NOTES

PROMOTING HEALING AND AVOIDING RETRAUMATIZATION: A PROPOSAL TO IMPROVE MENTAL HEALTH CARE FOR DETAINED UNACCOMPANIED MINORS THROUGH A BEST INTERESTS OF THE CHILD STANDARD

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INTRODUCTION

The boy to whom the United States federal court system would one day assign the dispassionate moniker "John Doe 4" was born into a life of violence in Honduras.[1] Growing up without his parents, Doe 4 witnessed brutal murders from the time he was about eight years old, and he himself was assaulted on at least one occasion with a machete.[2] As a result of these experiences, Doe 4 and a friend decided their only chance to survive was to come to the United States.[3] During and after the journey across the border, Doe 4 experienced further violence, including at the hands of Customs and Border Protection officers.[4]

After his arrest, Doe 4 was passed around a couple of detention centers before he arrived in December 2017 at the Shenandoah Valley Juvenile Center in Staunton, Virginia.[5] A doctor at the facility almost immediately diagnosed Doe 4 with post-traumatic stress disorder (PTSD) and attention-deficit/hyperactivity disorder (ADHD).[6] Facility staff also observed Doe 4 engaging in self-harm on multiple occasions, causing the same doctor to declare that Doe 4 had a "medium risk" of committing suicide.[7] In response to this information about Doe 4's mental health, clinic staff provided him with weekly counseling sessions.[8]

On its surface, perhaps, the story seems straightforward. The situation at the facility was far more dire, however. Due to his mental health conditions, Doe 4 frequently acted out.[9] Clinic staff responded to these incidents by restraining Doe 4, isolating him

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1. *See* Doe 4 v. Shenandoah Valley Juv. Ctr. Comm'n, 985 F.3d 327, 331 (4th Cir.), *cert. denied*, 142 S. Ct. 583 (2021).

2. *See id.*

3. *See id.*

4. *See id.*

5. *See id.* at 329, 331-32. For simplicity's sake, and to avoid confusion with the Luzerne County Juvenile Detention Center, this Note will subsequently refer to the Shenandoah Valley Juvenile Center as "Shenandoah Valley."

6. *Id.* at 332.

7. *Id.*

8. *Id.*

9. *Id.* at 332-33.

from the rest of the center population, or both.[10] On one occasion, Doe 4 claimed he told the person restraining him that he could not breathe, only for the staff member to respond, "Good."[11]

Unfortunately, Doe 4's story is far from unique. Several other children who had been detained at Shenandoah Valley reported similar treatment.[12] The problem exists on an even larger scale, however. Every year, tens of thousands of children in the United States are held somewhere besides their homes.[13] According to one estimate, almost seventeen thousand of those are confined to detention centers—like Shenandoah Valley—that fall somewhere on the spectrum between prisons and treatment facilities.[14] Many of these juveniles have mental health concerns for which they require support from the facilities in which they are confined.[15] Juveniles in detention centers retain their constitutional rights to "medical and mental health care."[16] However, as Doe 4's story makes clear, these rights are not always respected.[17]

In the 2004 case *A.M. v. Luzerne County Juvenile Detention Center*, the Third Circuit held that juveniles alleging inadequate access to mental health care in detention facilities must show that the facility's staff acted with "deliberate indifference" toward their needs.[18] The Fourth Circuit disrupted this status quo when it heard Doe 4's case in 2021 and applied a professional judgment standard,

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10. *Id.*

11. *Id.* at 333.

12. *Id.* at 333-34. These other children include Does 5, 6, and 7, who took Doe 4's place in the suit while its writ of certiorari to the Supreme Court was pending. *See infra* note 21.

13. Press Release, Wendy Sawyer, Prison Pol'y Initiative, Youth Confinement: The Whole Pie 2019 (Dec. 19, 2019), https://www.prisonpolicy.org/reports/youth2019.html [https://perma.cc/F7L8-KA6X].

14. *See id.*

15. *See* Lee A. Underwood & Aryssa Washington, *Mental Illness and Juvenile Offenders*, 13 INT'L J. ENV'T RSCH. & PUB. HEALTH 1, 1-4 (2016). According to Underwood and Washington, especially prevalent mental health issues among detained juveniles "include[ ] affective disorders (major depression, persistent depression, and manic episodes), psychotic disorders, anxiety disorders (panic, separation anxiety, generalized anxiety, obsessive-compulsive disorder, and post-traumatic stress disorder), disruptive behavior disorders (conduct, oppositional defiant disorder, and attention-deficit[/]hyperactivity disorder), and substance use disorders." *Id.* at 3.

16. *Juvenile Detention Explained*, ANNIE E. CASEY FOUND. (Mar. 26, 2021), https://www.aecf.org/blog/what-is-juvenile-detention [https://perma.cc/6UK6-6G37].

17. *See Doe 4*, 985 F.3d at 333.

18. 372 F.3d 572, 579 (3d Cir. 2004).

deciding that such juveniles need only show that the staff members' actions constituted a "substantial[ ] depar[ture] from accepted professional standards."[19] In his dissent, Judge J. Harvie Wilkinson argued that the majority had not based its holding on any case or statutory law but instead attempted "something we are utterly unqualified to do—determine what constitutes acceptable mental health care."[20] Shenandoah Valley petitioned the Supreme Court for certiorari in July 2021.[21] In December 2021, the Court denied the petition.[22]

Part I of this Note will describe the circuit split. It will provide background on the *A.M.* and *Doe 4* cases, including an explanation of the major precedents on which the Third and Fourth Circuits based their respective decisions. Then, Part II will argue that *A.M.* and its deliberate indifference standard cannot appropriately be applied in cases involving detained unaccompanied minors, also called Unaccompanied Alien Children (UACs). This almost twenty-year-old standard does not consider the latest information about immigration policy and the unique mental health needs of UACs such as Doe 4 who came to the United States to escape traumatic situations in their home countries. At the same time, though, Part II will explain why *Doe 4*'s substantial departure from professional judgment standard, which the Supreme Court declined to review, is still not the correct solution to the UAC-specific problems that *A.M.*'s standard does not cover. Part III will recommend possible alternative standards that would be better equipped to practically and efficiently ensure that detained UACs receive the mental health

19. *See Doe 4*, 985 F.3d at 342.

20. *Id.* at 347 (Wilkinson, J., dissenting).

21. *See* Petition for Writ of Certiorari, Shenandoah Valley Juv. Ctr. Comm'n v. Doe 5, 142 S. Ct. 583 (2021) (No. 21-48). In October 2021, Shenandoah Valley's counsel notified the Supreme Court that the United States District Court for the Western District of Virginia, to which the Fourth Circuit remanded the case, had accepted John Does 5, 6, and 7, all of whom are UACs currently detained at Shenandoah Valley, as plaintiffs in lieu of John Doe 4. *See* Letter from Jason A. Botkins to Jeff Atkins, Deputy Clerk for Case Initiation, Sup. Ct. of the U.S. (Oct. 19, 2021), https://www.supremecourt.gov/DocketPDF/21/21-48/197459/20211025141225878_20211025-141123-95754914-00003073.pdf [https://perma.cc/775L-G5QG]; Third Amended Class Action Complaint at 1, Doe 5 v. Shenandoah Valley Juv. Ctr. Comm'n, No. 17-cv-0097-EKD/JCH (W.D. Va. July 23, 2021).

22. *Doe 5*, 142 S. Ct. 583.

care to which they are entitled. Finally, Part IV will acknowledge and refute several potential counterarguments.

I. THE CIRCUIT SPLIT

In 2004, the Third Circuit decided *A.M. v. Luzerne County Juvenile Detention Center*.[23] Relying principally on *Fuentes v. Wagner*, a case concerning the treatment of an incarcerated adult, the court held that deliberate indifference was the appropriate standard by which to judge the legal sufficiency of mental health care provided to a detained juvenile.[24] Seventeen years later, the Fourth Circuit declined to follow *A.M.* in *Doe 4 v. Shenandoah Valley Juvenile Center Commission*, a suit that arose from a class of detained UACs' claims of inappropriate mental health care.[25] Instead, it took inspiration from the Supreme Court case *Youngberg v. Romeo*, in which the plaintiff was an intellectually disabled adult confined to a state-run hospital, and instituted a substantial departure from professional judgment standard.[26] This Part will describe the resulting circuit split in further detail.

A. A.M. v. Luzerne County Juvenile Detention Center

Following an arrest for indecent conduct, A.M. was confined to the Luzerne County Juvenile Detention Center in Pennsylvania.[27] Staff at the center knew that he had existing mental health concerns, including ADHD, "anxiety disorder, depressive disorder, atypical bipolar disorder, and intermittent explosive disorder."[28] While at the center, A.M. repeatedly sustained physical injuries when fellow detainees assaulted him.[29] This abuse negatively impacted A.M.'s mental state, but it was not the only factor that contributed to his

23. *See generally* 372 F.3d 572.
24. *See infra* Part I.A.
25. *See generally* 985 F.3d at 347.
26. *See infra* Part I.B.
27. *A.M.*, 372 F.3d at 575. This Note will subsequently refer to Luzerne County Juvenile Detention Center simply as "Luzerne County."
28. *Id.* at 576.
29. *Id.* at 575-76.

overall decline during his time at the center.[30] He did not receive his ADHD medication for a few weeks, and he inconsistently received psychiatric services.[31] After a court order sent A.M. to a different facility, he informed a counselor there about his experiences, prompting a chain of events that ultimately gave rise to this suit against various Luzerne County administrators and staff members.[32]

Using 42 U.S.C. § 1983 and Pennsylvania tort law, A.M.'s suit alleged a violation of his Fourteenth Amendment substantive due process rights.[33] Specifically, his claim comprised four counts, two of which are within the scope of this Note.[34] The first count's relevant allegations were that Luzerne County, its main administrator, and its deputy chief of juvenile probation had hired improperly trained staff and failed to institute "policies and procedures to address the mental and physical health needs of residents."[35] In both respects, the United States District Court for the Middle District of Pennsylvania granted summary judgement to Luzerne County and its employees, ruling that A.M. had not provided sufficient evidence to show that the staff had acted with deliberate indifference.[36] It reached the same conclusion regarding A.M.'s second claim that the staff had not stepped in quickly enough to stop other detainees from assaulting him, notably citing a Third Circuit case about staff intervention in a prison altercation.[37]

Although the Third Circuit remanded the case due to unresolved factual questions, it held that the district court had been right to use the deliberate indifference standard to evaluate A.M's claims.[38] In arriving at this conclusion, the Third Circuit principally discussed *Fuentes v. Wagner*, a case upon which the district court had also relied.[39]

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30. *Id.* at 576.
31. *Id.*
32. *Id.* at 576-77.
33. *Id.* at 575.
34. *See id.* at 577-78.
35. *Id.*
36. *Id.* at 572, 577-78.
37. *See id.* at 578.
38. *See id.* at 580-81, 588.
39. *See id.* at 578, 584, 586-87.

The plaintiff in *Fuentes* was incarcerated pending his sentencing on federal drug charges when he allegedly threatened prison employees during a physical altercation.[40] His § 1983 claim arose from the employees' decision to place him, handcuffed and shackled, in a restraint chair for eight hours following the incident.[41] Although the staff followed all of the prison's policies associated with such a restraint, Fuentes claimed that this punishment constituted excessive force and caused him physical injury.[42]

The deliberate indifference standard entered the discussion when the Third Circuit tried to reconcile Fuentes's competing claims that his time in the restraint chair was both cruel and unusual punishment under the Eighth Amendment and a violation of substantive due process under the Fourteenth Amendment.[43] The court cautioned, however, that the Fourteenth Amendment, not the Eighth, governed the situation because the Eighth Amendment's protection against cruel and unusual punishment is not applicable until one is sentenced, which Fuentes had not been at the time of the incident.[44] However, the court did not find that the Eighth Amendment was wholly inapplicable but rather concluded that the Eighth and Fourteenth Amendments were intertwined: "Under the Fourteenth Amendment, a pretrial detainee is entitled 'at a minimum, [to] no less protection' than a sentenced inmate is entitled to under the Eighth Amendment."[45] Citing another one of its previous cases, the court noted that "the Eighth Amendment would seem to establish a floor of sorts" for the protections to which an unsentenced detainee is entitled.[46]

Turning to Supreme Court precedent, the court stated that the test to determine if a prison official had acted constitutionally consisted of two elements: (1) a deprivation serious enough "to fall within the Eighth Amendment's zone of protections" and (2) "a

40. Fuentes v. Wagner, 206 F.3d 335, 339-40 (3d Cir. 2000), *abrogated by* Martin v. Sec'y of Corr., No. 21-1522, 2022 WL 1576758 (3d Cir. May 19, 2022).

41. *See id.* at 339.

42. *Id.* at 340.

43. *Id.* at 343-45.

44. *See id.* at 343-44.

45. *Id.* at 344 (quoting Colburn v. Upper Darby Township, 838 F.2d 663, 668 (3d Cir. 1988)).

46. *Id.* (quoting Kost v. Kozakiewicz, 1 F.3d 176, 188 n.10 (3d Cir. 1993)).

sufficiently culpable state of mind ... motivated by a desire to inflict unnecessary and wanton pain."[47] Clarifying the second element in the context of a confinement like Fuentes's, the court found that a plaintiff must show there was "'deliberate indifference' to the inmate's health" on the part of the officials affecting the confinement or restraint.[48] Specifically, the plaintiff must have been "denied the minimal civilized measure of life's necessities."[49] Given that the officials had presented evidence that they had seen to Fuentes's basic human and medical needs during his restraint, the Third Circuit upheld the lower court's decision to grant summary judgment in favor of the defendants on this substantive-due-process-with-an-Eighth-Amendment-twist claim.[50]

When the Third Circuit applied the *Fuentes* holding to *A.M.*, it reached the same initial conclusion that the Fourteenth Amendment, not the Eighth, directly applied to A.M.'s claim because he, similar to Fuentes, was not a convicted *and* sentenced criminal.[51] It then decided that A.M.'s status as a detained juvenile meant he was "entitled to no less protection than a convicted prisoner is entitled to under the Eighth Amendment," despite the Supreme Court not having decided the exact confines of detainees' due process rights to medical care.[52] Therefore, in line with the *Fuentes* standard, the court found that A.M. would have to show that Luzerne County's staff had acted with deliberate indifference toward his physical and mental health medical needs and toward the assaults he endured at the hands of other detainees.[53]

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47. *Id.* (citing Wilson v. Seiter, 501 U.S. 294, 298 (1991)).

48. *Id.* at 345 (quoting Farmer v. Brennan, 511 U.S. 825, 837 (1994)).

49. *Id.* (quoting Hudson v. McMillian, 503 U.S. 1, 9 (1992)).

50. *Id.* at 345-46.

51. A.M. v. Luzerne Cnty. Juv. Det. Ctr., 372 F.3d 572, 584 (3d Cir. 2004); *see also Fuentes*, 206 F.3d at 344-45.

52. *A.M.*, 372 F.3d at 584 (citing City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983)).

53. *See id.* at 584, 587.

B. Displacing the "Deliberate Indifference" Standard in Doe 4 v. Shenandoah Valley Juvenile Center Commission

For almost two decades, the *A.M.* standard, although seldomly applied outside of the Third Circuit, went relatively unquestioned.[54] That changed in 2021 when John Doe 4 and a class of fellow detainees brought suit after their alleged mistreatment at Shenandoah Valley.[55] Doe 4 was the class representative until Does 5, 6, and 7 took his place.[56] Similar to A.M., Doe 4 brought a § 1983 claim and made several allegations, the most relevant among them that Shenandoah Valley and its staff had "fail[ed] to provide a constitutionally adequate level of care for plaintiffs' serious mental health needs."[57]

Curiously, despite its utter repudiation of the *A.M.* standard and reasoning, the majority opinion mentioned *A.M.* only once, not even in the main text.[58] Rather, Chief Judge Gregory used a footnote to quickly distinguish *A.M.* as irrelevant because A.M. was not a UAC.[59] Even though A.M. was a child during his time at Luzerne County, the majority further asserted that *A.M.* was inapplicable because the Third Circuit had apparently decided to apply the deliberate indifference standard without considering whether it was appropriate to apply to children's cases.[60]

Having disposed of *A.M.*, the *Doe 4* majority turned its attention to establishing the legal foundation of its rejection of the deliberate indifference standard.[61] Near the beginning of its discussion, it

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54. As of December 16, 2022, Westlaw reported that *A.M.* had been cited in 1,452 cases; 1,424 of these were in the Third Circuit or a federal district court within the Third Circuit's jurisdiction (Delaware, New Jersey, and Pennsylvania). Only nine cases, eight within the Third Circuit and one in the United States District Court for the District of New Mexico, involved negative treatment; however, each of these nine distinguished *A.M.* rather than overruling or even disagreeing with it.

55. Doe 4 v. Shenandoah Valley Juv. Ctr. Comm'n, 985 F.3d 327, 334 (4th Cir.), *cert. denied*, 142 S. Ct. 583 (2021). See *supra* notes 1-12 and accompanying text for the facts of Doe 4's mistreatment at Shenandoah Valley as the Fourth Circuit articulated them.

56. *Doe 4*, 985 F.3d at 334. Does 5, 6, and 7 took Doe 4's place as class representative in October 2021. *See* Letter from Jason A. Botkins to Jeff Atkins, *supra* note 21.

57. *See Doe 4*, 985 F.3d at 334.

58. *See id.* at 342 n.14.

59. *See id.*

60. *See id.*; *see also* A.M. v. Luzerne Cnty. Juv. Det. Ctr., 372 F.3d 572, 579 (3d Cir. 2004).

61. *See Doe 4*, 985 F.3d at 343-44.

applied *DeShaney v. Winnebago County Department of Social Services*.[62] The plaintiff in *DeShaney* was Joshua DeShaney, a young boy who became permanently incapacitated after suffering severe physical abuse at the hands of his father, who had been the subject of a Department of Social Services investigation due to previous suspicions about his mistreatment of his son.[63] The Supreme Court ultimately held that Joshua did not have a valid Fourteenth Amendment substantive due process claim against Social Services, and, by extension, the State of Wisconsin, because "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors," such as Joshua's father, absent the establishment of a duty-creating "special relationship" between the individual and the state.[64] The Court then clarified that such a relationship does exist when an individual is in state custody.[65] In that situation, the Court reasoned, the state has taken the person's liberty and thus made him unable to care for himself, so it assumes a duty to fulfill that person's "basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety."[66]

Although the Court in *DeShaney* did not find a special relationship between Joshua and Wisconsin,[67] its holding in the case worked in Doe 4's favor.[68] Because Doe 4, unlike Joshua, was in the custody of the state when he sustained the harm for which he sought relief, the Fourth Circuit implied that he and the government had the requisite special relationship when Chief Judge Gregory's majority opinion concluded that "a detainee's right to adequate mental health

62. *Id.* at 338.

63. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 191-93 (1989).

64. *Id.* at 195, 197.

65. *Id.* at 200.

66. *Id.*

67. *See id.* at 199-201; *see also id.* at 213 (Blackmun, J., dissenting) ("Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing."). The *DeShaney* decision has become rather infamous for its denial of relief to Joshua, who died in 2015 aged only 36. *See, e.g.*, Linda Greenhouse, Opinion, *The Supreme Court and a Life Barely Lived*, N.Y. TIMES (Jan. 7, 2016), https://www.nytimes.com/2016/01/07/opinion/the-supreme-court-and-a-life-barely-lived.html [https://perma.cc/MR2S-S6JC].

68. *See* Doe 4 v. Shenandoah Valley Juv. Ctr. Comm'n, 985 F.3d 327, 338-39 (4th Cir.), *cert. denied*, 142 S. Ct. 583 (2021).

care is clear."[69] Drawing from *DeShaney*'s dicta about the government's duty to provide for the "basic human needs" of anyone in its custody,[70] Chief Judge Gregory cited a Fourth Circuit case that held that "medical care" refers to treatment for both physical and mental health concerns.[71]

Having deduced a right to mental health care for detained UACs, the court then invoked the *Youngberg* standard as the appropriate measure of whether Shenandoah Valley's staff had violated Doe 4's right in this area.[72] The respondent in *Youngberg*, Nicholas Romeo, had severe intellectual disabilities: at age thirty-three, his I.Q. was no higher than ten.[73] Romeo's mother sought his confinement to the Pennhurst State School and Hospital in Pennsylvania due to the amount of daily assistance he required.[74] Similar to what A.M. and Doe 4 would one day experience, Romeo sustained repeated injuries at the hands of other residents, and he was restrained and denied training in basic life skills in a way that he claimed violated both his Eighth and Fourteenth Amendment rights.[75] Applying the deliberate indifference standard, the jury ruled against Romeo.[76]

The Third Circuit reversed, deciding that the Fourteenth Amendment, but not the Eighth, was applicable because Romeo was not incarcerated.[77] Although the majority never came to an agreement on the appropriate standard to use to judge whether the staff had violated Romeo's Fourteenth Amendment rights, Chief Judge Seitz, who concurred in the judgment, asserted that the standard should be "whether the defendants' conduct was 'such a substantial departure from accepted professional judgment, practice, or standards in the care and treatment of this plaintiff as to demonstrate that the defendants did not base their conduct on a professional judgment.'"[78]

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69. *Id.* at 339; *see also DeShaney*, 489 U.S. at 199-201.
70. *See supra* notes 65-66 and accompanying text.
71. *See Doe 4*, 985 F.3d at 339 (citing Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977)).
72. *See id.* at 339-43.
73. *See* Youngberg v. Romeo, 457 U.S. 307, 309 (1982).
74. *See id.* at 309-10.
75. *See id.* at 310-11.
76. *Id.* at 312.
77. *Id.* at 312-13.
78. *Id.* at 314 (quoting Romeo v. Youngberg, 644 F.2d 147, 178 (3d Cir. 1980) (Seitz, C.J., concurring)).

In its opinion, the Supreme Court ultimately adopted Chief Judge Seitz's proposed standard on the grounds that it balanced the government's interest in being able to restrain and make treatment decisions about people in its custody when necessary with the rights of committed individuals like Romeo to be in physically and mentally appropriate environments.[79] Further, the Court agreed with Seitz's warning that "[i]t is not appropriate for the courts to specify which of several professionally acceptable choices should have been made."[80]

The Fourth Circuit in *Doe 4* ultimately applied the *Youngberg* substantial departure standard, over Shenandoah Valley's objections that its residents were mainly at the facility not to be treated but to be confined due to their violent tendencies.[81] The court reasoned that although the detained minors were violent on occasion, that behavior was the result of the emotional trauma they had experienced and for which they needed mental health care.[82] Indeed, it characterized preventing the juveniles from harming anyone and providing them with the necessary mental health treatment as intertwined objectives, not separate ones.[83]

In terms of applying the substantial departure standard, the Fourth Circuit declined to express an explicit opinion as to whether Shenandoah Valley's staff had violated Doe 4's and the other detainees' rights.[84] However, it strongly hinted that due to the detainees' backgrounds, a trauma-informed approach would be the surest way to satisfy the standard.[85] With this decision, the Fourth

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79. *Id.* at 321-22.

80. *Id.* at 321 (quoting Romeo v. Youngberg, 644 F.2d 147, 178 (3d Cir. 1980) (Seitz, C.J., concurring)) .

81. Doe 4 v. Shenandoah Valley Juv. Ctr. Comm'n, 985 F.3d 327, 340, 342 (4th Cir.), *cert. denied*, 142 S. Ct. 583 (2021).

82. *Id.* at 340-41.

83. *See id.*

84. *See id.* at 346.

85. *See id.* at 345-46. The Fourth Circuit cited numerous sources that indicated that trauma-informed approaches are increasingly becoming the norm, when applicable, amongst mental health professionals. *See id.* One of these sources is a report from the Attorney General's office, and it uses the phrase "trauma-informed" 120 times in 256 pages. *See generally* U.S. DEP'T OF JUST., REPORT OF THE ATTORNEY GENERAL'S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE (2012), https://www.justice.gov/defendingchildhood/cev-rpt-full.pdf [https://perma.cc/Y4T3-7FWN]. The report addresses immigrant children specifically, recommending that "[e]vidence-based interventions should be created specifically for immigrant

Circuit split itself from the Third Circuit's *A.M.* holding, but without creating a sufficiently clear path forward.

II. NEITHER SIDE OF THE CIRCUIT SPLIT RESOLVES THESE CLAIMS IN A CONSTITUTIONALLY SUFFICIENT WAY

The Fourth Circuit's decision in *Doe 4* does indeed split from the Third Circuit's decision in *A.M.*, but, to respectfully disagree with Judge Wilkinson, it does not do so "needlessly."[86] The *A.M.* decision is almost twenty years old and therefore does not take into account more recent research on mental health and the impact of detention or incarceration on juveniles, especially UACs.[87] A number of researchers, in and outside of the legal field, have addressed the prevalence of mental health issues among incarcerated or detained youth.[88]

Determining the constitutionally appropriate standard in cases like *Doe 4* is challenging in part because the affected population—UACs who have been detained pending further immigration proceedings—is quite specific.[89] When taken together, *A.M.* and *Doe 4* seem to identify two different "menus" of categories, such that courts choose one option from the first menu and one from the second for each detained or incarcerated plaintiff whose case they decide.[90] The first menu concerns the status of the confined person, asking whether he is (1) a convicted, sentenced criminal; (2) an as-yet unsentenced convicted or suspected criminal; or (3) committed

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children ... who have been exposed to violence." *Id.* at 18.

86. *See Doe 4*, 985 F.3d at 349 (Wilkinson, J., dissenting).

87. *See generally* A.M. v. Luzerne Cnty. Juv. Det. Ctr., 372 F.3d 572 (3d Cir. 2004).

88. *See* Sara McDermott, Comment, *Calibrating the Eighth Amendment:* Graham, Miller, *and the Right to Mental Healthcare in Juvenile Prison*, 63 UCLA L. REV. 712, 714 (2016) ("Approximately 70 percent of incarcerated youth have some sort of mental illness, and 20 percent have an illness so severe that it significantly impairs their ability to function."); Charles D.R. Baily, Schuyler W. Henderson, Amanda R. Taub, Glynnis O'Shea, Honora Einhorn & Helen Verdeli, *The Mental Health Needs of Unaccompanied Immigrant Children: Lawyers' Role as a Conduit to Services*, 15 GRAD. STUDENT J. PSYCH. 3, 6, 10-11 (2014) (studying a sample of lawyers who work with UACs, ultimately recommending more training for such practioners); U.S. DEP'T OF JUST., *supra* note 85, at 119 (recommending trauma-informed mental health care for immigrant children, whether or not they are incarcerated or detained).

89. *See* 985 F.3d at 327.

90. *See generally id.*; *A.M.*, 372 F.3d 572.

for mental or physical health reasons.[91] The second menu is much simpler, merely asking whether the person is an adult or a juvenile.[92] A.M. rather cleanly fit the molds the menus set forth: while at Luzerne County, he was undisputedly a juvenile detained pending the resolution of his charge for indecent conduct.[93] Doe 4's situation, though, was less clear-cut; he was a juvenile, but his detention at the Shenandoah Valley stemmed neither from health reasons nor from pending or resolved criminal charges.[94] The Fourth Circuit's unwillingness to pigeonhole Doe 4 into a category that did not truly fit his situation appears to have been a main motivator behind its decision to apply the substantial departure standard instead of the deliberate indifference one.[95]

Although the Fourth Circuit's *Doe 4* decision appropriately grappled with the post-*A.M.* developments in immigration and mental health policy,[96] it most likely would not have survived the Supreme Court's scrutiny if the Court had decided to take the case.[97] The Fourth Circuit's opinion represents a valiant effort to protect UACs

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91. *See A.M.*, 372 F.3d at 584; *Doe 4*, 985 F.3d at 339-42.

92. *See Doe 4*, 985 F.3d at 342 ("The Supreme Court has long recognized that children are psychologically and developmentally different from adults." (citing Miller v. Alabama, 567 U.S. 460, 471 (2012))).

93. *See A.M.*, 372 F.3d at 575.

94. *See Doe 4*, 985 F.3d at 329-30. Criminal and immigration laws have converged on one another with increasing frequency in recent years. *See* Yolanda Vázquez, *Crimmigration: The Missing Piece of Criminal Justice Reform*, 51 U. RICH. L. REV. 1093, 1098 (2017) ("Criminal prosecutions of noncitizens have flooded criminal court dockets, prisons, and jails in local, state, and federal jurisdictions. In federal court, immigration prosecutions account for roughly 50% of cases." (first citing MARK MOTIVANS, U.S. DEP'T OF JUST., FEDERAL JUSTICE STATISTICS 2011-2012, at 3 (2015); and then citing DORIS MEISSNER, DONALD M. KERWIN, MUZAFFAR CHISTI & CLAIRE BERGERON, IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 116 (2013))); *Fact Sheet: Prosecuting People for Coming to the United States*, AM. IMMIGR. COUNCIL (Aug. 23, 2021), https://www.americanimmigrationcouncil.org/research/immigration-prosecutions [https://perma.cc/9KGU-EP5V] (stating that illegal entry, under 8 U.S.C. § 1325, and illegal re-entry, under 8 U.S.C. § 1326, have been "the most prosecuted federal offenses in recent years"); Danilo Zak, *Fact Sheet: Unaccompanied Migrant Children (UACs)*, NAT'L IMMIGR. F. (Nov. 2, 2020), https://immigrationforum.org/article/fact-sheet-unaccompanied-migrant-children-uacs/ [https://perma.cc/F6Z3-DG2E] (noting that unlike the criminally accused, UACs do not have a right to counsel at immigration proceedings). However, Doe 4 was detained at Shenandoah Valley pursuant to various immigration-related statutes, not criminal charges. *Doe 4*, 985 F.3d at 329; *see also* 6 U.S.C. § 279; 45 C.F.R. § 410 (2019).

95. *See Doe 4*, 985 F.3d at 340-42.

96. *See supra* notes 86-95 and accompanying text.

97. *See* Shenandoah Valley Juv. Ctr. Comm'n v. Doe 5, 142 S. Ct. 583 (2021).

but is legally insufficient for several reasons, most of which Judge Wilkinson pointed out in his dissent.[98] Regardless of whether one interprets *Youngberg* to apply to UACs, Judge Wilkinson is correct that the majority's standard will require courts to make judgments about whether the decisions of detention center staff comply with the standards of the mental health profession, which is a massive and risky broadening of substantive due process.[99] Judge Wilkinson briefly mentioned that the majority created a split with *A.M.*,[100] but he did not address how little time the majority spends engaging with that case.[101] Common sense would dictate that the Supreme Court would be unlikely to affirm a newly-formed circuit split built on such a suspect foundation. For these reasons, *Doe 4* does not provide a sustainable solution to the problem that *A.M.* leaves unanswered, so a novel approach is necessary.

III. RECOMMENDATION FOR A LEGISLATIVE SOLUTION IMPLEMENTING A "BEST INTERESTS OF THE CHILD" STANDARD

This Part will propose a legislative solution to the problem that the Fourth Circuit in *Doe 4* did not correctly address when it instituted a substantial departure from professional judgment standard.[102] After eliciting testimony from mental health professionals experienced in working with detained UACs, Congress would need to create a statute requiring detention centers to meet a "best interests of the child" standard in providing mental health care to UACs in their custody. This approach would legislatively bypass A.M.'s limitations while also avoiding the problem that Judge Wilkinson identified in *Doe 4* regarding the courts' inability to

98. *See generally Doe 4*, 985 F.3d at 347-57 (Wilkinson, J., dissenting).

99. *See id.* at 348-50. Judge Wilkinson cited *Washington v. Glucksberg* to support his assertion that the Supreme Court dislikes changing the boundaries of substantive due process. *Id.* at 349-50 (citing Washington v. Glucksberg, 521 U.S. 702, 720 (1997)). For more on the Court's recent jurisprudence on these boundaries, see Mark L. Rienzi, *Substantive Due Process as a Two-Way Street: How the Court Can Reconcile Same-Sex Marriage and Religious Liberty*, 68 STAN. L. REV. ONLINE 18, 20, 22-23 (2015) (arguing that the Court conceptualizes substantive due process as a doctrine that must equally protect the liberty of everyone, regardless of viewpoint).

100. *See Doe 4*, 985 F.3d at 348.

101. *See id.*; *see also supra* notes 60-67 and accompanying text.

102. *See supra* notes 95-101 and accompanying text.

legitimately adjudicate the quality of mental health care.[103] Further, the best interests of the child standard fits situations such as the one in *Doe 4* better than either the deliberate indifference or substantial departure from professional judgment standards.[104] The end of this Part will present a hypothetical scenario that illustrates how this Note's proposal would work in practice.

A. Congress Should Codify the Best Interests Standard

Much of the public discourse about UACs in the past few years has centered on the "kids in cages" detained at the United States-Mexico border as a result of the Trump administration's family separation policies.[105] Comparatively few discussions have addressed the specific situations of UACs like the *Doe 4* plaintiffs detained in facilities, such as Shenandoah Valley, that are neither at the United States-Mexico border nor specifically designed for UACs.[106] Much of the recent legislative effort on this topic has reflected this disequilibrium.[107] Indeed, the federal bill that comes the closest to

103. *See supra* note 20 and accompanying text.

104. *See supra* Part II.

105. For an overview of these issues, see Camila Domonoske & Richard Gonzales, *What We Know: Family Separation and 'Zero Tolerance' at the Border*, NPR (June 19, 2018, 2:17 PM), https://www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border [https://perma.cc/A6GY-VG8F]; Nick Miroff, *At Border, Record Number of Migrant Youths Wait in Adult Detention Cells for Longer than Legally Allowed*, WASH. POST (Mar. 10, 2021, 7:54 PM), https://www.washingtonpost.com/national/unaccompanied-minors-detention-cells/2021/03/10/a0d39390-81c6-11eb-bb5a-ad9a91faa4ef_story.html [https://perma.cc/8TFP-LLX9].

106. *See* Anjali Tsui, *In Crackdown on MS-13, a New Detention Policy Raises Alarms*, PBS FRONTLINE (Feb. 18, 2018), https://www.pbs.org/wgbh/frontline/article/in-crackdown-on-ms-13-a-new-detention-policy-raises-alarms/ [https://perma.cc/9KE8-A74P]; Theresa Cardinal Brown, *'Kids in Cages' Is a Distraction. The Real Problem Is a Lack of Migrant Housing*, WASH. POST (Mar. 11, 2021, 9:28 AM), https://www.washingtonpost.com/outlook/2021/03/11/migrant-youth-housing/ [https://perma.cc/H53S-RF2E]. On its website, Shenandoah Valley calls itself "a residential facility for *youth*" but does not specifically mention that some of the youth detained there are UACs. *About SVJC*, SHENANDOAH VALLEY JUV. DET. CTR., https://www.svjc.org/about-svjc [https://perma.cc/T933-AVE9] (emphasis added).

107. For examples of legislation proposed or enacted in recent years to improve the treatment of UACs, see Stop Cruelty to Migrant Children Act, H.R. Res. 3918, 116th Cong. (2019) (proposing policy improvements regarding family separation, general facility conditions, and immigration court procedure, but not specifically addressing mental health services for detained UACs); 8 U.S.C. § 1232 (providing for mental health services for trafficked UACs but not for UACs like the Does in Shenandoah Valley who voluntarily came to the United States); Responsibility for Unaccompanied Minors Act, S. Res. 772, 117th Cong.

addressing the specific issue outlined in the *A.M.-Doe 4* circuit split—mental health care for detained UACs who voluntarily came to the United States—is the Immigrants' Mental Health Act of 2021.[108] This bill was proposed in April 2021, and as of August 2022, it has not progressed out of the House of Representatives' Subcommittee on Immigration and Citizenship.[109] The bill is explicitly intended to address the mental health needs of "newly arriving immigrants *at the border*" and has provisions for further trauma-based training for Customs and Border Protection (CBP) agents.[110] It further states that it applies to various types of facilities, most relevantly "short-term custody facilities."[111] However, it is not clear if that would include detention centers not at the border—such as Shenandoah Valley—because the rest of the text is so focused on the border and contains no definition of "short-term."[112] For example, Doe 4 was at Shenandoah Valley for several months: would such a stay qualify as "short-term" under this bill?[113]

Because no enacted or proposed legislation yet addresses the specific problem at issue in the *A.M.-Doe 4* circuit split, a new bill needs to be designed to fill that gap. Unlike courts, legislatures can hold hearings and hear from experts on a particular issue without having to wait for a specific case or controversy to arise. As Judge Wilkinson said in his *Doe 4* dissent, courts lack the expertise to establish informed standards that members of an entirely separate profession must follow.[114] Legislators are certainly not psychologists, psychiatrists, therapists, or even detention facility employees. They cannot by themselves determine the standard by which the mental health care that detention centers provide to UACs like Does 4, 5, 6, and 7 must be judged—but they can call experts on the topic to

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(2021) (addressing the obligations of sponsors, but not detention centers, to provide for the "mental well-being" of UACs in their custody).

108. *See* Immigrants' Mental Health Act of 2021, H.R. Res. 2840, 117th Cong. (2021).

109. *See id.*

110. *See id.* (emphasis added).

111. *See id.*

112. *See id.*

113. Although the precise length of Doe 4's stay at Shenandoah Valley is unclear from the court records, he arrived in early December 2017 and was there for at least four months because a documented incident with staff occurred in April 2018. *See* Doe 4 v. Shenandoah Valley Juv. Ctr. Comm'n, 985 F.3d 327, 332-33 (4th Cir.), *cert. denied*, 142 S. Ct. 583 (2021).

114. *Id.* at 347 (Wilkinson, J., dissenting).

provide testimony that will give them the necessary information to do so.[115]

To be maximally effective, this more closely tailored legislation must cover the ground that *A.M.*, *Doe 4*, and previous legislative attempts have left untouched. The new statute must (1) specifically mention UACs detained at any facility that works with the Office of Refugee Resettlement (ORR), whether it is at the border or not, and (2) upon receiving input from mental health professionals, reference particular ethical rules by which courts can judge the quality of care under a best interests of the child standard. These features will both ensure that UACs like the Shenandoah Valley Does are not left out and institute an easy-to-follow, consistent standard for acceptable care.

As of December 2022, no one has yet argued for the best interests of the child standard to be applied in the context of the *A.M.-Doe 4* circuit split.[116] However, several scholars have argued for this standard to be incorporated more frequently in related areas of the law.[117] One commentator's statement that "[u]naccompanied

115. Such testimony would be far from the first time a mental health professional has testified before Congress to contribute to legislative efforts to allow people to get the help they need. For examples, see Katie O'Connor, *Congress Hears Testimony on Need for Robust MH Crisis Services*, PSYCHIATRIC NEWS (June 23, 2021), https://psychnews.psychiatryonline.org/doi/full/10.1176/appi.pn.2021.7.33 [https://perma.cc/CPV5-2XHU]; *APA President Testifies Before U.S. House Committee on Energy & Commerce on Mental Health During COVID-19 Pandemic*, AM. PSYCHIATRIC ASS'N (June 30, 2020), https://www.psychiatry.org/newsroom/news-releases/apa-president-testifies-before-u-s-house-committee-on-energy-commerce-on-mental-health-during-covid-19-pandemic [https://perma.cc/245R-D3U3].

116. So far, several student-written works have analyzed the impact of the Fourth Circuit's decision in *Doe 4*. At least one has argued that the Fourth Circuit wrongly decided the case. *See, e.g.*, Joshua Philip Elmets, Recent Development, *Doing Less with More: Why the Fourth Circuit Missed Its Chance to Raise the Floor of Mental Health Care of Detained Persons*, 100 N.C. L. REV. 1311 (2022) (contending that the Fourth Circuit should have upheld the deliberate indifference standard). Others have applauded the court's endorsement of the substantial departure from professional judgment standard. *See, e.g.*, Kathleen Callahan, Case Comment, Doe v. Shenandoah Valley Juvenile Ctr. Comm'n, *985 F.3d 327 (4th Cir. 2021)*, 44 SUFFOLK TRANSNAT'L L. REV. 459 (2021); Taylor C. Joseph, Comment, *Revitalizing the* Youngberg v. Romeo *Professional Judgment Standard to Require Trauma-Informed Care for Detained Children*, 81 MD. L. REV. 1329 (2022); Matthew Skolnick, Note, *The Doctor Will See You Now: The Fourth Circuit Revives the Juvenile Detainee's Right to Treatment by Adopting the Professional Judgment Standard in* Doe 4, 67 VILL. L. REV. 377 (2022).

117. *See, e.g.*, Illana Gomez, Note, *Ill-Advised, Ill-Prescribed: A Remedy for the Alarming Usage of Psychotropic Drugs Among Migrant Children Held in U.S. Detention Facilities,* 54 COLUM. J.L. & SOC. PROBS. 413, 453-59 (2021); Ann Laquer Estin, *Child Migrants and Child Welfare: Toward a Best Interests Approach*, 17 WASH. U. GLOB. STUD. L. REV. 589, 604 (2018);

migrant minors ... are deserving of comprehensive mental health care" echoes the Fourth Circuit *Doe 4* majority's motivation for not simply following *A.M.*[118] Another commentator's call for "federal agencies who take custody of unaccompanied minors [to] adequately address[ ] children's needs for care and protection as the process unfolds"[119] is similarly relevant, as is yet another's assertion that "[d]etention itself must be age-appropriate, not punitive or retraumatizing, and truly in the least restrictive manner possible."[120]

As all three of these scholars identified, a key piece of the judicial conversation about the rights of detained UACs is the 1997 settlement agreement in *Reno v. Flores* ("the *Flores* Settlement").[121] The *Flores* case arose when a class of UACs challenged the Immigration and Naturalization Service's (INS) policy of detaining UACs pending further immigration proceedings instead of releasing them to "responsible adults."[122] In its 1993 opinion remanding *Flores* to the Ninth Circuit, the Supreme Court rejected respondents' argument advocating for a best interests standard to be used in determining where to place UACs who did not have a parent or other "responsible adult" available to take custody of them.[123] Writing for the Court, Justice Scalia found that such a standard would be too taxing on the government.[124] He held instead that although the best interests of the child could be considered, only "[m]inimum standards must be met, and the child's fundamental rights must not be impaired; but the decision to go beyond those requirements ... is a policy judgment rather than a constitutional imperative."[125] Finding the INS's policy to be constitutionally sufficient, the Court remanded the case to the Ninth Circuit.[126]

In his dissent, Justice Stevens criticized the Court's rejection of the best interests standard, arguing that "the omission of any

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Elizabeth P. Lincoln, Note, *The Fragile Victory for Unaccompanied Children's Due Process Rights After* Flores v. Sessions, 45 HASTINGS CONST. L.Q. 157, 160-64 (2017).

118. Gomez, *supra* note 117, at 459; *see also Doe 4*, 985 F.3d at 340-41.

119. Estin, *supra* note 117, at 590.

120. Lincoln, *supra* note 117, at 184.

121. *See id.* at 159; Gomez, *supra* note 117, at 432-34; Estin, *supra* note 117, at 597.

122. Reno v. Flores, 507 U.S. 292, 294 (1993).

123. *Id.* at 304-05.

124. *See id.*

125. *Id.*

126. *Id.* at 315.

provision for individualized consideration of the best interests of the juvenile in a rule authorizing an indefinite period of detention of presumptively innocent and harmless children denies them ... [the] liberty" that the law gives "similarly situated citizens."[127] In essence, Justice Stevens believed that "good enough" detention situations were not actually "good enough" under the Constitution.[128]

After the case's remand, the parties reached a settlement in 1997.[129] Although that settlement did not explicitly require the INS to act according to the best interests of UACs in deciding whether to detain or release them to a qualified adult, it did lay out what it called "minimum standards" for licensed programs to which the UAC may be released after leaving INS custody.[130] One of these standards required such facilities to provide the UACs with "appropriate mental health interventions."[131]

Twenty years later, the Ninth Circuit applied the *Flores* Settlement in *Flores v. Sessions* in relation to an issue similar to the one in *Reno v. Flores*: whether UACs must receive a bond hearing.[132] In answering that question in the affirmative, the Ninth Circuit emphasized that the *Flores* Settlement was never intended to be in effect for as long as it has been because the now-defunct INS was meant to create "rules or regulations" to supersede it.[133] Although the court avoided explicitly overriding either the Settlement or the 1993 majority opinion, it discussed at length a provision of the Homeland Security Act (HSA) that requires the ORR, which has principal responsibility for the logistics of detaining UACs, to "ensure[ ] that the interests of the child are considered in decisions

127. *Id.* at 348 (Stevens, J., dissenting).

128. *See id.*

129. *See* Stipulated Settlement Agreement at 15, Flores v. Reno, No. 85-CV-4544 (C.D. Cal. 1997) [hereinafter *Flores* Settlement].

130. *Id.*

131. *Id.*

132. Flores v. Sessions, 862 F.3d 863, 881 (9th Cir. 2017).

133. *Id.* at 869. The Homeland Security Act, which was passed in 2002 in response to the September 11 attacks, replaced the INS with the Department of Homeland Security, which splits responsibility for the immigration process among three agencies: CBP, Immigration and Customs Enforcement, and U.S. Citizenship and Immigration Services. *See generally* U.S. CITIZENSHIP & IMMIGR. SERVS., OVERVIEW OF INS HISTORY 11 (2012), https://www.uscis.gov/sites/default/files/document/fact-sheets/INSHistory.pdf [https://perma.cc/VPM3-MGUM].

and actions relating to the care and custody of an unaccompanied alien child."[134]

Although portions of *Reno v. Flores*, the *Flores* Settlement, and *Flores v. Sessions* all hinted at a best interests approach being appropriate for application to problems like the one in *Doe 4*, Congress should take explicit, decisive action to apply that standard to ensure that UACs like Does 4, 5, 6, and 7 receive the mental health care that they need.

As Justice Scalia noted in the *Reno v. Flores* majority opinion, the Supreme Court has generally not interpreted the Constitution to require that the government provide anyone—citizen or otherwise—the *best* of anything, such as education or healthcare.[135] However, "best" and "best interests" are not necessarily synonymous. Justice Scalia remarked that the best interests standard really came from divorce proceedings, specifically child custody decisions, and pointed out that a parent need not show that he or she can provide the best possible care for the child, just the minimum required.[136] Through this example, then, Justice Scalia illustrated that "best interests" does not necessarily mean "best" given that the best interest of the child at the center of a custody dispute is to be placed with the parent most able to provide them with *at least* the *minimum* required care.[137] Congress could use the same reasoning in fashioning the statute this Note proposes: it is in the best interests of Does 4, 5, 6, 7 and all other detained UACs to receive even the minimum care required under the *Flores* Settlement. To be sure, the Shenandoah Valley Does have not received this level of care because retraumatization through isolation and inappropriate physical restraint certainly is not within the meaning of "appropriate mental health interventions."[138]

Both *Reno v. Flores* and the portion of the HSA that *Flores v. Sessions* cites require courts to at least consider the best interests of the UACs when judging the appropriateness of their care even if those interests are not dispositive.[139] However, a statute tailored

134. *Sessions*, 862 F.3d at 870 (quoting the Homeland Security Act, 6 U.S.C. § 279(b)(1)(B)).
135. 507 U.S. 292, 304 (1993).
136. *Id.* at 303-04.
137. *See id.*
138. *See supra* notes 130-31 and accompanying text.
139. *See supra* notes 121-34 and accompanying text.

specifically to situations like the one in *Doe 4* would apply this requirement not just to courts but also to detention centers. Hopefully, this new rule would affect these facilities' actions before an issue giving rise to litigation even happened.

All in all, legislatively instituting a best interests standard in lieu of either the *A.M.* deliberate indifference standard or the *Doe 4* substantial departure standard would ensure that UACs like the ones in *Doe 4* receive the mental health care that they deserve in a legally solid way.

B. How the Best Interests Standard Would Function in Practice

Imagine a UAC arrives at a detention center like Shenandoah Valley under similar circumstances to Doe 4's, including a history of trauma and mental illness, after the enactment of legislation this Note has proposed.[140] Despite regular counseling sessions, he continues to act out, perhaps violently, as a result of insufficiently managed mental health concerns. At that stage, the professionals in charge of his care could make one of two choices. They could be mindful of the nowstatutorily implemented standard and think critically before deciding the course of action in the child's best interest, whether that is more frequent counseling, different forms of behavioral therapy, or other situationally appropriate services. As the Fourth Circuit suggested, those services would most likely consist of trauma-informed (or trauma-focused) therapy, which "is rooted in understanding the connection between the trauma experience and the child's emotional and behavioral responses."[141] By using this approach, staff would recognize that the UAC is acting out not necessarily because he is a bad person but because he has had traumatic experiences that they can help him develop the tools to process and overcome.[142]

Alternatively, they could restrain or isolate him, retraumatizing him and stopping him from making progress, like the Shenandoah

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140. *See supra* text accompanying notes 1-12.

141. CTR. FOR CHILD TRAUMA ASSESSMENT, SERVS. & INTERVENTIONS, *What Is Trauma-Focused Therapy?*, NW. UNIV. FEINBERG SCH. OF MED., https://cctasi.northwestern.edu/trauma-focused-therapy/ [https://perma.cc/4BQP-9WDS]; *see also supra* note 85 and accompanying text.

142. *See* CTR. FOR CHILD TRAUMA ASSESSMENT, SERVS. & INTERVENTIONS, *supra* note 141.

Valley staff did to Doe 4. This further trauma would then lead him to file a suit similar to the one in *Doe 4*. The district court, and potentially the circuit court, Supreme Court, or both, would have to consider evidence of whether the staff's actions had been in the UAC's best interest. Because a fundamental tenet of trauma-informed practices is to avoid retraumatization,[143] it is unlikely that the court would conclude that the employees' actions were in the UAC's best interest in light of evidence indicating they had re-traumatized the UAC. A finding in the UAC's favor would allow him to recover for the harm the staff had inflicted upon him and get on a path to receiving the mental health treatment that is actually in his best interest.

IV. ADDRESSING POTENTIAL COUNTERARGUMENTS

This Note proposes a significant reform to the law concerning UACs with which not everyone will agree. Indeed, some may believe that the United States should not be expending valuable resources to provide better mental health care to detained UACs when so many American citizens are also struggling with similar mental health challenges. Further, even those who do think that detained UACs should receive better mental health care may think that it would be easier for Congress to simply affirm *Doe 4*'s substantial departure from professional judgment standard or that the judiciary should handle this issue without Congressional involvement. Although these counterpoints are reasonable, none of them outweigh the legal and practical benefits of having Congress institute a best interests of the child standard that the judiciary will then interpret and implement.

143. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., SAMHSA'S CONCEPT OF TRAUMA AND GUIDANCE FOR A TRAUMA-INFORMED APPROACH 9 (2014), https://ncsacw.acf.hhs.gov/userfiles/files/SAMHSA_Trauma.pdf [https://perma.cc/HJA6-3XQV] ("A program, organization or system that is trauma-informed realizes the widespread impact of trauma and understands potential paths for recovery; recognizes the signs and symptoms of trauma in clients, families, staff, and others involved with the system; and responds by fully integrating knowledge about trauma into policies, procedures, and practices, and seeks to actively resist re-traumatization.").

A. Why This Urgent Problem Requires Resolution

Providing detained UACs with better mental health care will require our government and society to invest valuable time, energy, and resources. It is already extremely expensive for the United States to provide basic, life-sustaining care to the migrants it detains.[144] There are certainly those who would argue that this enormous price tag is a sign that the United States should do less to sustain illegal immigrants, not more; indeed, a key reason that Donald Trump won the 2016 U.S. presidential election was his anti-immigration platform, which appealed to conservative voters.[145] Although there are undoubtedly immigration policy issues beyond the scope of this Note that need to be resolved, none of them cancel out the fact that detained UACs such as the Does from Shenandoah Valley are "persons" under the federal Constitution.[146] The number of detained UACs has risen steadily over the past several years, and experts have explained that UACs experience high rates of mental health problems, which are only exacerbated by events such as post-arrival detention at facilities such as Shenandoah Valley.[147] These post-arrival stressors only increased under the Trump administration's policies.[148] Although there are signs the Biden administration is willing to improve its immigration policy in general, the problem of mental health care for detained UACs is still far from resolved.[149]

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144. *See, e.g.*, Nick Miroff, *Biden Administration Spending $60 Million per Week to Shelter Unaccompanied Minors*, WASH. POST (Apr. 8, 2021, 3:36 PM), https://www.washingtonpost.com/national/border-shelters-cost/2021/04/08/c54eec3a-97bd-11eb-8e42-3906c09073f9_story.html [https://perma.cc/S9RB-N4Z5].

145. *Historical Overview of Immigration Policy*, CTR. FOR IMMIGR. STUD., https://cis.org/Historical-Overview-Immigration-Policy [https://perma.cc/KA5V-7RS9].

146. *See* Plyler v. Doe, 457 U.S. 202, 210-14, 230 (1982) (holding that undocumented children have a right to basic public education because they have Fourteenth Amendment rights).

147. *See* Kiara Alvarez & Margarita Alegría, *Understanding and Addressing the Needs of Unaccompanied Immigrant Minors*, AM. PSYCH. ASS'N (June 2016), https://www.apa.org/pi/families/resources/newsletter/2016/06/immigrant-minors [https://perma.cc/7CUN-UFAW] ("[UACs] represent a complex service population because of their unique needs. Almost half (48 percent) report leaving their home country because of experiences of violence.").

148. *See* Lucy Bassett & Hirokazu Yoshikawa, *Our Immigration Policy Has Done Terrible Damage to Kids*, SCI. AM. (Dec. 1, 2020), https://www.scientificamerican.com/article/our-immigration-policy-has-done-terrible-damage-to-kids/ [https://perma.cc/CAK8-SC2M].

149. *See* Nicole Narea, *Biden's Controversial Decision to Reopen Temporary Shelters for Migrant Children, Explained*, VOX (Mar. 1, 2021, 3:17 PM), https://www.vox.com/policy-and-

Mental health is already a serious problem for immigrants and citizens alike in the United States, especially in the wake of the COVID-19 pandemic.[150] According to the Centers for Disease Control and Prevention, over 50 percent of Americans "will be diagnosed with a mental illness or disorder at some point in their lifetime."[151] Although youth in general struggle with mental illness,[152] a staggering "70% of youth in the juvenile justice system have a diagnosable mental health condition."[153] Providing mental health care to those UACs over whom the government has complete control will be a crucial step to resolving this nationwide problem.

B. Why Congress Should Not Simply Uphold the "Substantial Departure from Professional Judgment" Standard

Arguably, it would be a procedurally easier, less time-intensive task for Congress (or, conceivably, the Supreme Court[154]) to simply uphold the substantial departure from professional judgment standard the Fourth Circuit instituted in *Doe 4* rather than design and implement the best interests of the child standard this Note proposes. However valid they may be, these logistical concerns do not outweigh the best interests standard's substantive superiority. For one, the best interests standard is well established in other areas of the law related to juveniles.[155] Further, even if its position has not

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politics/22299135/biden-kids-cages-migrant-children-carrizo-homestead [https://perma.cc/5KBR-E9C4].

150. *See* MENTAL HEALTH AM., COVID-19 AND MENTAL HEALTH: A GROWING CRISIS 2 (2020), https://mhanational.org/sites/default/files/Spotlight%202021%20-%20COVID-19%20and%20Mental%20Health.pdf [https://perma.cc/6NUU-ZYHA].

151. *About Mental Health*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/mentalhealth/learn/index.htm [https://perma.cc/DC83-UPX5] (last updated June 28, 2021).

152. *Mental Health by the Numbers*, NAT'L ALL. ON MENTAL ILLNESS, https://www.nami.org/mhstats [https://perma.cc/F8FD-EM73] (last updated June 2022) ("1 in 6 U.S. youth aged 6-17 experience a mental health disorder each year.").

153. *Id.*

154. *See infra* Part IV.C.

155. *See generally* Bridgette A. Carr, *Incorporating a "Best Interests of the Child" Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120 (2009). In her article, which focuses on *accompanied* children who will likely face persecution if their parents' attempts to avoid removal fail, Carr explains that several areas of American law, including those governing child custody and child abuse issues, already use the best interests standard, as do the United Nations Convention on the Rights of the Child and the Canadian

always remained consistent,[156] the United States government does have a history of acknowledging that children, including UACs, require thorough and specialized protection.[157] Therefore, having a standard centered on the children the government is supposed to be protecting rather than on the potentially misbehaving adult professionals only makes logical sense. In other words, the best interests standard will make professionals (and courts subsequently evaluating the sufficiency of those professionals' choices) ask, "What is the bar I need to *meet* to take proper care of this UAC?" rather than "Just *how harmful can* my decisions be before I open myself and my employer up to legal liability for the suffering of this child in my care?" To acknowledge Justice Scalia's point in *Reno*, UACs like Doe 4 are not legally entitled to the best possible mental health care.[158] A best interests standard would not institute that extra-constitutional requirement, though: by creating a bar for which to strive rather than a floor to avoid, it simply is in a much better position than any of the alternative standards to encourage professionals to fulfill their responsibilities to this class of vulnerable juveniles. Congress should therefore act accordingly and institute the best interests standard for application in cases like *Doe 4*.

C. Why a Legislative Solution Will Be More Effective than a Judicial One

In theory, the Supreme Court could simply resolve the *A.M.-Doe 4* split on its own when a factually similar case arises and gives it the occasion to institute the best interests of the child standard this Note has proposed.[159] This course of action would be inferior to a statutory solution because it would make the best interests of the

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immigration system. *Id.* at 124-28, 145-49.

156. For example, the Trump administration was particularly unsympathetic to UACs. *See, e.g.*, Nicole Einbinder, *How the Trump Administration Is Rewriting the Rules for Unaccompanied Minors*, PBS FRONTLINE (Feb. 13, 2018), https://www.pbs.org/wgbh/frontline/article/how-the-trump-administration-is-rewriting-the-rules-for-unaccompanied-minors/ [https://perma.cc/J8VL-YLTZ].

157. *See, e.g.*, *Flores* Settlement, *supra* note 129, ¶ 11 ("The [now-reorganized and renamed] INS treats, and shall continue to treat, all minors in its custody with *dignity*, *respect*, and *special concern* for *their particular vulnerability as minors*." (emphasis added)).

158. *See supra* notes 124-26, 132 and accompanying text.

159. *See supra* Part III.

child standard immediately vulnerable to justifiable criticism that it is the product of judicial activism. Defined objectively, "judicial activism" is "an approach to the exercise of judicial review ... in which a judge is generally considered more willing to decide constitutional issues and to invalidate legislative or executive actions."[160] However, in the current, highly partisan political environment, the term generally refers to judicial decisions that "abandon[ ] the impartial judicial role and 'legislat[e] from the bench.'"[161] Although judicial activism, even in this politicized sense, does have some supporters,[162] the practice nevertheless has a connotation negative enough that any decision associated with it will conceivably have its legitimacy questioned.[163] Regardless of its merits, any such questioning may delay the implementation of the best interests standard, to the detriment of UACs like the Shenandoah Valley Does. This concern will be moot, though, if Congress creates a statute that the courts can then review and apply because each entity will simply be carrying out the fundamental responsibilities of its respective branch of government. As such, a truly airtight solution to situations like the one in *Doe 4* will require legislative action to guide future judicial consideration.

CONCLUSION

Mental health is a pressing problem in society, especially for UACs who are confined in facilities that are not quite prisons yet are far from home. In *Doe 4 v. Shenandoah Valley Juvenile Center Commission*, the Fourth Circuit rejected the Third Circuit's nearly twenty-year-old precedent in *A.M. v. Luzerne County Juvenile Detention Center* and replaced it with an improved, but inadequately

160. Kermit Roosevelt, *Judicial Activism*, ENCYCLOPEDIA BRITANNICA (Oct. 16, 2019), https://www.britannica.com/topic/judicial-activism [https://perma.cc/B8K4-U2CL].

161. *See id.*

162. *See, e.g.*, George F. Will, Opinion, *Judicial Activism Isn't a Bad Thing*, WASH. POST (Jan. 22, 2014), https://www.washingtonpost.com/opinions/george-will-judicial-activism-isnt-a-bad-thing/2014/01/22/31b41a12-82c7-11e3-8099-9181471f7aaf_story.html [https://perma.cc/L2UD-NF8Q].

163. *See* Frank B. Cross & Stefanie A. Lindquist, *The Scientific Study of Judicial Activism*, 91 MINN. L. REV. 1752, 1752 (2007) ("While there is no intrinsic reason why an activist judiciary is inevitably or inherently problematic, the phrase typically carries a very negative connotation—at least in modern discourse.").

reasoned, standard for judging the sufficiency of mental health care for UACs confined in detention centers like Shenandoah Valley.

Although the Supreme Court has declined to resolve the *A.M.-Doe 4* split, the law in this area urgently needs clarification and reform. Because UACs like the Shenandoah Valley Does are detained, they have no power to procure mental health support on their own and thus depend on the law to ensure that they get the appropriate care and protection from retraumatizing treatment at the hands of detention center staff. Undoubtedly, solving the problem that cases such as *Doe 4* present will require valuable effort and resources. The best solution, however, is for Congress to institute a best interests of the child standard by which to judge the sufficiency of mental health care provided to detained UACs, which courts will then interpret and apply in future cases.

Without such a solution, UACs like Does 4, 5, 6, and 7 will continue to flee traumatic situations in their home countries only to find insufficient mental health care waiting for them in the United States.

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