 F.3d 327, 330–31 (4th Cir. 2021).

9. Danielle Hahn Chaet, *AMA Code of Medical Ethics' Opinions on Continued Knowledge Acquisition, Judgment, and Commitment to Innovation*, 19 AMA J. ETHICS, Feb. 2017, at 174–75, https://journalofethics.ama-assn.org/article/ama-code-medical-ethics-opinions-continued-knowledge-acquisition-judgment-and-commitment-innovation/2017-02 [https://perma.cc/8XHU-TSMW].

10. *Indifference*, BLACK'S LAW DICTIONARY (11th ed. 2019).

concerning them and take actions to better the mental health care provided in their facilities.

Part I of this Comment will address the history and placement of unaccompanied children, specifically: previous and current approaches and responses by presidential administrations, and a description of actual conditions at these facilities. Part II will introduce the Supreme Court's thoughts in a key case pertaining to unaccompanied children's mental health. Part III will emphasize the importance of the professional judgment standard. Part IV will discuss the deliberate indifference standard and why it is inappropriate to use. Part V will offer a comparison to both U.S. juvenile facilities and international detention centers and consider whether there are any improvements the U.S. can apply to its detention facilities. Finally, Part VI will describe the implications of a U.S. Supreme Court decision and propose recommendations for the U.S. government to consider in order to resolve the paramount problem of inadequate mental health care offered to unaccompanied children in facilities all across the U.S.

I. BACKGROUND

To understand the current issues surrounding mental health care for unaccompanied children, it is essential to establish a foundation through a brief history on unaccompanied children, including cases, statutes, and presidential approaches.

A. History of Unaccompanied Children

One of the first cases addressing the detention of unaccompanied children was *Reno v. Flores*, which challenged the Immigration and Naturalization Service (INS) regulations governing unaccompanied children's conditions of detention and release.[11] Although the U.S. Supreme Court held that the regulations at issue in *Flores* were constitutional, the case was remanded for further proceedings.[12] These further proceedings produced the Flores Settlement Agreement (FSA).[13]

The FSA was created to require child welfare protections for unaccompanied children. Under the FSA, the INS was required to "place each detained minor in the least restrictive setting appropriate to the minor's age and special needs."[14] The FSA also requires that unaccompanied

11. Reno v. Flores, 507 U.S. 292, 298 (1993).

12. *Id.* at 315.

13. *Id.* at 316.

14. Stipulated Settlement Agreement at ¶ 11, Flores v. Reno, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997), https://www.aila.org/File/Related/14111359b.pdf [https://perma.cc/HLN6-YRML].

children are placed in non-secure licensed facilities that meet the standards outlined. These standards include suitable living accommodations, food, clothing, personal grooming items, routine medical and dental care (medical examination within forty-eight hours of admission), appropriate immunizations, administration of prescribed medication, and mental health interventions including individual and group counseling sessions.[15] Unaccompanied children also have a right to educational and religious services, recreational activities, free legal assistance, and a reasonable right to privacy—all of which should be delivered in "a manner which is sensitive to the age, culture, native language and the complex needs of each minor."[16] In cases where an unaccompanied child has a drug or alcohol problem or is experiencing a mental illness, federal agencies are permitted to place them in a secure facility.[17]

While *Flores* only applied to the INS originally, the requirements accompanying the FSA extended to both the Department of Homeland Security (DHS) and the Department of Health and Human Services' (HHS) Office of Refugee Resettlement (ORR).[18] These regulations matter because children have the right to basic necessities and just because they do not have a legal guardian to care for them does not mean that the system would operate unregulated. However, there have been complications that suggest that the ORR has not been meeting these standards.[19] Specifically, this Comment will focus on secure facilities, where the most vulnerable unaccompanied children reside, and discuss why and how their right to basic necessities are not being addressed.

The FSA protections were later codified in the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA).[20] Under the TVPRA, any federal government department or agency that has an unaccompanied child in custody must transfer the child to the Department of Health and Human Services within seventy-two hours after becoming aware of the child's status.[21] This transfer is essential because it places children in the care of an "agency set up to safeguard their best interest,

15. *Id.*

16. *Id.*

17. *Id.* at ¶ 6.

18. *What is the Flores Settlement Agreement and What Does It Mean for Family Separation and Family Detention?*, JUST. FOR IMMIGRANTS, https://justiceforimmigrants.org/what-we-are-working-on/unaccompanied-children/what-is-the-flores-settlement-agreement-and-what-does-it-mean-for-family-separation-and-family-detention/ [https://perma.cc/6FHJ-K4HP] (last visited Oct. 15, 2022). DHS oversees care for accompanied children and ORR oversees care for unaccompanied children. *Id.*

19. *See infra* Part I section E.

20. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (codified as amended at 8 U.S.C. §§ 1232(c)(1)–(2) (2018)).

21. 8 U.S.C. § 1232 (b)(3) (2018).

rather than an agency whose mission is to enforce immigration laws."[22] This is important to understand because although the government is initially striving for the children's welfare, the issue is whether they genuinely continue to throughout children's time in custody.

B. Placement of Unaccompanied Children

Once the children are transferred to the Department of Health and Human Services, they are in the custody of the Office of Refugee Resettlement (ORR) which is responsible for coordinating and implementing their care.[23] While the majority of children are placed in shelters, others are placed with foster families, in small group homes, or sometimes—during times of high unaccompanied children arrivals—at influx shelters.[24] In certain circumstances, specialized care settings are available such as long-term foster care, residential treatment centers, staff secure facilities, and secure facilities.[25] Across the U.S., there are about 200 state-licensed facilities and programs in twenty-two states.[26]

Secure facilities host some of the most marginalized of this population and with this responsibility comes additional standards the facility must meet. As mentioned, secure facilities are used to house unaccompanied children who may be a danger to themselves or others and thus require the highest level of supervision.[27] "Staff secure facilities provide a heightened level of staff supervision, increased communication, and services to control problem behavior and prevent escape . . . [such as] a secure perimeter . . . and procedures typically associated with correctional facilities."[28] Unaccompanied children placed in secure facilities have their placement reassessed after thirty days to determine whether a new level of care is

22. *Trafficking Victims Protection Reauthorization Act Safeguards Children*, NAT'L IMMIGR. F. (May 23, 2018), https://immigrationforum.org/article/trafficking-victims-protection-reauthorization-act-safeguards-children/ [https://perma.cc/XN7E-LA3H].

23. 6 U.S.C. § 279(b)(1)(A) (2009).

24. *Care Settings for Unaccompanied Children*, JUST. FOR IMMIGRANTS, https://web.archive.org/web/20221103051347/https://justiceforimmigrants.org/what-we-are-working-on/unaccompanied-children/care-settings-for-unaccompanied-children/ (last visited Nov. 3, 2022). Small group homes and shelter care are "state-licensed, dorm-style" housing and facilities where residential staff are present at all times. *Id.* Influx shelters are "temporary housing during times of high unaccompanied child arrivals." *Id.*

25. *Id.*

26. *Fact Sheet Unaccompanied Children (UC) Program*, U.S. DEP'T. OF HEALTH & HUM. SERVS., https://www.hhs.gov/sites/default/files/uac-program-fact-sheet.pdf [https://perma.cc/SM2L-BSXS] (last visited Oct. 16, 2022).

27. *See* Stipulated Settlement Agreement, *supra* note 14, § 21(B).

28. *ORR Unaccompanied Children Program Policy Guide*, OFF. OF REFUGEE RESETTLEMENT, § 1.2.4 (Apr. 13, 2022), https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-1 [https://perma.cc/PKP4-WB5T].

more appropriate.[29] Children detained at secure facilities often continue to need a high level of care, resulting in mental health professionals frequently reviewing their detention in secure facilities. However, there is an open question as to whether these renewal decisions are accompanied by appropriate guidelines or whether they are hastily and carelessly made as a result of an alternative agenda.

The ORR requires that if an unaccompanied child requires medical attention, they should be "evaluated by a medical and/or mental health provider as soon as possible upon the[ir] . . . arrival at the facility."[30] The policy guide clearly states that "[u]nder no circumstances, may a care provider deny a[n] [unaccompanied child] access to routine or emergency medical, dental, mental health or other required services."[31] These medical professionals are required to be licensed and act within the scope of their practice.[32]

C. Response of the Trump Administration

While the TVRA was enacted in 2000, the act's enforcement took a decline during Donald Trump's presidency. During the Trump administration, "'[t]he government regularly violated the 72-hour rule,' . . . minors [were] being held for increasingly long times in unsafe facilities designed to hold adults, not children and babies."[33] The Administration justified detention and deportations by using and propagating the notion that every unaccompanied child is a criminal—an unfounded, conclusory assertion. Throughout Trump's presidency, his administration consistently rolled back protections for unaccompanied children through executive orders and various agencies.[34] This revocation of rights included, but was not limited to, separating families, targeting sponsors, terminating child refugee programs, and limiting asylum claims.[35] The regulations impacting unaccompanied children began in June 2017; the ORR director was required to

29. *Id.* at § 1.4.2.

30. *ORR Unaccompanied Children Program Policy Guide*, OFF. OF REFUGEE RESETTLEMENT, § 3.2 (Apr. 13, 2022), https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-3 [https://perma.cc/FZS6-PULK].

31. *Id.* at § 3.3.4.

32. *Id.* at § 3.4.1; *see infra* Part VI.

33. Anna Flagg & Andrew Rodriguez Calderón, *500,000 Kids, 30 Million Hours: Trump's Vast Expansion of Child Detention*, THE MARSHALL PROJECT (Oct. 30, 2020), https://www.themarshallproject.org/2020/10/30/500-000-kids-30-million-hours-trump-s-vast-expansion-of-child-detention [https://perma.cc/F257-M4LD].

34. These agencies included the DHS, HHS, and DOJ. KIDS IN NEED OF DEF., A TIMELINE OF HOW THE TRUMP ADMINISTRATION IS ROLLING BACK PROTECTIONS FOR CHILDREN (2018), https://supportkind.org/wp-content/uploads/2019/06/Timeline-How-the-Trump-Administration-is-Rolling-Back-Protections-for-Children_updated-June-4-2019.pdf [https://perma.cc/P8KP-RT3C].

35. *Id.*

personally approve the release of children placed in a secure facility thus slowing down child releases and prolonging their detention by weeks if not months.[36]

In April 2018, ORR collaborated with Immigration and Customs Enforcement (ICE) to put out a policy that required fingerprinting as part of an FBI criminal background check for potential sponsors; this made many sponsors ineligible and discouraged others from applying out of fear of deportation.[37] Without sponsors, more unaccompanied children will have to be placed in facilities rather than with foster families.

Finally, HHS proposed new regulations that "would provide only minimal protections for children in federal immigration detention and would decimate the protections provided by the Flores Settlement Agreement."[38] Although the proposal was rejected,[39] it illustrates how "[t]he Administration has repeatedly promoted the false narrative that all unaccompanied children are criminals and has used this erroneous contention to justify re-detention, as well as rapid deportations."[40] Overall, the impact of Trump's presidency on unaccompanied children decimated protection for this population and placed already vulnerable populations at increased risk of adversity.

D. Approach of the Biden Administration

Following Trump's presidency, President Biden signed executive orders to reverse several of his predecessor's measures, less than a month into his service.[41] Despite these efforts, the ongoing COVID-19 pandemic has made it challenging to reverse the impact of the actions taken by the Trump administration. Due to the pandemic, ORR reduced the facilities' occupancy to 60% to comply with Covid protocols.[42] To expedite releases, the government has indicated it would pay airfare for migrants in cases where sponsor families could not afford to.[43] "The Biden team has primarily focused its efforts so far on adding capacity to shelters and other

36. *Id.*

37. *Id.*

38. *Id.*

39. Flagg & Calderón, *supra* note 33.

40. JENNIFER PODKUL & CORY SHINDEL, KIDS IN NEED OF DEF., DEATH BY A THOUSAND CUTS: THE TRUMP ADMINISTRATION'S SYSTEMATIC ASSAULT ON THE PROTECTION OF UNACCOMPANIED CHILDREN (2018), https://supportkind.org/wp-content/uploads/2018/05/Death-by-a-Thousand-Cuts_May-2018.pdf [https://perma.cc/NND6-74UP].

41. *See, e.g.*, Exec. Order No. 14010, 3 C.F.R. § 496 (2021); Exec. Order No. 14011, 3 C.F.R. § 501 (2021); Exec. Order No. 14012 3 C.F.R. § 504 (2021).

42. Miriam Jordan, *Thousands of Migrant Children Detained in Resumption of Trump-Era Policies*, N.Y. TIMES (Feb. 26, 2021), https://www.nytimes.com/2021/02/26/us/migrant-children-border-detained.html.

43. *Id.*

facilities to absorb the influx, declining to implement policies that would send minors back because the administration considers the policies morally unacceptable."[44] This move essentially suspended pandemic protocols in order for the administration to return shelter capacities to pre-Covid capacity.[45] In a recent audit of the ORR, it was revealed that the Biden administration released 344 unaccompanied migrant children to be placed with nonfamily sponsors who were already hosting three or more unaccompanied kids.[46] This is critical because the "ORR has come under increased scrutiny in the wake of reports that child labor exploitation is on the rise, including a Labor Department investigation that found more than 100 children—many of them unaccompanied minors from Guatemala—were employed cleaning Midwestern slaughterhouses."[47]

During an oversight hearing in the House, the director of the ORR was unable to answer basic questions about HHS's handling of unaccompanied children, such as reports that show they have lost contact with more than 85,000 children in the past two years.[48] Moreover, in response to a marked increase in crossings along the border, the Biden administration reopened an influx shelter that had previously been the subject of reports detailing poor living conditions.[49]

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44. Nick Miroff & Maria Sacchetti, *Migrant Teens and Children Have Challenged Three Administrations, but Biden Faces Rush with No Precedent*, WASH. POST (March 22, 2021), https://www.washingtonpost.com/nation/2021/03/22/unaccompanied-minors-immigration-obama-trump-biden/ [https://perma.cc/R4V2-QUCN].

45. *Id.*

46. Laura Strickler & Julia Ainsley, *Report Finds More than 340 Migrant Kids Were Sent to Live with Nonrelatives Who Sponsored Other Children*, NBC NEWS (June 2, 2023), https://www.nbcnews.com/politics/immigration/advocates-hhs-questions-unaccompanied-migrants-child-labor-rcna87326 [https://perma.cc/6YR7-Q65C].

47. *Id.*

48. Press Release, Comm. on Oversight & Accountability, *Hearing Wrap Up: ORR Director Fails to Answer Questions About 85,000 Lost Unaccompanied Alien Children, Flawed Vetting of Sponsors, and More* (Apr. 18, 2023), https://oversight.house.gov/release/hearing-wrap-up-orr-director-fails-to-answer-questions-about-85000-lost-unaccompanied-alien-children-flawed-vetting-of-sponsors-and-more%EF%BF%BC/ [https://perma.cc/8EC9-ME6E].

49. Camilo Montoya-Galvez, *U.S. Reopens Troubled Facility for Migrant Children in Texas Amid Spike in Border Arrivals*, CBS NEWS (Sept. 13, 2023), https://www.cbsnews.com/news/migrant-children-housing-facility-reopens-pecos-texas-spike-border-arrivals/ [https://perma.cc/6MAH-Y7FX]. *See also* Colleen Long, *Title 42 has Ended. Here's What it Did, and How US Immigration Policy is Changing*, AP NEWS (May 12, 2023), https://apnews.com/article/immigration-biden-border-title-42-mexico-asylum-be4e0b15b27adb9bede87b9bbefb798d [https://perma.cc/3QPK-MPUR]. In response to the end of the national COVID-19 emergency, Title 42 restrictions have been lifted, "[u]nder Title 42, migrants were returned over the border and denied the right to seek asylum. U.S. officials turned away migrants more than 2.8 million times. Families and children traveling alone were exempt." *Id.* Now, migrants apprehended crossing the border unlawfully will be barred from re-entry for five years and may face criminal charges upon attempting to return. *Id.* The Biden administration also reached a settlement with 4,000 migrants separated from their families that enables families to reside and work in the U.S. for three years, during which they will receive housing, mental health

E. Actual Conditions

Despite all of the recently enacted "protections" mentioned above[50]—Diego's story is real. Children spend "sleepless nights on cement floors, packed in with dozens of other children under the glare of white lights."[51] At these facilities, stale food is the only option, sick children do not get access to basic medical care, and many are forced to remain in filthy clothes.[52] Because bathrooms lack any privacy, they are mortified to use them.[53] Not only are the physical conditions inhumane and atrocious, but children held at immigration detention centers are at a high risk for mental health disorders. Among the sample of adolescents, 17% demonstrated signs of Post-Traumatic Stress Disorder (PTSD); 32% showed high rates of abnormal emotional problems, and 14% showed high rates of peer problems.[54] "Regardless of cause, the distress seen in these children highlights the need for immediate mental health treatment, as early intervention in children who demonstrate signs of psychological difficulties is shown to improve long-term emotional health."[55]

In order to understand the current state of mental health in unaccompanied children it is essential to look at current reports. The Office of Inspector General (OIG) conducts oversight of ORR and oversees their compliance with set standards. In 2019, OIG reported that:

> Facilities described the challenges inherent in addressing the mental health needs of children who had experienced significant trauma before coming into HHS care. Facilities reported that challenges employing mental health clinicians resulted in high caseloads and limited their effectiveness in addressing children's needs. Facilities also

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services, and legal aid to facilitate their asylum application process. Julia Ainsley & Jacob Soboroff, *Biden Admin Reaches Deal with Migrants Separated from Their Families Under Trump*, NBC NEWS (Oct. 16, 2023), https://www.nbcnews.com/politics/immigration/biden-admin-reaches-deal-migrants-separated-families-trump-rcna120587 [https://perma.cc/K9BS-TZA5]. "The deal, announced by the Justice Department, may end one of the darkest chapters in U.S. immigration policy, in which families crossing the U.S.-Mexico border illegally in 2017 and 2018 were systematically separated." *Id.*

50. *See supra* Part I section A.

51. Flagg & Preston, *supra* note 1.

52. *Id.*

53. *Id.*

54. Sarah A. MacLean, Priscilla O. Agyeman, Joshua Walther, Elizabeth K. Singer, Kim A. Baranowski & Craig L. Katz, *Mental Health of Children Held at a United States Immigration Detention Center*, 230 SOC. SCI & MED. 303, 305 (2019), https://txicfw.socialwork.utexas.edu/wp-content/uploads/2019/10/Impact-of-Immigrant-Detention-on-Children-Article.pdf [https://perma.cc/2LUL-2FAX]. PTSD is the "development of characteristic long-term symptoms following a psychologically traumatic event that is generally outside the range of usual human experience; symptoms include persistently reexperiencing the event and attempting to avoid stimuli reminiscent of the trauma." 260450 posttraumatic stress disorder (PTSD), STEDMANS MED. DICTIONARY (Nov. 2014).

55. MacLean, Agyeman, Walther, Singer, Baranowski & Katz, *supra* note 54.

> reported challenges accessing external mental health providers and transferring children to facilities within ORR's network that provide specialized treatment.[56]

Needless to say, there are countless issues with the U.S. immigration system,[57] but the mental health of unaccompanied children should be a priority of the government. The current state of affairs is clearly unacceptable and will only lead us down a dark, destructive path. This is why the Supreme Court should grant certiorari and consider the following case.

II. THE COURT'S RESPONSE: *DOE V. SHENANDOAH VALLEY JUV. CTR. COMM'N*

The leading case on the issue of the proper legal standard for the adequacy of mental health care provided to unaccompanied children is *Doe v. Shenandoah Valley Juv. Ctr. Comm'n*.[58] The case centered around the failure of the center to provide constitutionally adequate mental care because of its punitive practices and its failure to implement trauma-informed care.[59] The Shenandoah Valley Juvenile Center (SVJC) is a secure juvenile detention facility in Staunton, Virginia, that houses twenty to forty unaccompanied children.[60] Most of the unaccompanied children that SVJC cares for have experienced severe trauma.[61] Given the traumatic pasts of the children the SVJC serves, the staff is trained annually on ways to engage with these children and provide mental health services for each child.[62] Unaccompanied children meet with their mental health clinician (or professional counselor) for one-on-one counseling for one hour each week; they can ask for more sessions but their requests are usually denied or ignored.[63] Mental health clinicians also hold five to fifteen minute long group counseling sessions twice a week.[64] A psychiatrist visits SVJC every three to six weeks to prescribe medication.[65]

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56. JOANNE M. CHIEDI, OFF. OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUM. SERVS., CARE PROVIDER FACILITIES DESCRIBED CHALLENGES ADDRESSING MENTAL HEALTH NEEDS OF CHILDREN IN HHS CUSTODY 2 (2019), https://oig.hhs.gov/oei/reports/oei-09-18-00431.pdf [https://perma.cc/H3NZ-Z3H7]. OIG conducted site visits at 45 ORR-funded facilities and interviewed about 100 mental health clinicians, medical coordinators and faculty leadership. *Id.* at ii.

57. *See, e.g.*, Sam Cabral, *17-Year-Old Honduran Migrant Dies in US Custody*, BBC NEWS (May 12, 2023), https://www.bbc.com/news/world-us-canada-65578473 [https://perma.cc/2Q6D-FDXF]. The boy was in U.S. custody for five days. *Id.*

58. 985 F.3d 327 (4th Cir. 2021).

59. *Id.* at 329.

60. *Id.* at 329–30.

61. *Id.* at 330.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 330–31.

In 2001, "John Doe 4" was born in Honduras to a father in prison and a mother who abandoned him; early in his childhood, he witnessed gang members killing his friends.[66] Fearing the gangs, he fled to the U.S., and on his year-long journey, he was robbed, beaten, and shot.[67] When Doe 4 finally arrived in the United States, he was nearly knocked unconscious by Customs and Border Protection officers who slammed his head on the ground while handcuffing him.[68]

In 2017, around sixteen years old, Doe 4 was transferred to SVJC and was diagnosed with PTSD and attention deficit hyperactivity disorder (ADHD).[69] Doe 4 was "involved in several major disciplinary incidents, a few involving acts of self-harm . . . [he] tied a shirt around his neck, causing staff to intervene and place him in a suicide blanket."[70] Doe 4 had an incident with a staff member discussing his behavioral points in which the staff member ordered him to his room and then punched Doe 4, twisted his wrists, pinned him against the wall, fell on top of him, and responded "Good" when Doe 4 said he could not breathe.[71] Over seven months, Doe 4 spent over 800 hours either alone or in restricted contact with others.[72]

Many other unaccompanied children at SVJC "have also experienced and displayed deep distress from their severe mental health needs. . . . [b]etween June 2015 and May 2018, at least 45 children intentionally hurt themselves or attempted suicide."[73] Not only did the mental health of many unaccompanied children deteriorate while at SVJC but the staff did not seem to care and "reacted with indifference when children harmed themselves."[74] Despite the extensive training and awareness the facility had of the mental health needs of those in their care, at SVJC, the "techniques[] suggested were not implemented, and the training did not have any effect on the procedures or practices."[75] Instead of treating the unaccompanied children for their trauma, the "predominant approach utilized at SVJC is that of punishment and behavioral control through such

66. *Id.* at 332.

67. *Id* at 331.

68. *Id.*

69. *Id.* ADHD is "a behavioral disorder manifested by developmentally inappropriate degrees of inattentiveness (short attention span, distractability, inability to complete tasks, difficulty in following directions), impulsiveness (acting without due reflection), and hyperactivity (restlessness, fidgeting, squirming, excessive loquacity)." 259710 attention deficit hyperactivity disorder (ADHD), STEDMANS MED. DICTIONARY (Nov. 2014).

70. *Shenandoah*, 985 F.3d at 332.

71. *Id.* at 333.

72. *Id.*

73. *Id.* at 333–34.

74. *Id.* at 334. Comments like "let them cut themselves" and "[l]et them go bleed out" were reported by a former staff member. *Id.* (alteration in original). Staff also joked about the children's erratic behavior and poked fun that children in restraints could not move for six hours. *Id.*

75. *Id.* (alteration in original).

methods as solitary confinement, physical restraint, strapping to a restraint chair, and loss of behavioral levels. These approaches are not only unsuccessful, but are extremely detrimental to detained, traumatized youth."[76] These unaccompanied children filed a class action under 42 U.S.C. § 1983, contending that SVJC failed to provide a constitutionally adequate level of mental health care.[77]

III. PROFESSIONAL JUDGMENT STANDARD

The 4th Circuit in *Shenandoah Valley Juv. Ctr. Comm'n* held that if a facility caring for unaccompanied children departs from accepted professional standards then it has failed to provide a constitutionally adequate level of mental health care.[78] In order to meet this standard, there must be "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."[79] After determining that the professional judgment standard was proper, the court then determined that trauma-informed care represents the relevant standard of professional judgment. Specifically, trauma-informed care "provide[s] an environment in which youth feel safe, are assisted in coping when past traumatic experiences are triggered, and in which exposure to potentially retraumatizing reminders or events is reduced."[80] This type of care is implemented in many states across the U.S. and is used in juvenile detention systems.[81]

Given all of this, the standard coming out of *Shenandoah* requires that courts defer to the judgment exercised by qualified professionals and determine whether the person or facility charged with failing to perform their duties substantially departed from the established norms. Importantly, professional judgment does not require proof of subjective intent and "presents a lower standard of culpability" [82] compared to the deliberate indifference standard advocated by the dissent, discussed in the following section. This allows for a wider breadth of actions to come under scrutiny.

Shenandoah has potentially huge implications for the mental health of unaccompanied children. The Court was wise in choosing the

76. *Id.*

77. *Id.* (A Section 1983 action allows people to bring a claim against government entities and its employees for civil rights violations. 42 U.S.C. § 1983).

78. *Id.* at 342.

79. *Id.* (quoting Youngberg v. Romeo, 457 U.S. 307 (1982)). This standard has been discussed in *Youngberg* but in the context of a mentally disabled person involuntarily committed to a state institution. *Id.*

80. *Id.* at 344 (alteration in original).

81. *Id.* at 345.

82. *Id.* at 343.

professional judgment standard over the deliberate indifference standard, because the standard meaningfully considers the vulnerability of unaccompanied children and the negative consequences of a heightened standard.

Due to the experiences unaccompanied children go through, they are particularly vulnerable to experiencing challenging mental health concerns, such as toxic stress responses.[83] Toxic stress responses "occur when a child experiences strong, frequent, and/or prolonged adversity—such as physical or emotional abuse, chronic neglect . . . exposure to violence . . . —without adequate adult support."[84] Toxic stress can place a tremendous toll on a child's health, "[t]he more adverse experiences in childhood, the greater the likelihood of developmental delays and later health problems, including heart disease, diabetes, substance abuse, and depression."[85] These responses are further magnified for unaccompanied children who often endure hardships of poverty, financial insecurity, displacement, abduction, trafficking, and sexual and physical violence.[86] Because of exposure to extreme trauma, not only are unaccompanied children's health compromised but so is "the health of future generations through epigenetic changes long after conflict has subsided."[87]

The vulnerability of unaccompanied children demands the use of the professional judgment standard in determining the adequate mental health standard. As indicated, the professional judgment standard is a lower standard of culpability better safeguarding the health and wellness of unaccompanied children by ensuring they receive adequate care.[88] Therefore, the dissent's point on how the court is not the place to determine mental health is without merit—if a situation has exacerbated so much so to reach the courts, then with guidance from professionals, they are well-suited and can do so appropriately.

IV. THE DELIBERATE INDIFFERENCE STANDARD

Prior to *Shenandoah*, the deliberate indifference standard was used to evaluate claims from pretrial detainees for inadequate medical care.[89]

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83. *See generally Toxic Stress*, CTR. ON THE DEVELOPING CHILD HARV. UNIV., https://developingchild.harvard.edu/science/key-concepts/toxic-stress/ [https://perma.cc/H8CX-XKWH] (last visited Oct. 29, 2022).

84. *Id.*

85. *Id.*

86. Anushka Ataullahjan, Muthanna Samara, Theresa S. Betancourt & Zulfiqar A. Bhutta, *Mitigating Toxic Stress in Children Affected by Conflict and Displacement*, BMJ, NOV. 2020, at 2, https://www.bmj.com/content/bmj/371/bmj.m2876.full.pdf [https://perma.cc/4H2B-3AV7].

87. *Id.* at 3.

88. *Shenandoah*, 985 F.3d at 331.

89. *Id.* at 340.

Accordingly, both the SVJC and the dissenting opinion in *Shenandoah* advocated for this standard where, "a plaintiff must prove: (1) that the detainee had an objectively serious medical need; and (2) that the official subjectively knew of the need and disregarded it."[90] Unlike the professional judgment standard which does not require proof of subjective intent, under the deliberate indifference standard, "only reckless disregard of a serious medical need is actionable."[91]

In their critique of the professional judgment standard, the dissenting justices in *Shenandoah* cite three factors that are used to determine whether the professional judgment standard should apply: (1) purpose of the detention; (2) nature of the confining facility; and (3) duration of the detention.[92] The dissenting opinion also focused on how the court is unqualified to determine what constitutes an acceptable mental health standard—"[w]e are not psychiatrists with long educational and experiential training in mental health."[93] It further criticized the majority's decision, claiming it interferes with the constitutional power of States to design their juvenile detention systems and questions how much the reform would cost.[94] Finally, the dissent relied on precedent; ruling for the professional judgment standard created a circuit split, but as discussed below this does not mean that we must always rely on unjust decisions.[95] To the contrary, we must strive for what is best for the child and call for all circuits to do the same or for the Supreme Court to do so.

If implemented, the deliberate indifference standard would enable immigration facilities to circumvent the requirement to provide trauma-informed care, escaping liability in all but the most egregious circumstances, and permitting continued failures to fulfill the goals outlined in FSA or the ORR policy guide. The FSA "help[s] ensure that the best

90. *Id.* at 341.

91. *Shenandoah*, 985 F.3d at 348 (Wilkinson, J., dissenting).

92. *Id.* at 351.

93. *Id.* at 352.

94. *Id.* at 354.

95. A.M. *ex rel.* J.M.K. v. Luzerne Cnty. Juv. Det. Ctr., 372 F.3d 572 (3d Cir. 2004). In the Third Circuit case, a juvenile detainee sued the juvenile detention center and its staff under the same civil action, 42 U.S.C. § 1983, stating that they violated his rights in failing to protect him from harm at the center. Although the juvenile advocated for the deliberate indifference standard and the Court agreed with him on some of his claims, other claims did not rise to this level. The Court erroneously utilized the deliberate indifference standard in holding that the nurse did not fail to "disseminate information to the Center's staff about [the juvenile's] mental health history or take other steps in response to the information." *Id.* at 580. The Court held that the physician's actions in not conducting a psychiatric evaluation did not rise to the level of deliberate indifference. *Id.* The Third Circuit case observed how other courts have applied the deliberate indifference standard in prison settings and simply applied it to a drastically different setting—a juvenile detention center—without addressing the propriety of the standard in a case involving children. *Id.* at 587. If the Court had utilized the professional judgment standard, the juvenile's other claims would have likely prevailed.

interest of the child is a priority during government care of and placement decisions for unaccompanied children; these protections help prevent instances of abuse or neglect."[96] The ORR "Unaccompanied Children Program provides a safe and appropriate environment to children and youth who enter the United States without immigration status and without a parent or legal guardian."[97] Using the deliberate indifference standard would grant mental health technicians and staff exorbitant discretion in deciding how to manage unaccompanied children's health. This does not align with the "best interest of the child," nor does it offer a "safe and appropriate environment."

The factors considered by the dissent in *Shenandoah*, in fact, weigh *in favor of* the professional judgment standard. First, the facilities' purpose is to provide housing and services, including rehabilitative services (which the professional judgment standard applies to). While some unaccompanied children, like Doe 4, need to be placed in secure facilities due to safety concerns, it does not follow that these unaccompanied children cannot simultaneously receive mental health support—in fact it might be necessary in order for them to improve. Second, although SVJC is not a residential treatment center or hospital, this does not mean that they should be held to a different, materially higher standard. SVJC employs mental health technicians, psychologists, and licensed psychiatrists who are specialized personnel and provide a range of mental health services.[98] Given this, they provide services analogous to those found in a residential treatment center or hospital. Finally, although the dissent correctly points out that the deliberate indifference standard is more appropriate for temporary detentions, they incorrectly state that unaccompanied children like Doe 4 have temporary stays at SVJC. In fact, because of the limited number of secure facilities catered towards unaccompanied children, the duration of detention is likely to be lengthy, and as such the professional judgment standard is proper. Therefore, although the dissent raises some legitimate concerns, the deliberate indifference standard would serve to undermine these concerns and fail to serve the needs of vulnerable unaccompanied children placed in centers like SVJC.

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96. *What Is the Flores Settlement Agreement and What Does It Mean for Family Separation and Family Detention?*, JUST. FOR IMMIGRANTS, https://justiceforimmigrants.org/what-we-are-working-on/unaccompanied-children/what-is-the-flores-settlement-agreement-and-what-does-it-mean-for-family-separation-and-family-detention/ [https://perma.cc/UPW5-KWV3] (last visited Oct. 29, 2022). *See also* Stipulated Settlement Agreement, *supra* note 14.

97. *ORR Unaccompanied Children Program Policy Guide: Introduction*, OFF. OF REFUGEE RESETTLEMENT, (Jan. 30, 2015), https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-introduction [https://perma.cc/GVA5-QWVQ].

98. *Shenandoah*, 985 F.3d at 330.

However, because of how egregious the circumstances were in this case, even if the Fourth Circuit used the deliberate indifference standard here, they would have likely found Doe 4's inhumane treatment would have satisfied the two-prong approach. Doe 4 had objectively serious medical needs—his multiple mental health diagnoses and violent behavior—both of which were reported in his file and staff were well aware of his troubles yet did not appropriately address them. But not every case will be as egregious as Doe 4's case and yet the collective actions of the ORR, the facilities' staff, and the mental health professionals can still cause immense damage for unaccompanied children coming to the U.S. Therefore, the Court correctly decided to use the professional judgment standard, protecting future unaccompanied children from inhumane treatment that does not rise to the shocking level of abuse suffered by Doe 4.

V. THE STATUS OF DIFFERENT FACILITIES

To analyze whether the services provided to unaccompanied children residing at these facilities are adequate, it is important to take a look at how other types of facilities compare.

A. Juvenile Detention Facilities

Take for example a juvenile detention center, "a short-term facility that provides temporary care in a physically restricting environment for juveniles in custody pending court disposition and, often, for juveniles who are adjudicated delinquent and awaiting disposition or placement elsewhere, or are awaiting transfer to another jurisdiction."[99] Studies have indicated that "as many as 65 percent of youths in the juvenile justice system have a diagnosable psychiatric or substance abuse disorder."[100] The National Commission on Correctional Health Care (NCCHC) established minimum requirements for care including being screened quickly, developing treatment plans by qualified mental health staff, treating acute psychiatric symptoms appropriately, and only using psychotropic medication in accordance with "scientific evidence and professional standards to treat psychiatric symptoms, not merely to control behavior."[101]

Despite these requirements, the mental health care provided in juvenile detention centers is not significantly better than in immigration

99. *Glossary,* EASY ACCESS TO THE CENSUS OF JUVS. IN RESIDENTIAL PLACEMENT: 1997–2019, OFF. OF JUV. JUST. & DELINQ. PREVENTION, https://www.ojjdp.gov/ojstatbb/ezacjrp/asp/glossary.asp [https://perma.cc/P2FU-FDL6] (last visited Nov. 9, 2022).

100. Rani A. Desai, Joseph L. Goulet, Judith Robbins, John F. Chapman, Scott J. Migdole & Michael A. Hoge, *Mental Health Care in Juvenile Detention Facilities: A Review*, 34 J. AM. ACAD. PSYCHIATRY & L. 204, 206 (2006), https://jaapl.org/content/jaapl/34/2/204.full.pdf [https://perma.cc/JK7Z-PJ73].

101. *Id.* at 207.

detention centers. The Office of Juvenile Justice and Delinquency Prevention (OJJDP) conducted a survey and reported that 49% of detainees did not have daily access to mental health professionals and the "availability of specific behavioral health services in detention facilities [was] fairly low, with the exception of general support services."[102] Additionally, these children often face "more severe diagnoses than what is warranted," and "over-medication by staff who are not equipped to handle their emotional needs."[103]

Notwithstanding these conditions, there has been significant improvement in the mental health care of detained juveniles. Yet, "it is often difficult to establish programs in the face of questions about the appropriateness and effectiveness of therapeutic detention and the vulnerability of mental health professionals who, lacking proper consent, share health information with the courts."[104] Thus, although the juvenile detention system has undeniably flawed practices, there is one facet to consider—transparency. Mental health professionals at facilities for unaccompanied children should be transparent and voluntarily share information about the status of the facility with the courts.[105] This clarity would improve communication between the bodies and surely improve our definitions of the professional judgment and deliberate indifference standards.

B. International Policies Regarding Unaccompanied Children

Since the U.S. has poorly addressed the issues of both unaccompanied children and juvenile children, an examination of how other countries approach caring for this vulnerable group is needed. "In 2021, 24,147 children arrived in Bulgaria, Cyprus, Greece, Italy, Malta and Spain."[106] Of those children, "[71%] were unaccompanied or separated children."[107] The majority of these unaccompanied children originated from Afghanistan,

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102. *Id.* at 208–09.

103. Kasey Corbit, *Inadequate and Inappropriate Mental Health Treatment and Minority Overrepresentation in the Juvenile Justice System*, HASTINGS RACE & POVERTY L.J. 75, 88–89 (2005), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1025&context=hastings_race_poverty_law_journal [https://perma.cc/C2N7-ZYXX].

104. Desai, Goulet, Robbins, Chapman, Migdole & Hoge, *supra* note 100, at 212.

105. *See* GLORIA L. JARMON, OFF. OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUM. SERVS., FLORENCE CRITTENTON SERVICES OF ORANGE COUNTY, INC., DID NOT ALWAYS MEET APPLICABLE SAFETY STANDARDS RELATED TO UNACCOMPANIED ALIEN CHILDREN (2018) https://oig.hhs.gov/oas/reports/region9/91601005.pdf [https://perma.cc/JRB4-3TAV]. This can start by requiring facilities to provide training to staff regarding the documentation of each child and increase oversight of quality review for case files.

106. JAVED KHAN, DEEPAK KUMAR DEY & IVONA ZAKOSKA TODOROVSKA, UNHCR, UNICEF & IOM, REFUGEE AND MIGRANT CHILDREN IN EUROPE: ACCOMPANIED, UNACCOMPANIED AND SEPARATED (2021), https://www.unicef.org/eca/media/23466/file/Refugee%20and%20Migrant%20Children%20in%20Europe%20.pdf [https://perma.cc/73V6-EYPX].

107. *Id.*

Egypt, Tunisia, and Syria, with war and conflict as the primary reason for leaving.[108] This draws striking similarities to the reasons that unaccompanied children arrive in the U.S.[109] In Greece, unaccompanied children have the right to free health services, but there is a lack of interpreters, and for mental health problems, there is a "lack of special psychological care and specialised treatment entrusted to local mental health care services . . . are not often specialised on juvenile or intercultural issues."[110] In Germany, unaccompanied children have access to a large range of care, where "[a]ny person entitled to asylum, or who has been recognised as a refugee, receives identical treatment to that accorded to nationals."[111] In Hungary, unaccompanied children "are considered to require special treatment and are entitled to health services, rehabilitation, psychological and psychotherapeutic support."[112]

It must be noted that these short, one-line descriptions do not depict the picture fully and accurately. Several Human Rights Watch reports have exposed the true conditions unaccompanied children encounter in various European countries. For example, in Greece, "children face unsanitary and degrading conditions and abusive treatment, including detention with adults and ill-treatment by police."[113] Unaccompanied children were not provided with "critical care and services," in fact,"[t]here was no access to psychological care" and children attempted to harm themselves.[114] Another example points out that "many children decide to leave Italy and travel to France because they have not received access to education or adequate health care in Italy."[115] However, when they finally make it to France, "unaccompanied children are often placed in centers located far from urban areas, with little access to schools and health services."[116] As a final example, in Sweden, "some children, including those who had experienced sexual violence, had not received adequate health screening or

108. *Id.* at 2, 4.

109. *See* Cheatham & Roy, *supra* note 3.

110. EUROPEAN MIGRATION NETWORK, UNACCOMPANIED MINORS—AN EU COMPARATIVE STUDY, https://www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_9_politikalar/1_9_8_dis_politika/Policies_on_reception_return_and_integration_for_and_numbers_of_unaccompanied_minors.pdf [https://perma.cc/DZ5H-F29U].

111. *Id.*

112. *Id.*

113. *"Why Are You Keeping Me Here?" Unaccompanied Children Detained in Greece*, HUM. RTS. WATCH (Sept. 8, 2016), https://www.hrw.org/report/2016/09/08/why-are-you-keeping-me-here/unaccompanied-children-detained-greece [https://perma.cc/7BXQ-GEXS].

114. *Id.*

115. *Subject to Whim the Treatment of Unaccompanied Migrant Children in the French Hautes-Alpes*, HUM. RTS. WATCH (Sept. 5, 2019), https://www.hrw.org/report/2019/09/05/subject-whim/treatment-unaccompanied-migrant-children-french-hautes-alpes [https://perma.cc/ARL3-79X8].

116. *Id.*

mental and physical health care."[117] All across Europe, unaccompanied children not only did not receive critical care but there "is a lack of prioritization of applications of vulnerable unaccompanied children" which contributes to the backlog of cases and delays in application processing.[118]

Despite countless international conventions and EU legislation,[119] these countries are failing to meet the standards set out for unaccompanied children—even when it comes to basic necessities. As demonstrated, numerous European countries' aspirational goals of protecting one of the most vulnerable populations do not even come close to the realities unaccompanied children endure. This is significant because not only is the U.S. failing unaccompanied children, but so is the rest of the world. It is time for the U.S. to step up as an international leader and illustrate that the professional judgment standard works and improves the mental health care that unaccompanied children receive.

CONCLUSION: IMPLICATIONS AND RECOMMENDATIONS

Historically, immigration has been a heated debate in the U.S.—but it has recently become extremely politicized, and this has resulted in immigration being forced into a negative light. Partly because of the way immigration is portrayed in the media and partly because of the incessant dehumanizing and criminalizing rhetoric endorsed by government leaders, the issue has exacerbated.[120] "[N]egative portrayals of immigrants generate physiological and emotional hostility toward the outgroup, and ingroup favoritism in economic transactions."[121] Not only does the issue

117. *Seeking Refuge Unaccompanied Children in Sweden*, HUM. RTS. WATCH (June 9, 2016), https://www.hrw.org/report/2016/06/09/seeking-refuge/unaccompanied-children-sweden [https://perma.cc/MB63-G4SV].

118. *Id.*

119. *See, e.g.*, Convention on the Rights of the Child, arts. 19, 22, 24–25, Nov. 20, 1989, 1577 U.N.T.S. 3; Council Regulation 2016/399 of Mar. 9, 2016, On a Union Code on the Rules Governing the Movement of Persons Across Borders (Schengen Borders Code), 2016 O.J. (L 077) 1 (EU).

120. *See* DIANA C. MUTZ, UNIV. OF PA., MASS MEDIA AND AMERICAN ATTITUDE TOWARD IMMIGRATION, (2018), https://global.upenn.edu/sites/default/files/Mutz.pdf [https://perma.cc/33LH-6CPP]; Adrian Horton, *Immigrant Representation on TV Over-Emphasizes Criminality, Study Finds*, GUARDIAN (Sept. 23, 2020), https://www.theguardian.com/tv-and-radio/2020/sep/23/immigrant-representation-tv-criminality-study [https://perma.cc/5ZGL-ZEBM]; *see also* John Fritze, *Trump Used Words Like 'Invasion' and 'Killer' to Discuss Immigrants at Rallies 500 Times: USA TODAY Analysis*, USA TODAY (Aug. 8, 2019), https://www.usatoday.com/story/news/politics/elections/2019/08/08/trump-immigrants-rhetoric-criticized-el-paso-dayton-shootings/1936742001/ [https://perma.cc/U4D9-Q7WW]; Eugene Scott, *Trump's Most Insulting—and Violent—Language is Often Reserved for Immigrants*, WASH. POST (Oct. 2, 2019), https://www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-immigrants/ [https://perma.cc/95P2-VM4K].

121. Pierluigi Conzo, Giulia Fuochi, Laura Anfossi, Federica Spaccatini & Cristina Onesta Mosso, *Negative Media Portrayals of Immigrants Increase Ingroup Favoritism and Hostile*

surrounding immigration influence politics and the economy but it has led to a steady rise in hate crimes against immigrants.[122] With more immigrants entering the U.S. every day, the current immigration system demands an overhaul. This includes transforming the way immigrants are portrayed in the mass media and by politicians. By taking a stand against racism and xenophobia through online platforms and national movements, these views can be appropriately denounced. One creative approach taken by an attorney is publishing a picture book featuring excerpts of testimonies from unaccompanied children. The author says, "the purpose is to center the narrative back on the people most directly affected—the children" and she hopes to inspire families to write to political leaders, volunteer to sponsor, or foster children.[123] However inspiring this strategy is, it will likely be gradual, and the safety concerns faced by unaccompanied children are terribly urgent.

Notably, "there has been a seventeen-fold increase in the number of unaccompanied children since [fiscal year] 2008," and officials predict that this will only continue, so the U.S. government must address the matter.[124] One major step the U.S. can take to address the matter is to ratify the Convention on the Rights of the Child (CRC). The U.S. is the only country that has not ratified the treaty and because of this, "it does not receive guidance from the Committee on the Rights of the Child, the U.N. committee charged with overseeing CRC compliance."[125] The CRC shows that "[i]nternational legal norms are clear: detention is never in a child's best interest, and arbitrary detention, or detention in conditions that are inappropriate for children, is prohibited."[126] However, it is critical to note that countries that have ratified the CRC still face problems, as demonstrated above. The reality is not only that unaccompanied children are detained in the U.S., but they are detained in horrifying conditions—

Physiological and Emotional Reactions, SCI. REPORTS, Aug. 12, 2021, https://www.nature.com/articles/s41598-021-95800-2#:~:text=Overall%2C%20negative%20portrayals%20of%20immigrants,relative%20to%20ethnically%2Dhomogeneous%20markets [https://perma.cc/6FHQ-UTCS].

122. Suzanne Gamboa, *Rise in Reports of Hate Crimes Against Latinos Pushes Overall Number to 11-year High*, NBC NEWS (Nov. 16, 2020), https://www.nbcnews.com/news/latino/rise-hate-crimes-against-latinos-pushes-overall-number-highest-over-n1247932 [https://perma.cc/FC6K-44YD] ("Authorities said that before the attack, the gunman had posted a hate-filled racist statement decrying the 'invasion' of Mexican immigrants in the United States.").

123. Anya Kamenetz, *A Picture Book About Children at the Border Aims to Spark Family Conversations*, NPR (Apr. 12, 2021), https://www.npr.org/2021/04/12/985726774/a-picture-book-about-children-at-the-border-aims-to-spark-family-conversations [https://perma.cc/SYG5-MPYL].

124. *Growing Numbers of Children Try to Enter the U.S.*, TRAC IMMIGR. (June 28, 2022), https://trac.syr.edu/immigration/reports/687/ [https://perma.cc/S7VS-JYVY].

125. Shaw Drake & Megan Corrarino, *U.S. Stands Alone: Not Signing U.N. Child Rights Treaty Leaves Migrant Children Vulnerable*, HUFFPOST (Oct. 13, 2015), https://www.huffpost.com/entry/children-migrants-rights_b_8271874 [https://perma.cc/SV72-EYST].

126. *Id.*

inappropriate for anyone to be kept in—and which seriously deteriorates their health. Hence, the facilities should start by actually following the policies set out by the ORR governing the minimum standards regarding nourishment, hygiene, mental health, and privacy.[127]

To address the fact that facilities struggle to support the mental health needs of children in their care, ORR should work with experts to create resources that can improve facilities' readiness. Specifically, ORR:

> Could establish and make available a technical assistance group composed of subject matter experts, which could help to ensure that facilities' treatment reflects current best practices. This group could serve as a resource to facility mental health clinicians when they have questions or need help treating children in their care.[128]

This would help guarantee that facilities are following the professional judgment standard set out in *Shenandoah*.

Another issue that directly impacts the standard of care at these facilities is the difficulty with hiring and retaining qualified mental health professionals. ORR could assist facilities in recruitment by raising awareness of job opportunities and benefits.[129] ORR could enter "agreements with governmental and nongovernmental entities that could dispatch mental health clinicians to fill vacancies to address facilities' needs."[130] In the event that there is a lack of professionals, ORR could use telemedicine for unaccompanied children to have access to remote psychiatry instead of leaving unaccompanied children without the treatment they need for long periods of time.[131] "These efforts could help release the time and workload pressures that contribute to mental health clinician staffing issues and could improve their ability to address children's needs."[132] Since addressing children's needs is one of the requirements of trauma-informed professional judgment under *Shenandoah*, this presents a promising solution to the personnel issues that facilities face.

A report by the Office of Inspector General revealed that most facilities conducted and documented FBI fingerprint checks but "over half the facilities allowed employee(s) to start without first receiving background check results."[133] Additionally, "over half of all facilities hired case

127. *See ORR Unaccompanied Children Program Policy Guide*, *supra* note 28.

128. Chiedi, *supra* note 56.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. JOANNE M. CHIEDI, OFF. OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUM. SERVS., UNACCOMPANIED ALIEN CHILDREN CARE PROVIDER FACILITIES GENERALLY CONDUCTED REQUIRED BACKGROUND CHECKS BUT FACED CHALLENGES IN HIRING, SCREENING, AND RETAINING

managers who did not meet minimum educational requirements, while almost all facilities hired mental health clinicians who did meet minimum requirements."[134] To ensure that unaccompanied children receive care that meets professional judgment standards, only those applicants whose background checks are cleared should be hired because they are authorized to be around children. All employees should meet minimum educational requirements; each employee has a role in caring for unaccompanied children and if they do not have the necessary background or experience, then they are simply not qualified to work with unaccompanied children.

As discussed repeatedly throughout this Comment, unaccompanied children are extremely vulnerable and for facilities to hire unqualified and unauthorized people to support unaccompanied children is deplorable—and would likely result in violations under both the professional judgment and deliberate indifference standards. ORR should implement a sanction system imposed on those facilities engaged in these inappropriate hiring practices through the professional judgment standard. This system could involve several warnings followed by fines if the facility does not adhere to the regulations outlined.

Finally, and arguably one of the most important steps the U.S. can take to safeguard unaccompanied children's rights regarding mental health standards is for the U.S. Supreme Court to take up the issue presented in *Shenandoah* and grant certiorari. There is no reason to delay or wait until another child has suffered further abuse from their detention at a facility. This urgent issue demands our immediate attention. The Court's ruling in *Shenandoah* created a circuit split as it held for a professional judgment standard, but the Third Circuit had applied the deliberate indifference standard. This split will result in increased confusion at facilities across the U.S. as to what constitutes appropriate mental health care when physicians and staff should be solely concerned about the best interests of the child. Since immigration is an area of law regulated by the federal government, it follows that the facilities unaccompanied children are placed in should be held to uniform federal standards. In holding that the professional judgment standard should be utilized in detention centers, the Supreme Court would produce uniformity and understanding in this complicated area.

People seek refuge in the U.S. because the U.S. has portrayed an image of hope, opportunity, and freedom. By better supporting unaccompanied children the U.S. can continue to honor these values. The U.S. has a legal and moral obligation to properly protect and care for all children that

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EMPLOYEES 11 (Sept. 2019), https://oig.hhs.gov/oas/reports/region12/121920001.pdf [https://perma.cc/KCU9-V8L2].

134. *Id.* at 16.

arrive no matter how they got here. Future generations will look back on the abhorrent decisions made and it is our duty to make sure this is not just another mistake written into history textbooks or swept under the rug. The U.S. should lead the way on the international stage as an example of a safe haven for immigrants instead of perpetuating the belief of exclusion and keeping the marginalized out. It should be done for all children suffering at the hands of an oppressive system, it should be done for children like Diego.