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## Professional Indifference?: How One Case Improves Protection for Immigrant Children in United States Detention Centers

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## PROFESSIONAL INDIFFERENCE?: HOW ONE CASE IMPROVES PROTECTION FOR IMMIGRANT CHILDREN IN UNITED STATES DETENTION CENTERS

*Caitlin Fernandez Zamora*\*<sup>1</sup>

**ABSTRACT**—This Article discusses the case *Doe 4 ex rel. Lopez v. Shenandoah Valley Juvenile Center Commission*. This case was a class action brought by unaccompanied immigrant children against the Shenandoah Valley Juvenile Center Commission under § 1983 protection for adequate medical care. The plaintiff class alleged that, among other things, the Commission failed to (i) provide adequate mental health care due to punitive practices; and (ii) implement trauma-informed care. The plaintiffs were immigrant children who fled their native countries due to harrowing circumstances, many of whom struggled with severe mental illness. The district court granted the defendant’s motion for summary judgment regarding the mental health care claim, which the plaintiffs appealed. On appeal, the Fourth Circuit considered which standard should be applied to analyzing a claim regarding the detention center’s level of mental health care. This Article explores the approach and impact of *Doe 4*, as a case of first impression for the Fourth Circuit and effectively for all circuits with regard to this class of immigrant children. Specifically, this Article discusses whether the majority opinion followed precedent or broke away from it in a way that properly embodies federal law and Constitutional guarantees. This Article also discusses the role of international law in United States courts, particularly related to protections for migrants and children. The Article ultimately concludes that the Fourth Circuit’s decision in *Doe 4* was correct and explains why and how it should be further adopted and adapted by other federal courts, to promote an end to the *professional indifference* that the United States judicial system has normalized with regard to care for juveniles in detention centers.

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INTRODUCTION: LAYING THE GROUNDWORK TO UNDERSTAND AND  
 ANALYZE *DOE 4*

Information is widespread regarding immigrant children apprehended at the United States border. News outlets have closely followed the topic in recent years, with many closely observing and scrutinizing President Biden regarding his policies for detaining children at the border.<sup>2</sup> It is no wonder the topic is receiving so much media attention, given that the annual number of unaccompanied migrant children – called Unaccompanied Alien

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<sup>2</sup> Tessa Hesson & Mica Rosenberg, *Explainer: Why More Migrant Children Are Arriving at the U.S.-Mexico Border*, REUTERS (Mar. 25, 2021), <https://www.reuters.com/article/us-usa-biden-immigration-children-explai/explainer-why-more-migrant-children-are-arriving-at-the-u-s-mexico-border-idUSKBN2BH1BF>; see also Michelle Hackman & Alicia A. Caldwell, *U.S. Reduces Migrant Children in Border Patrol Custody, but Emergency Shelters Pose New Concerns*, WALL ST. J. (May 5, 2021), <https://www.wsj.com/articles/u-s-reduces-migrant-children-in-border-patrol-custody-but-emergency-shelters-pose-new-concerns-11620234355>; Priscilla Alvarez, *More than 20,000 Unaccompanied Migrant Children Are Now in US Custody*, CNN (Apr. 7, 2021), <https://www.cnn.com/2021/04/07/politics/unaccompanied-migrant-children-in-us-custody/index.html> (noting that as of April 7, 2021 there were over 20,000 unaccompanied migrant children in U.S. custody. About 4,000 of that total were in the custody of Customs and Border Protection, “an agency not generally prepared to care for children for prolonged periods,” and the other 16,000 were in the custody of the Department of Health and Human Services).

Children (UACs) by United States law<sup>3</sup> – apprehended by Customs and Border Patrol (CBP) grew from 18,622 in FY 2010 to 76,136 in FY 2019.<sup>4</sup> In that ten-year period, CBP recorded 434,253 unaccompanied children apprehended.<sup>5</sup> While FY 2020 saw a decrease in unaccompanied children apprehended – thought to be because of the effects of the COVID-19 pandemic<sup>6</sup> – FY 2021 demonstrated higher numbers again, with CBP encountering almost 147,000 unaccompanied children at the Southwest border,<sup>7</sup> and apprehending over 47,000 unaccompanied children at the border by April 2022 alone.<sup>8</sup> Given the dramatic increase in child apprehensions at the border, the legal standards which apply to UACs are of increasing importance.

Alongside increasing apprehensions, recent years have seen an increasing number of minor children detained by CBP, many of whom are later transferred to the authority of the Office of Refugee Resettlement (ORR).<sup>9</sup> Once a UAC enters the United States, they are immediately under

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<sup>3</sup> 6 U.S.C. § 279(g)(2) (defining an unaccompanied alien child (UACs) as a child who “has no lawful immigration status in the United States;” “has not attained 18 years of age;” and who either has “no parent or legal guardian in the United States” or has “no parent or legal guardian in the United States [who] is available to provide care and physical custody.”). This article will utilize the term ‘Unaccompanied Alien Child’ (UAC) because this is the class of person at issue in the central case, as defined per U.S. law. The use of this term, however, should not be read as approval of it, given its degrading nature. The article will also use the term ‘unaccompanied child. While not statutory, is sometimes used in U.S. government statistics and newly by the Office of Refugee Resettlement (ORR). See, e.g., *Unaccompanied Children*, ORR, <https://www.acf.hhs.gov/orr/programs/uc> (last visited May 20, 2022).

<sup>4</sup> TOTAL UNACCOMPANIED ALIEN CHILDREN (0-17 YEARS OLD) BY MONTH - FY 2010- FY 2019, U.S. CUSTOMS & BORDER CONTROL (2020), [https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Total%20Monthly%20UAC%20Apprehensions%20by%20Sector%20%28FY%202010%20-%20FY%202019%29\\_0.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Total%20Monthly%20UAC%20Apprehensions%20by%20Sector%20%28FY%202010%20-%20FY%202019%29_0.pdf). The government’s fiscal years run from October 1 to September 30. FY 2019 ran from October 1, 2018 to September 30, 2019.

<sup>5</sup> *Id.*

<sup>6</sup> Under the Trump administration, DHS was permitted under Title 42 of the U.S. Code to “rapidly expel all individuals without a valid visa or who [were] apprehended between official ports of entry in order to prevent the spread of COVID-19.” CONG. RSCH. SERV., IN11638, INCREASING NUMBERS OF UNACCOMPANIED ALIEN CHILDREN AT THE SOUTHWEST BORDER 2 (2021), <https://crsreports.congress.gov/product/pdf/IN/IN11638>. The Biden administration exempted unaccompanied migrant children from this order, which is likely why there has been such an increase of children apprehended at the border in 2021. See *id.*

<sup>7</sup> *Southwest Land Border Encounters*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> (last visited June 10, 2022).

<sup>8</sup> Unfortunately, the United States Customs and Border Protection page does not have updated information on apprehensions from 2021, but the total number of children apprehended is certainly higher than the fiscal year 2021 data going only through March. *U.S. Border Patrol Southwest Border Apprehensions by Sector*, U.S. CUSTOMS & BORDER PROT. (June 20, 2021), <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters/usbp-sw-border-apprehensions>.

<sup>9</sup> In March 2021, the number of unaccompanied children taken into CBP custody peaked at a record 18,951—significantly more than the previous record of 11,861 in May 2019—before dropping

the legal responsibility and custody of ORR, who is responsible for their placement and care.<sup>10</sup> ORR then decides where to place the unaccompanied children, with placements varying in levels of treatment capabilities, security, and confinement. There are a number of placement options, including a shelter facility, foster care or group home, staff-secure or secure care facility, residential treatment center or other special needs care facility.<sup>11</sup> The most restrictive placement is called a secure care facility, which is a restrictive detention center where pre-trial detainees are also often held.<sup>12</sup> This placement is the most relevant to this Article's discussion. U.S. law defines a secure care facility as:

[A] facility with a physically secure structure and staff able to control violent behavior. ORR uses a secure facility as the most restrictive placement option for an unaccompanied child who poses a danger to self or others or has been charged with having committed a criminal offense. A secure facility may be a licensed juvenile detention center or a highly structured therapeutic facility.<sup>13</sup>

UACs are entitled to the least restrictive placement that is in their best interest.<sup>14</sup> Moreover, ORR *only* has the authority to place UACs in secure facilities with a “determination that the child poses a danger to self or others or has been charged with having committed a criminal offense.”<sup>15</sup> Because UACs are entitled to the least restrictive setting that is in their best interest, ORR faces additional procedural hurdles to maintain a UAC's

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25.3% by May to 14,158 and then rebounding slightly in June to 15,018. AMERICAN IMMIGRATION COUNCIL, RISING BORDER ENCOUNTERS IN 2021: AN OVERVIEW AND ANALYSIS 17 (2022), [https://www.americanimmigrationcouncil.org/sites/default/files/research/rising\\_border\\_encounters\\_in\\_2021.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/rising_border_encounters_in_2021.pdf).

<sup>10</sup> 6 U.S.C.A. § 279; *see also Unaccompanied Children*, ORR, <https://www.acf.hhs.gov/orr/programs/uc> (last visited July 3, 2022).

<sup>11</sup> *Children Entering the United States Unaccompanied: Section 1*, ORR, (Feb. 12, 2021), <https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-section-1>.

<sup>12</sup> *See id.* § 1.2.4 (“Secure facilities are for youth who require the strictest level of supervision.”).

<sup>13</sup> *Children Entering the United States Unaccompanied: Guide to Terms*, ORR, (Mar. 17, 2021), <https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-guide-terms#Secure%20Care>.

<sup>14</sup> *See Stipulated Settlement Agreement* ¶ 11, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997), [https://www.aclu.org/sites/default/files/assets/flores\\_settlement\\_final\\_plus\\_extension\\_of\\_settlement011797.pdf](https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf) [hereinafter “Flores Settlement Agreement”] (requiring that the government place unaccompanied minors in “the least restrictive setting appropriate to the minor’s age and special needs . . .”). The protections were later strengthened by 8 U.S.C.A. § 1232(c)(2)(A) (entitling UACs to “the least restrictive setting that is in the best interest of the child”).

<sup>15</sup> 8 U.S.C.A. § 1232(c)(2).

placement in a secure facility, having to reconsider the restrictive placement every thirty days.<sup>16</sup>

This information helps give context for *Doe 4 ex rel. Lopez v. Shenandoah Valley Juvenile Center Commission* (“*Doe 4*”). Here, the plaintiff class of UACs were being held in the most restrictive placement option,<sup>17</sup> a secure care facility called Shenandoah Valley Juvenile Center (SVJC).<sup>18</sup> The Center is a juvenile detention center that holds both UACs as well as non-migrant juveniles awaiting trial. The plaintiff class of UACs detained at SVJC sought to vindicate their Fifth and Fourteenth Amendment rights in *Doe 4*<sup>19</sup> by challenging the conditions at the facility. They filed a class action<sup>20</sup> in the Western District of Virginia under 42 U.S.C. § 1983 against the Commission who runs the Center.<sup>21</sup> Plaintiffs alleged Fourteenth and Fifth Amendment violations based on practices of excessive force and restraints<sup>22</sup> and inadequate mental health care.<sup>23</sup> The district court denied Defendant’s motion for summary judgment with regard to the excessive force claims, but granted the motion with regard to the plaintiff class’s claim of inadequate mental health care. In arriving at its holding, the court applied a deliberate indifference standard<sup>24</sup> to SVJC’s

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<sup>16</sup> *Id.* (“The placement of a child in a secure facility shall be reviewed, at a minimum, on a monthly basis, in accordance with procedures prescribed by the Secretary, to determine if such placement remains warranted.”); *see also* ORR, *supra* note 11, § 1.4.2.

<sup>17</sup> *See* ORR, *supra* note 11, § 1.2.4.

<sup>18</sup> The abbreviation SVJC will be used interchangeably for Shenandoah Valley Juvenile Center and the Shenandoah Valley Juvenile Center Commission (defendant to the *Doe 4* case) which runs the Center.

<sup>19</sup> Though this article discusses both the district and appellate decisions, the bulk of discussion surrounds the Fourth Circuit’s decision. As such, the *Doe 4* abbreviation will refer to the appellate decision.

<sup>20</sup> *Doe ex rel. Lopez v. Shenandoah Valley Juvenile Ctr. Comm’n*, 355 F. Supp. 3d 454 (W.D. Va. 2018), *rev’d and remanded sub nom. Doe 4 ex rel. Lopez v. Shenandoah Valley Juvenile Ctr. Comm’n*, 985 F.3d 327 (4th Cir. 2021). Because of the transient nature of UAC treatment and SVJC’s care, the certification process took some time. The class was eventually certified, but the time expended for the process allowed for further incidents of alleged inadequate health care to occur at the defendant facility, SVJC.

<sup>21</sup> *See id.* at 458-59.

<sup>22</sup> The Fourth Circuit only considered the mental health claim on appeal because, after the district court granted partial summary judgment, the plaintiff class abandoned all claims other than the mental health care claim, appealing only with regard to that claim. *See* 985 F.3d 327, 336 (4th Cir. 2021), cert. denied sub nom. *Shenandoah Valley Juvenile Ctr. Comm’n v. Doe 5 ex rel. Lopez*, 142 S. Ct. 583 (2021).

<sup>23</sup> *See Doe*, 355 F. Supp. 3d at 458. *See also Doe 4*, 985 F.3d at 329; *Status of representative is issue in class action*, VIRGINIA LAWYERS WEEKLY (Jan. 12, 2019), <https://plus.lexis.com/document/index?crd=297ef86b-4a70-46e5-a09f-952f9744183c&pdpermalink=94331ee5-aacb-4557-9f81-e14092827f02&pdmfid=1530671&pdisurlapi=true&cbc=0>.

<sup>24</sup> For more discussion of the legal deliberate indifference standard and its application, *see infra* note 43 and accompanying text.

provision of medical treatment to UACs in its care,<sup>25</sup> meaning that SVJC would only be liable if the plaintiffs could prove that its officials had actual knowledge of UACs' serious medical needs and then disregarded those needs.<sup>26</sup>

Plaintiffs subsequently appealed the Western District of Virginia's decision regarding SVJC's provision of medical care. Their appeal was considered by the Fourth Circuit in January 2021. The Fourth Circuit addressed two questions in ruling on the plaintiffs' appeal: (1) did the class have standing to sue SVJC, when ultimately a different state agency (ORR) was responsible for the well-being of the UACs making up the plaintiff class,<sup>27</sup> and (2) what is the appropriate standard to apply in determining whether a detention center holding UACs has provided adequate medical care?<sup>28</sup> As a matter of first impression, the Fourth Circuit approached the issue of which standard should apply to claims of inadequate medical care for UACs, with a majority of the Fourth Circuit panel deciding that the standard should be one of professional judgment, rather than the more deferential standard of deliberate indifference<sup>29</sup> used by the district court. The Fourth Circuit's holding in *Doe 4* is timely given the increasing number of migrant children detained, because it strengthens the constitutional rights of UACs.<sup>30</sup>

Because the Western District of Virginia applied an improper standard to the facts, the court excluded key evidence material to the summary judgment determination.<sup>31</sup> Accordingly, the Fourth Circuit reversed and remanded the district court's summary judgment ruling. On July 9, 2021, defendant SVJC filed a petition for writ of certiorari, requesting review by the Supreme Court, which was denied on December 6, 2021.<sup>32</sup> As of this

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<sup>25</sup> See *Doe ex rel. Lopez*, 355 F. Supp. 3d at 468-69.

<sup>26</sup> *Farmer v. Brennan*, 511 U.S. 825, 834-37 (1994).

<sup>27</sup> SVJC argued that, by failing to name ORR as a defendant, plaintiffs failed to meet the requirements of redressability and therefore had no standing. *Doe 4*, 985 F.3d at 337. The Fourth Circuit rejected this argument, finding that: "[b]ecause [plaintiff]'s proposed remedy focuses on the treatment and services provided by SVJC, [plaintiff] seek relief likely to redress their injuries." Plaintiffs met the requirements for redressability. *Id.* Thus, Plaintiffs had standing. *Id.* This article will not discuss the matter of standing further, but expresses support for this reading of standing, which promotes the ability of detained immigrant juveniles – and vulnerable populations in general – to seek remedy for unconstitutional conditions and harms.

<sup>28</sup> Discussed *infra* Section II.

<sup>29</sup> *Doe 4*, 985 F.3d at 349 (discussing a time when the Supreme Court applied a "less deferential" professional judgment standard, in lieu of the more deferential deliberate indifference standard).

<sup>30</sup> See *supra* note 2.

<sup>31</sup> *Doe 4*, 985 F.3d at 346-47.

<sup>32</sup> *Shenandoah Valley Juv. Ctr. Comm'n v. Doe 5 ex rel. Lopez*, 142 S. Ct. 583 (2021).

writing, the case is still awaiting remand, and therefore the plaintiff class is still awaiting relief.

The majority also spent a portion of its opinion discussing how developments in trauma-informed care inform professional judgment regarding adequate mental health care.<sup>33</sup> The Court defined a trauma-informed system of care as one that “provides 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.”<sup>34</sup> To understand this portion of the opinion, it is important to appreciate the context of trauma-informed care as a relatively recent development in healthcare. From 1995-1997 the Center for Disease Control (CDC) conducted what became a groundbreaking study on the effects of childhood trauma.<sup>35</sup> The study showed that there were significant links between childhood trauma, or “Adverse Childhood Experiences” (ACEs), and increased risk of death and delinquency.<sup>36</sup> Since this discovery, Congress has recognized trauma as a public health crisis<sup>37</sup> and various groups – including state and federal government actors – have discussed and implemented standards for child health care to better address the effects of trauma.<sup>38</sup>

Trauma-informed care is salient to *Doe 4* because UACs are a vulnerable class. Many UACs have experienced trauma in their lifetime, which is one of the many disadvantages UACs face. UACs experience additional vulnerability due to their status as migrants and children. Because UACs are unaccompanied, they are put in the care of ORR. Instead of having parents or close family advocating for them, UACs have only ORR. It is unsurprising, then, that doctors have noted that

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<sup>33</sup> See *infra* Section III for a discussion of the majority and dissenting opinions on trauma-informed care and the proper legal analysis for children in detention.

<sup>34</sup> *Doe 4*, 985 F.3d at 344.

<sup>35</sup> Anda et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTATIVE MED. 245 (1988); see also CTR. FOR DISEASE CONTROL & PREVENTION, *Violence Prevention: CDC-Kaiser ACE Study* (Apr. 6, 2021) <https://www.cdc.gov/violenceprevention/aces/about.html>.

<sup>36</sup> Anda et al., *supra* note 35, at 245; see also Kadee Atkinson & Phelan Wyrick, *Examining the Relationship Between Childhood Trauma and Involvement in the Justice System*, NAT’L INST. OF JUST. J., Oct. 2021, at 1 (“Trauma experienced during childhood may result in profound and long-lasting negative effects [such as] delinquency and adult criminality, substance abuse, poor school performance, depression, and chronic disease.”) (citing several studies and articles from 1998 through 2020).

<sup>37</sup> *Identifying, Preventing, and Treating Childhood Trauma: Pervasive Public Health Issue that Needs Greater Federal Attention*, Hearing before the Subcomm. on Oversight and Reform 116 Cong. (2019), <https://oversight.house.gov/legislation/hearings/identifying-preventing-and-treating-childhood-trauma-a-pervasive-public-health>.

<sup>38</sup> See, e.g., *infra* notes 198-200.

*unaccompanied* migrant children are more disadvantaged than *accompanied* migrant children.<sup>39</sup> Additionally, UACs often undergo procedures in the United States without giving proper consent.<sup>40</sup> In order to understand how domestic courts should analyze the rights of UACs, one must recognize the legal protections afforded to UACs due to their status as children, their status as migrants (often as refugees or asylum seekers), and their unique medical situations owing to the impact of trauma on their lives.

This Article recognizes how judicial standards of review, in their current state, result in a professional indifference towards the amount of mental health care provided to children and vulnerable groups while in detention. Despite this, this Article takes the position that *Doe 4* is a small step in the right direction, recognizing how an especially vulnerable group is entitled to a stricter standard of review regarding their medical care. This Article begins by providing background on the current state of the law regarding plaintiffs as detainees, refugees, and children,<sup>41</sup> and then conducts an in-depth analysis of the majority's holding and dissent's concerns in *Doe 4*, considering the potential impact of international law and precedent upon the subject matter. Section I reviews the legal history behind a detainee's right to medical care in the United States and notes special protections for vulnerable populations such as refugees, asylum seekers, and children. Section II discusses the holding in *Doe 4*, namely that the relevant standard for a § 1983 claim brought by UACs based on inadequate mental healthcare is one of professional judgment, rather than deliberate indifference. Section II also addresses concerns voiced by the dissent in *Doe 4*. Section III examines how trauma-informed care is relevant to the professional judgment standard. Section IV highlights how international law would interpret *Doe 4*, and suggests how this interpretation could and should affect domestic law. Lastly, Section V concludes with recommendations for courts moving forward, in light of both *Doe 4* and additional policy considerations discussed here.

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<sup>39</sup> Giselle Malina, *How Should Unaccompanied Minors in Immigration Detention be Protected From Coercive Medical Practices?*, 21 AMA J. ETHICS 603, 606 (2019).

<sup>40</sup> *Id.*

<sup>41</sup> When it comes to Constitutional rights, the case law has largely treated prisoner's rights and detainees of any other sort as equal. *Cf. Doe 4*, 985 F.3d at 335 (noting that courts have repeatedly applied the deliberate indifference standard to civil detainees, which includes immigrant detainees). In some cases, certain detainees have been awarded additional safeguards. The professional judgment standard is such an additional safeguard which applies only to a limited number of detainees, not to prisoners. Since *Doe 4* and the putative class are not prisoners, rather detained UACs, this article will use the term 'detainee' when discussing the plaintiff class throughout, though prisoner and detainee may otherwise be used interchangeably.

## I. ELEVATED PROTECTION FOR CERTAIN GROUPS

The plaintiff class in *Doe 4* is unique because it is comprised of a group with three intersecting identities, namely, (1) detainees, (2) migrants, and (3) children. This section therefore reviews a brief history of a detainee's right to medical care and discusses the extra protections provided to migrants and children under domestic and international law. This background is important for understanding how domestic and international law applies to the plaintiff class in *Doe 4*. In reaching its holding, the majority primarily discussed the detainee aspect of UACs' identities, somewhat glossing over their status as children and largely ignoring their status as migrants. Despite the Court's approach, this Article argues that all three identities are crucial to a proper analysis of *Doe 4* and a UAC's right to adequate mental health care.

### A. Development of a Detainee's Right to Medical Care

In 1973, the American Medical Association conducted a study of U.S. jails, finding that: "25% had no medical facilities whatsoever; 65.5% had first aid as the only medical care available; 28% had no regular sick call; and 11.4% did not have a physician on call."<sup>42</sup> This lack of care was likely due to the fact precedent previously supported the notion that as "a general matter, a State is under no constitutional duty to provide substantive services for those within its borders."<sup>43</sup> Recognizing this deficiency, common law developed to recognize that "[w]hen a person is institutionalized – and wholly dependent on the State," the State has "a duty to provide certain services and care," though the State is allowed "considerable discretion in determining the nature and scope of its responsibilities."<sup>44</sup>

The 1976 Supreme Court decision, *Estelle v. Gamble*,<sup>45</sup> was grounded in this same reasoning: prisoners should be entitled to adequate medical care because they are not free to select the provider or care they prefer.<sup>46</sup> *Estelle* held that "deliberate indifference to serious medical needs of

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<sup>42</sup> William J. Rold, *Thirty Years After Estelle v. Gamble: A Legal Retrospective*, 14 J. CORR. HEALTH CARE 11, 17 (2008) (citing STEINWALD & ALEVIZOS, AMA, MEDICAL CARE IN U.S. JAILS - A 1972 AMA SURVEY (1973)).

<sup>43</sup> *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982); see also *Harris v. McRae*, 448 U.S. 297, 318 (1980) (denying that the government has an affirmative duty to secure publicly funded abortions); *Maher v. Roe*, 432 U.S. 464, 469 (1977) (same, for medical treatment).

<sup>44</sup> *Youngberg*, 457 U.S. at 317; see also *Richardson v. Belcher*, 404 U.S. 78, 83-84 (1971); *Dandridge v. Williams*, 397 U.S. 471, 478 (1970).

<sup>45</sup> 429 U.S. 97 (1976).

<sup>46</sup> Eric Neisser, *Is There a Doctor in the Joint? The Search for Constitutional Standards for Prison Health Care*, 63 VA L. REV. 921, 938 (1977).

prisoner[s] constitutes unnecessary and wanton infliction of pain” under the Eighth Amendment, and therefore deliberate indifference to serious medical needs forms a cause of action for prisoners under § 1983.<sup>47</sup> Even before *Estelle*, in *Rhodes v. Chapman*, the Supreme Court stated that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>48</sup> Then, in *Estelle*, the Court applied the same concept to a prisoner’s right to medical care, clarifying that the proper standard must be deliberate indifference that “offend[s] *evolving* standards of decency.”<sup>49</sup> Thousands of court opinions cite this language from *Estelle*, making efforts to address the ever-evolving standards of decency.<sup>50</sup>

The deliberate indifference standard put in place by *Estelle* only applies to care for “serious medical needs.”<sup>51</sup> This standard requires that: (1) the detainee has an objectively serious medical need; (2) a prison official subjectively knows of the need; and (3) the prison official disregards the need.<sup>52</sup> Court decisions subsequent to *Estelle* have established multiple categories that constitute deliberate indifference, including “such systemic and gross deficiencies in staffing, facilities, equipment, or procedures that inmate population is effectively denied access to adequate medical care,”<sup>53</sup> denial of care mandated by a physician,<sup>54</sup> denial of care that “is so obvious that even a lay person would

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<sup>47</sup> *Estelle*, 429 U.S. at 104-05; *see also*, *Williams v. Vincent*, 508 F.2d 541, 543-44 (1974) (a physician’s choice to avoid the more difficult treatment of trying to reattach a prisoner’s ear and instead stitch the stump constituted deliberate indifference. The court noted that “sufficient callousness and deliberate neglect on the part of prison officials to [a detainee’s] medical needs” could violate eighth and fourteenth amendment rights); *Jones v. Johnson*, 781 F.2d 769, 771 (1986) (denying treatment for a painful condition due to budgetary concerns rather than medical reasons was deliberate indifference).

<sup>48</sup> *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

<sup>49</sup> *Estelle*, 429 U.S. at 106 (emphasis added) (citations omitted).

<sup>50</sup> *See, e.g.*, *Hudson v. McMillian*, 503 U.S. 1, 4, 8 (1992) (holding that a facility may be liable for constitutional violations resulting from beating a prisoner, even if that prisoner did not require medical attention. In so finding, the court noted that “the objective component of an Eighth Amendment claim is therefore contextual and responsive to ‘contemporary standards of decency’”); *Porter v. Pennsylvania Dep’t of Corr.*, 974 F.3d 431, 441-44 (3d Cir. 2020) (discussing the “evolving standards of decency” surrounding newly understood negative effects of solitary confinement); *Malam v. Adducci*, 469 F. Supp. 3d 767, 783-84 (E.D. Mich. 2020) (demonstrating how the *Estelle* standard must shift to current events, in this case, as applied to the COVID-19 pandemic and detainment of pretrial detainees with underlying medical conditions).

<sup>51</sup> *Estelle*, 429 U.S. at 104.

<sup>52</sup> *Farmer v. Brennan*, 511 U.S. 825, 834-37 (1994).

<sup>53</sup> *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980).

<sup>54</sup> *Duran v. Anaya*, 642 F. Supp. 510, 524 (D.N.M. 1986).

easily recognize the necessity for a doctor’s attention,”<sup>55</sup> and denial of care for conditions that “cause pain, discomfort, or threat to good health.”<sup>56</sup>

The deliberate indifference standard still controls in most facets of this area of law, applying both to prisoners and pretrial detainees.<sup>57</sup> The first time the Supreme Court used a different standard to analyze the adequacy of a detainee’s medical care was in 1982. In *Youngberg v. Romeo*, the mother of a young man who suffered from severe mental illness filed a § 1983 suit against the mental institution where her son was committed, alleging that his constitutional rights were violated by the facility’s practices regarding its provision of medical care.<sup>58</sup> The *Youngberg* Court found that the mere fact that the boy was detained did not deprive him of his Fourteenth Amendment substantive liberties, which typically do not apply to incarcerated individuals.<sup>59</sup> Rather, “[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.”<sup>60</sup> As such, the Court held that liability should be imposed only when the decision by the professional represents a “substantial departure from accepted professional judgment.”<sup>61</sup> To date, the application of the professional judgment standard has primarily been applied in cases of involuntarily committed patients with mental illness.<sup>62</sup>

## B. Protections Enjoyed by Child Migrants

### I. Rights for Children

Children are treated very differently than adults within legal systems, both in the United States and globally. “Children traditionally have had narrower legal rights than adults. Until the nineteenth century . . . ‘children could be sold, abandoned, abused, and mutilated with impunity.’”<sup>63</sup>

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<sup>55</sup> *Pace v. Fauver*, 479 F. Supp. 456, 458 (D.N.J. 1979), *aff’d*, 649 F.2d 860 (3d Cir.1981).

<sup>56</sup> *Dean v. Coughlin*, 623 F. Supp. 392, 404 (S.D.N.Y. 1985).

<sup>57</sup> *See e.g.*, *Martin v. Gentile*, 849 F.2d 863, 871 (4th Cir. 1988); *DeJesus v. Delaware ex rel. Delaware Dep’t Corr.*, 833 Fed. App’x. 936 (3d Cir. 2020); *Strain v. Regalado*, 977 F.3d 984 (10th Cir. 2020); *Chroate v. Lockhart*, 7 F.3d 1370 (8th Cir. 1993); *Hatton v. Paris*, 381 Fed. App’x. 445 (5th Cir. 2010).

<sup>58</sup> *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982).

<sup>59</sup> *Id.* at 315.

<sup>60</sup> *Id.* at 321-22.

<sup>61</sup> *Id.* at 323.

<sup>62</sup> *See, e.g.*, *P.C. v. McLaughlin*, 913 F.2d 1033, 1042-43 (2d Cir. 1990); *Woe v. Cuomo*, 729 F.2d 96, 105-07 (2d Cir. 1984); *Lojuk v. Quandt*, 706 F.2d 1456, 1467 (7th Cir. 1983); *Morgan v. Rabun*, 128 F.3d 694, 697-98 (8th Cir. 1997).

<sup>63</sup> Elizabeth M. Calciano, *United Nations Convention on the Rights of the Child: Will It Help Children in the United States*, 15 HASTINGS INT’L & COMP. L. REV. 515, 530-32 (1992) (citing D. Kelly

Thankfully, protection for children’s rights has substantially improved over the last century, as evidenced by the Convention on the Rights of the Child (CRC).<sup>64</sup> While the United States remains the only State globally that has not yet ratified the CRC, courts have – at least – developed precedent that recognizes children as a vulnerable population deserving heightened protection. In holding that mandatory life without parole is an unconstitutional sentence for juveniles, the Supreme Court stated that “children are constitutionally different from adults . . . because juveniles have diminished culpability and greater prospects for reform.”<sup>65</sup> Additionally, the Court acknowledged that during youth “a person may be most susceptible to influence and psychological damage,”<sup>66</sup> and “[i]t is in the interest . . . of the whole community that children be both safe-guarded from abuses and given opportunities for growth into free and independent well-developed [individuals] and citizens.”<sup>67</sup> In sum, Supreme Court precedent distinguishes children from adults in reasoning that communities maintain an interest in safeguarding children and protecting their freedoms to a greater degree.

This specialized concern is reflected in the statutory language concerning UACs. Specifically, the Code of Federal Regulations states that “[w]ithin all placements, UACs shall be treated with dignity, respect, and special concern for their particular vulnerability.”<sup>68</sup> In order to ensure that UACs are treated properly once they arrive in the United States, ORR assumes custody.<sup>69</sup> ORR must coordinate the UACs’ placement and identify and supervise qualified individuals or facilities to care for the child.<sup>70</sup> These placements must be in “the least restrictive setting that is in the best interest of the child.”<sup>71</sup>

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Weisberg, *Evolution of the Concept of the Rights of the Child in the Western World*, 21 I.C.J. REV. 43, 45 (1978).

<sup>64</sup> Convention on the Rights of the Child, Feb. 16 1995, U.N.T.S. 1577 [hereinafter “CRC”]. See *infra* Section IV for a deeper analysis of the protections enjoyed by children under the CRC.

<sup>65</sup> *Miller v. Alabama*, 567 U.S. 460, 471 (2012); see also, e.g., *Roper v. Simmons*, 543 U.S. 551, 569-75 (2005) (“juveniles are more vulnerable to negative influences and outside pressures, including peer pressure” and “the character of a juvenile is not as well formed as that of an adult”); *Graham v. Florida*, 560 U.S. 48, 67-75 (2010) (“juveniles have a ‘lack of maturity and an underdeveloped sense of responsibility’”) (quoting *Roper*, 543 U.S. at 569).

<sup>66</sup> *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982).

<sup>67</sup> *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

<sup>68</sup> 45 C.F.R. § 410.102(d) (2022).

<sup>69</sup> 45 C.F.R. § 410.207 (2022).

<sup>70</sup> 45 C.F.R. § 410.102 (2022).

<sup>71</sup> 8 U.S.C. § 1232(c)(2)(A).

## 2. *Protections for Migrants*

The broadest protection for migrants, under both domestic and international law, exists for refugees, although these protections have been applied to other groups of migrants. Under the Immigration and Nationality Act (INA), a refugee is a non-U.S. citizen who has experienced persecution in the past “or has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>72</sup> This definition stems from the 1951 Convention Relating to the Status of Refugees (“1951 Refugee Convention”),<sup>73</sup> to which the United States is a de facto party.<sup>74</sup> States have responsibilities towards refugees,<sup>75</sup> and often to a higher degree for vulnerable categories within the larger group such as children, women, and refugees with disabilities.<sup>76</sup> Asylum-

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<sup>72</sup> U.S. *Refugee Admissions Program*, U.S. DEP’T OF STATE, <https://www.state.gov/refugee-admissions> (last visited March 6, 2021).

<sup>73</sup> The INA sources its categories of persecution from the Convention, which defines a refugee as anyone who:

[O]wing to well- founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 137. In fact, when you view the entire US statutory definition for a refugee, it is apparent that it very closely follows the 1951 Refugee Convention’s definition:

[A]ny person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .

8 U.S.C. § 1101(a)(42) (also known as INA § 101(a)(42)).

<sup>74</sup> The United States became a de facto party by ratifying the 1967 Protocol to the Convention, which incorporated a significant part of the Convention. Protocol Relating to the Status of Refugees art. 1, *adopted* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]. The Protocol incorporates articles 2-34 of the Convention, and requires that States agree to be bound by them. *Id.*

<sup>75</sup> State obligations toward refugees include protection against refoulement (the forcible return of refugees to the State fled from where they could be persecuted) and similar protections for civil, political, economic, social and cultural rights as a State’s nationals. *Information on UNHCR Resettlement*, UNHCR <https://www.unhcr.org/information-on-unhcr-resettlement.html>. While historically the U.S. has accepted more resettled refugees than any other country, it has not kept up with the growing refugee population around the globe. “In FY 2021, the number of refugees resettled was the lowest since the passage of the Refugee Act of 1980.” NAT’L IMMIGR. F., FACT SHEET: U.S. REFUGEE RESETTLEMENT (2020), <https://immigrationforum.org/article/fact-sheet-u-s-refugee-resettlement>.

<sup>76</sup> With regard to children, State obligations and norms are discussed in Comm. on Rights of the Child, *General Comment No. 6 (2005): the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005). For discussion of State’s obligations and best practices for vulnerable populations, see UNHCR, *A GUIDE TO INTERNATIONAL REFUGEE PROTECTION AND BUILDING STATE ASYLUM SYSTEMS* (2017), <https://www.unhcr.org/>

seekers who flee targeted violence in their home and transit countries are entitled to the same protections afforded to refugees under the 1951 Refugee Convention.<sup>77</sup> In *Doe 4*, the Fourth Circuit recognized that the majority of the class member UACs are in the United States because of violence in their home countries, thus many would likely qualify as asylum-seekers and receive corresponding protection.<sup>78</sup>

Refugees and asylum-seekers have several rights under the 1951 Refugee Convention. The main principle of the Convention is *non-refoulement*,<sup>79</sup> meaning refugees have a right not to be returned to a country where they face serious threats to their freedom.<sup>80</sup> It is the receiving State's responsibility to protect refugees and provide them with applicable rights while they reside within that State's borders.<sup>81</sup> Examples of rights the 1951 Refugee Convention guarantees include non-discrimination based on race, religion, or country of origin;<sup>82</sup> freedom to practice one's religion;<sup>83</sup> rights of association;<sup>84</sup> access to courts;<sup>85</sup> and freedom of movement – i.e., the right not to be detained absent extraordinary circumstances.<sup>86</sup>

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publications/legal/3d4aba564/refugee-protection-guide-international-refugee-law-handbook-parliamentarians.html.

<sup>77</sup> Article 31 of the 1951 Refugee Convention provides for the concept (though not the term) of asylum, by guaranteeing that:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

1951 Refugee Convention, *supra* note 73, art. 31(1).

Additionally, Article 14 of The Universal Declaration on Human Rights states that “Everyone has the right to seek and to enjoy in other countries asylum from persecution.” G.A. Res. 217A (1948). Notably, the U.S. uses the international definition for refugee in order to establish asylum. *See* <https://www.uscis.gov/humanitarian/refugees-asylum>.

<sup>78</sup> *Doe 4 v. Shenandoah Valley Juv. Ctr. Comm'n*, 985 F.3d 327, 329 (4th Cir. 2021).

<sup>79</sup> 1951 Refugee Convention, *supra* note 73, art. 33.

<sup>80</sup> UNHCR, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, 4 (date) <https://www.unhcr.org/en-us/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html>.

<sup>81</sup> *Id.* at 4-5.

<sup>82</sup> *See* 1951 Refugee Convention, *supra* note 73, art. 3.

<sup>83</sup> *See id.* art. 4.

<sup>84</sup> *See id.* art. 15.

<sup>85</sup> *See id.* art. 16.

<sup>86</sup> *See id.* art. 26. The UNHCR Executive Committee discussed the detention of asylum-seekers and refugees in their 37th session in 1986, stating that:

[i]f necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order . . . .

### 3. *Protections for Child Migrants*

Combining the dual statuses of UACs as children and migrants, international law contemplates even greater protection. Most immigrant children leave their home country feeling they have no other choice: children understand the grave dangers of the journey to the United States, yet choose to take the journey anyway.<sup>87</sup> The majority of UACs entering the United States are from Guatemala, Honduras, and El Salvador.<sup>88</sup> Of those populations, most children say their reason for leaving their home countries relates to youth gangs and drug cartels, which may involve violent attacks by gang members and police.<sup>89</sup> Other stated causes include poverty, poor harvests, and continuing unemployment.<sup>90</sup> Girls face additional challenges of gender-based violence, including rape.<sup>91</sup> These experiences make UACs more vulnerable than average children.

Given the persecution from which most UACs flee, many qualify as refugees or asylum-seekers; therefore they are entitled not only to international protections for being minors, but also extra protections under the 1951 Refugee Convention.<sup>92</sup> Refugee and asylum-seeking UACs are also afforded the protection of United Nations High Commissioner for Refugees (UNHCR) oversight. This oversight can be beneficial, as the UNHCR works to promote ratification for international and regional treaties that promote refugee rights; advocate for and monitor the treatment and rights of refugees; and build capacity of and otherwise support national legislative, administrative, and judicial structures.<sup>93</sup>

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Executive Comm. Conclusion No. 44 (XXXVII) 1986, para. b.

For more discussion on how Article 31 of the 1951 Refugee Convention has been interpreted by international bodies and applied by States, see Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection*, UNHCR (Nov. 2001), <https://www.unhcr.org/en-us/publications/legal/419c778d4/refugee-protection-international-law-article-31-1951-convention-relating.html>.

<sup>87</sup> Susian Terrio, *Dispelling the Myths: Unaccompanied, Undocumented Minors in US Immigration Custody*, 31 *ANTHROPOLOGY TODAY* 15, 15-18 (2015).

<sup>88</sup> U.S. CUSTOMS & BORDER PROT., *supra* note 7.

<sup>89</sup> WOMEN'S REFUGEE COMM'N, FORCED FROM HOME: THE LOST BOYS AND GIRLS OF CENTRAL AMERICA 1 (2012), [https://www.womensrefugeecommission.org/wp-content/uploads/2020/04/border\\_childrens\\_report\\_10-2012.pdf](https://www.womensrefugeecommission.org/wp-content/uploads/2020/04/border_childrens_report_10-2012.pdf).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> To clarify, only those who fall under the definition of 'refugee' are automatically entitled to the protection of the 1951 Refugee Convention. As previously discussed in Section I.B, however, the intent behind the Convention applies to all UACs, and as such, non-refugee UACs could be entitled to protection.

<sup>93</sup> *United Nations High Commissioner for Refugees*, U.N., <https://www.un.org/ruleoflaw/un-and-the-rule-of-law/united-nations-high-commissioner-for-refugees> (last visited July 3, 2022).

States can fulfill their increased obligations toward child refugees and asylum-seekers by establishing procedures to ensure the best interests of children are realized. UNICEF International has created the following policy recommendations for how the U.S. can practically uphold the best interests of child immigrants:

1. Uphold all children's rights to access protection, to seek asylum and remain and reunite with family members, while taking public health precautions. This includes ending pushbacks and forced expulsions of all children without due process.
2. Strengthen child-sensitive border and reception processes.
3. Prioritize family- and community-based care and case management as alternatives to immigration detention and institutional care.
4. Ensure inclusion, non-discrimination and equity in care, and strengthen linkages between the unaccompanied children's program and other children's programs overseen by the U.S. Department of Health and Human Services Administration for Children and Families (HHS/ACF) to ensure consistent standards of care and protection.
5. Establish best interest determinations as a core component of the system for unaccompanied children and ensure that each unaccompanied child is appointed an independent child advocate.
6. Support every child to participate in all matters affecting him or her, including decisions related to placement, care and access to services, in accordance with the age and maturity of the child.
7. Scale up post-release services, case management and integrated support so that each unaccompanied child receives continuity of care as they transition to families and local communities. Ensure that every unaccompanied child has access to free legal representation during immigration proceedings.
8. Ensure child-sensitive return and reintegration support for every child for whom returning to country of origin is safe and in his or her best interests.<sup>94</sup>

These are foundational elements to ensuring the best interests of UACs and other minor immigrants, representing a start to meeting the more protective standards of international instruments such as the 1951 Refugee Convention and the Universal Declaration of Human Rights.

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<sup>94</sup> *New Approach Needed to Ensure Protection and Care for Unaccompanied Migrant Children in the United States*, UNICEF, (Feb. 25, 2021), <https://www.unicef.org/press-releases/new-approach-needed-ensure-protection-and-care-unaccompanied-migrant-children-united>.

## II. THE FOURTH CIRCUIT CORRECTLY APPLIED THE PROFESSIONAL JUDGMENT STANDARD TO UACs' CLAIMS OF INADEQUATE MENTAL HEALTH CARE

With an understanding of the unique rights to which the plaintiff class of UACs in *Doe 4* is entitled – as detainees, migrants, and children – this section analyzes the Fourth Circuit majority's conclusion that the correct standard to apply in *Doe 4* is one of professional judgment. Section II(A) describes the relevant laws and analyzes important factors the Fourth Circuit considered in coming to its ruling. II(B) then discusses the policy considerations debated by the majority and dissent. Finally, II(C) briefly analyzes the impact of the Fourth Circuit's decision of standard, both due to the procedure of the case, and given that it is a decision of first impression.

### A. Substance of the Decision

The Court in *Doe 4* evaluated the two standards accepted in similar cases: the deliberate indifference and professional judgment standards. The deliberate indifference standard requires “(1) that the detainee had an objectively serious medical need; and (2) that the official subjectively knew of the need and disregarded it.”<sup>95</sup> This standard is difficult for plaintiffs to prove and gives substantial deference to prison administrations on how they handle detainees. Consider *Perez v. Oakland County*,<sup>96</sup> wherein a young man with an extensive record of mental illness – including one suicide attempt while in prison – was arrested for violating his probation and brought to jail.<sup>97</sup> Once at the jail, a caseworker, instead of a medical professional, chose to put him in a single, unsupervised cell.<sup>98</sup> The young man hung himself in that cell.<sup>99</sup> His father brought the case, alleging that the county's policy of allowing caseworkers, rather than medical professionals, to determine housing for mentally ill inmates constituted deliberate indifference.<sup>100</sup> The district court disagreed, granting summary judgment for the county, and the Sixth Circuit affirmed on appeal.<sup>101</sup> The court asserted that because there was “no evidence that [the] practice [of

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<sup>95</sup> *Doe 4*, 985 F.3d at 340 (citing *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).

<sup>96</sup> *Perez v. Oakland County*, 466 F.3d 416 (6th Cir. 2006). For an in-depth analysis of this case, see Daniel I. Bober & Debra A. Pinals, *Prisoner's Rights and Deliberate Indifference*, 35 J. AMER. ACAD. PSYCHIATRY & L. ONLINE 388 (2007).

<sup>97</sup> *Perez*, 466 F.3d at 421.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 423.

<sup>101</sup> *Id.* at 432.

allowing staff other than medical professionals to make housing decisions for mentally ill inmates] has ever resulted in a suicide or attempted suicide by another inmate,” there was not adequate foreseeability to meet the deliberate indifference standard.<sup>102</sup> This case demonstrates that the deliberate indifference standard requires much more than negligence or willful blindness: it requires actual knowledge of the need or danger to a prisoner’s health, and disregard of that need or danger.

In contrast, the professional judgment standard is easier for plaintiff detainees to satisfy. The standard requires that plaintiffs show that officials failed to exercise judgment within reasonable bounds of a given field’s professional standard.<sup>103</sup> The professional judgment standard elevates detention facilities’ level of responsibility and potential for liability. Even still, this standard is far more difficult to prove than mere negligence,<sup>104</sup> and remains deferential to facility administration and the State.<sup>105</sup> When using the professional judgment standard, “liability may be imposed *only* when the decision by the professional is . . . a substantial departure from accepted professional judgment . . . .”<sup>106</sup> There is a presumption that professionals<sup>107</sup> provide adequate care,<sup>108</sup> which is why the standard requires a *substantial* departure from accepted judgment.<sup>109</sup>

While a detainee’s right to mental health care is clear, the Fourth Circuit considered for the first time in *Doe 4* which standard should apply in determining a violation of UACs’ right to adequate mental health care.<sup>110</sup>

<sup>102</sup> *Id.* at 431.

<sup>103</sup> See *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982).

<sup>104</sup> *Id.* at 324; see also *Patten v. Nichols*, 274 F.3d 829, 845 (4th Cir. 2001) (“mere departures from the applicable standard of care is insufficient to show a constitutional violation”).

<sup>105</sup> See *Youngberg*, 457 U.S. at 322-23; see also *Parham v. J.R.*, 442 U.S. 584, 607 (1979); *Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979).

<sup>106</sup> *Patten*, 274 F.3d at 836 (citing *Youngberg*, 457 U.S. at 323) (emphasis added).

<sup>107</sup> *Youngberg* defines professionals as:

a person competent, whether by education, training or experience, to make the particular decision at issue. Long-term treatment decisions normally should be made by persons with degrees in medicine or nursing, or with appropriate training in areas such as psychology, physical therapy, or the care and training of the retarded. Of course, day-to-day decisions regarding care—including decisions that must be made without delay—necessarily will be made in many instances by employees without formal training but who are subject to the supervision of qualified persons.

*Youngberg*, 457 U.S. at 327 n.30.

<sup>108</sup> *Id.* at 323 (“Decision[s] made by a professional [are] presumptively valid; liability may be imposed only when the decision by the professional is 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.”).

<sup>109</sup> It is likely that the manner in which the professional judgment standard is applied does not meet international standards. See *infra* Section IV.

<sup>110</sup> *Doe 4 ex rel. Lopez v. Shenandoah Valley Juvenile Ctr. Comm’n*, 985 F.3d 327, 339 (4th Cir. 2021). The majority recognizes several cases that are related, but sufficiently different as to apply a

The majority considered several factors in determining that the professional judgment standard should apply in this case.

### *I. Nature and Purpose of Detention*

First, the nature of UAC detention is important.<sup>111</sup> In the majority’s discussion of the nature and purpose of the UAC class’s detention at the Shenandoah Valley Juvenile Center, the Court considered Fourth Circuit precedent, *Patten v. Nichols*,<sup>112</sup> which addressed when to apply a heightened professional judgment standard for claims of inadequate medical care. In *Patten*, the Fourth Circuit applied the professional judgment standard to an involuntarily committed psychiatric patient’s claim, explaining that a key factor was “the reason for which the person has been taken into custody.”<sup>113</sup> The *Patten* plaintiff was in custody both for his own safety and to receive mental health treatment.<sup>114</sup> The Court therefore considered him different than a pretrial detainee – in custody because they are suspected of committing a crime<sup>115</sup> – and a sentenced detainee – in as a matter of punishment.<sup>116</sup>

Placement for UACs differs from the *Patten* analysis because UACs are governed by separate laws from citizen detainees, and UACs are in ORR custody. 8 U.S.C. § 1232(c)(2) clearly lays out the process of UAC placement, including in detention centers:

. . . [A]n unaccompanied alien child in the custody of the Secretary of Health and Human Services shall be promptly placed in the least restrictive setting that is in the best interest of the child. In making such placements, the Secretary may consider danger to self, danger to the community, and risk of flight. Placement of child trafficking victims may include placement in an Unaccompanied Refugee Minor program, pursuant to section 412(d) of the Immigration and Nationality Act (8 U.S.C. 1522(d)), if a suitable family member is not available to provide care. *A child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense.* The

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different standard. *See, e.g., E.D. v. Sharkey*, 928 F.3d 299, 306-07 (3d Cir. 2019) (discussing the standard for adult immigrants detained for enforcement proceedings); *A.M. ex rel. J.M.K. v. Luzerne Cnty. Juv. Det. Ctr.*, 372 F.3d 572, 579 (3d Cir. 2004) (addressing non-immigrant children); *A.J. ex rel. L.B. v. Kierst*, 56 F.3d 849 (8th Cir. 1995) (same).

<sup>111</sup> The Court spends time discussing Fourth Circuit case *Patten v. Nichols*, 274 F.3d 829, 840-41 (4th Cir. 2001). The Supreme Court pre-dated *Patten*, however, with the same assertion that the reason a detainee was detained is relevant to the selection of standard. *Youngberg*, 457 U.S. at 321-22.

<sup>112</sup> 274 F.3d 829 (4th Cir. 2001).

<sup>113</sup> *Id.* at 840. This mirrors the Supreme Court’s distinction in *Youngberg*. *See Youngberg*, 457 U.S. at 321.

<sup>114</sup> *Patten*, 274 F.3d at 840.

<sup>115</sup> *Id.* at 841.

<sup>116</sup> *See Youngberg*, 457 U.S. at 321-22.

placement of a child in a secure facility shall be reviewed, at a minimum, on a monthly basis, in accordance with procedures prescribed by the Secretary, to determine if such placement remains warranted.<sup>117</sup>

The statute which governs UAC placement dictates that UACs may be detained for only two reasons: (1) they commit a crime, or (2) they pose a danger to themselves or others.<sup>118</sup> While in some ways these purposes mirror the *Patten* scheme of custody, there are elements of UAC custody that make placement unique. First, ORR is clear that its placement decisions are made according to “child welfare best practices” and that placements put UACs in “the least restrictive setting appropriate for the child’s needs.”<sup>119</sup> ORR also strives “whenever possible” to place children with special needs in facilities that provide services and treatment for those special needs.<sup>120</sup> Additionally, ORR has even designated a preferred placement for youth with severe mental health: a “residential treatment center,” which is a therapeutic setting.<sup>121</sup> These considerations suggest that all UACs, regardless of why they are placed in a secure facility, merit higher standards of care than ordinary detainees.

The named plaintiff, Doe 4, like many UACs, has a past filled with trauma and several recognized mental disorders. When Doe 4 underwent his initial evaluation he was recommended for residential treatment due to his mental health.<sup>122</sup> Unfortunately, Doe 4’s mental health affected his behavior, leading to several violent incidents at the facility where he was placed prior to SVJC.<sup>123</sup> His violent history is the reason ORR placed Doe 4 at SVJC for months on end instead of being transferred to a residential treatment center — a less restrictive environment within ORR’s placement system that is specifically designed for mental health treatment.<sup>124</sup> Doe 4’s rights to the promotion of his welfare and the least restrictive environment in his best interest, however, did not disappear simply because his mental illness resulted in physical altercations. In the placement and care of Doe 4, per ORR policy, SVJC still needed to consider Doe 4’s needs and the treatment he required.

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<sup>117</sup> 8 U.S.C. § 1232(c)(2)(A) (emphasis added).

<sup>118</sup> *Id.* A UAC is detained when put in any jail, prison, or secured treatment center (such as SVJC).

<sup>119</sup> ORR, *supra* note 11, § 1.2 (emphasis added).

<sup>120</sup> *Id.* § 1.2.2.

<sup>121</sup> *Id.* § 1.2.4.

<sup>122</sup> Upon being transferred to SVJC, Doe 4 was evaluated by a doctor who diagnosed him with post-traumatic stress disorder (PTSD) and attention deficit hyperactivity disorder (ADHD) based upon his clinical records. *Doe 4 v. Shenandoah Valley Juv. Ctr. Comm’n*, 985 F.3d 327, 332 (4th Cir. 2021).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

In his dissent, Judge Wilkinson asserted that ORR detained Doe 4 at SVJC as a protective measure due to behavioral incidents at his previous placement facility, and therefore his presence at SVJC was more akin to punishment than treatment.<sup>125</sup> The majority rejected this view as presenting a false binary between security and treatment: “the need to institutionalize the plaintiff for security reasons [does] not undermine the fact that he also need[s] . . . treatment.”<sup>126</sup> The majority further expounded by asserting that “[i]f a child is held at SVJC until he no longer behaves aggressively, and this aggressive behavior arises from an underlying traumatic condition, then it follows that SVJC’s efforts to improve a child’s behavior should also treat the child’s underlying trauma that gives rise to the misbehavior.”<sup>127</sup> This same principle was recognized in *Youngberg*, where the Supreme Court acknowledged that an individual could be detained for more than one purpose, finding that the plaintiff had been committed for reasons of *both* “care and safety.”<sup>128</sup>

The Court did not comment on whether Doe 4 was entitled to the higher professional judgment standard of care solely because he was only in custody for his own safety and the safety of others, instead of criminal activity. The law regarding UACs does not distinguish the placement protocols between these two permitted purposes for restrictive care, leaving the interpretation open as to whether UAC children who ORR detains due to criminal activity are also entitled to the least restrictive environment for their needs and best interests. Given the statutory guarantees that ORR may only place UACs with entities that can provide for their physical and mental well-being,<sup>129</sup> it seems that regardless of the reason for a UAC’s placement in a secure care facility, the UAC should be entitled to a higher standard of care. What *is* clear post-*Doe 4* is that UACs in custody because

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<sup>125</sup> *Id.* at 350-51 (Wilkinson, J., dissenting).

<sup>126</sup> *Id.*; see also *Youngberg v. Romeo*, 457 U.S. 302, 309, 314 (1982) (applying a professional judgment standard despite the plaintiff being institutionalized because his mother could not “control his violence”).

<sup>127</sup> *Doe 4*, 985 F.3d at 340-41.

<sup>128</sup> *Youngberg*, 457 U.S. at 320 n.27. Indeed, the majority in *Doe 4* discusses how both safety and care are intertwined for UACs at SVJC: “If a child is held at SVJC until he no longer behaves aggressively, and this aggressive behavior arises from an underlying traumatic condition, then it follows that SVJC’s efforts to improve a child’s behavior should also treat the child’s underlying trauma that gives rise to the misbehavior.” *Doe 4*, 985 F.3d at 340-41 (“For unaccompanied children, [their history of trauma] often plays a role in the legal and behavioral problems that bring them in contact with . . . secure placement.”).

<sup>129</sup> 8 U.S.C. § 1232(c)(3)(A) (“[A]n unaccompanied alien child may not be placed with a person or entity unless the Secretary of Health and Human Services makes a determination that the proposed custodian is capable of providing for the child’s physical and mental well-being.”).

they pose a danger to themselves or others *are* entitled to a higher standard of medical care.

The dissent in *Doe 4* also expressed that SVJC is not a therapeutic setting<sup>130</sup> and thus “is not equipped or staffed to provide the type of mental health services available in a residential treatment center or psychiatric hospital.”<sup>131</sup> The record, however, shows that SVJC requires input from a mental health professional when placing children at its facilities. As part of that process, SVJC has “mental health clinicians evaluate prospective referrals to see if their facility can meet those children’s mental health needs.”<sup>132</sup> Those same medical professionals then have the power to decline the referral for the child if they believe SVJC cannot provide adequate care.<sup>133</sup> This process demonstrates that SVJC assumes responsibility for the mental health of the children it accepts, and confirms the intent and ability of SVJC to treat those children’s needs.<sup>134</sup>

Lastly, the dissent asserted that SVJC should not be subject to the professional judgment standard because it is not intended for long-term detention.<sup>135</sup> The length of a detention, however, is not dispositive of which standard should apply. In fact, *Patten* acknowledged that “some involuntarily committed patients are confined for short periods of time.”<sup>136</sup>

## 2. *Balance of Interests Between State and Child*

Another factor weighed by the *Doe 4* Court was the balance of interests between the State and the child.<sup>137</sup> The Court relied heavily on its own estimation that the plaintiff class may have been subjected to violations of both their constitutional *and* statutory rights, given the federal

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<sup>130</sup> Like a residential treatment center, or a hospital. *Doe 4*, 985 F.3d at 341.

<sup>131</sup> *Id.* at 351.

<sup>132</sup> *Id.* at 341.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* As the majority notes:

SVJC has various methods to care for mental illness: each child receives a case manager and a licensed mental health clinician, residents have weekly meetings with their clinician, and twice-weekly 5-15 minute large group sessions. SVJC also has a psychiatrist, Dr. Timothy Kane, who visits the facility every three to six weeks. Dr. Kane does not counsel or provide psychotherapy, however, instead he prescribes medications. Despite the services it offers, SVJC acknowledges that the facility does not have “the internal capacity to deal effectively with the needs of unaccompanied kids who have severe mental illness” because it lacks the treatment capabilities of “a residential treatment center or hospital.” For example, it does not offer prolonged exposure therapy to treat PTSD because its clinicians are not qualified to offer such treatment.

*Id.* at 330-31.

<sup>135</sup> *Id.* at 351.

<sup>136</sup> *Patten v. Nichols*, 274 F.3d 829, 841 (4th Cir. 2001).

<sup>137</sup> *Id.* at 836.

protection in place for UACs.<sup>138</sup> Section 1983<sup>139</sup> provides a remedy for violations of rights delineated in the Constitution *and federal laws*.<sup>140</sup> UACs have several statutory rights outside the Constitution, including the right to be “treated with dignity, respect, and special concern for their particular vulnerability.”<sup>141</sup> Furthermore, if it is necessary for ORR to place a UAC in a supervised facility, their statutory rights dictate that it must be a facility qualified to provide for their physical and mental needs<sup>142</sup> and their “best interest.”<sup>143</sup>

Ordinarily, when determining if there was a Fourteenth Amendment violation of a detainee’s rights, a court must balance the detainee’s “liberty interests against the relevant state interests.”<sup>144</sup> For UACs, however, the balance must not be against a detainee’s general liberty interests, but rather against his or her *best* interests and in light of his or her particular vulnerability, due to the extra guarantees federal law extends to UACs.<sup>145</sup> The backdrop for these statutes comes from a 1993 Supreme Court case, and subsequent settlement, *Reno v. Flores*.<sup>146</sup> In that case, a class of children that INS detained<sup>147</sup> challenged a blanket policy which required INS to detain migrant juveniles pending deportation proceedings.<sup>148</sup> The policy only allowed release to adult relatives or guardians living in the United States, but not to other willing and responsible adults.<sup>149</sup> The Court ruled for INS, placing heavy emphasis on the noncitizen status of the children as a reason to grant them fewer rights than would be applied to citizens.<sup>150</sup> Despite this ultimate holding, however, the Supreme Court also stated that the best interest of a child is a relevant criterion to weigh against

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<sup>138</sup> See 45 C.F.R. § 410 (2022).

<sup>139</sup> 42 U.S.C. § 1983.

<sup>140</sup> Elsewhere referred to as “laws of the United States.” See 18 U.S.C. § 242.

<sup>141</sup> 45 C.F.R. § 410.102(d).

<sup>142</sup> 8 U.S.C. § 1232(c)(3)(A) (“[A]n unaccompanied alien child may not be placed with a person or entity unless the Secretary of Health and Human Services makes a determination that the proposed custodian is capable of providing for the child’s physical and mental well-being.”); 45 C.F.R. § 410.102.

<sup>143</sup> 8 U.S.C. § 1232(c)(2)(A).

<sup>144</sup> *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982).

<sup>145</sup> 8 U.S.C. § 1232(c)(2)(A).

<sup>146</sup> *Reno v. Flores*, 507 U.S. 292 (1993).

<sup>147</sup> United Immigration and Naturalization Service is now “USCIS,” which stands for U.S. Citizenship and Immigration Services.

<sup>148</sup> *Reno*, 507 U.S. at 292.

<sup>149</sup> *Id.* at 304.

<sup>150</sup> *Id.*

other legitimate government interests.<sup>151</sup> Importantly, the holding in *Reno v. Flores* was overshadowed by the Flores Settlement Agreement,<sup>152</sup> which the parties reached only four years later and would form the basis for current UAC rights.

The dissent in *Doe 4* addressed the “best interests of the child” language, arguing that the Supreme Court rejected use of such language as a standard in *Reno v. Flores*.<sup>153</sup> This argument misunderstands *Reno*, however, which did not cast aside a child’s “best interest” but rather asserted that the best interests of children is not the *only* relevant criterion when ruling on the government’s exercise of its custodial responsibilities.<sup>154</sup> Moreover, the extent to which *Reno* influences *Doe 4* is limited in light of the Flores Settlement Agreement. The agreement in many ways controverted the findings of the Court by broadening the category of adults to whom immigrant children could be released and establishing immigration policies to ensure juveniles’ well-being and best interests.<sup>155</sup> The Agreement is an example of successful pushback against a judiciary that saw immigration enforcement as a greater priority than the rights of immigrant children.<sup>156</sup> The Flores Settlement Agreement, along with the various federal statutes it influenced, still largely governs the treatment of UACs.<sup>157</sup> This history serves as a signal to courts that immigrant children are not afforded fewer rights than citizens, but rather enjoy additional protections due to their vulnerable status. Because heightened considerations for UACs go beyond those granted to involuntarily committed persons – the original group whose inadequate care claims merited application of the professional judgment standard in *Youngberg* – the Fourth Circuit was correct in applying at least as stringent a standard for the care of UACs.

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<sup>151</sup> *Cf. id.* (““The best interests of the child” is likewise not an absolute and exclusive constitutional criterion for the government’s exercise of the custodial responsibilities that it undertakes, which must be reconciled with many other responsibilities.”).

<sup>152</sup> Stipulated Settlement Agreement, *supra* note 14.

<sup>153</sup> *Id.* at 350 (citing *Reno*, 507 U.S. at 292).

<sup>154</sup> *Reno*, 507 U.S. at 303-04.

<sup>155</sup> Olga Byrne, *Promoting a Child Rights-Based Approach to Immigration in the United States*, 32 GEO. IMMIGR. L.J. 59, 84 (2017); *see also* Office of the Inspector General, *Unaccompanied Juveniles in INS Custody*, DEP’T OF JUST. (Sept. 28, 2001), <https://oig.justice.gov/reports/INS/e0109/exec.htm>.

<sup>156</sup> Byrne, *supra* note 155 at 70-71; *see, e.g.*, Flores Settlement Agreement, *supra* note 14, ¶ 11 (requiring that the government place unaccompanied minors in “the least restrictive setting appropriate to the minor’s age and special needs . . . .”); *id.* ¶ 12A (when UACs are detained, it should be in “safe and sanitary” facilities, separate from adults); *id.* ¶ 24A (alien minors not released from detention are entitled to a bond hearing before an immigration judge).

<sup>157</sup> KELSEY Y. SANTAMARIA, CONG. RSCH. SERV., IF11799, CHILD MIGRANTS AT THE BORDER: THE FLORES SETTLEMENT AGREEMENT AND OTHER LEGAL DEVELOPMENTS (2021).

## *B. Policy Considerations Discussed by the Fourth Circuit*

### *I. Substantive Due Process*

The majority found that the due process rights of the plaintiff class of UACs in *Doe 4* were properly upheld by the professional judgment standard. This is because Plaintiffs asserted a fundamental right: the right to adequate medical care while in government custody.<sup>158</sup> Because this right is covered under a substantive due process analysis under the Fourteenth Amendment, the majority argues, the decision for the Court is only “what measurement of culpability to use to determine when an unaccompanied child has been deprived of that fundamental right.”<sup>159</sup>

The *Doe 4* dissent argued that the majority erred in applying the professional judgment standard, emphasizing the Supreme Court’s historical treatment of standards in substantive due process cases.<sup>160</sup> The dissent cited an opinion in which the Supreme court expressed concerns with expanding substantive due process surrounding physician-assisted suicide, “because guideposts for responsible decision-making in [that] uncharted area are scarce and open-ended.”<sup>161</sup> This does not apply to *Doe 4*. While it may be possible to argue that mental health lacked sufficient guideposts in the past, that is no longer the case. Data and cultural understanding have shifted to create a wealth of knowledge surrounding mental health and treatment,<sup>162</sup> and courts have repeatedly been asked to determine matters regarding adequate levels of mental health-care or mental illness and incarcerated individuals;<sup>163</sup> thus, the judiciary may no longer call mental health “uncharted” territory. Given the large percentage of current detainees and inmates dealing with mental illness – 54% of state prisoners and 45% of federal prisoners – courts should be familiar with and

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<sup>158</sup> See *Doe 4 ex rel. Lopez v. Shenandoah Valley Juv. Ctr. Comm’n*, 985 F.3d 327, 338 (4th Cir. 2021) (holding that *DeShaney v. Winnebago County Dep’t. of Soc. Servs.*, 489 U.S. 189 (1989) established that adequate medical care in government custody is a fundamental right).

<sup>159</sup> *Doe 4*, 985 F.3d at 341.

<sup>160</sup> *Id.* at 349-50.

<sup>161</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); see also DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 323-26 (5th ed. 2019).

<sup>162</sup> One need not look further than the several amici briefs regarding mental health conditions, treatments and trauma-informed care filed for the court in *Doe 4*. Additionally, the very existence of the government’s declared Mental Health Awareness Month (May) demonstrates that this issue is understood to be pressing and pervasive. See, e.g., Proclamation No. 10193, 86 Fed. Reg. 23, 981.

<sup>163</sup> There are 71,899 federal cases discussing mental health or mental healthcare on LexisNexis, not including any state cases. 336 of those cases are opinions of the Supreme Court. Search for Mental Health or Mental Health-Care, LEXISNEXIS, <http://plus.lexis.com> (search field for “‘mental health’ OR ‘mental health-care’” then select the drop down titled “Court”).

comfortable addressing the interplay between mental illness and incarceration.<sup>164</sup>

## 2. Federalism

The dissent started its discussion of federalism by likening *Doe 4* to “institutional reform” cases, which “often raise sensitive federalism concerns.”<sup>165</sup> Relying on the Supreme Court’s determination that states have a strong interest in regulating the administration of their prisons,<sup>166</sup> the dissent extrapolated that “states have a similarly strong interest in being able to design and manage their juvenile detention systems in a manner free from federal judicial fine-tuning.”<sup>167</sup> The dissent’s federalism argument fails to recognize that facilities take on UACs *knowing* that UACs are specially protected by a federal agency (ORR) and federal law. The Shenandoah Valley Juvenile Center is owned and operated by Shenandoah Valley Juvenile Commission which operates in several counties and cities within Virginia.<sup>168</sup> SVJC is not a federal facility, but rather a state facility owned by a public regional commission, which falls within the oversight of the Virginia Department of Juvenile Justice.<sup>169</sup> Though SVJC is a state facility, it must uphold detainee’s constitutional rights *and* the additional statutory requirements regarding UAC care. In fact, SVJC’s responsibilities are partially outlined in their Cooperation Agreement with ORR, where it agrees to house UACs until they are transferred to a different placement by ORR or until they reach majority.<sup>170</sup> SVJC is thus bound by its own agreement to uphold ORR’s standards for the UACs it holds. Additionally, the services SVJC provides to UACs must comply with “State residential care licensing requirements, the *Flores* settlement agreement, pertinent

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<sup>164</sup> Lorna Collie, *Incarceration Nation: The United States Leads the World in Incarceration. A New Report Explores Why — and Offers Recommendations for Fixing the System*, 45 AM. PSYCH. ASS’N 56 (2014), <https://www.apa.org/monitor/2014/10/incarceration> (“Mental illness among today’s inmates is . . . pervasive, with 64 percent of jail inmates, 54 percent of state prisoners and 45 percent of federal prisoners reporting mental health concerns, the report found. Substance abuse is also rampant and often co-occurring.”); *see also* DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP’T OF JUST., MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES, (2006), <https://bjs.ojp.gov/content/pub/pdf/mhppji.pdf> (recognizing that, as of 2005, more than half of all state prison and jail inmates symptoms of a mental health problem).

<sup>165</sup> *Doe 4*, 985 F.3d at 353 (citing *Horne v. Flores*, 557 U.S. 433, 448 (2009)).

<sup>166</sup> *Woodford v. Ngo*, 548 U.S. 81, 94 (2006).

<sup>167</sup> *Doe 4 v. Shenandoah Valley Juv. Ctr. Comm’n*, 985 F.3d 327, 353 (4th Cir. 2021).

<sup>168</sup> Specifically, the counties of Augusta, Rockbridge, and Rockingham, and the cities of Harrisonburg, Lexington, Staunton, and Waynesboro. *About SVJC*, SHENANDOAH VALLEY JUV. CTR., <https://www.svjc.org/about-svjc> (last visited July 3, 2022).

<sup>169</sup> *Notable Differences between Shenandoah Valley Juvenile Center and Border Facilities*, NEWSRADIO WINA (June 20, 2018), <https://wina.com/news/064460-notable-differences-between-shenandoah-valley-juvenile-center-and-border-facilities>.

<sup>170</sup> *Doe 4*, 985 F.3d at 341.

federal laws and regulations, and the ORR[‘s] policies and procedures.”<sup>171</sup> SVJC must also provide “appropriate mental health interventions when necessary.”<sup>172</sup>

SVJC agreed to be the placement for plaintiff class members knowing that doing so would subject it to federal standards. Some of the privileges that federal law grants UACs include being placed with their “best interests” in mind and in settings that can provide for their “physical and mental health.”<sup>173</sup> When balancing the interests of UACs against those of the government, courts must take into account that these guarantees are greater than those provided to other detainees. Concerns regarding federalism will always be present when applying stricter standards to state entities, as the Fourth Circuit did in this case by applying the stricter professional judgment to UACs in place of the more deferential deliberate indifference standard. Regardless, the federal legislature took care to award UACs special protections because of their particular vulnerability, a decision that should not be undone in the name of federalism.

### 3. *The Court’s Role*

The dissent expressed concerns that “the majority establishe[d] the judiciary as the new overseer of mental health care to all detention facilities.”<sup>174</sup> However, by that reasoning, the Supreme Court already established the judiciary as the overseer of all state facilities or hospitals that commit individuals for mental health care when it applied the professional judgment standard in *Youngberg*. Yet that was neither the intention nor the practical implication of the Supreme Court’s holding in *Youngberg*. The *Doe 4* majority made no attempt to increase judicial involvement in the administration of detention facilities, instead it followed the Supreme Court’s *Youngberg* precedent, which required a higher standard for administering care to detainees that are committed for their own safety and are receiving treatment,<sup>175</sup> rather than detainees in custody solely for punishment.<sup>176</sup> In fact, the Court in *Youngberg* addressed the *Doe 4* dissent’s very concern by iterating that the professional judgment standard still requires deference to the state’s decisions: “[i]t is not appropriate for the courts to specify which of several professionally

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<sup>171</sup> The majority distinguishes this from ORR’s responsibility to coordinate and implement UAC care by placing them in facilities that meet appropriate standards, including its own. *Id.* at 337.

<sup>172</sup> *Id.*

<sup>173</sup> 8 U.S.C. § 1232(c)(2)(A) and § 1232(c)(3)(A).

<sup>174</sup> *Doe 4*, 985 F.3d at 348.

<sup>175</sup> This can involve those detained for treatment and for the security of themselves and the public, as was the case in *Youngberg*. *See id.* at 340-41.

<sup>176</sup> *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982).

acceptable choices should have been made,” merely whether or not “professional judgment in fact was exercised.”<sup>177</sup> It is the judiciary’s role to ensure constitutional and statutory protections to rights holders, which is both what the Supreme Court did in *Youngberg*, and what the majority did in *Doe 4*; it remains the state’s role to implement constitutional standards.

Briefly, it is also worth noting that the dissent is inconsistent in expressing separation of powers concerns. The dissent accused the majority of taking too much power from the legislature by considering trauma-informed care. This demonstrates a double standard, as the dissent would limit the judiciary’s role with regards to trauma-informed care, yet inflate its role by enabling it to disregard how the legislature has already spoken with regard to the rights and interests of UACs.

### C. *Impact of the Majority’s Holding*

When it comes to the specific impact of this case for the *Doe 4* plaintiff class, the Fourth Circuit’s decision will largely depend on remand, since the majority did not decide whether the professional judgment standard of care was met in providing the plaintiff class medical care. Instead, the majority held that summary judgment was improper because the trial court’s application of the deliberate indifference standard caused it to exclude key evidence that would be material in the summary judgment determination.<sup>178</sup> It is important not to conflate a finding of legitimate issues of material fact, which prohibit summary judgment, with a finding that there was a departure from professional judgment. The dissent suggests that the majority overstepped its role by “cherry-picking” the facts to reach its desired conclusion,<sup>179</sup> but in a motion for summary judgment the court *must* view the evidence in the light most favorable to the nonmoving party,<sup>180</sup> drawing “all justifiable inferences” in the nonmoving party’s favor.<sup>181</sup> By analyzing the facts in a way most favorable to the plaintiffs (the nonmoving party for summary judgment), the majority was abiding by the rules of procedure. The ultimate finding the Court made was that the use of the deliberate indifference standard precluded potentially material facts from evidence.<sup>182</sup> This created legitimate issues of material fact, making it strictly

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<sup>177</sup> *Id.* at 321-22.

<sup>178</sup> *Doe 4*, 985 F.3d at 346-47.

<sup>179</sup> *Id.* at 352.

<sup>180</sup> Fed. R. Civ. P. 56(a) (emphasis added).

<sup>181</sup> *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986).

<sup>182</sup> *Doe 4*, 985 F.3d at 346-47.

within the judiciary's role to find that summary judgment was not warranted.<sup>183</sup>

The *Doe 4* majority was careful in coming to its conclusions, limiting its analysis to a narrow group (UACs), rather than using a broader brush to consider other child, refugee, or asylum-seeking detainees.<sup>184</sup> Still, *Doe 4* necessarily carries systemic implications. The Supreme Court has repeatedly recognized that even the professional judgment standard should give deference to the decisions of professionals within prison administrations and minimally invade their internal operations.<sup>185</sup> Yet in order for the court or detention facility administrators to ensure that facility staff adhere to the standards of professional judgment, those standards must be established in some way. There should be a consistent standard of care that does not vary wildly across detention center facilities.<sup>186</sup> Whether intentional or not, applying a professional judgment standard demands that detention facilities increase and maintain their standards of health care in a way that the deliberate indifference standard would otherwise not.<sup>187</sup> Perhaps the Court in *Doe 4* went through additional analyses regarding children<sup>188</sup> and trauma-informed care<sup>189</sup> for this very reason—to call on the legislature to address the concerns of unchecked executive definitions of adequate care, and to supply detailed standards of their own.

### III. THE COURT INTENTIONALLY ADDRESSED TRAUMA-INFORMED CARE IN THE CONTEXT OF THE PROFESSIONAL JUDGMENT STANDARD

The Court spent a portion of its opinion discussing the relevance of trauma-informed care and how it could relate to professional judgment regarding adequate mental health care.<sup>190</sup> The recent developments in health care surrounding trauma-informed care provide important context for this portion of the opinion. From 1995-1997, the Center for Disease Control

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<sup>183</sup> Fed. R. Civ. P. 56(a).

<sup>184</sup> *Doe 4*, 985 F.3d at 342.

<sup>185</sup> See e.g., *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982); *Parham v. J.R.*, 442 U.S. 584, 607 (1979); *Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979).

<sup>186</sup> See Lester N. Wright, *Health Care in Prison Thirty Years After Estelle v. Gamble*, 14 J. CORR. HEALTH CARE 31, 33 (2008).

<sup>187</sup> Since the deliberate indifference standard requires a subjective element, the courts can rely on this to escape looking at systemic problems with regards to standards of medical care for detainees. *Farmer v. Brennan*, 511 U.S. 825, 835-36 (1994).

<sup>188</sup> *Doe 4*, 985 F.3d at 342.

<sup>189</sup> See *infra* Section III.

<sup>190</sup> This discussion was not necessary to the *Doe 4*'s holding, yet the Court took the time to create dicta, likely because of the high volume of amici briefs written concerning its opinion by human rights groups and advocates. See *Doe 4*, 985 F.3d at 344-46.

conducted a groundbreaking study on the effects of childhood trauma,<sup>191</sup> which showed significant links between childhood trauma or “Adverse Childhood Experiences” (ACEs) and increased risk of death and delinquency.<sup>192</sup> Since this discovery, many have declared trauma to be a public health crisis, forming the basis for conversations among Congress and medical professionals about adapted standards of health care for children.<sup>193</sup> Awareness of the public health crisis of trauma caused many states to respond with initiatives that seek to mitigate the effects of Adverse Childhood Events and provide support for trauma-survivors.<sup>194</sup>

A trauma-informed approach, according to the majority, “has three implications: (1) appropriate [clinical or therapeutic] interventions, (2) a more global perspective to consider less restrictive alternatives to detention, and (3) staff rely[ing] less on the use of restraint and seclusion.”<sup>195</sup> The Fourth Circuit defined a trauma-informed system of care as “one that provides 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.”<sup>196</sup> The majority then discussed several amici submissions and statistics related to trauma-informed care, including that trauma-informed care “is already in widespread use in juvenile detention systems and is considered the accepted standard of professional care.”<sup>197</sup> Ultimately, the court did not determine whether a trauma-informed approach should be incorporated into the professional judgment standard or not, instead leaving such a

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<sup>191</sup> See *Anda et al.*, *supra* note 35; see also CTR. FOR DISEASE CONTROL & PREVENTION, *supra* note 35.

<sup>192</sup> See *Anda et al.*, *supra* note 35.

<sup>193</sup> See, e.g., *infra* notes 199-201 and accompanying text.

<sup>194</sup> For example, Tennessee developed Building Strong Brains, a joint initiative by the legislative, executive and judiciary bodies to mitigate the impacts of Adverse Childhood Events. NAT’L ACAD. FOR ST. HEALTH POL’Y, STATE ACTIONS TO PREVENT AND MITIGATE ADVERSE CHILDHOOD EXPERIENCES 4 (2021), [https://www.nashp.org/wp-content/uploads/2021/12/NGA\\_State\\_Actions\\_to\\_Prevent\\_Mitigate\\_ACEs\\_Dec\\_2021.pdf](https://www.nashp.org/wp-content/uploads/2021/12/NGA_State_Actions_to_Prevent_Mitigate_ACEs_Dec_2021.pdf). New Jersey created an Office of Resilience, in 2022 with the goal to “1) Achieve trauma-informed and healing-centered state designation; 2) Conduct an ACEs public awareness and mobilization campaign; 3) Maintain community-driven policy and funding priorities; 4) Provide cross-sector ACEs training; and 5) Promote trauma-informed/healing-centered services and supports.” *Id.* Delaware implemented an annual survey sent to all state employees regarding trauma-informed practices. *Id.* at 5. To read more about these and other examples, see *id.*

<sup>195</sup> *Doe 4*, 985 F.3d at 344-45 (internal quotations omitted).

<sup>196</sup> *Id.* at 344.

<sup>197</sup> E.g., Brief for Criminal Justice and Disability Rights as Amicus Curiae Supporting Appellant-Plaintiffs, *Doe 4*, 985 F.3d at 345 (No. 19-1910). In considering if and how trauma-informed care fits into a proper professional judgment standard, the Court discussed this and several other amici submissions. *Doe 4*, 985 F.3d at 345. The Court also noted that several states have already required systems of trauma-informed care in their detention facilities.

determination to the trial court if necessary and perhaps hinting to the legislature to reach that conclusion.<sup>198</sup>

The dissent took issue with this discussion of trauma-informed care, claiming that it is not the judiciary's role to determine the professional level of care for mental health.<sup>199</sup> While it may not be the judiciary's role to define professional judgment in the medical field, it does fall within its purview to interpret Constitutional amendments in order to give them meaning within "the evolving standards of decency that mark the progress of a maturing society."<sup>200</sup> Medical care has been recognized as an especially quick-moving sector, where the relevant standards change often from one year to the next.<sup>201</sup> As such, the majority appropriately considered the several amicus briefs it received as relevant to the discussion of how trauma-informed care might play a role in the current standard for professional judgment.<sup>202</sup>

The majority's deep-dive into the relevance of trauma-informed care in detention facilities, paired with the court's ultimate decision not to rule on the matter of whether it should be incorporated into a standard of professional judgment, suggests that the Fourth Circuit was making an effort to signal the legislature to act. Systemic insufficiencies such as the one suggested by the Fourth Circuit in *Doe 4* are best resolved by the legislature, as courts can, at best, interpret the law in ways most favorable to vulnerable populations. As previously noted, the professional judgment standard for medical care is constantly changing as new knowledge comes to light.<sup>203</sup> Thirty years ago, the terrain surrounding mental health and childhood trauma was very different from today.<sup>204</sup> Now that experts have recognized the profound effects of trauma,<sup>205</sup> medical professionals – including those working in detention facilities – have a responsibility to incorporate that knowledge into their standard of care.<sup>206</sup>

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<sup>198</sup> *Doe 4*, 985 F.3d at 346.

<sup>199</sup> *Id.* at 352.

<sup>200</sup> *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

<sup>201</sup> See *Wright*, *supra* note 186, at 32 ("the level of health care required, the target for the prison system, is a shifting target.").

<sup>202</sup> See *Doe 4*, 985 F.3d at 345-46 (citing various amici submissions discussing the role of trauma-informed care and its importance).

<sup>203</sup> *Wright*, *supra* note 186, See, e.g., *Hudson*, 503 U.S. 1; *Porter*, 974 F.3d 431; *Malam*, 469 F. Supp. 3d 767.

<sup>204</sup> This is evident from even a cursory glance at state responses to the ACEs study and subsequent research into how trauma affects the development of children. See, e.g., NAT'L ACAD. FOR ST. HEALTH POL'Y, *supra* note 194.

<sup>205</sup> *Anda et al.*, *supra* note 35.

<sup>206</sup> Care which does not substantially differ between facilities, or between detainees and free individuals. See *Wright*, *supra* note 186.

Likewise, legislation should reflect the changing understanding of childhood health. Indeed, several attempts have been made. In 2019, the RISE from Trauma Act<sup>207</sup> was introduced to the Senate; then, in 2020, the STRONG Support for Children Act<sup>208</sup> and the Children’s Protection Act of 2020<sup>209</sup> were also introduced. All three bills attempted to proactively prevent and respond to the effects of childhood trauma, often by funding programs that provide services to infants, children, youth, and families who have experienced trauma. The latter two bills were proposed following congressional hearings on trauma in 2019, where information was presented showing that “[c]hildhood trauma is a pervasive public health issue with negative long-term health effects that costs the United States billions of dollars.”<sup>210</sup>

The evidence presented during the congressional hearings for these bills should impact how courts weigh state interests against individual interests when it comes to trauma. Because of the epidemic nature of trauma in the United States and the ways it continues to drain state-funded systems, the judiciary should consider that both the state and individuals will benefit if trauma is proactively addressed. Indeed, one might argue that – given how the medical profession has evolved in its understanding of trauma in the lives of children – it is problematic that other courts apply a deliberate indifference standard to U.S. citizen children in detention centers and have failed to apply a stronger standard for their due process violations.<sup>211</sup> While the additional vulnerability of UACs make their case particularly clear, the judiciary has arguably made it too difficult for other classes of children to receive adequate care in detention.

#### IV. THE UNITED STATES HAS RELEVANT INTERNATIONAL OBLIGATIONS

Though rarely cited in domestic case law, the United States has international obligations to various groups both within and outside its borders. The most common and powerful obligations come from

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<sup>207</sup> S. 1770, 116th Cong. (2019) [hereinafter RISE Act].

<sup>208</sup> H.R. 8544, 116th Cong. (2020) [hereinafter STRONG Act].

<sup>209</sup> H.R. 8565, 116th Cong. (2020) [hereinafter Children’s Protection Act].

<sup>210</sup> *Identifying, Preventing, and Treating Childhood Trauma: Pervasive Public Health Issue that Needs Greater Federal Attention: Hearing Before the Subcomm. on Oversight & Reform*, 116th Cong. 1 (2019) (statement of Sen. Elijah E. Cummings, Chairman, Subcomm. on Oversight & Reform).

<sup>211</sup> *See, e.g., A.M. ex rel. J.M.K. v. Luzerne Cnty. Juv. Det. Ctr.*, 372 F.3d 572 (3d Cir. 2004) (holding that the deliberate indifference standard is appropriate for constitutional claims from juveniles in detention centers); *A.J. ex rel. L.B. v. Kierst*, 56 F.3d 849, 854 (8th Cir. 1995) (recognizing that “assessments of juvenile conditions of confinement are necessarily different from those relevant to assessments of adult conditions of confinement” yet refusing to determine the appropriate standard.)

international agreements the United States has ratified. This is because ratification binds a State to obey the ratified treaty, making it “party” to the treaty<sup>212</sup> and subjecting it to international enforcement mechanisms. In contrast, signing a treaty merely demonstrates support for the treaty and requires that a State “refrain, in good faith, from acts that would defeat the object and the purpose of the treaty.”<sup>213</sup> Despite its habit of signing international agreements and rarely ratifying them,<sup>214</sup> the United States is party to a treaty relevant to *Doe 4*. By ratifying the 1967 Protocol,<sup>215</sup> the United States agreed to abide by Articles 2 through 34 of the 1951 Refugee Convention.<sup>216</sup> Many UACs qualify as asylum-seekers fleeing persecution.<sup>217</sup> The main duty the United States owes to those UACs, then, is a duty to prevent refoulement.<sup>218</sup> In other words, the United States cannot send refugee or asylum-seeking UACs back to their home states where they might be subject to persecution. Additional rights may be required by the Protocol, increasing in proportion with the amount of time a refugee (or UAC) has been present in the country.<sup>219</sup>

Beyond the obligations of the United States to UACs as asylum-seekers meriting international protection,<sup>220</sup> there are several likely obligations because of UAC’s status as minors. The most widely accepted

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<sup>212</sup> *What Is the Difference between Signing, Ratification and Accession of UN Treaties?*, ASKUN (Mar. 18, 2022), <https://ask.un.org/faq/14594> (last visited July 3, 2022).

<sup>213</sup> *Id.*

<sup>214</sup> See, e.g., International Covenant on Economic, Social and Cultural Rights, October 5, 1977, S. Treaty Doc. No. 95-19, 993 U.N.T.S. 3; American Convention on Human Rights “Pact of San Jose, Costa Rica,” June 1, 1977, S. Treaty Doc. No. 95-21, 1144 U.N.T.S. 123; Vienna Convention on the Law of Treaties, Apr. 24, 1970, 1155 U.N.T.S. 311. All are treaties that the United States signed decades ago but never ratified.

<sup>215</sup> 1967 Protocol, *supra* note 74; UNHCR, STATE PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL 4, <https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>.

<sup>216</sup> 1967 Protocol, *supra* note 74.

<sup>217</sup> See Terrio, *supra* note 87; WOMEN’S REFUGEE COMM’N, *supra* note 89.

<sup>218</sup> 1951 Refugee Convention, *supra* note 73, art. 33.

<sup>219</sup> See NAT’L IMMIGR. F., *supra* note 75.

<sup>220</sup> While ORR does not maintain data on the reasons UACs entered the U.S. a 2014 study conducted by the United Nations High Commissioner for Refugees Regional Office for the United States and the Caribbean Washington, D.C. revealed that 58% of unaccompanied children who entered the U.S. from the most common countries (El Salvador, Guatemala, Honduras and Mexico) raised international protection needs. UNHCR, CHILDREN ON THE RUN (2014), <https://www.unhcr.org/56fe26d27.html>. Often this was concluded based on why the children were fleeing their home country:

Forty-eight percent of the displaced children interviewed for this study shared experiences of how they had been personally affected by the augmented violence in the region by organized armed criminal actors, including drug cartels and gangs or by State actors. Twenty-one percent of the children confided that they had survived abuse and violence in their homes by their caretakers.

*Id.*

source of international law protecting children is the Convention on the Rights of the Child.<sup>221</sup> The United States is the only member of the United Nations not to have ratified the CRC.<sup>222</sup> Despite the fact that the CRC is not technically binding, it should be persuasive in domestic courts. This strategy can succeed by calling attention to areas where United States human rights standards are lower than international standards, and arguing that the United States should not lag behind the rest of the world in protecting human rights.<sup>223</sup> In fact, courts have readily accepted this argument in prison cases, using the International Covenant on Civil and Political Rights,<sup>224</sup> the Universal Declaration on Human Rights,<sup>225</sup> the Charter of the United Nations,<sup>226</sup> and the Standard Minimum Rules for the Treatment of Prisoners<sup>227</sup> to shape prisoner's rights within the United States. Given this history, while not binding law, the CRC could be persuasive to domestic courts in interpreting and even expanding the rights of children detained in U.S. facilities.

The CRC recognizes that children “should be fully prepared to live an individual life in society, and brought up in . . . the spirit of peace, dignity, tolerance, freedom, equality and solidarity,” and that “the child, by reason

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<sup>221</sup> CRC, *supra* note 64.

<sup>222</sup> The U.S. did sign the CRC, however, on Feb. 16, 1996. *Convention on the Rights of the Child*, U.N. TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=en) (noting all the States who ratified the CRC and their reservations, notably missing the United States) (last visited July 3, 2022).

<sup>223</sup> Connie de la Vega, *Using International Human Rights Law in Legal Services Cases*, 22 CLEARINGHOUSE REV. 1242, 1245 (1989).

<sup>224</sup> The Oregon Supreme Court cited the Charter of the United Nations, the Universal Declaration on Human Rights, and the International Covenant on Civil and Political Rights in upholding an injunction against that pat downs of prisoners' private areas by guards of the opposite sex. The court used these international treaties and agreements as examples of principled treatment of prisoners. *See Sterling v. Cupp*, 290 Or. 611, 622 n.21 (1981); International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. 95-20, 999 U.N.T.S. 171.

<sup>225</sup> *See id.*; G.A. Res. 217 (III) A, Universal Declaration on Human Rights (Dec. 10, 1948).

<sup>226</sup> *See supra* note 220; U.N. Charter arts. 55, 56.

<sup>227</sup> In 1980, the District Court of Connecticut court used the Standard Minimum Rules for the Treatment of Prisoners to help determine what constituted overcrowding in detention. The court noted that the Standard Minimum Rules were “obligations to the international community of member states of the United Nations.” *Lareau v. Manson*, 507 F. Supp. 1177, 1187 n.9 (D. Conn. 1980). *See* G.A. Res. 70/175, annex, Standard Minimum Rules for the Treatment of Prisoners (Dec. 17, 2015). More recently, in 2004 the District of Massachusetts noted that “compliance with [the Standard Minimum Rules] constitutes both relevant practice and evidence of *opinio juris*.” *Kane v. Winn*, 319 F. Supp. 2d 162, 198 (D. Mass. 2004). The court also noted that in 1984, when the Secretary General of the UN made his first inquiry into the United States' implementation of the Standard Minimum Rules, 40 states reported to have implemented the rules, eleven reported partial implementation, and only one reported no implementation. *Id.* For the second assertion, (citing U.N. Secretary General, *Implementation of the United Nations Standard Minimum Rules for the Treatment of Prisoners*, 6–7, 12, U.N. Doc. A/CONF. 121/15 (May 31, 1983)).

of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.”<sup>228</sup> Additionally, the CRC states that children have the right “to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.”<sup>229</sup> General Comment 24 to the CRC adds to that language, including a right to the “highest attainable standard of physical *and* mental health.”<sup>230</sup> These documents are strong support for the judiciary to apply *at minimum* the professional judgment standard to the treatment of any child in detention – not just to UACs. As the Fourth Circuit stated in *Doe 4*, both the deliberate indifference and the professional judgment standard are deferential to the detention facility administration.<sup>231</sup> This substantial deference makes it less likely that children are provided even an adequate standard of physical and mental health care, much less “the highest attainable” standard as required by international law. The CRC also requires that States provide special protection to more vulnerable groups of children, such as refugees (or UACs).<sup>232</sup> This provides even stronger support for applying a stringent standard to detention centers’ provision of medical care for UACs. The principles of the CRC are echoed in various standards promulgated by the United Nations relating to juvenile detention centers.<sup>233</sup>

While the professional judgment standard is *closer* to meeting the U.S.’s obligations to protect children than the deliberate indifference standard, *both standards* likely fail to satisfy international agreements, at least in their current state. Regarding deference to the state and detention facilities, the *Youngberg* court explicitly clarified that while “[c]ourts

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<sup>228</sup> CRC, *supra* note 64.

<sup>229</sup> *Id.* art. 24(1).

<sup>230</sup> Comm. on Rights of the Child, *General Comment No. 24 on Children’s Rights in the Child Justice System*, ¶ 82. U.N. Doc. CRC/C/GC/24 (Sept. 18, 2019) (emphasis added) [hereinafter “General Comment 24”].

<sup>231</sup> *Doe 4 v. Shenandoah Valley Juv. Ctr. Comm’n*, 985 F.3d 327, 349-55 (4th Cir. 2021). While the deliberate indifference standard is clearly deferential, courts have consistently discussed how the professional judgment standard is also deferential. *Shaw ex rel. Strain v. Strackhouse*, 920 F.2d 1135, 1145-46 (3d Cir. 1990) (recognizing that a professional judgment standard, while less deferential than a deliberate indifference standard, remains deferential to state actors); *Yvone L. ex rel. Lewis v. New Mexico Dep’t. of Hum. Servs.*, 959 F.2d 883, 893-94 (10th Cir. 1992); *Montin v. Gibson*, 718 F.3d 752, 755 (8th Cir. 2013) (“Pursuant to this test, great deference is owed to the professional judgment of a qualified professional charged with balancing the plaintiff’s freedom from bodily restraint against the safety of the public, the plaintiff, and other patients.”).

<sup>232</sup> CRC, *supra* note 64, arts. 20, 22.

<sup>233</sup> See G.A. Res. 40/33, U.N. Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), ¶¶ 13.5, 19.1, 24.1, 26.2, (Nov. 29, 1985); G.A. Res. 45/113, U.N. Rules for the Protection of Juveniles Deprived of Their Liberty (Havana Rules), ¶¶ 28, 49, 51, 53, 73, (Dec. 4, 1990).

[must] make certain that professional judgment in fact was exercised [i]t is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.”<sup>234</sup> This suggests that the judiciary is unable to discuss whether a certain action adequately provided for a detainee’s needs so long as it arguably meets the undefined standard of “professional judgment.” This is problematic in the context of children, especially given the detailed international standards surrounding children in detention. Since the courts are currently unable to define professional judgment, or to apply it as international standards would require, the need for legislative action is obvious.

## V. RECOMMENDATIONS

Given both domestic and international precedent and laws, I recommend that sister circuit courts (and the Supreme Court, if the opportunity arises) follow the Fourth Circuit’s lead in applying the professional judgment standard to unaccompanied immigrant children. International law suggests that such a standard applies to *all* children in detention, not just to UACs. This would require courts to revisit previous case law which failed to discuss the special vulnerability of children and thus applied the deliberate indifference standard.

As for the legislature and practitioners, the following recommendations may help to address the health crisis of trauma in migrant children: first, require and develop indicators to assess the realization of children’s rights (according to both domestic and international law).<sup>235</sup> These systems should ensure that care is similar across facilities.<sup>236</sup> Second, work to eliminate special privileges afforded to *unaccompanied* migrant children versus *accompanied* migrant children, as such discrimination is contrary to international law<sup>237</sup> and the Flores Agreement.<sup>238</sup> Third, broaden the scope of the Child Advocate Program, created under the Trafficking Victims Protection Reauthorization Act of 2008,<sup>239</sup> to apply to unaccompanied

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<sup>234</sup> *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982) (quoting *Romeo v. Youngberg*, 644 F.2d 147, 178 (3d. Cir. 1980)).

<sup>235</sup> States should not only have established evaluation and monitoring systems in place, but those systems should be informed by and include input from the children they affect. *See* General Comment 24, *supra* note 230, ¶¶ 113-15; *see also* Byrne, *supra* note 155, at 76.

<sup>236</sup> Wright, *supra* note 186, at 33.

<sup>237</sup> *See, e.g.*, CRC, *supra* note 64, art. 2.

<sup>238</sup> The Ninth Circuit ruled that this discrimination was illegal in *Flores v. Lynch*, 828 F.3d 898, 908 (9th Cir. 2016).

<sup>239</sup> The program advocates for child welfare, release from detention, where appropriate, and for family reunification. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-446, 122 Stat. 5044.

migrant children.<sup>240</sup> The Child Advocate Program is guided by the principles of the CRC, and acts to provide independent child advocates to migrant children.<sup>241</sup> Child advocates provide a voice for migrant children to ensure their best interests.<sup>242</sup> Currently, the program covers children who are considered “the most vulnerable,” but does not automatically extend to UACs.<sup>243</sup> Extending this program will ensure consent to medical care for UACs, as lack of consent is currently an issue for this population.<sup>244</sup> Lastly and ideally, the legislature should work to ensure that alternatives to detention are available and implemented, and that detention conditions for children meet international standards.<sup>245</sup>

### CONCLUSION

*Doe 4* opens a very narrow exception to the low standard of accountability for detention centers in the United States – one that only applies to unaccompanied immigrant children being held in detention. This article recognizes how the judicial standards of review, in their current state, result in a sort of professional indifference toward children and vulnerable groups receiving inadequate mental health care while in detention. Despite this, the *Doe 4* holding is important because it is the first to determine that a migrant child is entitled to heightened protections while detained, as is the case when a UAC is placed in a secure care facility by ORR. While this exception will do little to combat the high volume of improper detentions of immigrant children, it might demonstrate that domestic courts will be more receptive to broadening protections in the future. This is certainly required by the CRC and other international agreements. As the legislature begins to recognize the importance of trauma-informed care, and courts the importance of heightened accountability in the U.S. detention system, hopefully momentum will move the U.S. toward broadening care for all those detained within its borders, whether in the short or long-term.

*Doe 4* is just one case, but the principles it highlights are important – the guarantees provided by federal statute should not be formalities that are lost in practice. Vulnerable populations, especially those who are not

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<sup>240</sup> Malina, *supra* note 39, at 606 (“Establishing a third party independent of the ORR and facilities detaining the children, whose sole responsibility is child welfare, seems a reasonable course of action.”).

<sup>241</sup> *Child Advocate Program*, YOUNG CTR FOR. IMMIGRANT CHILD. ’S RTS., <https://www.theyoungcenter.org/child-advocate-program> (last visited July 3, 2022).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> Malina, *supra* note 39, at 604.

<sup>245</sup> *Detention*, UNHCR USA, <https://www.unhcr.org/detention.html> (last visited July 3, 2022).

detained for the sake of punishment, deserve special consideration and care in detention. The meaning of Constitutional Amendments will necessarily change alongside the “evolving standards of decency” as educated by science, progress and societal shifts – and it should. Children need protection.